

***"THE FATHER, AND AFTER
HIM, THE MOTHER"***

***GENDER IN JUDICIAL REASONING IN HINDU
CUSTODY LAW***

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Abstract

This thesis problematises the treatment of gender in judicial reasoning in the cases decided under Hindu custody law in Indian courts. India has several religious personal laws to regulate the lives of its citizens. Of these, Hindu law governs the personal lives of about 800 million people in India and forms the largest set of personal laws. It is largely based on Common Law Principles, due to colonial influence at the time of its codification. However, there has been limited research on case law in this area of law, especially in terms of analysing gender in these judgments. This thesis takes a set of cases not previously analysed, problematises how judges approach gender in them, and thereby contributes to Indian legal feminist and religious personal law literature.

The site of this research is a set of custody cases decided under the Hindu Minority and Guardianship Act, 1956. In the first part of the thesis, the underlying premises of judicial reasoning in the cases are studied. The analysis of the cases draws out disparity of treatment of gender in these cases, as well as underlying normative assumptions about gender roles in judicial reasoning. Further, the thesis demonstrates how the middle-class Hindu woman is constructed as a privileged but subordinate person or "Elite Dependent" in judicial reasoning. The analysis challenges the claim that these cases are decided in line with Constitutional ideals. The central argument developed from the cases is that judicial reasoning is based on normative ideas of gender and the judges do little to rectify gender inequities.

The second part of the thesis examines the possible impact of judicial reasoning in the cases under study on the formulation of a new Uniform Civil Code to replace religious personal laws in India. The key argument in this part of the thesis is that the Hindu code should not be used as a blueprint for this Uniform Civil Code, as the gendered nature of judicial reasoning raises

important concerns on the egalitarian nature of the Hindu Code. Using both the parts, this thesis verifies and expands the hypothesis proposed by Indian legal feminists that religious personal law in India is gendered. This thesis contributes to Indian legal feminist scholarship on religious personal laws in general and to the specific debates in India. The analysis of case law as well as the formulation of the category of Elite Dependent are its unique contributions to furthering this body of literature.

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Abbreviations

ACJ	Allahabad Civil Journal
AIR	All India Reporter
ALD	Andhra Legal Decisions
ALJ	Allahabad Law Journal
All	Allahabad High Court
ALR	Allahabad Law Reports
BLJR	Bihar Law Journal Reports
BomCR	Bombay Cases Reporter
Cal	Calcutta High Court
CALLT	Calcutta Law Times
CG.L.R.W.	The Chhattisgarh Law Reports (Weekly)
CGLJ	Chhattisgarh Law Judgments
CHN	Calcutta High Court Notes
CTC	Current Tamil Nadu Cases
Del	Delhi High Court
DLT	Delhi Law Times
DRJ	Delhi Reported Journal
GLH	Gujarat Law Herald

Guj	Gujarat High Court
HC	High Court
ILR	Indian Law Reports
JT	Judgment Today
Kant	Karnataka High Court
Kar	Karnataka High Court
KarLJ	Karnataka Law Journal
LW	Law Weekly
Mad	Madras High Court
MLJ	Madras Law Journal
MP	Madhya Pradesh
MPHT	MP High Court Today
PLJR	Patna Law Journal Reports
PLR	Punjab Law Reporter
Raj	Rajasthan High Court
RPL	Religious Personal Laws
SC	Supreme Court of India
SCC	Supreme Court Cases
U.P.	Uttar Pradesh

UCC Uniform Civil Code

Prologue

When I began this thesis, I had separated from my (now ex) husband and one of the conditions of the separation (and later, divorce) was that I give up custody of my son. It was a Hobson's choice, which caused me to be ostracised by most of my family and some people I considered friends. I was the subject and object of intense scrutiny and name-calling and had the support of very few friends during a personally trying time. These incidents served as a catalyst to seek answers about how normative notions of gender inherent in law and society impact the lives of Hindu women like me, especially in instances when one went against the established social norms.

I appeared in court for my divorce proceedings in 2015. Since my ex and I had filed for a divorce by mutual consent to fast track the process, it was necessary that I did not highlight the emotional issues of the marriage. The district magistrate, who doubled up as the judge of the family court, presided over our case. I took to the witness stand and my advocate ran through the list of standard questions on the breakdown of marriage and the need for divorce. Then, the judge asked me if I wished to stay within the marriage. I replied with a firm 'No'. She asked if I was ok to relinquish custody of my child and I answered in the affirmative. She then proceeded to lecture me about how I was not being a good wife and mother, as I was shirking my responsibilities. She stressed on the need to 'adjust' with one's husband, as it is in the interest of one's children. Again, she questioned if I will stay in the marriage. I responded that while I appreciated everything she had said, I was unable to stay in the marriage. She then said that the real issue was that I was 'over-educated' and that there was no point in reasoning with women like me, as we think we know it all. She then said that she is signing the divorce decree with a heavy heart because of my actions. I felt judged, both literally and legally, at that moment.

This incident was an eye-opener that changed the way I viewed my research, as I realised that judicial reasoning in custody cases is often coloured by social norms. My education and my ability to make independent decisions in my life became weapons to be used against me, due to my gender. I began to reflect on how normative ideas of what it means to be a woman, or a mother largely influences judicial reasoning, more than the actual interpretation of the law. Moreover, the Constitution of India guaranteed my right to equality and considered me to be on par with my ex-husband or any other person, but the judge chose to treat me as a second-order citizen, due to her gendered view of my actions. This research then emerged from my personal experience, which has served to ground my theoretical perspectives. In many ways, my lived experience has informed and perhaps influenced my research immensely.

Chapter 1 – Introduction: The Gendering of Hindu Law¹

1.1 Beginnings

As a woman who has spent the better part of my life in a male-dominated Hindu society and being one of the privileged to have the benefits of higher education, I often reflected on the role of women in Hindu families. Most Hindu women of my background, the educated upper middle-class, had access to good quality education and life choices. There were some exceptions to this, especially those who were denied higher education or were provided lesser quality of education compared to men,² but most had the benefit of privilege that was denied to our poorer sisters. But despite privilege, these women were not entirely independent to make their life decisions. Their education, marriage, career or social standing were dictated by the men in their natal or marital families – fathers, brothers or husbands and later, sons. India, being a society steeped in male privilege, such practices were seldom questioned as women did not have alternative sources of support or livelihood.

Having witnessed these instances first-hand and experienced most of the social pressures myself, I decided to adopt women in the Hindu family as the starting point of my research. Questions of gendered norms were invariably intertwined in the Hindu family, as there existed different sets of standards

¹ Here and throughout my thesis, I use the term ‘gender’ (along with its verb forms such as gendering/gendered) to denote social relations and not identities.

² It is a common occurrence in India to prevent girl children from education, as they are considered better for housework and had to be married early. Moreover, in houses with male and female children, it was considered better to educate the son as he will support the parents, while daughters would be married into another household. Sometimes, daughters were funded for “lesser” degrees in Humanities while sons were funded to study “better” degrees such as medicine or engineering. This was based on the gendered premise that the son is the future asset generator of the family while the daughter is an economic dependent. While this attitude is changing in urban areas to some extent, they continue to exist in semi-urban and rural India.

based on gender. My personal experience of living in an arranged marriage that disintegrated with time and my struggles with normative ideas on gender roles, both as a woman and as a parent in a Hindu family, propelled me towards analysing how gendered relations in families are produced and reproduced in Hindu law. Lastly, my legal background, especially my training in law and my experience in family courts during the initial years of my legal practice, awakened my interest in understanding how women negotiate the complexities of family life and law. So, I gravitated towards questions of law's interaction with family structures and the relationship between law and women in India.

As in most countries, there is a distinction between the provisions of gender equality in the letter of law and social equality on the ground in India. While the Indian Constitution supports principles of affirmative action for the socially disadvantaged,³ the Constitution and other laws do not account for the historical lack of privilege faced by women and other social groups. There are several such disadvantaged groups within the framework of Indian laws and social norms. An analysis of all these groups would be complicated and beyond the scale of this thesis. Instead, I focus on the category of the middle-class Hindu woman for two reasons –

1. While this group is considered more privileged than most other social groups, the privilege hides the inherent gender bias faced by this category of Hindu women. As they are privileged, social norms tend to construct them as independent women in control of their lives, while hiding the gendered assumptions that confront them.

³ The Indian Constitution specifically provides that the State has the authority to make special provisions in favour of women and children (Article 15(3)). This was included as a provision for affirmative action to help those who were vulnerable groups in need of protection. Such provisions of affirmative action were provided for other historically disadvantaged categories too.

2. This is the category that I personally identify with due to my lived experience and environment. Personal affiliation and identification helps me to relate to my work of analysing the law and its effects on this category of women. However, I recognise that such personal affiliation may make me less attentive to my location within and outside the sphere of this thesis.

Some of my initial thoughts on the Hindu woman were - How does Hindu law imagine the middle-class Hindu woman? Are there inherent gendered assumptions in judicial reasoning that impact this woman? Might any such assumptions affect the ways in which she encounters or experiences the law? I turned to the Hindu code to identify the enactment that would provide a suitable basis of study for these questions that I wished to explore. I found that in custody cases decided under Hindu Minority and Guardianship Act (HMGA), 1956, normative ideas on gender roles are evident as these cases offer ample scope to define the role of a woman and mother. I selected custody cases under HMGA that were decided between 2000 and 2014, as the foundation of my analysis.⁴

During the duration of this research, debates surrounding the proposed introduction of a Uniform Civil Code (UCC) began to gain momentum in India. I take a short detour here to explain India's system of Religious Personal Laws (RPLs) and the UCC, before elaborating on its role in my thesis. In 1947, the leaders of newly independent India felt compelled to maintain it as a secular nation and to differentiate it from Pakistan, which was established as an Islamic state. The Preamble of the Indian Constitution describes India as a sovereign, socialist, secular democratic republic. The word 'secular' denotes

⁴ While I have explained the choice of the enactment here, I have elaborated on the choice of the case-laws and the period of study in detail later in this chapter. I have also explained the methodology of analysis of case-laws in Chapter 2.

that the Indian state does not affiliate itself to any religion. In the Indian context, secularism indicates that the state is equidistant from all religions and treats all religions equally.⁵ While secularism may be considered an essential feature of polity in the Indian Constitution, religion is a key player in society. To establish its secular credentials, the Indian state continued with the policy of non-interference in religious matters adopted by colonial rulers.⁶ However, this was viewed as a temporary provision until society and law sufficiently evolved to allow the integration of RPLs into the Uniform Civil Code (UCC), as envisaged under Article 44 of the Indian Constitution.⁷

While the Indian version of secularism is enshrined in the Constitution, there are certain political and legal factors that are context-specific to India today. These are the existence of religious personal laws in a secular democracy, the presence of the multi-religious nation state, as well as the jurisdiction of secular (non-religious) courts to decide what is religious. The current government, which has its roots in the Hindu Right, has committed itself to

⁵ This is different from the Western interpretation of secularism as separation of the church and the state. While the nature of Indian secularism has a whole body of literature dedicated to it, it is outside the scope of this thesis. I have provided a summary understanding of the concept for adding cogency to my arguments here.

⁶ The British colonial rulers of India followed a policy of administering RPL for Hindus, Muslims, Christians and Parsis separately but reserved the right to legislate all RPLs. The independent Indian state adopted a policy of social reform for the modernisation of the nation. It chose to remain secular but governed matters of family and religion. For a detailed discussion on this, see Chapter 3. India continues to have a legal system in which Civil and Criminal issues are common to all citizens, but personal laws with respect to marriage, divorce, custody, maintenance or succession are governed by the respective religious laws of the individuals. But both these sets of laws are administered by the same courts. A detailed account of the Court structure and judicial system in India is provided in Appendix 1 – Indian Court Structure.

⁷ For instance, see Maitrayee Mukhopadhyay, *Legally Dispossessed: Gender, Identity and the Process of Law* (Stree, Calcutta 1998). The UCC provision was placed under the Directive Principles of State Policy, the non-justiciable part of the Indian Constitution. Successive governments have not taken any initiative to implement the UCC, even when the Supreme Court of India has indicated its displeasure on this subject (For instance, see the *Shah Bano* judgment, discussed in Chapter 3). In the recent times, there is a move to enact the UCC along the lines of the Hindu Code. For more on this, see chapter 3.

the creation of the UCC, albeit along the lines of the Hindu code.⁸ This agenda has contributed to increased momentum in formulating the UCC and it included the publication of a questionnaire on 7th October, 2016 by the Law Commission of India, which sought the opinion of the lay public, legal specialists and gender justice activists on the provisions of the UCC.⁹ My research on how Hindu law imagines the middle-class Hindu woman and gender is relevant to this debate because it highlights the possibility of differential treatment on the basis of gender and identifies areas of inherent gender bias in Hindu custody law. Further, since it is proposed that the Hindu code (or parts of it) will be utilised as a blue print for the UCC, my research contributes to Indian legal feminists' arguments on the treatment of gender in law and gender justice,¹⁰ especially from the perspective of how Hindu women experience the law.

The following sections outline the framework of my thesis by first explaining the area of my study, viz., Hindu law; and then identifying the theoretical

⁸ The Bharatiya Janata Party (BJP) is the political front of all the organisations that come under the umbrella term of Hindu Right in India. The party captured a thumping majority in the Indian general elections in 2014 and came to power by forming the Central or Union Government in India. Its election manifesto in 2014 sets out that one of its aims is the formulation of the Uniform Civil Code in India, along the lines of Art.44 of the Indian Constitution. It states that the BJP believes that there can be no gender equality till the adoption of a Uniform Civil Code that protects the rights of all women and that the party intends to draft the UCC by 'drawing upon the best traditions and harmonising them with the modern times' (Bharatiya Janata Party, '*BJP Election Manifesto 2014*' (2014), accessed 11 February 2017). Feminist scholarship in Indian has critiqued that the party's agenda is to make the Hindu code form the blueprint of the UCC, thereby taking away the rights of minorities under their RPLs. For more on this, see Ratna Kapur, '*A Leap of Faith: The Construction of Hindu Majoritarianism through Secular Law*' (2014) 113 *The South Atlantic Quarterly*.

⁹ Law Commission of India, '*UCC Questionnaire*' (2016), accessed 7 February 2017. The questionnaire has been attached as Appendix 2 and some of its important parts have been analysed in Chapter 6.

¹⁰ Ratna Kapur argues that the term "gender justice" refers to the process of unearthing gender biases that are inherent in legal processes and exploring the ways in which these biases affect the way in which women experience law. She asserts further that gender justice is contingent on location, especially location in terms of family, class/religious community and nation-state (Ratna Kapur, '*Challenging the Liberal Subject: Law and Gender Justice in South Asia*' in Maitrayee Mukhopadhyay and Navsharan Singh (eds), *Gender Justice, Citizenship and Development* (Zubaan 2007). I adopt this view of gender justice in my thesis in the context of the Hindu woman, especially the middle-class Hindu woman, in Hindu law.

perspectives that inform my research. Having outlined the background and theory that inform the research, I elaborate on the key themes, arguments and questions that are undertaken in this thesis. Finally, I sketch the outline of the chapters that follow and develop my thesis. In the next section, I demonstrate why I have chosen Hindu law as my area of study for this research.

1.2 Why Hindu Law?

My thesis focuses on understanding how the middle-class Hindu woman is constructed in judicial reasoning. I choose the Hindu Code as the field from which I selected cases for closer study due to the reasons outlined in this section. The Hindu Corpus or Code consists of four Acts passed by the Parliament of India after the independence of the nation from colonial rule in 1947: the Hindu Marriage Act (1955), Hindu Succession Act (1956), Hindu Minority and Guardianship Act (1956) and Hindu Adoptions and Maintenance Act (1956). Taken together, these Acts are collectively called the Hindu Code. The significance of these enactments is that they succeeded in changing the definition of the Hindu family, which had far-reaching effects on Indian polity, law and society.¹¹ It is significant in the context of this thesis that the Hindu Code Bill generated much debate in the 1940s between liberal and conservative legislators on the nature and role of women in Hindu society.¹² While the Indian nationalist movement provided the platform for women to participate in the struggle for independence from colonial rule, it was in the controversies surrounding the Hindu Code Bill that the perception of women and notions of gender in contemporary society came to be highlighted. The

¹¹ More on this in Chapter 3.

¹² The Hindu Code Bill was an important legislative event in the history of newly independent India. The passage of the Bill and the debates surrounding it have been discussed in detail in Chapter 3.

female subject played an important role in the cultural construction of the nation, during and after the colonial rule.¹³

Hindu law reform was a flagship component of the post-independence government's approach to social progress.¹⁴ The Hindu code and the depiction of Hindu women in this code was considered both as the template for the personal laws of other communities, and as a demonstration of the state's ability to legislate and restructure relations within the Hindu family. The Indian state undertook various affirmative social legislations for women as these were viewed as the path to development and progress.¹⁵ While affirmative action was undertaken by the state, it did not completely displace or over rule religious, cultural or social norms. Religion was (and has remained) one of the important markers for defining identity in India.¹⁶ The partition of the country on religious lines specifically facilitated the constructs of modern and secular views of the individual in politico-legal discourse of newly independent India. While religion and gender were identified as markers of individual and familial identity in the Indian Constitution and other laws (including the Hindu code) passed during this period, caste,¹⁷ an important

¹³ For more on this, see Tanika Sarkar, *Hindu Wife, Hindu Nation - Community, Religion and Cultural Nationalism* (Indiana University Press 2001), Maitrayee Mukhopadhyay, *Legally Dispossessed: Gender, Identity and the Process of Law* (Stree, Calcutta 1998).

¹⁴ *ibid.*

¹⁵ For instance, the responsibility of the state to ensure affirmative action towards women and minorities was incorporated in the Indian Constitution. Several legislations such as the Dowry Prohibition Act, 1961 were passed by the Indian Parliament to undertake positive affirmative action favouring women.

¹⁶ For instance, the last census of India provides a country-wide break up of religious groups. For more on this, see Office of the Registrar General and Census Commissioner, <http://www.censusindia.gov.in/2011census/Religion_PCA.html> accessed 19 September 2017.

¹⁷ Caste is a form of social classification which originated based on occupations and later took on adverse forms of persecution. The *Brahmins* (Preceptors) were the highest caste, followed by the *Kshatriyas* or Warriors, *Vaishya* or merchants and *Shudras* or servile classes. There existed other types of social ordering outside the caste hierarchies such as *Mlecchas* or foreigners and *Nishadas* or tribals. Over time, Brahmins maintained social superiority. The lower castes tried to emulate the upper castes by imitating their ritualistic practices to gain social mobility. This process was termed as "*Sanskritization*". For more on this, see Paola Bacchetta, '*Sacred Space in Conflict in India: The Babri Masjid Affair*' (2000) 31 *Growth and Change*, Sudipta Kaviraj, '*Religion and Identity in India*' (2010) 20 *Ethnic and Racial Studies*, Rosalia Condorelli, '*An Emergentist vs a Linear Approach to Social Change*

social marker, was deliberately left out as it did not align with the ideal of the modern Indian citizen. Hence, in the Hindu code as well as the Indian Constitution, the legal subject is constructed on the lines of gender and religion, while all other markers of identity take a back seat.

As Narendra Subramanian argues, policymakers tended to regulate family life by upholding group or community norms and by emphasising a normative vision of family life, which was carried out by introducing gender equalizing laws with cultural accommodation, in the years following Independence.¹⁸ At the same time, as the Indian state demonstrated an intention to improve the position of women in society, it displayed a paternalistic approach to social reform.¹⁹ It exercised its powers to regulate religious personal laws as a mechanism by which to maintain the political aims of nation-building and national integration.²⁰ But this approach was problematic as it reinforced normative ideas of gender roles in the public sphere of the Indian nation, apart from the axis of gender demarcating roles in the private sphere. Therefore, Hindu law reforms gave women more legal rights on paper, than in practice. Though the Hindu code had inherent issues of gender imbalance as highlighted above, one of its important contributions is that it provided legislative definition of the term 'Hindu'. For example, Sec.2 of Hindu Adoptions and Maintenance Act, 1956 defines a Hindu as any person who is a follower of Hindu religion or any of its sects and that it applies to Buddhist, Jains and Sikhs as well as any person who is not a Muslim, Christian, Jew or

Processes: A Gender Look in Contemporary India between Modernity and Hindu Tradition.' (2015) 4 SpringerPlus. Caste is an important axis of identity and conflict in the social context and it also determines the prevalence of traditional laws. However, as I confine myself to the study of judgments in which caste plays no role in judicial reasoning, I have not analysed it as a primary identity marker here.

¹⁸ Narendra Subramanian, *'Legal Change and Gender Inequality: Changes in Muslim Family Law in India'* (2008) 33 Law & Social Inquiry.

¹⁹ Archana Parashar, *Women and Family Law Reform in India* (Sage Publications Pvt Ltd, New Delhi 1992).

²⁰ *ibid.*

Parsi by religion. This definition finds resonance in other enactments of the Hindu code. Article 25 of the Indian Constitution provides that 'reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly' (Sub-clause (b) of Clause (2) of Explanation II of Article 25, Constitution of India). This is perhaps one of the few instances in modern secular legislative history globally, when an attempt was made to define the follower of a religion.

This definition also throws light on the impact of the Hindu personal law system in India. What is considered as 'Hindu' law today, is a curious instance of anglicizing of Hindu local laws and customs, where community rights were converted to individual rights.²¹ Moreover, the category of 'Hindu', as evinced by the enactments of the Hindu code, is broad-based. It is evident that 'Hindu' is a default bucket category that includes persons professing Buddhist, Jain and Sikh religion, as well as children born to parents professing the Hindu faith and persons who do not belong to any religious denomination or are atheists or agnostics. By this logic, Hindu law governs about 800 million+ people, about 1/7th of human population.²² Only Christians, Muslims and Parsis living in India are exempt from this definition as they have exclusive RPLs governing their respective communities. Therefore, 'Hindu' law veers away from religious inclination and is applicable to about 80% of the Indian population now. Currently, Hindu law has very little in common with customary law or Hindu religion. It is more in line with Common Law principles, such as restitution of conjugal rights and welfare of the child, that

²¹ Werner Menski, *Hindu Law - Beyond Tradition and Modernity* (Oxford University Press, New Delhi 2008).

²² Indian Census 2011 states that about 966 million (79.8%) are followers of Hindu religion, 20 million (1.72%) are Sikh, 8.4 million (0.70%) are Buddhists and 4.45 million (0.37%) are Jains. Also, over 7.9 million belong to minor religions and sects. All these categories are classified as Hindus under law. (Office of the Registrar General and Census Commissioner, <http://www.censusindia.gov.in/2011census/Religion_PCA.html> accessed 19 September 2017).

were a colonial legacy.²³ As the Hindu Code is modelled along liberal principles and is premised on gender equality on paper, it cannot be completely categorised as religious law. However, its allusions to the premise of equality and the volume of people it governs make it an important gauge of normative notions of gender within religious personal laws in India.

Another factor that makes the Hindu Code significant is the rise of the Hindu Right in Indian politics after the 1980s. The Hindu Right paints a different imagination of Nation, in which normative gender roles are emphasised in the realms of society and family. A political party (Bharatiya Janata Party or BJP for short) with Hindu Right roots captured power in 2014 and now wishes to model the personal laws of other communities along the lines of the Hindu Code. If this is carried through, the Hindu code is in a strange position of being used both as a standard and a correction manual. From the above points, it is evident that the reach and value of the Hindu code among RPLs is unmatched in India. Moreover, due to its impending relevance on the UCC, it is a topical area of research in the administration of personal laws. It is within this area of law that I situate my research. Having provided a selective overview of the area of law and its role in my thesis, I now turn to this domain of scholarship to elaborate on the theoretical perspectives that inform my research, in the next section.

1.3 Theoretical Perspectives

In India, as in most other countries, each aspect of social reality is gendered due to the inter-relation of patriarchal practices with politics, economy, religion, law and culture.²⁴ In my thesis, I focus mainly on how judicial reasoning on gender roles within the Hindu family subscribes to normative

²³ For more on this, see Chapter 3.

²⁴ Kumkum Sangari and Sudesh Vaid (eds), *Recasting Women - Essays in Colonial History* (Zubaan, New Delhi 1989).

notions of gender. Throughout my thesis, I use terms such as normative notions of gender or gendered norms. What are the normative ideas of gender in judicial reasoning that I am referring to here? The normative notions that I refer to, are the ideas that men and women are different and that they must perform certain roles in families due to their gender. For instance, the man is considered the breadwinner or provider and the woman is the nurturer or caregiver. These roles are the product of normative ways of thinking about gender and arise from socially conditioned ways of constructing gender differences. In this section, I elaborate on the theoretical perspectives, mostly informed by the scholarship of Indian legal feminists, which have helped me to form the basis of my analysis throughout this thesis.

In my thesis, I study judicial reasoning predominantly through the lens of Indian feminist legal theory. Currently, there are several key themes or debates in contemporary feminist legal theory in India. These themes include the notion of equality and sameness between men and women within marriage, the use of the generic term 'women' which takes away context and location for women from minority communities and the notion of 'universal' human rights values, which is Western in origin but is applied to the non-West.²⁵ I use the first of these themes, namely, the notion of equality and sameness between men and women within marriage, as a key focus in my thesis. However, my explorations are not on the concept of equality specifically. Rather, I analyse how inherently normative and gendered notions present in judicial reasoning undermine and obstruct gender justice. Specifically, I focus on the nature of treatment of men and women in the Hindu family by the Courts, to determine if the treatment is same or different, based on gender of the individual. So, I situate my thesis within the first theme in contemporary

²⁵ Flavia Agnes, *Family Law Volume 1: Family Laws and Constitutional Claims* (Oxford University Press 2011).

feminist legal theory in India, by questioning whether there really exists a notion of equality or sameness within the Hindu family, in view of the disparate treatment of gender by the judges in the cases under study.

In the initial stages of my research, I read different strands of scholarship ranging from feminist epistemology to relational equality to Indian feminist theory. Of these varied scholarship, two articles that I read influenced my overarching approach to the cases under study and my thesis. The first one is “Women of Legal Discourse” by Carol Smart. While arguing that law is gendered, Smart mentions that instead of asking “How law can transcend gender?”, we need to question “How does gender work in law and how does law work to produce gender?”.²⁶ I paraphrased her question to ask how does gender work in Hindu custody law and how does judicial reasoning in this law work to produce/reproduce gender. The second work is that of Ratna Kapur titled “Challenging the Liberal Subject: Law and Gender Justice in South Asia”, wherein Kapur argues that gender justice can be achievable if gender biases inherent in legal processes are unmasked, especially by throwing light on the ways in which these biases affect women’s experience of law.²⁷ Most Indian legal feminists’ claim that all religious personal laws have an inherent gender bias. I further this claim by demonstrating how judicial reasoning in custody cases exhibit disparate treatment of gender, due to normative ideas on gender roles.²⁸ I argue that it is important to identify these biases in legal processes, to strengthen the cause of gender justice in religious personal laws in India. Due to the influence of these writers, I formulated my thesis into two distinct

²⁶ Carol Smart, *The Woman of Legal Discourse* (1992) 1 Social and Legal Studies. While most literature I have used in my thesis belongs to Indian feminist legal literature category, I have used some literature outside this category to support my arguments throughout the thesis.

²⁷ Ratna Kapur, *Challenging the Liberal Subject: Law and Gender Justice in South Asia* in Maitrayee Mukhopadhyay and Navsharan Singh (eds), *Gender Justice, Citizenship and Development* (Zubaan 2007).

²⁸ More on this in Chapter 6.

parts. Part One consists of an analysis of a set of cases selected on the basis that they have a distinct gendered basis for their reasoning. This is my exploration of how gender roles work in judicial reasoning in Hindu custody law and how this reasoning works to produce a certain type of Hindu woman in the cases under study.²⁹ Part Two of the thesis demonstrates how such gendered judicial reasoning impacts the notion of gender justice in RPLs in India.³⁰ I now analyse the two theoretical strands that inform my research in the following sub-sections. In the last sub-section, I provide an example of gender asymmetry in property ownership in Hindu law, which shows that disparate treatment of gender may not be confined to custody cases but is prevalent elsewhere in the Hindu code too.

1.3.1 Feminist Engagement on Family

Many Indian feminists have long held the view that the traditional gender hierarchy in Indian society has adversely affected women's position and status in society.³¹ Further, some feminists have argued that there are "multiple and overlapping patriarchies",³² which are being constantly shaped by culture and class. They contend that these notions of patriarchy are responsible for the inequalities that exist between men and women in society.³³ The oppression

²⁹ More on this in Chapters 4 and 5.

³⁰ More on this in Chapter 6.

³¹ For instance, see Nivedita Menon, *Recovering Subversion - Feminist Politics Beyond the Law* (Permanent Black 2004), Nivedita Menon, *Seeing like a Feminist* (Zubaan, India with Penguin UK 2012), Nirmala Banerjee, 'Analysing Women's Work Under Patriarchy' in K Sangari and U Chakravarti (eds), *From Myths To Markets, Essays on Gender* (Manohar Publications 1999), Uma Chakravarti, *Gendering Caste Through a Feminist Lens* (Stree, Calcutta 2003), Flavia Agnes, *Law and Gender Inequality - The Politics of Women's Rights in India* (Oxford University Press 1999).

³² The best argument for multiple patriarchies has been made by Kumkum Sangari, '*Politics of Diversity: Religious Communities and Multiple Patriarchies*' (1995) 30 *Economic and Political Weekly*. Many other feminists have followed Sangari's arguments. In the Indian context, patriarchy is a system in which the beneficiaries are male, and the agents of enforcement are all the members of a family and it possesses a high degree of social and familial sanctions. Here, I confine myself to various perspectives on patriarchies to set the context for my arguments and do not analyse these in depth, as my focus is on disparate treatment of gender in the cases under study.

³³ For example, according to the World Economic Forum's Gender Gap Index for the year 2009, which critically examined four important areas of inequality - economic participation and opportunity,

of women is usually perpetuated by resorting to normative stereotypes of women, such as the role of the mother as nurturer.³⁴ While women are forced to conform to patriarchal standards and culture, most men tend to recognise that it is advantageous to them if the subordinate position of women are maintained in society.³⁵ Most feminists agree that the focus is on men, since men define the household, society and nation in India and women's positions are relational, that of daughter, sister or mother.³⁶ Gender inequalities continue to exist, like in other countries. What makes the Indian case unique is that multiple markers, such as caste and class, intersect to create or deepen existing inequalities. So, what are the factors that caused the emergence of new forms of patriarchy in India? Cultural values, religious norms, social organisation and gender ideology are some of the factors that interacted with each other to create statutory norms in the period just after independence from colonial rule.³⁷

A literature review on this topic indicated that a certain ideal of the middle-class Hindu woman—the central actor in this thesis—was constructed through interactions between the colonial government and the nationalist movement in late nineteenth and early twentieth centuries. The question of how gender

educational attainment, political empowerment, and health and survival - India ranks 114th among 128 countries, as cited in Aparajita Chowdhury and Manoj Manjari Patnaik, *'Empowering Boys and Men to Achieve Gender Equality in India'* (2010) 26 *Journal of Developing Societies* 455. The report claims that the index comprises of economic, political, educational, and health parameters. India has overall 61.5 percent gender equality. In economic participation and opportunity, India's position is 127, at 41.3 percent.

³⁴ For instance, see Archana Parashar, *'Family Law as a Means of Ensuring Gender Justice for Indian Women'* (1997) 4 *Indian Journal of Gender Studies* 199.

³⁵ For instance, see Steve Derne, *'Hindu Men Talk about Controlling Women : Cultural Ideas as a Tool of the Powerful'* (1994) 37 *Sociological Perspectives*.

³⁶ For instance, see Huma Ahmed-Ghosh, *'Chattels of Society: Domestic Violence in India'* (2004) 10 *Violence Against Women*. According to Menon and Bhasin, 'Family, community and state emerge as the three mediating and interlocking forces determining women's individual and collective destinies' (Ritu Menon and Kamla Bhasin, *Borders and Boundaries: Women in India's Partition* (Kali for Women 1998).

³⁷ N Subramanian, *Nation and Family - Personal Law, Cultural Pluralism and Gendered Citizenship in India* (Stanford University Press 2014).

structures institutions and historical experience was addressed by Indian feminists early and the themes of women's existence were problematized since the nineteenth century under the colonial rule.³⁸ Partho Chatterjee argues that the nationalists resolved the 'Women' question by creating a dichotomy between the inner, spiritual world of middle-class Indians that contrasted with the outer, material world.³⁹ The inner or the world of the home held Indian traditional values while the outer one was infused with "Western" values. The women were the guardians of this inner world and even when exposed to the benefits of a Western style education, they were expected to remain traditional. Thus, the figure of the Indian middle-class woman was born, and this was used as the yardstick for the "respectable woman". This created a new patriarchy defined by the norms of the educated middle-class.⁴⁰

So, it emerged that the hegemonic cultural construct of the nation was the Hindu middle-class woman.⁴¹ This was accompanied by the social construction of the Hindu family as a "modern, conjugal unit".⁴² The dominant ideology of the Hindu family was that it was patriarchal and heterosexual in nature.⁴³ In this type of family, gender played an important role to determine

³⁸ Kalpana Kannabiran, 'Voices of Dissent' in Robin Rinehart (ed) (ABC Clio 2004).

³⁹ Partho Chatterjee, 'The Nationalist Resolution of the Women's Question' in K Sangari and Vaid.S. (eds) (Zubaan 1989).

⁴⁰ Here, I use patriarchy in the sense of male privilege and essentializing gender relations, which helped to hierarchize "an upper-caste, propertied, patrilineal, North Indian male tradition" (Maitrayee Mukhopadhyay, *Legally Dispossessed: Gender, Identity and the Process of Law* (Stree, Calcutta 1998). This patriarchal tradition defined men as breadwinners and women as homemakers, thereby making women economic dependents. Further, this helped to maintain unequal resource positions within the family that served to keep the family power balances intact (Bina Agarwal, 'Bargaining' and Gender Relations: Within and Beyond the Household' (1997) 3 Feminist Economics 1).

⁴¹ Maitrayee Mukhopadhyay, *Legally Dispossessed: Gender, Identity and the Process of Law* (Stree, Calcutta 1998).

⁴² Mytheli Sreenivas, *Wives, Widows & Concubines - The Conjugal Family Ideal in Colonial India* (Orient Black Swan, India 2009).

⁴³ For a detailed discussion on the dominant heterosexual family ideology in India, see Brenda Cossman and Ratna Kapur, *Subversive Sites - Feminist Engagements with Law in India* (Sage Publications India Pvt Ltd 1996).

a person's standing and rights within the family. The state recognised only the dominant family norm of the patriarchal heterosexual family in the Hindu Code Bill, and over time this emerged as the only norm.⁴⁴ The heterosexual, monogamous nuclear family that was central to modern family life became the normative model of family in Hindu law.⁴⁵ This model of the Hindu family was inherently gendered and conceptualised the role of the Hindu woman along normative ideals of womanhood and motherhood, and considered the Hindu woman to be the repository of culture and traditional values, despite being educated and/or modern.⁴⁶ Even in late 20th century, the patriarchal, patrilineal and virilocal⁴⁷ marriage, which is inherently gendered, was the universally accepted form of marriage in India. Thus, gender emerged as a significant differentiator of roles in the Hindu family and this is one of the theoretical perspectives that inform my research.

The relationship between tradition and modernity in India does not necessarily mean polarization or social dichotomy. Instead, it can sometimes be a fusion of traditional and modern elements or a reinforcement of one by

⁴⁴ For more on this topic, see Rina Verma Williams, *'Hindu Law as Personal Law: State and Identity in the Hindu Code Bill Debates, 1952 - 1956'* in T Lubin, DR Davis Jr. and JK Krishnan (eds) (First, Cambridge University Press, Cambridge 2010), Rina Verma Williams, *'The More Things Change: Debating Gender and Religion in India's Hindu Laws, 1920 - 2006'* (2013) 25 *Gender & History*, Rachel Sturman, *The Government of Social Life in Colonial India Liberalism, Religious Law, and Women's Rights* (New York, NY : Cambridge University Press 2012).

⁴⁵ For a detailed discussion on this, see N Subramanian, *'Making Family and Nation: Hindu Marriage Law in Early Postcolonial India'* (2010) 69 *The Journal of Asian Studies*, Brenda Cossman and Ratna Kapur, *Subversive Sites - Feminist Engagements with Law in India* (Sage Publications India Pvt Ltd 1996).

⁴⁶ More on this in Chapter 3.

⁴⁷ Virilocality refers to patrilocal residence, a social system in which a married couple reside with or close to the husband's parents. It is a social practice in India for parents to tell girls from a young age that they need to go to a different house (i.e., husband's house). So, they should learn to behave properly so that they earn their parents a good name in the husband's family. A woman is often thought to be marrying the man's family, rather than the man himself, as she must adjust and adapt to the culture and traditions of her new family from the day of her marriage. (Nivedita Menon, *Seeing like a Feminist* (Zubaan, India with Penguin UK 2012).

the other through mutual adaptations.⁴⁸ For example, there still exist strong ties with Hindu traditions and extended families in contemporary Indian society, and this in turn leads to the compliance with 'arranged marriages' as the dominant form of marriages as well as traditional or gendered conception of marital roles. Many Indian legal feminists claim that the discourse on the family in India tends to align itself with the dominant sexual ideology of Indian society in general, in which the family is headed by the eldest male member and the woman is represented to be the repository of culture. The ideal woman is pure, chaste and virginal prior to her marriage and becomes devoted to her husband after marriage. The relationship between a man and a woman can exist only in the form of marriage, which is considered a sacred bond to sanctify a heterosexual union.⁴⁹

Most feminist scholars like Archana Parashar and Flavia Agnes claim that gender was domesticated by state policy in India after independence from colonial rule, as women were viewed as the key to ensure the perpetuation of patriarchal values in family and society and to maintain status quo.⁵⁰ However, from 1947 to the present, there has been a tension that is evident in law-making between the need to provide gender equality while protecting the interests of women, as they were considered weaker when compared to men. Indian lawmakers considered it important to maintain gender equality in legal policy, without disturbing gender roles, as this would lead to cultural and

⁴⁸ Rosalia Condorelli, 'An Emergentist vs a Linear Approach to Social Change Processes: A Gender Look in Contemporary India between Modernity and Hindu Tradition.' (2015) 4 SpringerPlus.

⁴⁹ Brenda Cossman and Ratna Kapur, *Subversive Sites - Feminist Engagements with Law in India* (Sage Publications India Pvt Ltd 1996).

⁵⁰ Archana Parashar, *Women and Family Law Reform in India* (Sage Publications Pvt Ltd, New Delhi 1992), Flavia Agnes, *Law and Gender Inequality -The Politics of Women's Rights in India* (Oxford University Press 1999). They also argue that the lawmakers considered it important to contain women's sexuality as this was essential for transmission of property to the male heirs of the family and the notion of sexual control in marriages was followed to ensure the regulation of property relationships. (Flavia Agnes, *Law and Gender Inequality -The Politics of Women's Rights in India* (Oxford University Press 1999)).

social conflicts.⁵¹ This tension spills over to the interpretation of the law by the judges, as I explore in later chapters.

Some feminist scholars argued that the claim of the post-independence Indian state to reform Hindu law on the grounds of conformity of principles with the Indian Constitution was premised on unequal gender relations. They stated that the formulation of the Indian Constitution as well as personal laws exhibited an inherent tension between dominant (and unequal) gender relations.⁵² Moreover, while state laws embraced the concept of gender equality on paper, personal law reforms (especially Hindu law) did not alter the family power structure, as this was thought to come at great political cost.⁵³ What we can say for certain in this scenario is that equality and protectionism tend to be at loggerheads with each other in the Indian Constitution as well as the Hindu code, and this struggle is reflected in the judicial decisions to this day.⁵⁴

The need to balance widely-held, culturally-grounded assumptions on gender and Constitutional notion of gender equality is one of the important sources

⁵¹ Vijaya Nagarajan and Archana Parashar, *'My Brother's Keeper: Regulation of the Brother-Sister Relationship in the Religious Personal Laws of India'* (2013) 36 *South Asia: Journal of South Asian Studies*. Flavia Agnes, Sudhir Chandra and Monmayee Basu, *Women and Law in India: An Omnibus Comprising Law and Gender Inequality, Enslaved Daughters, Hindu Women and Marriage Law* (Oxford University Press 2004).

⁵² For more on this, see Christine Keating, *'Framing the Postcolonial Sexual Contract : Democracy, Fraternalism and State Authority in India'* (2007) 22 *Hypatia*, Zakia Pathak and Rajeswari Sunder Rajan, *"Shah Bano"* (1989) 14 *Signs*.

⁵³ Archana Parashar, *Women and Family Law Reform in India* (Sage Publications Pvt Ltd, New Delhi 1992).

⁵⁴ Equality and protectionism emerged from the twin ideas that originated during the nationalist movement in the early twentieth century - the liberal, unmarked citizens who needed to be treated equally and the elite, upper-class Hindu woman who needed to be protected for her own good. These concepts did not exist in pre-colonial Hindu law and were a product of the colonial interaction with Indian nationalism, with liberalism thrown in for good measure. Indian nationalist leaders considered it important for Indians to have their own non-Western definitions of modernity and claimed that Indians were modern but not Western. However, this modernity tended to be fractured, "half reflecting and half rejecting tradition", not just in India but in the entire sub-continent (Pratiksha; Baxi, Shirin M. Rai and Shaheen Sardar Ali, *'Legacies of Common Law: "Crimes of Honour" in India and Pakistan'* (2006) 27 *Third World Quarterly*).

of friction within Hindu law. I have found that this tension is evident in judicial reasoning in the cases under study and contributes to disparate treatment of women and men by the judges, as I explain in subsequent chapters. In the next section, I demonstrate how feminist perspectives on religious personal laws analyse disparate treatment of gender in these laws.

1.3.2 Feminist Engagement on Religious Personal Laws⁵⁵

For Indian feminists, the inability of the courts and the legislature to implement gender equality in family and personal laws is an attempt by the state (as represented by its legislative and judicial arms) to ensure that women are treated as second-class citizens.⁵⁶ They claim that questions on women's rights are subsumed within the sphere of the family and this leads to a reduction of their autonomy in the polity.⁵⁷ In the Indian feminist discourse, the ideas of gender and gender justice are important markers to define women's condition in the political, legislative, social and legal spheres.

So, how is gender viewed in Indian legal policy? Menon claims that legal policy in India largely uses gender as a category and not as a lens of examination.⁵⁸ She argues that the judiciary confines itself to normative ideals of womanhood and motherhood and adopts the idea that women need protection, compared to men. Here, the issue is one of latent patriarchy in the state apparatus. Feminist theoretical engagement with legal discourse in India critiques legal systems to be andro-centric, as they promote active or passive discrimination

⁵⁵ For a detailed analysis of this literature, see Chapter 6.

⁵⁶ For instance, see Rajeswari Sunder Rajan, *The Scandal of the State - Women, Law and Citizenship in Postcolonial India* (Duke University Press 2003). See also Nivedita Menon, *Seeing like a Feminist* (Zubaan, India with Penguin UK 2012), Rajeswari Sunder Rajan, 'Women between Community and State: Some Implications of the Uniform Civil Code Debates in India' (2000) 18 *Social Text*, Catharine A MacKinnon, 'Sex Equality under the Constitution of India: Problems, Prospects, and "Personal Laws"' (2006) 4 *International Journal of Constitutional Law*, Flavia Agnes, *Law and Gender Inequality - The Politics of Women's Rights in India* (Oxford University Press 1999).

⁵⁷ Paula Banerjee, 'The Acts and Facts of Women's Autonomy in India' (2006) 53 *Diogenes* 85.

⁵⁸ Nivedita Menon, *Recovering Subversion - Feminist Politics Beyond the Law* (Permanent Black 2004).

against women and interpret law in patriarchal ways, thereby eroding the subjective experience of women under law.⁵⁹

While the law is presumed to be neutral in its treatment of citizens, Indian feminists argue that it gravitates towards protectionism of women based on gendered perception of roles within and outside families, especially within RPLs. In judicial discourse, facts and law tend to mesh together with the notional elements of a patriarchal system and women are generally denied agency as chattel, as it is considered necessary to undertake reification and subjugation of women to maintain the patriarchal system.⁶⁰ Judges often reflect and follow social norms in their legal reasoning and decision-making, which is often clear from the judicial language used in judgments.⁶¹ Some Indian legal feminist scholars offer a critique of gendered norms and biases in RPLs, which is a useful lens of analysis that can be employed for judicial reasoning.⁶² Thus, there is a clear agreement among feminist scholars that religious personal laws tend to be gender discriminatory.⁶³

For a long time, most feminists in India considered law to be the only tool to remedy gender inequalities and restore gender justice.⁶⁴ But in due course, Indian feminists realised that law is just one of the tools that help to achieve gender justice.⁶⁵ While most Indian legal feminists engage with a critique of

⁵⁹ Nivedita Menon, *Seeing like a Feminist* (Zubaan, India with Penguin UK 2012).

⁶⁰ Kalpana Kannabiran, 'Judicial Meanderings in Patriarchal Thickets: Litigating Sex Discrimination in India' (2009) XLIV Economic and Political Weekly.

⁶¹ Srimati Basu, 'Judges of Normality: Mediating Marriage in the Family Courts of Kolkata, India' (2012) 37 Signs.

⁶² For a nuanced critique of the role of judges in family law, see *ibid*, Srimati Basu, *The Trouble with Marriage - Feminists Confront Law and Violence in India* (University of California Press 2015). In some instances such as cases on succession laws, scholars have pointed out that judges attempt to bridge ancient Hindu traditions with modern legal principles, creating a new and egalitarian rhetoric. For a more detailed discussion on this, see PP Saxena, 'Succession Laws and Gender Justice' in Archana Parashar and Amita Dhanda (eds) (Routledge 2008).

⁶³ More on this in Chapter 6.

⁶⁴ Nivedita Menon, *Recovering Subversion - Feminist Politics Beyond the Law* (Permanent Black 2004).

⁶⁵ For a detailed analysis on this, see Chapter 6.

policy and legislation, very few engage with caselaw in their analysis. There exists virtually no scholarship on Hindu custody law, especially by way of case law analysis. My original contribution to this literature is that I strengthen this body of literature by way of caselaw analysis in a hitherto unexplored area of law. I build on the feminists' argument that the Hindu code should not form the basis for the UCC, as it is evident from my caselaw analysis that the application of law in judicial reasoning has gendered undertones, while being ostensibly perceived to be neutral.

I use some of the threads of feminist theory that I have discussed in this section - gendering of roles in the Hindu family and disparate treatment of men and women within Hindu families – in my analysis of case law in subsequent chapters. I make an important contribution to existing theory by demonstrating how its arguments are valid in analysing judicial reasoning, as I demonstrate in chapters 4, 5 and 6. In the next sub-section, I provide an example of the case of property ownership in Hindu Law, to explain how Hindu legislation exhibits a differential treatment based on gender and why it is necessary to explore this treatment, in the interest of gender justice.

1.3.3 Gender Asymmetry – Example of Property Ownership in Hindu Law

Many Indian legal feminists claim that the conjugal family systems in Hindu law construct a subordinate position as well as identity for women. Women's interests are considered legitimate only in terms of community or familial interests and not as individual interests. In such a system, the role of women and their economic entitlements are determined only by four basic factors – title, fault, need and contribution.⁶⁶ This meant that a woman who is a homemaker did not have a value of her own and was commonly treated as

⁶⁶ Flavia Agnes, '*Conjugal, Property, Morality and Maintenance*' (2009) 44 *Economic and Political Weekly*.

the property or chattel of her husband, while the husband was entitled to own independent property. She was entitled to property only by default, in the event of her being widowed or divorced. However, while she did not have the right to claim financial resources during her marriage, she was provided the right of maintenance by law. This implied that she needed to walk out of the marriage to be able to seek legal recourse to financial remedies while she was powerless if she stayed within her marriage. Moreover, the Hindu woman did not obtain property rights or maintenance automatically, if she obtained custody of her children. She had to sue separately for maintenance under the Criminal Procedure Code. More importantly, her rights over marital property is virtually non-existent as there is no legislation governing rights of a Hindu woman over marital property post-divorce.⁶⁷ Thus, the right to property and right to maintenance are outside the purview of the HMGA and involve separate claims or suits. Here, I specifically provide the example of property rights of the Hindu woman to explain the disparate and gendered treatment in law.

Property was envisaged in law as a set of relationships of belonging that are interlinked to the space and gender hierarchies.⁶⁸ With the codification and enforcement of laws in the Hindu code, it came to follow that the morality of marriage was closely linked to economic claims, an argument that has been iterated by many Indian feminist scholars. I utilise this theoretical perspective

⁶⁷ The right over marital property is virtually non-existent in India's RPLs or its secular laws, as the concept of 'marital assets' does not exist in Indian family law jurisprudence. In the event of divorce, the wife or husband has no claim on the property of the other, irrespective of their religious affiliation. Under Sec.24 and Sec.25 of the Hindu Marriage Act, 1956, permanent alimony and maintenance can be claimed by either spouse, in the event of not having a permanent source of income. Under the Hindu Succession Act, 1956, a woman can make claims as a daughter, widow or widowed daughter-in-law over coparcenary property. Equal rights for Hindu women over coparcenary property was well-established only by way of the Hindu Succession (Amendment) Act, 2005. However, this Act does not cover the rights of divorced Hindu women.

⁶⁸ Vijaya Nagarajan and Archana Parashar, *'My Brother's Keeper: Regulation of the Brother-Sister Relationship in the Religious Personal Laws of India'* (2013) 36 South Asia: Journal of South Asian Studies.

for making a sub-argument on economic advantage within the Hindu family in subsequent chapters. Here, I explain how there is a gendered treatment that provides economic advantage to Hindu men, by using the example of property ownership in Hindu law.

While the reforms in Hindu law attempted to manage diverse and competing expectations at several levels,⁶⁹ they are not entirely successful in addressing the questions of gender parity within the family. The notion of individual property ownership in the Hindu Code views property as a social relation and gendered access to property is located within the family system.⁷⁰ Moreover, the patriarchal thrust on lineage and property systems is undeterred by the codification of Hindu law. For instance, under Hindu law, daughters have an equal share in the father's property on par with sons. However, most families do not include daughters in the division of family property on the grounds of providing them adequate dowry at the time of their marriages. The domestic space of the Hindu family is considered as shared, irrespective of sharing of ownership or equality in relationships.⁷¹ The unequal power relationships in the domestic domain tend to increase vulnerability of women as they are forced to remain in relationships for want of adequate resources to ensure their independence. While family is thought to be an institution that conventionally worked on altruism⁷², this claim is proved incorrect due to the increase in gendered vulnerability and differential privileges in the Hindu family.

⁶⁹ Werner Menski, *Slumdog Law, Colonial Tummy Aches and the Redefinition of Family Law in India* (2010) 30 Sage.

⁷⁰ Archana Parashar, *Women and Family Law Reform in India* (Sage Publications Pvt Ltd, New Delhi 1992).

⁷¹ Kalpana Kannabiran, *Sociology of Caste and the Crooked Mirror: Recovering BR Ambedkar's Legacy* [2009] Economic and Political Weekly.

⁷² Pradeep Panda and Bina Agarwal, *Marital Violence, Human Development and Women's Property Status in India* (2005) 33 World Development.

Due to the traditional social structure that emphasises caste and religious identities, women in Hindu families are closely tied to their community and religious identities. In a patriarchal society like India, women tend to have a notion of secondary citizenship, identity and belonging, as they are placed in positions that are secondary or subservient to men.⁷³ As citizenship and familial membership is split along gendered lines, it has led to social discrimination of women, regulation of sexuality and construction of gendered identities to govern the female half of the population differently. Within the Hindu family, these identities are delineated along clear hierarchies and economic control, favouring males. From this example of property ownership in Hindu law, we can infer that there exists a disparate treatment in Hindu law, based on gender. Such imbalances reinforce the case for the need to rectify this asymmetry of treatment of gender in law. I use this example here to highlight why it is necessary to employ the theoretical perspectives that I have adopted in this thesis, viz., how gender works in Hindu law (and how law works to produce gender) as well as the need to explore this disparate treatment of gender in law. In the next section, I focus on the key themes, arguments and research questions that I explore in this thesis.

1.4 Key Themes, Arguments and Questions

In this section, I appraise the key themes and arguments of this thesis, which emerge from my case analysis. Each of these themes corresponds to one of the subsequent substantive chapters in my thesis. I advance my key themes and arguments to address the following research questions –

1. How have judges engaged with gender and gender roles in the custody cases decided from 2000 to 2014, under the Hindu Minority and

⁷³ Rajeswari Sunder Rajan, *The Scandal of the State - Women, Law and Citizenship in Postcolonial India* (Duke University Press 2003).

2. Guardianship Act, 1956?⁷⁴
3. How have judges conceptualised the Hindu woman in the cases under study?
4. How does judicial reasoning on gender roles impact/inform the feminist debates on RPLs? Based on judicial reasoning in the cases under study, can the Hindu code be used as a blueprint for the UCC?

I now elaborate on the themes associated with each of these questions below.

1.4.1 Judicial Reasoning on Gender and Gender Roles

The first theme of my analysis is the judges' interpretative engagement on gender and gender roles in the Hindu family, which I discuss in detail in Chapter 4. The upper courts (under study here) often tend to emphasise the widely-held social norms, as the judges are mostly a product of the society from which they emerge.⁷⁵ The gender-neutral citizen-subject of the Indian Constitution is frequently interpreted in gendered ways in these judgments. The common approach adopted by the judges is to employ protectionism towards gender difference in these judgments, as I explain in Chapter 4 later.⁷⁶ Women are often viewed as being subordinate to men. They are perceived to be weaker and in need of protection of their bodies and rights. The judges interpret the state to be in the position of protectors of women, thereby emphasising the difference between genders as well as perpetuating these differences. While there exists the fiction of the gender-neutral citizen-subject in law, latent gender norms are reified in judicial reasoning.

⁷⁴ For a detailed discussion on the period of study, viz., 2000 – 2014, see Chapter 2.

⁷⁵ For a detailed discussion on this, see Leila Seth, *Talking of Justice - People's Rights in Modern India* (Aleph Book Company 2014), Srimati Basu, '*Judges of Normality: Mediating Marriage in the Family Courts of Kolkata, India*' (2012) 37 Signs.

⁷⁶ Throughout my thesis, I use the term 'protectionism' to refer to the practice of shielding Hindu women, by interpreting their roles within families along normative notions of womanhood and motherhood and by considering them as a weaker sex that needs protection from men.

In the cases I analyse, the judges attempt to explain and delineate the relationship between these women and their families. For instance, in the case of *Githa Hariharan*, they adopt the Constitutional principle of equality and strive to treat women as citizen-subjects.⁷⁷ I argue that in doing so, they adopt a protectionist stance on gender difference. I build on the above arguments to demonstrate how gendered norms get normalised in judicial reasoning and judges attempt to construct a one-size-fits-all model of womanhood and motherhood for all women, without considering their background or diverse situations. There is a conscious attempt at creating a unitary 'solution' for a plural condition. I argue that it is evident from this case and others, that many judges view gender as a category in the Constitutional checklist for equality, rather than being a different approach to interpretation of laws. As a result, there emerges a tension between normative notions upheld in the judgments under study and the modern notion of rights provided by the Constitution. In the next section, I explain how the judges tend to use the trope of the Elite Dependent to ease this tension, without considering how this stance obstructs gender justice and that this approach is inherently premised on entrenched gender norms.

Further, I analyse the use of the welfare principle in judicial reasoning. While the judges are careful to premise their reasoning on welfare while deciding custody of children, it emerges from the cases that they often premise welfare on the economic or material advantages provided by one parent. As the father in the Hindu family usually emerges as the financially capable parent, this economic advantage tends to tip the scales in the father's favour in most

⁷⁷ *Githa Hariharan v. Reserve Bank of India (1999) (2) SCC 228*. This case is the starting point of my analysis and provides a good example of the tension found in judicial reasoning between the Constitutional ideal of gender equality and underlying gendered notions. For a discussion on why this is the point of origin of my case analysis, see Chapter 2. For a detailed analysis of this case, see Chapter 4.

instances. This, along with the provisions of Sec. 6(a) of HMGA, provides the father with an edge over the mother. Moreover, judicial reasoning tends to favour providing custody of girl children to their mothers and boy children to their father, while justifying this gender-based reasoning to be in the best interests of the child. I argue that though the welfare principle appears to be even-handed at first glance, it is hijacked from its child-centric focus by the inherent gendered norms in judicial reasoning.

1.4.2 The Construction of the Elite Dependent

To denote the group of upper middle-class Hindu women who appear in majority cases under discussion as parties to the suit, I have introduced the category of "Elite Dependent".⁷⁸ The term "Elite" indicates that these women have the advantage of privilege, in comparison to other Indian women from the marginalised classes. There is a presumption of an affluent background and access to higher education for this group, as it comes from the upper middle-class society. Moreover, as the judgments under study are appeals to the High Courts or the Supreme Court of India, which are the highest courts of the land, it is safe to premise that most of these women have access to expensive legal representation. This premise is strengthened by the fact that none of the parties in these cases were represented by Amicus Curiae. I have used the term 'dependent' in the literal sense, to imply the subsidiary position held by these Hindu women, in comparison to Hindu men. The construction of the Elite Dependent in judicial reasoning forms the theme of my analysis in Chapter 5. I argue that this construction rests on normative notions of gender

⁷⁸ This term is inspired by the term "Elite Subaltern" used by Purnima Bose, to denote the category of the colonial subject who was elite compared to compatriots but subaltern in the relationship with the colonial master. As the term 'subaltern' has associations with post-colonial literature which is not a lens used in this thesis, I have modified the term and evolved a new category of Hindu women constructed by the judicial reasoning in the judgments under study (Purnima Bose, *Organizing Empire: Individualism, Collective Agency, and India* (Duke University Press 2003)).

norms, which is reflected in the reasoning employed in the judgments. This category symbolises the disproportionate treatment in gender relations and reflects the nature of gender relations within the Hindu family.

As I explained earlier, Indian feminists claim that the Hindu family is premised on gender difference and economic control, as it hides the nature of economic advantage provided to the male members of the family at the cost of its female members. Women are viewed as economic dependents rather than asset generators in this family. In those instances, in which women have economic advantage, they manage to obtain better leverage for negotiating the family spaces. However, I am confining this observation to the category of the Elite Dependent, as the judgments under study do not reflect the reality of lived experiences of all women in India.

As seen earlier, the Elite Dependent, who is educated but retained traditional values, became the blueprint for normative womanhood in the Hindu code.⁷⁹ So, according to the judges, how does this ideal woman behave? She is the homemaker who cares for the house (cooking, cleaning, and deploying all other skills needed to ensure a smooth running of a household) and provides physical comforts for her husband as well as his family. Upon the birth of her children, she cares for their physical and emotional well-being, and it is the responsibility of her husband to provide for them financially. While she may be educated, and have a career of her own, she puts the interest of her family first. As a wife and mother, she is always willing to sacrifice her comforts and her career for the sake of her husband and children.

Thus, this norm of womanhood and motherhood is used as the standard against which all others are measured. Any violation of this gendered role is

⁷⁹ More on this in Chapter 3.

considered socially deviant behaviour.⁸⁰ Such a woman is the fulcrum of her family and if she fails in her role as a respectable woman and mother, it could result in the breaking of established family structures. I argue that this view on gendered roles is adopted by the judges in their reasoning in the cases under study. Further, I argue that the notion of the Elite Dependent is often used by the judges to resolve the tension between equality provided to the unmarked citizen of the Indian Constitution and protectionism accorded to women.

1.4.3 Gendering of Law

As I explained in Section 1.3, my focus in this thesis is on how gender is treated in Hindu custody law and how judicial reasoning in the cases under this law work to produce gender. While the Constitution of India guarantees the right to equality to all citizens irrespective of caste, religion or sex, the rights of the middle-class Hindu women in their marriages and families are mostly not on par with their male counterparts. This is not context-specific to India, but it does highlight the economic vulnerability and disparity experienced by women, especially those trapped in abusive marriages. However, the thrust of my thesis is not on the notion of rights or the concept of equality. Rather, I focus on the disparity of treatment between parents in judicial reasoning and argue that this disparity is caused due to normative ideas of gender inherent in judicial reasoning. While I have used the concept of equality in some instances, this is with a view to contrast it with disparate treatment of gender in the cases. Further, I use the idea of equality in my critique of judicial reasoning in the cases to point out that while the reasoning claims to be based on an ideal of equality, it is premised on disparate notions of gender. I use the concept of equality for contrast and critique, but my concentration is on

⁸⁰ Sharmila Rege, *'Feminist Pedagogy and Sociology for Emancipation in India'* (1995) 44 Sociological bulletin.

disparate treatment. I have used the term 'gender parity' in most places in this thesis to indicate this disparity, rather than equality.

As I explained earlier, I focus on normative notions that underlie how judges view gender roles within families. This reasoning does not account for fluidity of gender or gender roles and operates on preconceived biases and perceptions about gender. Moreover, this type of reasoning is unfair and unjust to all who are subject to it, irrespective of their gender, as it tends to confine them in rigidly structured categories. So, my argument is that this type of reasoning, involving normative ideas, views gender disparately and creates a gendered hierarchy within families. I focus on how judicial reasoning works to produce a certain construction of gender roles, by way of my caselaw analysis in Chapters 4 and 5.

The common thread that runs across my thesis is the question of how gender works in law, especially the area of law I analyse in these cases. While unpacking how gender works in this area of law, I simultaneously analyse the consequences of this line of questioning on religious personal laws in India. The third and final theme of my analysis focuses on how the inherently gendered interpretation of Hindu custody law by the courts impacts gender relations in personal laws at the level of theory and practice, which I explain in detail in Chapter 6. I analyse the relationship between judicial reasoning and feminist positions on RPLs in that chapter. I argue that judicial reasoning privileges normative definitions of gender roles over gender equality, thereby proving the feminist claim that law is gendered. At the level of legislation, this impacts the formulation of a UCC, as such reasoning would be an impediment to gender justice.

As seen from the subsections above, the central argument I make in this thesis is that judges in the child custody cases under study tend to impose a one-

size-fits-all idea of motherhood and womanhood upon the women who knock on the doors of appellate courts for custody disputes. Judicial reasoning employed in these cases resorts to the use of the trope of 'Elite Dependent', to resolve the tension between gender equality provided in the Indian Constitution and protectionism of women. Moreover, judicial reasoning tends to use normative ideas on gender and gender roles to hijack the child-centric welfare principle provided in the HMGA.

In my substantive chapters (Chapters 4 to 6) that follow, I first analyse judicial reasoning on gender, especially gender roles in the family, and the welfare principle. I demonstrate that the judicial reasoning exhibits areas of friction between disparate treatment of gender and gender equality. I argue that the judges try to reconcile this friction, by using protectionism to explain the disparate treatment. I then analyse how the judges design and define the Elite Dependent in the cases under study, especially with respect to gender roles within the family. Further, I demonstrate that the judicial interpretation is premised on normative ideas on gender roles and I argue that this bias is instrumental for a disparate treatment between men and women in judicial reasoning in these cases. Finally, I formulate how such gendered interpretations may upset the UCC apple cart, if the Hindu code is adopted as a blueprint for the UCC. In the following chapters, I undertake a detailed analysis of the above elements of the cases under study to answer my research questions. In the next section, I have provided an overview of the outlines of further chapters by detailing the arguments and discussions in each of them.

1.5 Chapter Outlines

In the next chapter, I elaborate on the methodology adopted by me for analysis of case law used in this thesis. I provide an insight into the process of choosing and studying the cases and the themes that emerged from them. I also elaborate on my approaches and a few limitations that I encountered

during this process. In the third chapter, I describe how colonial intervention created a certain ideal of the Hindu middle-class woman and how it introduced gender as an axis of analysis for the Hindu family. I then explain how the nationalist and women's movement altered the perceptions of the Hindu family. I locate the origins of the Hindu code and discuss how certain colonial perceptions were carried over to the Hindu code. I then explain the code's formulation and evolution, with special reference to the UCC debates. In the fourth chapter, I elaborate on the judgment of *Githa Hariharan* and examine how gender norms and gender equality are perceived in this judgment. I then analyse how the welfare principle is conceived in the judicial reasoning in the cases under study. I argue that there is a latent notion of economic advantage, premised on gender, which is evident in judicial reasoning.

In the fifth chapter, I further the case analysis, with special reference to the Hindu family. I analyse how judicial reasoning on gender roles within the Hindu family, is constructed along normative ideals. I then analyse how the figure of the Elite Dependent is constructed by judicial reasoning in the cases under study, leading to a disproportionate treatment based on gender. In the sixth chapter, I analyse the relation between gendered nature of judicial reasoning and UCC debates in India, by appraising the arguments on personal laws and UCC made by feminist legal scholarship in India. I then use this analysis to argue that judicial reasoning, which is premised on normative formulations of gender, impact gender justice in the UCC. In the concluding chapter, I reflect on some aspects of my case analysis and scholarship. Finally, I outline the trajectory for further research.

Chapter 2 - Methodology of Case Law Analysis

2.1 Introduction

In Chapter 1, I explained the choice of Hindu law as my area of research and the key themes, arguments and questions I address in my thesis. In this chapter, I examine the parameters I used to analyse the custody cases under study. Firstly, I demonstrate how these choices came about in my research journey and explain the method underpinning my case law analysis. Secondly, I explore how my key themes and research questions emerged from my case analysis. Thirdly, I elaborate on why these cases can be taken as indicators of differential and gendered treatment of parents in judicial reasoning. This chapter highlights the methodological contribution of my thesis to feminist scholarship in India in general, and to specific debates on Indian personal laws.

I begin this chapter by explaining the evolution of my research project. In the following section, I set out the research design and the method I adopted to analyse 200 cases decided under Hindu Minority and Guardianship Act (HMGA), 1956. In the next section, I elaborate on the process of my case analysis by explaining how I sorted and organised the cases into themes. Further, I discuss my personal position as a researcher and the advantages and limitations of such a position. In the concluding section, I provide an overview of the chapter as well as some benefits of the process of case law analysis that I evolved for my research.

2.2 The Paths Travelled

While I had practised in family law courts at an early stage of my career, my research interest in custody law began during the time I worked on my

Masters' thesis.⁸¹ At that time, I had separated from my ex-husband and had to leave my child behind. There was much stigma attached to me as the 'bad mother' who abandoned her child. I contemplated on the nature of motherhood and the labelling of good and bad mothers that existed in social standards. As a student of law, I wanted to explore how these standards appeared in legal reasoning. So, my Masters' dissertation focused on Legal Parenthood in Hindu law. I explored questions of gender equality that existed in Hindu law using notions of relational equality. But I was unable to obtain satisfactory insights from the literature on equality, as my lived experiences repeatedly reinforced that there was no such ideal of equality in real life in India. This process raised some questions for me, especially in terms of methodologies and frameworks of research. I began to question if it is appropriate to use a single frame of reference for the Indian condition, considering its diversity and plurality and whether equality was a good lens to adopt for research on Hindu law. Moreover, while India is very diverse in every sphere and it was impossible to generalise any idea to its entire population, the existing laws attempt just such an exercise.⁸² While I explored questions of equality and subjecthood in Hindu custody law for my MA dissertation, I was convinced that there is a need to look at this body of law from a different angle, using approach(es) suitable for its study.

In the final semester of my MA, one of my courses was on the philosophy of science and some of my readings included the works of Donna Haraway and

⁸¹ I did a two-year master's in Interdisciplinary Humanities at the Manipal Centre for Philosophy and Humanities. This programme was from August 2011 to May 2013 and consisted of 4 semesters. It was loosely based on the model of U.S. Liberal Arts programmes and provided a lot of scope for interdisciplinary research and writing. I separated from my ex-husband and child in 2012, in the middle of this programme. I wrote my masters' thesis in April – May 2013, a period in which my experiences as a student and my personal experiences as a parent converged to produce my MA dissertation.

⁸² The famous economist, Joan Robinson, said that "The frustrating thing about India is that whatever you can rightly say about India, the opposite is also true", as quoted by her student Amartya Sen. (Amartya Sen, '*Contrary India*' (The Economist, 2005), accessed 20 September 2017).

Sandra Harding. Haraway's arguments on situated knowledge⁸³ and Harding's arguments on women's voices and subjectivity in research⁸⁴ made me reflect on the importance of women's experiences and social locations to the production of feminist epistemology. From my further research on standpoint theory, I understood that due to its very definition and nature, it could be used as an "epistemology, methodology and/or political strategy".⁸⁵ Standpoint theory focuses primarily on certain positions such as knowledge is socially situated and that research on socially marginalised groups, especially in terms of relations of power, would contribute to improving both knowledge and methodology. My understanding of standpoint theory was that it is a chair in which one sits and everything that is within view contributed to one's standpoint. Of course, the flip side was that one did not see the chair one is sitting on. While standpoint theory has its fair share of critique,⁸⁶ I focus on how it argues that our experiences and our social location shape our view of the world.⁸⁷ Moreover, Hindu law treats all Hindu women as a monolithic category with the same rights, without looking at the urban/rural, educated/illiterate or upper/lower class divides, not to mention divisions of caste, all of which are important axes of analysis. Due to this, standpoint theory suited the monolithic nature of Hindu law, as it does not address difference

⁸³ Donna J Haraway, 'Situated Knowledges: The Science Question in Feminism as a Site of Discourse on the Privilege of Partial Perspective' (1988) 14 *Feminist Studies*.

⁸⁴ Sandra Harding, *Whose Science? Whose Knowledge? Thinking from Women's Lives* (Cornell University Press 1991).

⁸⁵ Sandra Harding, *Introduction: Standpoint Theory as a Site of Political, Philosophic and Scientific Debate* (Sandra Harding ed, Routledge 2004).

⁸⁶ There are several critiques of standpoint theory, especially that it creates a false notion of universalism and epistemic relativism. More significantly, it does not address the concept that has been key to feminist thinking in the recent past – difference, especially difference among women. For instance, see Susan Hekman, 'Truth and Method: Feminist Standpoint Theory Revisited' (1997) 22 *Signs: Journal of Women in Culture & Society*. However, Harding argues that it is important to use the "decentred subject of knowledge and history" in feminist research. (Harding, 'Introduction: Standpoint Theory as a Site of Political, Philosophic and Scientific Debate').

⁸⁷ Judith Lorber, *Gender Inequality: Feminist Theory and Politics* (Oxford University Press 2010).

but tends to promote essentialism or universalism of women as a monolithic category.

My takeaway from standpoint theory is that self-reflexivity could be a good methodological approach to my research, as it helps to illuminate my experiences as a woman and my position as a researcher and a student of law. As Samia Bano argues, stand point is a good method of reconciling personal, subjective experiences and research, as the researcher is in the position of the researched and understands the dynamics of the relationship.⁸⁸ For me, the important questions at that juncture of my research were - Where am I situated in the process of creating this knowledge? How do my experiences contribute to this process?

I began this journey with standpoint theory as my line of enquiry, but I did not restrict myself to this theory. While individual experiences produce possibilities, they can also reproduce limitations of one's worldview. So, I wanted to use a combination of approaches to arrive at answers for my research questions. Due to my personal experiences, I wanted to understand whether judges treated men and women differently under Hindu custody law and if yes, how was this treatment different. I then turned to Indian feminist literature, which helped me to formulate some ideas about the difference in treatment between men and women in Hindu law and about how normative ideas on gender roles underlie the perception of society around us. I found that women like me, who were urban, middle/upper class and educated, did not have a prominent position in this literature. There was limited research

⁸⁸ She argues that stand point theory is useful in feminist research, in which the binaries of insider/outsider are destabilised as the researcher is both simultaneously, especially in terms of power and hierarchical difference. She has used this argument for her research on Muslim personal laws in the UK. (Samia Bano, *'Standpoint', 'Difference' and Feminist Research* (Reza Banakar and Max Travers eds, Hart Publishing 2005). Since her area of research is similar to mine, her arguments are useful to the subject of my research too.

available on this type of women, as most social/legal researchers favoured working on marginalised or oppressed women.⁸⁹

What the Indian legal feminist literature yielded was that feminist vocabulary in India took a turn from 'women's issues' to 'rights of being an equal citizen' and 'gender justice', due to several socio-political reasons over the decades.⁹⁰ This was an attempt to broaden the scope of the conversation without having to define 'rights' at every stage.⁹¹ This conversation then shifted to the need to examine how women encountered patriarchy in their everyday lives and "how patriarchal power is experienced in the minute and dense capillaries of family and social life".⁹² With this shift, the scholarship then focused on how women experience the law in their everyday lives, especially within the family. Further, while Indian feminists have held on to a position of a unified notion of 'women' as a singular category historically, this attitude changed considerably in recent years with a rising awareness that there are several divides among women such as elite and subordinate, urban and rural, Hindu, Christian, Parsi or Muslim as well as upper-caste or Dalit.⁹³ Most Indian feminists vigorously questioned the concept of gender equality, asking whether unequals can be treated as equals, both in law and in society. It is this questioning attitude that I adopt in my analysis of cases in this thesis. As I explained in Chapter 1, I do not analyse the concept of equality, rather, I

⁸⁹ For more on this, see Aditi Mitra, *'To Be or Not to Be a Feminist in India'* (2011) 26 *Journal of Women and Social Work*.

⁹⁰ More on this in Chapter 6.

⁹¹ S Raju, *'The Issues at Stake: An Overview of Gender Concerns in Post-Independence India'* (1997) 29 *Environment and Planning A*.

⁹² U Kalpagam, *'Life Experiences, Resistance and Feminist Consciousness'* (2000) 7 *Indian Journal of Gender Studies*.

⁹³ For a detailed discussion on this, see Tanja Herklotz, *'Dead Letters ? The Uniform Civil Code through the Eyes of the Indian Women's Movement and the Indian Supreme Court'* (2016) 6 *Südasiens-Chronik - South Asia Chronicle*, Hyderabad Anveshi Law Committee, *'Gender Justice Only a Legal Issue? Political Stakes in UCC Debate'* [1997] *Economic and Political Weekly*.

analyse how the treatment of gender in the cases undermines the idea of equal treatment of men and women in judicial reasoning.

Being a non-custodial parent, custody was and continues to be a topic that personally impacts me. Moreover, my experiences in the Family Courts, both as a lawyer and as a petitioner, made me aware of disparate treatment based on gender. So, I travelled many paths as a middle-class educated Hindu woman, lawyer, divorcee, non-custodial parent and a student of law to arrive at analysing custody cases in Hindu law. Once I decided that these cases would be the basis of my research and the Indian feminist literature would be my framework, I studied the Acts under Hindu law to identify which of them were suitable for my research. I found that the Hindu Minority and Guardianship Act (HMGA) dealt exclusively with custody questions in Hindu law. What was significant about my choice of cases was that this legislation or body of case law had not been analysed or theorised by others. This was (and continues to be) a niche area in which there is virtually no scholarship. I found just one article that was written on the custody aspect of religious personal laws in general.⁹⁴ Apart from this article, no other academic source existed on these cases. Both in terms of my choice of legislation, as well as caselaw analysis, this would be a unique and pioneering project, prompting me to choose case law under HMGA as my area of investigation. I wanted to evaluate if an analysis of custody cases could provide collective insight drawn from judicial opinions and this was the starting point of my research into these cases.

⁹⁴ This article, written by Asha Bajpai (Asha Bajpai, '*Custody and Guardianship of Children in India*' (2005) 39 Family Law Quarterly), discusses custody and guardianship from the angle of the child and focuses on cases prior to 2000 mostly. Moreover, it is not confined to Hindu Law and cuts across the spectrum to other RPLs too.

2.3 Research Design and Methods Used

While I discuss the methods and process of case analysis in greater detail in the next section, I have provided an overview of my research design and approaches here. In this section, I explain how I analysed a socially constructed reality of which I am a part, against the backdrop of my professional and personal experiences, using certain approaches. My personal experience served as an entry point into my research and it helped to direct my line as well as method of enquiry. This in turn led to the formulation of theory from the cases I studied. The below diagram is a pictorial representation of my research paradigm.

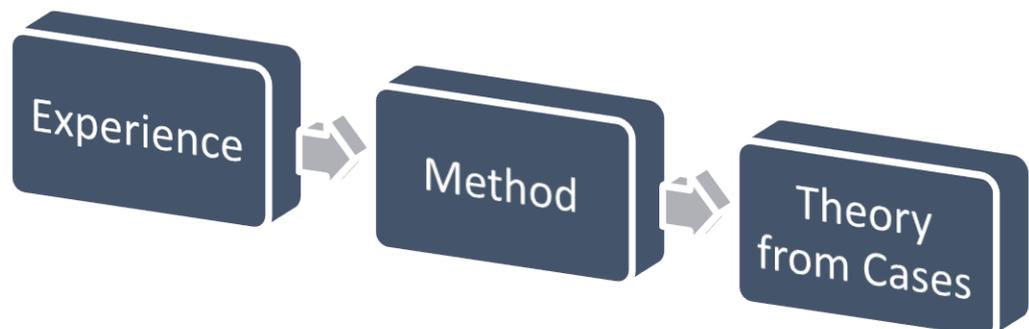


Figure 1 - Research Paradigm

The objectives of my research were two-fold – theoretical and practical. At the level of theory, I wanted to explore the judicial vocabulary on gender in Hindu custody law. I examined Indian feminist legal scholarship to understand what is known about the relationship between gender and judicial reasoning and to identify the gaps in that knowledge. Using this, I arrived at a framework of questioning how the judges constructed the Hindu woman in Hindu custody

law, especially in the role of a mother. At a practical level, I analysed the judicial interpretation of gender differences in the custody cases, in relation to religious personal laws and the formulation of a Uniform Civil Code in India.

In Chapter 1, I elaborated on the key themes and arguments I address in my thesis. To address these themes and arguments, I advanced the following research questions –

1. How have judges engaged with gender and gender roles in the custody cases decided from 2000 to 2014, under the Hindu Minority and Guardianship Act, 1956?
2. How have judges conceptualised the Hindu woman in the cases under study?
3. How does judicial reasoning on gender roles impact/inform the feminist debates on RPLs? Based on judicial reasoning in the cases under study, can the Hindu code be used as a blueprint for the UCC?

Question 1 and Question 2 both emerged directly from, and are answered by, the sample of cases analysed (These questions are elaborately discussed in Chapter 4 and Chapter 5 respectively). I explain the process of how these questions emerged from the case analysis, later in this chapter. From the case analysis, I generated a theory of how judicial reasoning is gendered in custody cases. Question 3 (addressed extensively in Chapter 6) emerged as a practical application of that theory to a crucial contemporary development in the field of Indian personal laws: the formulation of a Uniform Civil Code. The process I explain in this chapter pertains to the first two research questions and does not engage with the third research question. The third research question evolved by taking the case law analysis a step further, using the perspectives of both theory and application of law. For this question, I used my case law

analysis and the work of Indian legal feminist scholars to address the practical implications that arise out of my first two research questions.

Gender is the central category of analysis in my research, in line with some feminist approaches.⁹⁵ I examined how the judges have explained or defined gender and gender roles in these cases. I focused on discussions of gender and parental roles in the judgments, to ascertain the nature of gendered relations in judicial reasoning. Further, I analysed how these discussions have been rooted in normative ideas of womanhood and motherhood, while the judges attempted to balance it with gender equality. I explored the areas of disparate treatment between men and women in these judgments, to ascertain if there was a gender bias inherent in judicial reasoning.

While this is my broad approach to the thesis, I adopted what can loosely be termed as a grounded theory approach⁹⁶ of developing an explanation to understand a situation from the material in the cases themselves. I explored the research questions with an open mind. I initially used broad, open-ended questions and let the ideas and themes emerge from the cases. Once I classified the cases based on themes that emerged from them initially (more on this in the next section), I unpacked them in greater detail subsequently. I conducted a structured analysis of the cases using Excel spreadsheets, for which samples are attached in this chapter as well as the appendix. My analysis involved aspects such as parties to the case, Acts and legal principles used,

⁹⁵ For more on how gender operates as a category of analysis, see Deborah L Rhode, '*Feminist Critical Theories*' (1990) 42 *Stanford Law Review*. For an Indian perspective on this, see Brenda Cossman and Ratna Kapur, *Subversive Sites - Feminist Engagements with Law in India* (Sage Publications India Pvt Ltd 1996).

⁹⁶ For more on a historical perspective on grounded theory, see Kathy Bryant, Antony; Charmaz, *Grounded Theory in Historical Perspective: An Epistemological Account* (Kathy Bryant, Antony; Charmaz ed, SAGE Publications 2007). While grounded theory has several positions and arguments within it, I have chosen to use it from the perspective that it offers scope to 'think outside the paradigm', as Bryant and Charmaz argue. The plural nature of my cases as well as the Indian situation needed a theory that enabled me to think outside established or regular theoretical paradigms.

outcome of the case and the other bases for decisions. It was this approach which led me to formulate the concept of the Elite Dependent, which is my original contribution to theory. I explain this further in subsequent sections and in Chapter 5. This approach also helped me to identify those instances which were “moments of potential”, in which the judges reasoned along gender-just lines, like the case of *Chethana Ramatheertha*.⁹⁷

2.4 Process of Case Analysis

2.4.1 Case Collection and Initial Selection

Any researcher who engages in case law analysis can identify with some basic questions/issues that arise –Which are the cases I should choose, Why and How many? Also, in which order should I choose the cases? Do I analyse the cases first or should I look at the literature? In this section, I explain how I did what I did and why I chose certain ways of looking at the cases, in the process of my case analysis.

After deciding on the area of study, my next step was to start collecting the cases that I would require for the study. During a field trip to India, I collaborated with the Centre for Law and Policy Research in Bangalore. The Centre provided me free access to their databases and this helped me immensely, as it was a faster as well as a less expensive method to collect cases. I collected the cases over a period of five weeks at the Centre. I worked on databases such as *Manupatra* (a database for Indian legal research) and the Judgments Information System that consists of judgments of Supreme Court of India and several High Courts (www.judis.nic.in). Initially, I conducted a search for cases decided under HMGA exclusively or in conjunction with other acts, such as the Guardians and Wards Act, 1890, using key word

⁹⁷ For a detailed discussion of this case, see Chapters 4 and 5.

searches such as a combination of 'Hindu law' and 'custody'. Then, I searched for special references to roles of parents in the cases that dealt with custody under Hindu law, so that I could filter the most relevant cases from these databases. I wanted to understand how the judges looked at parents and whether there was differential treatment based on gender. At the end of this exercise, I collected around 470 cases that dealt with custody cases under Hindu law and referenced parents. These cases spanned decades and I refer to these as my personal database of cases.

I then focused on deciding: Which are the cases I should choose, why should I choose them and how many of them should I choose for my research from my personal database? My initial (and broad) research objective was to do a historical and political analysis of the circumstances surrounding the cases and analyse the impact of these circumstances on the cases. I attempted to organise the cases based on a chronological order of decades, from 1950s to 2010s, upon my return to the UK. However, the sheer number of cases dissuaded me from this idea subsequently, as it proved to be a very broad and unwieldy attempt at categorisation and analysis. I then decided to explore alternative mechanisms for analysis.

During the time of my research trip, I was simultaneously reading about the background of formulation of the Hindu code and the subsequent developments and debates in personal laws at that time. The Hindu Right played a significant part in this background, especially with their role in the co-option of the Indian feminists' position on the formulation of a UCC. At that point, India had its general elections and the Hindu Right came to power with a majority. During my visit for case collection, I observed that there seemed to be a general mood of exhilaration in the country as many Indians adopted a majoritarian view of politics. I witnessed this in media reports and personal interactions. I was curious to understand the impact of this political

trend on gender issues. The party that came to power stated that it was interested in formulating a UCC, as a part of its manifesto. These events influenced my thinking about my project. While I set out to analyse custody cases initially, I then started to look at how my analysis would contribute to the UCC debates.

With the UCC formulation in the background, I then started a process of selecting the cases that would be most relevant to connecting the UCC formulation to the gender issues I wished to address. After dividing the cases on a chronological basis, I used key sections from Hindu Minority and Guardianship Act, 1956 (HMGA), to guide my selection. HMGA is a compact act consisting of 13 sections. Of these, Section 6 (Father being the natural guardian of a Hindu minor) and Section 13 (Welfare principle) were the key sections used by the judges, based on which most cases in my personal database were decided. I used these sections as the starting point of my analysis. Within the 470 cases, about 200 cases spread across decades were decided based on these sections and I started analysing these cases. My aim was to develop my analysis organically from what the cases were telling me, rather than trying to fit them into any existing framework. I did a close and in-depth reading of these cases to analyse if there are any common themes emerging from them.⁹⁸

⁹⁸ At that point, there were also readings that influenced my approach to the cases. I was inspired by Dorothy E. Smith's analysis of experience as a method of speaking and enquiry and how social relations could be penetrated or discovered from within, through textual analysis (Dorothy E Smith, *Texts, Facts and Femininity - Exploring the Relations of Ruling* (Routledge 1990)). The writings of my supervisors were also important influences at this juncture. Didi Herman's and Suhraiya Jivraj's critical and insightful analysis on cases under UK law helped me to formulate my line of enquiry for the cases I studied (Didi Herman, *An Unfortunate Coincidence: Jews, Jewishness and English Law* (Oxford University Press 2011), Suhraiya Jivraj and Didi Herman, 'It Is Difficult for a White Judge to Understand: Orientalism, Racialisation, and Christianity in English Child Welfare Cases' (2009) 21 Child and Family Law Quarterly, Suhraiya Jivraj, *The Religion of Law - Race, Citizenship and Children's Belonging* (Palgrave Macmillan 2013)). Amanda Perry-Kessaris's insights on text, context and sub-text in adopting a socio-legal approach to international economic law helped me approach my cases from the angle of text and sub-text and discover the hidden layers in judicial reasoning (Amanda Perry-

What emerged from a reading of the cases was that welfare principle was used as the paramount legal principle to decide on custody cases under HMGA. While the father was considered the natural guardian under HMGA, this was not always followed in all cases. Once the custody of the child was disputed, it emerged that the Welfare principle became the key factor for deciding custody. In the event of a contradiction between Sec. 6(a) and Sec.13, the latter superseded the former in judicial reasoning, in most instances. The questions on my choice of cases that emerged at this stage continued throughout my research until the time of finalising my substantive chapters. I refined my choice of cases at every stage of the process, in line with the evolution of my research questions. The selection process underwent further refinement as I explain in the following sections.

2.4.2 Emergence of Themes

Phase one of my case analysis dealt with developing a thematic classification of how parents were treated and how welfare was defined in these cases. In all the cases, the welfare of the child was considered as the paramount principle for deciding custody of minor children, under HMGA. So, I further refined the thematic classification to those pertaining only to parents and criteria for welfare. For ease of reference and access, I plotted the cases under the following headings on an excel spreadsheet – cause title, date of decision, decade, case facts and comments/quotes from the cases. I made several spreadsheets of data that I have plotted on the cases. A sample of the spreadsheet can be seen in Figure 2.⁹⁹

Kessarlis, 'What Does It Mean to Take a Socio-Legal Approach to International Economic Law?', *Socio-Legal Approaches to International Economic Law - Text, Context, Subtext* (Routledge 2013).

⁹⁹ I have provided detailed samples of these spreadsheets in Appendix 3.

This stage of analysis produced a crucial finding: that a Supreme Court judgment in the case of *Githa Hariharan*¹⁰⁰ challenged the social and legal convention of gendering of parental roles, by invoking a right of gender equality provided in the Indian Constitution. In this case, the Constitutional validity of Sec.6 (a) of HMGA was challenged. This section stated that the father was the natural guardian of a Hindu minor and the mother came after the father. The petitioner claimed that this was in violation of the right to equality provision in the Indian Constitution. The Court opined that the provisions of the Act do not contravene the Constitution of India as legislative intent is to be construed as being in alignment with gender equality found in the Constitution –

*"It is well settled that if on one construction a given statute will become unconstitutional, whereas on another construction, which may be open, the statute remains within the constitutional limits, the Court will prefer the latter on the ground that the Legislature is presumed to have acted in accordance with the Constitution and courts generally lean in favour of the constitutionality of the statutory provisions."*¹⁰¹

While the father is the natural guardian as provided by Sec. 6(a), the judges tend to ignore this provision once the custody of the child was disputed and granted custody based on welfare of the child. However, they were unwilling to strike down Sec.6 (a) as being unconstitutional, despite this anomaly. The Court provided an explanation to reconcile two contradictory positions, using the principle of welfare as the basis of its reasoning.

The important outcome of the *Githa Hariharan* judgment was that it opened the flood gates for discussing gender parity of parents, a concept that did not

¹⁰⁰ *Githa Hariharan v. Reserve Bank of India* (1999) (2) SCC 228.

¹⁰¹ *Ibid.*

exist in cases before. However, a close reading of the judgment produced a second important finding: although the Court was addressing gender equality, it premised its reasoning on gendered norms. This case was important for my analysis as this was the first instance in which the judges spoke of gender equality between parents, a criterion that I was focused on exploring. I decided to use this case as my starting point because of its reasoning on gender equality and parental roles. This insight structured phase two of my case analysis, which focused on those cases that used *Githa Hariharan* as a precedent. As this case was decided in 1999, I decided to read the cases in the descending order, starting from the most recent. I reasoned that the latest cases would be less researched, compared to the older ones, and they would also provide better insights about post-liberalisation India.¹⁰²

Having addressed the issues of which cases I wished to analyse, why this set of cases as well as the order of analysis, I now turned to another important question in case law analysis - Do I complete the analysis of cases first or should I look at the literature? I decided that I would analyse these cases while reading the literature simultaneously. My reasoning was that this process would provide me with parallels from both case law and scholarship and I would be able to perceive and connect the dots. In the next section, I demonstrate the outcome of conducting my case law analysis in conjunction with the theoretical perspectives that emerged from the Indian feminist scholarship.

¹⁰² India opened its doors to foreign investments and arrival of multinational corporations in 1990. I reckoned that the decade after this liberalisation, different trends may emerge in judicial reasoning, as the country was open to fresh ideas and possibilities.

Cause Title	Date of Decision	Decade	Case facts	Comments and Quotes
Mausami Moitra Ganguli vs. Jayant Ganguli	12.05.2008	2000	Appellant and respondent had breakdown of marriage and were fighting for custody of only child, Mother (Appellant) moved family court to be declared lawful guardian of minor son and to get his custody, Family court relied on evidence provided by mother and awarded her custody, father challenged the order in High Court, HC obtained advice from director of psychology and wishes of child and set aside judgment of family court, Mother appealed to Supreme Court, Appeal dismissed	<p>“Better financial resources or their love for the child may be one of the factors but not the sole one, Court has heavy responsibility to exercise judicial discretion keeping welfare as prime concern,</p> <p>Father is presumed to be better suited to look after the interests of the child by statutes as he is normally the working member and head of the family..... Child's best interest is addressed when he is with his father.”</p>

<p>Mohan Kumar Rayana vs. Komal Mohan Rayana and Komal Mohan Rayana vs. Mohan Kumar Rayana</p>	<p>16.01.2009</p>	<p>2000</p>	<p>Father and mother of girl child married by Hindu law. Mother moved back to her parents' home due to father's alcohol problems, while father claims desertion. Mother alleged that the father forcibly kept the daughter in his custody. Mother was TV/Film star and in public interviews, she did not acknowledge the presence of her child or that she was married. Thorough examination of counselling records and parents' status. Custody given to mother, with the proviso that if she tries to poison the child's mind against the father, the decision may be reversed.</p>	<p>"We are conscious of the emphasis laid by the learned Counsel for the petitioner that the lap of a mother is the natural cradle where the safety and welfare of the child can be assured and there is no substitute for the same.... In selecting a guardian, the court is expected to give due weight to the child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings."</p>
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Figure 2: Sample of first phase of case analysis (Emphasis added to indicate the gendered nature of assumptions in the reasoning)

2.4.3 Postulates and Arguments

In the second phase of my case analysis, my objective was to ascertain the premises on which judicial reasoning was based, and how the judges viewed parental roles within Hindu families. I also wished to ascertain if gendered hierarchies that existed in families and society at large also existed in the judges' reasoning. About 80 cases decided between 2000 and 2014 used *Githa Hariharan* as a precedent and I decided to use these cases to test my hypotheses. I examined the reasoning of the judges and the factors that were explicitly cited by the judges as the criteria to decide on the welfare of the child in the judgments. I identified 58 cases as best illustrations of the identified themes and ideas and decided to reference them in the thesis.

Of these 58 cases, 41 cases involved a custody dispute between the father and the mother of the child(ren), i.e. parent vs. parent custody dispute. 13 cases referred to a custody dispute between a parent and grandparent(s) of the child(ren), i.e. parent vs. grandparent custody case. The remaining 4 cases referenced certain aspects of personal laws in India (For instance, the case of *Shah Bano Begum*). Of the 41 parent vs. parent cases, mothers were awarded custody in 32 cases, while fathers were awarded custody in 8 cases. In one case, which involved the custody of two children, the parents were awarded the custody of one child each. While it did appear that mothers were awarded custody in their favour in most of the cases, the reasoning for awarding such custody was premised on normative notions of gender. However, the welfare principle was used as the legal premise for awarding custody and gendered reasoning was disguised to appear as supporting the child(ren)'s welfare. While women did seem to win custody, the judicial reasoning that led to this outcome was premised on archaic and one-size-fits-all notions of womanhood and motherhood, rather than gender equality. As I explained earlier, the focus of my thesis is the process of judicial reasoning, rather than

its outcome. So, it is problematic to consider what might be a favourable result when it is premised on gendered reasoning, as the means tend to defeat the ends in these cases.

The gendered premise of judicial reasoning became even more apparent in the parent vs. grandparent cases. Of the 13 cases in this category, grandparents were awarded custody in 5 cases. What is interesting to note is that in all these instances, it was the paternal grandparents who were awarded custody against the mother. The father of the child was awarded custody in 5 cases against the maternal grandparents, out of which 3 cases involved the death of the mother of the child, for which the father was directly or indirectly accused. In the other two instances, maternal grandparents had brought up the child from a very young age and both children were in their early teens. Despite this situation, the father of the child was awarded custody in these cases. The mother of the child was awarded custody against the paternal grandparents in the remaining 3 cases. However, in two of these cases, the reasoning was based on the ideals of womanhood and motherhood, as envisaged by the judges. It was only one case which exhibited a moment of potential where the judges exercised reasoning based on gender parity to decide on the custody of the child. This category of cases reinforced the idea that it was important to consider the process of how the judges arrived at the decision for custody of the child(ren), rather than focus on just the outcome of the cases.

From both sets of cases, I identified that the focus is on the process of judicial reasoning in all these cases, rather than the outcome or result of the custody dispute. It became evident that reasoning based on normative gender roles was not confined to parent vs. parent disputes. In fact, it was more pronounced in the parent vs. grandparent disputes. In this category, paternal grandparents were provided special treatment, while maternal grandparents

did not stand much of a chance to win custody. This underlined that deeply entrenched normative ideas of gender were reflected in judicial reasoning. Moreover, in these instances, grandparents were standing *in loco parentis*, in the absence, inability or death of a parent. In this sense, they were being viewed as substitute parents by the Courts. The reasoning in these cases was premised on similar lines of the reasoning in parent vs. parent cases. Since it was my focus to study the process of judicial reasoning in these cases, it was evident that this process was similar, irrespective of whether parents or grandparents were seeking custody of the child(ren). For this reason, I have used cases involving parent vs. parent as well as parent vs. grandparent for my analysis in Chapters 4 and 5.

Apart from the above analysis, I specifically examined whether preferential treatment was provided to either parent in same or similar circumstances. For instance, if it is evident in cases that the parents are equal in terms of education, income and/or social standing, do the judges favour one parent over the other? If yes, what was their reasoning for providing preferential/different treatment of parents? Another point of my examination was to analyse whether any gendering or stereotyping of parental roles were present in the cases. For instance, I analysed if the mother is treated as the caregiver or nurturer and the father is considered as the provider or breadwinner in these cases.

The judgments that I studied cited welfare or best interests of the child as the primary basis for making custody decisions. The cases revealed that in many instances the welfare principle was premised on material or financial circumstances in which the child was raised. This point gave me an important link to the argument made by most Indian feminists that all personal laws are gender discriminatory. In the body of Indian feminist literature, personal laws held a prime position historically. For a long period of time, Indian feminists

viewed law as the instrument to deliver gender justice.¹⁰³ This view altered with changing circumstances, as feminist theorists and activists shifted towards alternative solutions, rather than viewing law as the only instrument of social change. Parashar and others maintained that gender justice can become achievable only when there is a separation between religion and family law.¹⁰⁴ They argued that it is important to create a 'rights regime' favouring women, though the Constitution did provide equal rights to women. While the Courts were willing to validate the rights of women in some respects, they found that there is a judicial reluctance to apply equality principles to personal laws.¹⁰⁵ So, most scholars acknowledged that while laws are inherently gendered, this gendering is starker in the realm of personal laws. My analysis on the Welfare principle aligned with this position and I explain this in detail in Chapter 4.

Another important insight during this phase of case analysis was that the gender imbalance inherent in judicial reasoning created a certain figure of the Hindu woman, who is educated and follows traditional values, rather than become "Westernised" or "modernised".¹⁰⁶ This figure is constantly subject to a tension between her individual rights and her subordinate/secondary social status. I coined the term "Elite Dependent" to denote this figure and I explored how the judges often created this figure in their reasoning. The concept of the Elite Dependent is one of my key contributions in the thesis. Using the literature, I then analysed how the nature of judicial reasoning and the figure

¹⁰³ More on this in Chapter 6.

¹⁰⁴ For instance, see Archana Parashar, *'Family Law as a Means of Ensuring Gender Justice for Indian Women'* (1997) 4 *Indian Journal of Gender Studies* 199.

¹⁰⁵ Catharine A MacKinnon, *'Sex Equality under the Constitution of India: Problems, Prospects, and "Personal Laws"'* (2006) 4 *International Journal of Constitutional Law*. Here, MacKinnon argues that the reason for this reluctance is that the notion of sex equality is a Western concept and hence it is resisted by the Indian judiciary.

¹⁰⁶ The idea that a woman who received education would tend to follow 'modern' ideas such as independence, rather than stick to traditional or subservient gender roles was prevalent in popular discourse during the late colonial as well as post-colonial periods in India. More on this in chapter 3.

of the Elite Dependent help to enhance my argument that judicial reasoning is inherently gendered and is based on normative notions of gender roles within the family. I deepened and strengthened this argument by analysing the application of judicial reasoning, as the literature confined itself to the letter of the law in most instances. Further, I analysed the cases to understand how judicial reasoning tends to reproduce existing gender norms. I have demonstrated these aspects in detail in Chapters 4, 5 and 6. During this analysis, I synthesised the themes that emerged from the cases with the literature and explored the linkages between the two.

As I explained earlier, I was looking at the decisions of the appellate courts, mainly the Supreme Court of India and the state-level High Courts. I expanded my earlier excel spreadsheet to include further headings on the court in which the case was decided as well as the legislation or sections under which the decision was made (*Figure 3*). This was with the view to understand whether there were regional differences among the courts and if there were other trends that may emerge from them. However, the application of gender norms in judicial reasoning was not the prerogative of any one court and it appeared to be a more universal phenomenon. There were some gender neutral and/or gender-just judgments that were passed by some courts, which were, again, not specific to any region. Also, reasoning based on normative gender roles was not confined to the geographies perceived to be conservative parts of the country. For instance, in the case of *Venugopalan vs. Beena*, the Kerala High Court ruled that the mother should be given custody of the girl child as she would be in a better position to instil traditional values of marriage and family in her daughter. This reasoning based on normative gender roles came from the High Court of the state which had a matrilineal system of inheritance in customary Hindu law and consistently performed well on several developmental indicators, including highest levels of literacy in the country.

So, this phase of my case analysis yielded more scope to theorise on the gendered nature of judicial reasoning. My first area of further analysis was the Welfare principle that was used as the basis for all the decisions. What was distinct about Welfare is that it was repeatedly mentioned as the paramount consideration for deciding custody cases.¹⁰⁷ Since this was the primary legal principle used to decide on custody, I analysed various ways in which welfare was defined by the Courts in these cases. What emerged was that judicial premise on welfare mostly rested on normative notions of gender and gender roles. For example, gender of the child played a key role in decisions and so did the financial capacity (mother must become the father or have the capability of being a breadwinner). Other cases offered some insights on how marriage, family, matrimonial discord, roles and remarriage of parents were viewed by the courts. The underlying commonality in all these instances was the adherence to gendered and social norms in deciding legal questions. When I started to analyse gendered perceptions, I found that there were many layers to unpack from the cases.

In the third phase of my analysis, I conducted a more detailed analysis of the different aspects of welfare, as provided in the sample list I have attached at the end of this section (*Figure 4*). I read and re-read the cases to understand how welfare is premised on gender norms. These readings helped me to define and sharpen my ideas on how gendered perceptions played a large role in the way judges reasoned about parents. It was this exercise that largely shaped my ideas on judicial construction of the father and the mother as well as the family. I could discern the roles of the Caregiving mother and the Deviating mother in the judges' reasoning. The in-depth reading of the cases

¹⁰⁷ For a detailed discussion on this, see Chapter 4.

led me to the construction of the Elite Dependent from the judges' reasoning. I started to trace the patterns of disparate treatment between the father and mother in these cases and how this disparity revealed a tension between the mother's rights and her secondary status in the familial hierarchy. From a broad and open-ended format, I migrated to seeking answers for specific questions at this stage. By the time of this analysis, I had written initial drafts of two of my substantive chapters. I categorised the cases thematically and plotted where they would fit into each of these substantive chapters. I have provided a sample of such classification below (*Figure 5*). This helped in nuancing the arguments made in these substantive chapters. This was the last and defining phase of my case analysis as it helped to set my objectives in place. The process of my case analysis helped to translate my research from the real to the abstract, as I transitioned from the cases that were real to theory that was abstract. In the next section, I appraise my personal position as a researcher, followed by the limitations I encountered during my research.

Case	Court	Acts /Rules/Orders	Case facts	Quotes
Smt. Imarti Devi vs. Madhu Devi	High Court of Punjab And Haryana	Guardians and Wards Act, 1890 - Section 7; Hindu Minority and Guardianship Act,1956 - Section 6	Father died, mother remarried and lived with child and second husband. Paternal grandmother sued for custody based on precedent that mother's remarriage makes the child to appear to be in foster care of step father	"The child, from the very beginning is in the care and custody of her natural mother, i.e., the respondent... The argument that as respondent has remarried, custody of the minor should be entrusted to the appellant is abhorrent to the very concept of parenthood and a throwback to feudal times in our social past. The right of a widow to remarry, is absolute and not circumscribed by any condition that requires her to give up her minor child as a condition precedent to a second marriage."

Figure 3: Sample of second phase of case analysis

S.no.	Case	Keywords	Comments
1	Mausami Moitra Ganguli vs. Jayant Ganguli	Welfare, Rights of parents, financial resources	Welfare as stability and security
2	Amit Beri son of Hardaya Narain Beri and Hardaya Narain Beri son of Jai Narain Beri vs. Smt. Sheetal Beri wife of Amit Beri D/o Raj Kumar	Welfare, Mother, Indian culture (night clubs)	Welfare as a point of fact and not of law
3	Arun Grover vs. Ritu Grover	Welfare, No contact with child	Welfare by derivation - father didn't meet the child or bear his expenses

Figure 4: Sample of analysis on Welfare Principle

Title	Case	Quotes	Case facts	Section
Master Shobhit Vs. State of U.P. and Ors.	<i>Master Shobhit Vs. State of U.P. and Ors.2011 (89) ALR 136</i>	"There has been number of divergence of views that if mother is a drunkard, or she is a licentious lady, having extra marital relationship, or that she is unable to look after required welfare of the child or that she is morally unfit, she cannot be given custody of a child."	Mother accused of being an accomplice to father's killing by her paramour. Child with grandparents.	5.3.1

Figure 5: Chapter-wise classification in third phase of case analysis

2.5 Researcher's Personal Position

As I explained earlier, my lived experience was largely responsible for my choice of looking at custody cases. My personal experience in family courts in India made me realise that there was a huge gap in the way men and women were perceived by the judges. I observed that most women who approached the Courts for divorce and custody had to struggle through long and tedious hours of waiting to be called to appear before the judge. Even when they did appear, they had to endure incisive questioning about their personal lives. Often, they were viewed as deviant, as they chose to break social taboos on divorce. This perception was visible in the deprecating way the judges spoke to them in court. During the long periods we spent waiting for the case to be called, one of my clients recounted her internal struggle of seeking a divorce after twenty-five years of being married to an abusive and alcoholic man. She had a well-paying job and two grown children (closer to me in age) but she could not bring herself to seek divorce because of social pressure. She put up with his physical and emotional abuse for decades. However, she resisted when he started to abuse their daughter. She fought with him and he left the family, never to return. She had not heard from him for over seven years and had come to seek an *ex-parte* divorce, due to her children's insistence. Though she was an educated woman and could support her family and herself, the judge subjected her to probing questions on her conduct that were borderline insulting. At that point, I was a rookie lawyer who was trying to learn the ropes in a system that resembled a maze. While I felt this was dehumanising at many levels, there was little I could do then. I did not realise the deep impact that this would have on the psyche of a person undergoing it, until I was put in such a position.

My next encounter with the judicial system was during my divorce process. Initially, I thought that a passage of fifteen years would have caused it to

change in some ways. I was mistaken, as I found out to my detriment. Gendered perceptions had not altered. Instead, they seemed to have deepened. Moreover, the way the judges treated persons before them was often based on gendered norms – women were supposed to be taking care of family and children, men were supposed to work and earn outside the home. These experiences were vastly responsible to turn my attention towards family relationships and especially towards how a Hindu woman was perceived by the judges in their reasoning. My experiences have both helped and hindered. They have helped me to better discern underlying gendered norms in judicial reasoning and their impact on lived experiences. They have hindered at times by making me less objective about my research, especially when dealing with cases like mine. In many ways, reading these cases was both cathartic and traumatic. While this is my personal position as a researcher, I also encountered some limitations with respect to the subject area.

2.6 Limitations of the Research

The limitations that I encountered during the process of case-analysis were both theoretical and empirical in nature. An important finding that emerged from my analysis was that these cases represent Common Law principles masquerading as religious law. Though these cases come under Hindu law, religion is mentioned only in one of them. The reference to religion had no bearing on the reasoning in the case. Modern Hindu law cannot be compared to other religious laws (for instance, the Sharia) because it is mostly rooted in Common-Law and is intended to be a secular code by its framers.¹⁰⁸ To superimpose notions of religion/religious law or even customary Hindu law on modern Hindu law, may result in a strange and inexplicable marriage.

¹⁰⁸ More on this in Chapter 3.

Therefore, I decided to treat it like liberal secular law, as it does not explore any questions of religion. Moreover, anyone who is not a Christian, Parsi or Muslim is considered as a Hindu by definition, under Hindu law. There maybe a few cases in my analysis which deal with individuals who follow Sikh or Jain religion or are even atheists. I have included them in the analysis as they are viewed as Hindus under law and these cases are included under the body of Hindu law.

Some of the other limitations that I have encountered in my thesis were empirical in nature. For example, I cannot use my analysis to draw conclusions about Indian women in general. This is because the pool of cases that I have analysed specifically pertain to upper-class, elitist Hindu women and cannot be used to infer any propositions about all Indian women. Moreover, as I observed earlier, 'women' cannot be reduced to a single category in India. Due to sheer size and diversity of India, it is virtually impossible to generalise any trend for the whole country. My research provides insights into how normative notions on gender roles are produced, reproduced and iterated in custody cases and how this has an impact on formulation of a UCC for India. I do not attempt to provide solutions for the larger social issues of gender and caste in India. Another minor point is that I am a student of history and law and I hold multiple degrees in the humanities and social sciences (including a Masters' in Interdisciplinary Humanities). Due to this background, I prefer a multidisciplinary, particularly historical, approach to my work.¹⁰⁹ This has been useful most of the time, but it may have caused me to look at the cases with specific lenses.

¹⁰⁹ This may be evident in a few of my subsequent chapters.

2.7 Concluding Remarks

While my research is the first of its kind on Hindu custody law, certain key elements of it can be used in other contexts as well. I have developed a unique method of case analysis that combines several approaches, which can be used as a prototype for future research. For instance, I have attempted to provide a rich context and in-depth description of the cases and the larger socio-political circumstances surrounding the legislation. These circumstances are not confined to Hindu custody law and they are useful to look at several legislations in India, within and outside Hindu law.

Here, I have demonstrated how I conducted my case analysis, using a step-by-step process. I have provided an explanation on several aspects of my research process, like research design and methods adopted, which can be used in similar context, such as the analysis of cases in other legislations under Hindu law. Moreover, this process may be helpful to obtain similar results if followed for gender-based analysis of legislation. This need not be confined to Hindu law and can be extended to other personal laws as well as legislations with gender implications. In the interest of fairness and credibility, I have explained my personal positions and biases as well as limitations that impacted the research. My research contributes strongly to aspects of gender in legislation at a broad level and to case law analysis in Hindu law at a specific level. I hope that my research would open new ways of thinking about gender and law in the Indian context. In the next chapter, I appraise the formation of the Hindu code and the context in which it was created, to set the stage for my case analysis in further chapters.

Chapter 3 – The Hindu Woman in the Hindu Code

3.1 Introduction

Personal law systems in most countries under colonial rule were largely influenced by state-society relations and discourses of community that were prevalent among the ruling class or policy-making elite.¹¹⁰ The imperial power constituted the definition of state, while the colonized people constituted society and hence, there was an encounter between the ideas of the colonizer and colonised in this sphere. This encounter was always categorised in terms of traditional binaries, such as modern and indigenous. With the rise of nationalism in colonised states, it became important to construct different discourses of nation and community that would aid the nationalist agenda. This in turn led to the creation of discourses on personal laws, as personal law systems helped to frame and reflect group cultures and the visualization of group norms by individuals.¹¹¹ Personal law systems serve the function of grounding normative notions of society and India is not an exception to this rule.¹¹² In India, like in other colonized nations, the concepts of nation and community, legal rationale and democratization of the nation were important influences in personal law reform since the colonial times.¹¹³

¹¹⁰ This included the discourses of nation, cultural groups and traditions (N Subramanian, *Nation and Family - Personal Law, Cultural Pluralism and Gendered Citizenship in India* (Stanford University Press 2014).

¹¹¹ Largely, the features that influenced personal law changes in India were nationalist discourses, protectionist policies for women, categorization of cultural groups, ideals of modernity and the idea that personal law was a bridge between modernity and cultural practices (ibid).

¹¹² For instance, see Nivedita Menon, *Seeing like a Feminist* (Zubaan, India with Penguin UK 2012), Rajeswari Sunder Rajan, *The Scandal of the State - Women, Law and Citizenship in Postcolonial India* (Duke University Press 2003), Flavia Agnes, *Law and Gender Inequality -The Politics of Women's Rights in India* (Oxford University Press 1999).

¹¹³ N Subramanian, *Nation and Family - Personal Law, Cultural Pluralism and Gendered Citizenship in India* (Stanford University Press 2014).

As I explained in Chapter 1, India continued to follow the colonial system of Religious Personal Laws (RPLs) to govern different religious communities, after independence from colonial rule. There exists a Constitutional provision for the amalgamation of RPLs and the creation of the Uniform Civil Code (UCC), with the aim of establishing equality before law for all citizens of India. However, this has not been carried out by successive governments in almost seventy years. The UCC question has become topical recently, with the Law Commission of India distributing questionnaires to the Indian public at large and seeking public opinion on UCC and questions of gender in RPLs.¹¹⁴ While it is debatable in what form and time frame the UCC would be enacted, the RPLs continue to govern the entire Indian population. So, what are the origins of RPLs in India? How did the colonial and nationalist interventions influence and shape RPLs? What were the effects of these interventions on the formulation of the Hindu code, especially from the aspect of gendering of roles? These are the questions that I attempt to answer in this chapter, thereby providing the background for analysis of case law in the Hindu code further ahead.

In this chapter, I focus on the evolution of the figure of the middle-class Hindu woman, whom I call the "Elite Dependent",¹¹⁵ in Hindu personal law. This figure emerged through a confluence of narratives from the colonial, nationalist and the women's movements' in late nineteenth and early twentieth century India. While I critique how the judicial treatment of the Elite

¹¹⁴ Law Commission of India, *'UCC Questionnaire'* (2016), accessed 7 February 2017. This has also been published in major newspapers in India. For instance, see The Hindu News Bureau, *'Law Commission Seeks Public Opinion on Uniform Civil Code'* The Hindu, New Delhi, 8 October 2016). Until the end of December, about 40,000 responses have been received by the Law Commission (Press Trust of India, *'40,000 plus and Counting: Responses to Questionnaire on Uniform Civil Code'* *The New Indian Express* New Delhi, 22 December 2016).

¹¹⁵ I coined the term "Elite Dependent" to indicate educated, upper middle-class Hindu woman who is one of the key actors in these judgments (the other being the Hindu man). For more on this, see Chapters 1 and 5.

Dependent is based on gendered roles in Chapter 5, I evaluate how this figure gets incorporated in legislation of the Hindu code in this chapter. I begin by appraising the formation of Anglo-Hindu law and analysing the position of the Hindu woman in this system. I outline the circumstances which led to formulation of the figure of the upper middle-class woman in the Hindu code. I demonstrate that gendered roles played an important role in the origin and conceptualisation of this code. I then build upon this to argue that certain normative ideas on gender roles were accepted and incorporated as a central feature of this code, due to the extraordinary circumstances that existed at the time of its enactment.

3.2 Colonial Intervention – Creation of Anglo-Hindu Law

3.2.1 Religious Personal Laws under the English East India Company

During the early years of colonisation in the seventeenth and eighteenth centuries, the European companies that came to India concentrated on trade and commerce, as it was their intention to enjoy commercial rights. This attitude was adopted by the British, French and Portuguese colonisers alike. However, this situation changed when the English East India Company (hereinafter, the Company) started acquiring more territories under its control. The Company was then faced with twin questions of devising a system of administration of justice for its Indian territories, as well as the type of law to be followed in such a system.¹¹⁶ As this was a period of consolidation of the Company rule over parts of India and the establishment of Presidency towns

¹¹⁶ The information on Indian colonial legal history in this section has been derived from the works of Derrett and Menski. For a detailed discussion on this history, see JDM Derrett, *An Introduction to Legal Systems* (Universal Law Publishing 2011), JDM Derrett, *The Administration of Hindu Law by the British* (1961) 4 *Comparative Studies in Society and History*, Werner Menski, *Hindu Law - Beyond Tradition and Modernity* (Oxford University Press, New Delhi 2008).

of Calcutta, Madras and Bombay, the company wanted to tread carefully in handling the issues of Indian subjects under its administration.¹¹⁷

While the Company attempted to follow a policy of non-intervention in local tradition or practice, it wanted to administer justice in the public sphere such as rights in revenue, excise and criminal law matters.¹¹⁸ It allowed the locals to handle civil or personal matters, to avoid friction with the governed population. Despite such limitations, the Company's administration decided to attempt its hand at codifying personal laws for uniform and easy administration in the areas under its control. In this section, I demonstrate how colonial intervention in Hindu personal law system led to the introduction of Common Law and liberal principles such as autonomy and equality in customary Hindu law.

When confronted by the plurality of Indian legal systems in the eighteenth century, the British resorted to seeking guidance from Brahmanical *pundits*¹¹⁹ who were supposedly well-versed in *Sāstric* laws.¹²⁰ In 1772, the then Governor-General, Warren Hastings, enlisted a group of eleven Brahmin *pundits* belonging to the *Mitākshara*¹²¹ school of Hindu customary law in

¹¹⁷ With this end in mind, the company administered existing principles of British Common Law in its courts in the Presidency towns, but it was slow to implement this system in rural areas as it feared opposition from the local community. It also supported the usage of Hindu customary law to settle disputes in caste courts.

¹¹⁸ For a detailed discussion on this, see, Werner Menski, *Hindu Law - Beyond Tradition and Modernity* (Oxford University Press, New Delhi 2008), Rina Verma Williams, 'The More Things Change: Debating Gender and Religion in India's Hindu Laws, 1920 - 2006' (2013) 25 *Gender & History*.

¹¹⁹ *Pundit* was the title reserved for a learned scholar. It was often provided to a person of the highest caste order, i.e., *Brāhmins*, as they were usually considered to be well versed in religious texts and were respected as scriptural authorities. *Pundits* were trained in interpretation of religious texts or *Sāstra*-s and were the official interpreters of canonical texts.

¹²⁰ The British East India Company encouraged the *Sāstric* training of *pundits* but this was confined to parts of Eastern India, notably Bengal and Bihar, which were Company strongholds (Werner Menski, *Hindu Law - Beyond Tradition and Modernity* (Oxford University Press, New Delhi 2008)).

¹²¹ Variations in local customs led to the emergence of two prominent schools of legal interpretation in customary Hindu law, namely *Mitākshara* and *Dayabhagā*. They were founded by *Vijñānesvara* and *Jimūtavāhana*, respectively. They paved the way for several local sub-schools of interpretation, leading to further diversity of customary law. These schools were characterised by their terseness,

Varanasi,¹²² to produce a written code of Hindu law. This code was published in 1776 with the title of "*A Code of Gentoo Laws, Or, Ordinations of the Pundits*" and was popularly called the Gentoo code. For almost a century, this code was considered as the fundamental document administering Hindu law and was referred to by English jurists in India.¹²³ This code influenced shaping personal laws in India as it marked, for the first time, the entry of the state into the realm of personal law by way of statutes.

After the consolidation of their territories in India, the British colonisers wanted to create a system of centralised administration for procedural ease. With this view in mind, they passed several Acts concerning secular, civil and criminal laws during the eighteenth and nineteenth centuries. While the British claimed that they did not interfere in the personal laws and merely acted as interpreters, it cannot be denied that the personal law system was impacted by British judgments. This led to an artificial reconstruction of Hindu law.¹²⁴ The British judges attempted to interpret *Sāstric* texts very literally, in line with the Common law system that was precedent heavy, with a view to enforce

juridical skill and scholarship and dealt extensively with subjects of adoption, inheritance and succession; joint family rights and obligations; guardianship; maintenance of dependents; marriage and matrimony; caste discipline and order; religious and charitable endowments and trusts (JDM Derrett, *An Introduction to Legal Systems* (Universal Law Publishing 2011)).

¹²² A famous Hindu pilgrimage city in North India.

¹²³ The Gentoo code was followed by other attempts at codifying Hindu law by William Jones and Colebrooke, who were employed by the East India Company to translate Indian texts to English. Colebrooke prepared a summary of Hindu procedural law using textual sources and explains in detail constitution of a Hindu sovereign court, subordinate courts, original and appellate jurisdiction, arbitration and conduct of proceedings (HT Colebrooke, '*On Hindu Courts of Justice*' (1829) 2 Transactions of the Royal Asiatic Society of Great Britain and Ireland). But these attempts failed to provide a comprehensive legislative code that would address the problems of the judicial system, such as the multiplicity of local customs.

¹²⁴ There was an understanding amongst most English judges that principles of common law and equity were a universal language, and these were used to plug the gaps of substantive and procedural Hindu law. The effect was felt especially in procedural law, as there was a tendency to homogenise procedure by the establishment of district level courts as well as inferior and superior appellate courts to administer justice by 1861 (JDM Derrett, *An Introduction to Legal Systems* (Universal Law Publishing 2011)).

greater uniformity and streamline the legal process.¹²⁵ As a result, traditional Hindu law merged with English Common Law principles to produce a new category of “Anglo-Hindu”¹²⁶ Law, which was almost exclusively adopted from the *Mitākshara* School and did not represent the entire gamut of customary Hindu law in existence at that time. The Anglo-Hindu code combined the issues of partition of property and maintenance of family members that had gained prominence in pre-modern Hindu law, with the notions of capitalist economy and property ownership that were a legacy of liberal thought, thereby prompting the British judges to view personal laws through the lens of property ownership.¹²⁷ The capacity to hold property was associated with “autonomy, equality and full legal subjecthood”.¹²⁸

The British jurists and judges thus transformed the plural nature of customary Hindu law to a more unitary one.¹²⁹ The increasing rigidity and Anglicisation of customary Hindu law was thought necessary by the British to aid their administration and was actively supported by British-educated Indians, who adopted the colonial idea that customary or traditional laws were regressive and needed to be overhauled in the name of modernity.¹³⁰ This process commenced in the closing decades of the eighteenth century and continued until almost to the close of the nineteenth century.

¹²⁵ They were prone to dispensing justice in the areas under their control from the perspective of European text writers’ interpretation of *Sāstric* law (JDM Derrett, *The Administration of Hindu Law by the British*’ (1961) 4 *Comparative Studies in Society and History*).

¹²⁶ JDM Derrett, *Religion, Law and the State in India* (Faber and Faber 1968).

¹²⁷ Rachel Sturman, *The Government of Social Life in Colonial India Liberalism, Religious Law, and Women’s Rights* (New York, Cambridge University Press 2012).

¹²⁸ Rachel Sturman, ‘Marriage and Family in Colonial Hindu Law’ in Timothy Lubin, Donald R Davis Jr. and Jayanth K Krishnan (eds), *Hinduism and Law: An Introduction* (Cambridge University Press 2010).

¹²⁹ Werner Menski, *Hindu Law - Beyond Tradition and Modernity* (Oxford University Press, New Delhi 2008), JDM Derrett, *The Administration of Hindu Law by the British*’ (1961) 4 *Comparative Studies in Society and History*.

¹³⁰ Tanika Sarkar, *Hindu Wife, Hindu Nation - Community, Religion and Cultural Nationalism* (Indiana University Press 2001).

3.2.2 Religious Personal Laws under the Crown

As customary Hindu law was thought to be oppressive and patriarchal by the colonisers and the newly-emergent Indian middle class,¹³¹ the movement for formulation of a new Hindu code of laws, based on modern notions of jurisprudence, started gaining momentum from the mid-1800s.¹³² By about 1870, India witnessed recommendations of Law Commissions over three decades. These recommendations established the foundations of India's modern (and current) legal system by legislating on civil and criminal procedure codes, contract as well as personal laws for regulating religion, caste and family. After the transfer of power from the Company to the British Crown in 1858, the administration of British Indian territories was taken over by British civil servants, who wanted to maintain separate legal systems for Hindus and Muslims. They thought it necessary to follow a policy of non-interference in local customs, especially with respect to personal laws.¹³³ However, while they maintained that they wanted to preserve Indian personal laws, they decided what constituted law and tried to separate social or moral

¹³¹ The British introduced English system of education in India in the 1830s. This in turn led to the creation a new middle-class of Indian intelligentsia that was both Indian and English simultaneously. For more on this, see Mytheli Sreenivas, *'Conjuality and Capital: Gender, Families, and Property under Colonial Law in India'* (2004) 63 *The Journal of Asian Studies*.

¹³² The British administrators, under the guidance of the then Governor of Bengal, William Bentinck, decided to enact laws for the abolition of practices such as *Sati* (the immolation of a wife on the funeral pyre of her husband), which were perceived to be archaic and barbaric. Indian reformers of the nineteenth century, like Raja Ram Mohan Roy and Iswar Chandra Vidyasagar, criticized gender imbalances in customary Hindu law, especially the practice of *Sati*. However, these movements were viewed as open opposition to Hindu custom and traditions by the conservative Hindu subjects of colonial India (Chitra Sinha, *Debating Patriarchy - The Hindu Code Bill Controversy in India (1941 - 1956)* (Oxford University Press 2012).

¹³³ This view was largely accepted and acted upon, especially after the Mutiny of 1857, during which Hindus and Muslims fought together against the British. One of the important causes of the Mutiny was said to be the interference of the British in religious customs of both communities. After the Mutiny, the administration of British Indian territories was transferred from the English East India to the British Crown directly, in 1858. Moreover, the intersections between concepts of religion and race, along with connections to orientalism, formed an important basis for the events of 1857 (Shruti Kapila, *'Race Matters: Orientalism and Religion, India and Beyond C. 1770- 1820'* (2007) 41 *Modern Asian Studies*).

practices from law. In this sense, it was a limited form of pluralism. Hence, the personal law system was not free from state interference or from the influences of liberalism, especially the ideas of justice as equity and the nation-state project.¹³⁴ In fact, it seems to have been shaped by such interference and personal law became a separate legal domain within the jurisdiction of the state.¹³⁵ The later part of the nineteenth century witnessed a legal turn as there were numerous officials who read and interpreted ancient textual traditions of Hindu law.¹³⁶ The rulers considered it unwieldy to have multiple customs to adjudicate and there was a concerted move towards standard legal practices along the lines of English Common Law. These changes, combined with the theme of property, served to change the nature of the Hindu family. There was a move towards homogenization and legal uniformity, which resulted in the creation of new legal identities, especially in the sphere of the Hindu family.¹³⁷

¹³⁴ The important and enduring legacy of the colonial state was the emergence of new discourses of polity and legality. India was constructed as a polity with precise historical origins, which was perceived to be backward and traditional and it became the responsibility of the colonial government to bring ideas of modernity to this condition. While the usual colonial imagery of ‘civilising mission’ and ‘white man’s burden’ were used to define the role of the colonial state, there were also attempts to introduce the discourses of “justice as equity” and “justice as liberty”, to provide a discursive framework for the British rule. Here, justice as equity was grounded in the conscience of the “monarch” or “ruler” and was administered exterior to the populace that was being ruled. Thus, justice as equity became the sovereign legislative principle and this idea, along with the legacy of the nation-state project, was transmitted from the colonial to the post-colonial discourses pertaining to state and judiciary. For more on this, see Mithi Mukherjee, *India in the Shadows of Empire: A Legal and Political History 1774 - 1950* (Oxford University Press 2010).

¹³⁵ Rachel Sturman, ‘Marriage and Family in Colonial Hindu Law’ in Timothy Lubin, Donald R Davis Jr. and Jayanth K Krishnan (eds), *Hinduism and Law: An Introduction* (Cambridge University Press 2010).

¹³⁶ Customary law was to be given preference over *Sāstric* texts and there was an effort to prepare comprehensive digests of customs as well as use of legal precedents for cases of custom. One such example was “Ancient Law”, written by Henry Maine in 1861. This book compared Hindu law to ancient Roman legal systems and served to encourage the turn to customary practice. His theory was aligned to the discourse that modernization or industrialization caused the shift from joint family system to nuclear family system. Maine was also the Law member of the Governor General’s Council and was responsible for codification of several statutes. (Patricia Uberoi, ‘Introduction’ in P Uberoi (ed), *Family, Kinship and Marriage in India* (1993) Oxford University Press).

¹³⁷ Chandra Mallampalli, ‘Escaping the Grip of Personal Law in Colonial India: Proving Custom, Negotiating Hindu-Ness’ (2010) 28 *Law and History Review*.

Under the new Anglo-Hindu law, the most significant aspect of the Hindu family was its joint or undivided nature. This was termed as a “coparcenary”¹³⁸ of several generations of males related by patrilineal descent residing together in the same household and owning common property. The family was viewed as a property-owning unit and the relations between its male members were perceived to be those of rights and entitlement over property. Property became the central theme of personal law and influenced both secular and religious civil law.¹³⁹ The notion of self-acquired or individual property was very narrow in scope. However, the judicial attitude towards the nature of Hindu joint family changed after 1860, when the courts started recognizing Hindu joint property to be divisible into shares and provided the right of alienation of their shares to male members, which coincided with the introduction of direct taxation.¹⁴⁰ The creation of more taxable subjects was

¹³⁸ The Hindu joint family was a system of coparcenary, in which all cognate male members who have lineally descended from a common male ancestor, shared property rights. The members of a Hindu joint family were united by birth, marriage or adoption. In *Mitākshara* law, the undivided Hindu family is based on community of interests and unity of possession among persons descended from a common ancestor in the male line. This method was a safeguard to ensure that members of the family unable to support themselves were provided with maintenance (HK Saharay, *Family Law in India* (2011) Eastern Law House). In this model, wives, unmarried daughters, widows and other dependents had a right of maintenance but did not enjoy a right of ownership in the property.

¹³⁹ The courts dispensing justice mostly presumed that all Hindu families were joint families in nature and all family property was owned as joint family property. Until the 1860s, colonial courts considered the joint family to be a single, property-owning unit and individual men of the family did not have a right to alienate or transact with their share in the joint family property. Even the property earned by an individual by way of his education was considered as joint family property, if his education was paid out of common funds. (Rachel Sturman, ‘Marriage and Family in Colonial Hindu Law’ in Timothy Lubin, Donald R Davis Jr. and Jayanth K Krishnan (eds), *Hinduism and Law: An Introduction* (Cambridge University Press 2010).

¹⁴⁰ The first Income Tax Act passed by the British Government in 1860 considered the Hindu joint family as a single taxable entity. This practice was continued in India after independence from colonial rule. The Indian Income Act, 1961, recognises the Hindu Undivided Family or HUF as a taxable entity. Per the Act, all the persons lineally descended from a common ancestor are considered coparceners. This definition is gender-independent and include mother, wives and unmarried daughters. This was followed by attempts to introduce wealth tax on the Hindu joint family, as a means of revenue generation. After 1870, declining agricultural revenues and a fall in value of India’s currency also provided impetus to the shift in colonial economic policy towards greater taxation. From 1870 to 1930, several legal measures on Companies Law, Negotiable Instruments, Income tax, Charitable Giving, Pension funds and distinction between gambling and speculation/futures trading, were introduced. For a more detailed analysis on this topic, see Ritu Birla, *Stages of Capital: Law, Culture and Market Governance in Late Colonial India* (2009) Duke University Press.

considered necessary for the increase of revenue. Against this background, the legal administration took a drastic turn. Within a few decades, sons could request partition of the joint family property and in 1930, the Hindu Gains of Learning Act allowed Hindu men to own their self-acquired property, obtained through their education, as individual property.¹⁴¹ This in turn led to the multiplication of taxable Hindu male subjects during this period. From the above discussions, it is evident that the colonial intervention in customary Hindu law led to the creation of a new category of Anglo-Hindu law, which was a curious mixture of elements of customary law, Common law principles and liberal thought. While I have explained the condition of male subjects under this law, the position of women was different. In the next section, I discuss the condition of Hindu women and how they were perceived as legal subjects during this time.

3.3 The Hindu Woman in Anglo-Hindu Law

The treatment of the Hindu woman was different from that of the Hindu man in Anglo-Hindu law. The Common law notions of women's property rights and lack of autonomy or capacity to manage property, led to progressive restrictions on Indian women's right to individual property.¹⁴² The influence of

¹⁴¹ The Hindu Gains of Learning Act, 1930 established that a Hindu professional's salary was his individual or self-acquired property, rather than joint family property. Prior to this Act, male Hindus had a right in the Hindu Undivided Family (HUF) or joint family of *Mitākshara* coparcenary and were not entitled to own individual property. The British treated the HUF as a single entity for assessing income tax. But all this was changed by this Act, which paved the way for creation of two categories of tax assessments – HUF and Hindu male individual. Confronted by economic depletion post-World War I and the Great Depression globally, the British were quick to capitalise on this opportunity to increase tax incomes. This Act aided in projecting individual estate as the financial base for a Hindu family and established the authority of a Hindu male as husband. For a more detailed analysis on this topic, see Eleanor Newbigin, *The Hindu Family and the Emergence of Modern India - Law, Citizenship and Community* (Cambridge University Press 2013).

¹⁴² In pre-modern times, a woman's conduct was supposed to be indicative of her caste and community status. Women could act per the dictates of their caste and most lower caste women had freedom of choice, especially in terms of marriage and divorce. While women could not be coparceners, pre-modern Hindu law had recognised their right to individual property (and in some instances, a share of the joint family property) in the form of *Stridhana*. In Sanskrit, *Stridhana* literally means Woman's wealth (*Stri* = Woman, *Dhana*=Wealth). It is a customary practice in Hindu society

liberalism transformed topics once considered religious, into secular notions.¹⁴³ The colonial power recognised a set of Hindu practices as law while ignoring others but wanted to critique the so-called oppression of women prevalent in Hindu Law. It looked upon itself as a “saviour” of Hindu women, in line with the civilising mission envisaged for Indians.¹⁴⁴ However, the colonial liberal discourse, combined with its administration of justice, ensured that all Hindu women were clubbed together in a single unified category with rights resembling those of upper caste Hindu women.¹⁴⁵ But, when there was a political and economic need for more taxable subjects, the colonial government did a U-turn on its stance on women’s individual property rights,

to gift both movable and immovable property to a daughter at the time of marriage, which could be used for her personal maintenance and expenses. A woman had absolute interest in her *Stridhana* property and could use or alienate it per her will. Her husband or male relatives could not interfere in her decisions regarding this property. For more on this see, Werner Menski, *Hindu Law - Beyond Tradition and Modernity* (Oxford University Press, New Delhi 2008), Flavia Agnes, *Law and Gender Inequality -The Politics of Women’s Rights in India* (Oxford University Press 1999). Traditionally, a mother’s *Stridhana* property was inherited by her daughters and in their absence, by daughters-in-law. This practise is followed even today in most Hindu families. With time, *Stridhana*, which was a voluntary bequest, turned into the forced social practice of Dowry or bride price and associated social issues.

¹⁴³ For instance, adoption was of a religious character as it provided a male heir to perform libations. However, by early twentieth century, it became a secular process which dealt with transfer of property and its ritual significance in Hindu law was forgotten (Rachel Sturman, ‘Marriage and Family in Colonial Hindu Law’ in Timothy Lubin, Donald R Davis Jr. and Jayanth K Krishnan (eds), *Hinduism and Law: An Introduction* (Cambridge University Press 2010).

¹⁴⁴ Gayatri Spivak, ‘Can the Subaltern Speak?’ in C Nelson and L Grossberg (eds), *Marxism and the Interpretation of Culture* (Macmillan Education 1988).

¹⁴⁵ Under customary Hindu law, widows were entitled to claim a share in the property of their deceased husbands for their maintenance. While custom differed from place to place, the tenet of the widow’s right to absolute ownership of property was recognised. However, the colonial government did not acknowledge widows right to property for a long time. Contrary to customary Hindu law, Hindu widows were not entitled to maintenance under the Anglo-Hindu code, as they did not have autonomy and hence possessed no capacity to own property. This situation continued until the passage of the Hindu Women’s Right to Property Act, 1937. Under this Act, Hindu widows were provided differential treatment from Hindu males in matters of inheritance. The British Government introduced the concept of “Widow’s Estate” from the British legal system. Now, the Hindu widow was allowed the enjoyment of the property during her lifetime, but she was deemed to possess no autonomy to alienate the property. After her lifetime, the property reverted to her husband’s heirs. (Brenda Cossman and Ratna Kapur, *Subversive Sites - Feminist Engagements with Law in India* (Sage Publications India Pvt Ltd 1996). This legislation was piecemeal at best and suffered from legal flaws, such as discriminating between agricultural and non-agricultural property, and did little to alleviate the condition of Hindu widows. It was criticised by the liberal section of Indian society as being not radical enough and by the conservative elements as being too radical. However, it helped to create a new category of taxable and legal subject – The Hindu widow.

as seen in the case of Hindu Widows Right to Property Act.¹⁴⁶ In this manner, colonial Anglo-Hindu law contributed to the creation of a new kind of female subject in the Indian personal law system.¹⁴⁷

The creation of the subject of the Hindu woman had other influences as well as repercussions. In the mid and late nineteenth century, there arose a class of Hindu reformers who wanted to change the way women were treated in Hindu society by seeking the abolition of *Sati* (the practice of burning a widow on the funeral pyre of her deceased husband), female infanticide and raising the legal age of consent for Hindu marriage.¹⁴⁸ The Hindu conservatives developed a resistance to the reform movement and claimed that the family space was 'pure' and women who occupied the domestic space should not be touched by colonial intervention, especially in terms of definition of conjugality and determination of the age of consent.¹⁴⁹ However, both the reformers as well as orthodox Hindus were firm in their construction of the

¹⁴⁶ The Hindu Women's Right to Property Act, 1937, in combination with the Muslim Shariat Application Act, was touted as legislation that established property rights for women in society. In effect, both these enactments created additional taxable subjects which were necessary for generating greater revenue to the British Government of the country. For more on this, see Eleanor Newbiggin, *The Hindu Family and the Emergence of Modern India - Law, Citizenship and Community* (Cambridge University Press 2013).

¹⁴⁷ The colonial state regulated property and enforced differential property rights under secular and personal law and this led, in turn, to "differential legal subjecthood" (Rachel Sturman, 'Marriage and Family in Colonial Hindu Law' in Timothy Lubin, Donald R Davis Jr. and Jayanth K Krishnan (eds), *Hinduism and Law: An Introduction* (Cambridge University Press 2010).

¹⁴⁸ The reformers held a protectionist stance and were of the view that protective forms of legislation were necessary to weed out social ills. In contrast to reformers, conservative Hindus iterated the notions of a woman's chastity and modesty and demanded that the government should not interfere in the private lives of individuals. For more on this, see Chitra Sinha, *Debating Patriarchy - The Hindu Code Bill Controversy in India (1941 - 1956)* (Oxford University Press 2012).

¹⁴⁹ Child marriage was a common custom in Hindu society during nineteenth century. Girls as young as 10, were married to men who were 30 or even older. Sometimes, this resulted in instances of marital rapes or even death of these girls due to forceful sexual intercourse, as in the case of Phulmani Devi in Bengal. The husband was not punished as sexual intercourse with his wife was considered his conjugal prerogative. This case triggered a national controversy on deciding the age of consent for marriage of Hindu girls, a debate that was carried on into the early decades of the twentieth century and eventually led to the passing of the Child Marriage Restraint Act, 1929 or as it is popularly called, Sarda Act (Tanika Sarkar, 'Colonial Lawmaking and Lives/Deaths of Indian Women: Different Readings of Law and Community' in Ratna Kapur (ed), *Feminist Terrains in Legal Domains: Interdisciplinary Essays on Women and Law in India* (Kali for Women, New Delhi 1996).

role of women within families as the ideal wife and mother. Thus, the legal subject of the Hindu woman, who was vastly different from the Hindu man, came to stay in Hindu legal and social life.

The late nineteenth century witnessed the emergence of division of public and private domains in the political arena.¹⁵⁰ The public domain consisted of the ruling elite who enjoyed power over the subjects while the private domain was composed of relationships of love and affection, namely, the family. This divide served to reinforce the private domain or family as the space for preserving traditions and customs and the moral initiative of preserving these cultural norms were passed on to women.¹⁵¹ This social and cultural division was also characterised by the public domain being cast as materialistic and “Western” in its ideals, while the private domain was spiritual and Indian in character.¹⁵² The workings of the Hindu family were confined to the private domain during this time.

Moreover, this period also witnessed a shift in the mind-set of Hindu male merchants and professionals, who were ardent critics of the *Mitākshara* coparcenary system. They advanced arguments about caring for and protecting their wives so that they could acquire greater individual control and autonomy over their property, instead of submitting to the control of the joint, coparcenary Hindu family.¹⁵³ So, the rise of the new middle class consisting of

¹⁵⁰ The public domain served as the site of struggle for the emasculated male body that was subject to power inequalities with the colonial masters, while the private domain of the family was untouched by the outside and represented by the pure female body that was living according to the scriptures. While the conjugal relationships of the Hindu household reflected the colonial power structures, it was repeatedly overshadowed by discourses of self-surrender and self-fulfilment of women in the framework of the family. For more on this, see Tanika Sarkar, *Hindu Wife, Hindu Nation - Community, Religion and Cultural Nationalism* (Indiana University Press 2001), Partho Chatterjee, ‘*The Nationalist Resolution of the Women’s Question*’ in K Sangari and Vaid.S. (eds) (Zubaan 1989).

¹⁵¹ Tanika Sarkar, *Hindu Wife, Hindu Nation - Community, Religion and Cultural Nationalism* (Indiana University Press 2001).

¹⁵² *ibid.*

¹⁵³ Mytheli Sreenivas, *Wives, Widows, and Concubines: The Conjugal Family Ideal in Colonial India* (Indiana University Press 2008).

professional elite and merchant class led to the challenging of property rights of the Hindu joint family. The concept of a modern conjugal family consisting of a man and his wife and their children assumed centre-stage in the Hindu social scene, as the newly emerging Hindu middle-class wanted to secure its self-acquired property.¹⁵⁴ However, this view was confined to a Hindu male's individual property, as is evident from the Hindu Gains of Learning Act, 1930, which was applicable only to Hindu males. What is evident from the political and legal events of this period is that there was a concerted effort to create the Hindu male as an economic subject capable of rational decisions, while the Hindu female was a political subject with limited economic interests, largely confined to the private sphere of the family.¹⁵⁵ This notion, of a differential legal subjecthood based on gender, is largely responsible for conceptualisation of normative gender roles in the Hindu family, as I explore later in this chapter and in subsequent chapters.

To summarise, while the colonial government repeatedly insisted that it followed a policy of non-intervention in religious personal laws, it steered the course of conversion of the plural nature of Hindu customary law into a more uniform and homogenized system. This process was aided by the way Hindu customary law was interpreted and administered in courts by English judges. Hindu law eventually came to be dependent on precedents and rules laid down by British courts, which made the legal system more rigid and led to the creation of the Hindu joint family as a legal category in the late eighteenth

¹⁵⁴ Mytheli Sreenivas, *'Conjugal and Capital: Gender, Families, and Property under Colonial Law in India'* (2004) 63 *The Journal of Asian Studies*.

¹⁵⁵ Eleanor Newbigin, *The Hindu Family and the Emergence of Modern India - Law, Citizenship and Community* (Cambridge University Press 2013). Newbigin traces the creation of legal subjecthood based on gender roles within the family in this book. In her concluding remarks, she states that it would be interesting to analyse how these legal subjects reflect in the judgments under various enactments of the Hindu code. I explore this idea by way of case law analysis in subsequent chapters, thereby taking her research forward (I arrived at a similar conclusion of how different legal and gendered subjects were created under the Hindu code in my background research, which coincided with the publication of her book).

and first part of nineteenth centuries.¹⁵⁶ The culmination of several factors, such as the newly emerging middle class of British educated Indians as well as the political and economic compulsions faced by the colonial government in the nineteenth and early years of the twentieth centuries, witnessed an 'invention' of the Hindu family. But, this family was not an invention but merely an inversion of the earlier joint family ideal. The Hindu joint family was viewed as being regressive and opposed to modernizing tendencies that prevented economic development due to its traditional functioning.¹⁵⁷ This sentiment was utilised by the colonial rulers to garner support for a 'modern' Hindu nuclear family, as it suited their economic considerations. Therefore, individual property came to be the marker of the Hindu nuclear family.

It was this modern, nuclear, heterosexual conjugal family that was the site of nationalist action in the early years of the twentieth century. Women were called to fight along with their men and were also asked to take the place of their men folk when the latter went to prison. With the rise of the nationalist movement, the family was revived in political discourse, as it was used to draw analogies between the nation and its subjects. There was vivid family imagery used for drawing parallels between a family and the nation. For example, the portrayal of the nation as a mother and its citizens as a happy and united family recurs in nationalist literature of the period.¹⁵⁸ The leaders of the nationalist struggle tried to harness the support of women and in this context, the family once again occupied centre stage in politics. In the next section, I analyse how this construction of the Hindu family was altered in the late

¹⁵⁶ Chitra Sinha, *Debating Patriarchy - The Hindu Code Bill Controversy in India (1941 - 1956)* (Oxford University Press 2012).

¹⁵⁷ Patricia Uberoi, 'Introduction' in P Uberoi (ed), *Family, Kinship and Marriage in India* (1993) Oxford University Press).

¹⁵⁸ Many novels and poems written in regional language during this period (such as Subramanya Bharati writing in Tamizh), describe the imagery of 'Mother India' and the nation as 'one family'. The nationalists fighting for independence from British rule often portrayed 'Mother India' being in chains or shackles, as is evident from newspapers and magazines of the times.

colonial times, especially in conjunction with the nationalist movement for independence of India and questions of gender.

3.4 The Hindu Woman in the Nationalist Movement

With the rise of the nationalist movement seeking independence from colonial rule during the late nineteenth and early twentieth centuries, it became important to nationalist leaders to relate every aspect of life to political independence of India. The ideology of the nationalist movement envisaged the construction of a modern Indian society that would not lose its ancient spiritual identity.¹⁵⁹ For this, it was important to integrate the twin strands of liberal Western thought and spiritual Indian beliefs. This was made possible by constructing the image of a new category of the middle-class “woman”, who was Western educated but who held onto traditional value systems. This woman was subject to a newly emerging patriarchy of a new middle class.¹⁶⁰ Thus the social subject of the Hindu woman, who was vastly different from the Hindu man, came to stay in Indian political and social life.

The latter half of the nineteenth century and early years of the twentieth century witnessed the rise of women’s movements, which prioritised education as a tool to alleviate women’s condition in society.¹⁶¹ These movements contributed to pressurising the colonial government to revisit legislation, especially those involving women and property rights, to guarantee financial freedom for women. This period witnessed increased legislative activity, as the British government undertook the codification and

¹⁵⁹ This was largely a legacy of Gandhian thought in the national movement.

¹⁶⁰ The creation of the category of the modern middle-class woman and the absorption of the women’s question in the nationalist discourse led to false essentialisms of home/world, spiritual/material, feminine/masculine in the nationalist ideology. For detailed discussion, see Partho Chatterjee, *The Nationalist Resolution of the Women’s Question* in K Sangari and Vaid.S. (eds) (Zubaan 1989).

¹⁶¹ Renuka Ray, *The Background of the Hindu Code Bill* (1952) 25 Pacific Affairs 268.

secularization of commercial, civil, criminal and procedural law in India.¹⁶² However, Hindu personal law was left largely untouched during this period, as legislating on it was considered an intrusion into the private space of Hindu families, and the British wanted to wait to obtain the co-operation of Indians to legislate in the private domain of Hindu law.¹⁶³

The early decades of the twentieth century witnessed a period of intense political and social changes in India. With the rise of the nationalist movement, the women's movement was also beginning to gain ground across India and this period witnessed the formation of Pan-India women's organisations.¹⁶⁴ Women leaders began to seek women-friendly legislation and were instrumental in reshaping the political and social agenda of the times. However, to have a national presence, these organisations had to hitch their wagons to the Congress party leadership, as the Congress¹⁶⁵ emerged as the dominant force on the national political scene at that time. As discussed earlier, the newly emerging middle class supported individual ownership and conjugal relationship as being the basis of the Hindu family, while retaining the role of women as perpetuators of tradition. The combination of the rise of women's organizations, strong liberal leadership within the dominant political

¹⁶² HL Levy, *Lawyer-Scholars, Lawyer-Politicians and the Hindu Code Bill, 1921-1956* 3 *Law & Society Review* 303.

¹⁶³ Chitra Sinha, *Debating Patriarchy - The Hindu Code Bill Controversy in India (1941 - 1956)* (Oxford University Press 2012).

¹⁶⁴ Some of the famous organisations that emerged were Women's Indian Association (1917) (which campaigned actively to include enfranchisement of women under the Government of India Act, 1919), National Council of Women in India (1925) and All India Women's Conference (1927).

¹⁶⁵ The Indian National Congress (Congress for short) was the most popular political party of the Indian national movement. This period witnessed the rise of M.K. Gandhi, Jawaharlal Nehru, B R Ambedkar, Dr Rajendra Prasad and Vallabhbhai Patel in the nation's and Congress party's leadership, men who were all British-educated lawyers. While Nehru, Ambedkar and held liberal and modern views, Gandhi combined the modern with Indian spiritual ethics while Prasad and Patel were conservative in their politics. Ambedkar belonged to the lower Untouchable Caste, which made him more sensitive to caste discrimination and he tried to incorporate provisions to address this issue in the Hindu code.

party of the time and the emergence of the new middle class set the stage for socio-legal reform in the subsequent years.

In the 1920s and 1930s, nationalists and women's leaders in India asserted that the question of maltreatment of women was a by-product of colonial legacy and that the liberation of women was linked to the liberation of the nation. The important creative contribution of the nationalist ideology was the evolution of a cultural project of an "inner" identity in which the nation's autonomy could be located.¹⁶⁶ A new subject position was created for the Hindu woman with an "essentialized Indianness", which was inherently different from the 'Westernized' woman.¹⁶⁷ The debate on the "status of women" was taken up by nationalist claims and was supported by the emergence of liberal women's movements during this time. However, this movement adhered to a gendered notion of family, as they constructed women's identity based on the ideal of motherhood and women were to be ideal mothers, full of sacrifice and loyalty.¹⁶⁸

This period also witnessed the emergence of an equal rights discourse, which was assimilated into the currents of nationalism, as the freedom of the nation superseded all other political and social agendas of the time.¹⁶⁹ In the inter-war period, Indian women's movements, with their liberal overtones, mobilised support for several legislative reforms, such as the Hindu Age of Consent Bill.¹⁷⁰ The movement demanded reforms that were forward-looking, leading to the construction of the "allegedly neutral and unmarked citizen-

¹⁶⁶ Partho Chatterjee, 'The Nationalist Resolution of the Women's Question' in K Sangari and Vaid.S. (eds) (Zubaan 1989).

¹⁶⁷ *ibid.*

¹⁶⁸ Brenda Cossman and Ratna Kapur, *Subversive Sites - Feminist Engagements with Law in India* (Sage Publications India Pvt Ltd 1996).

¹⁶⁹ Mrinalini Sinha, 'Refashioning Mother India: Feminism and Nationalism in Late-Colonial India' (2000) 26 *Feminist Studies*.

¹⁷⁰ Chitra Sinha, *Debating Patriarchy - The Hindu Code Bill Controversy in India (1941 - 1956)* (Oxford University Press 2012).

subject".¹⁷¹ This group opposed both the colonial regime and male domination in society, thereby paving the way for representational politics for women and for the creation of the identity of the liberal citizen, along the lines of liberal feminism. The activism of this movement helped to protect the nationalist ideology from the critiques of gender, caste and religious hierarchies, which were the three fundamental axes of conflict in India.¹⁷² What emerged was the new claim of Indian modernity, especially the modern Indian subject who transcended caste, gender or religious barriers and this subject became the blueprint for the citizen-subject of free India.¹⁷³

The idea of the 'neutral and unmarked citizen-subject' gained ground during the Hindu-Muslim riots following the partition of India. While the family was used as a medium to redefine national identity, the independence of India and the partition of the country provided new perspectives to definition of family.¹⁷⁴ Religious and communal identity became central to defining both individual and family identity. Because of the partition of the country and subsequent riots, the need to define a national identity along religious lines became important. Due to this necessity, the family signified the religious community and in turn, the national identity. The family was viewed as the bedrock of preservation of the nation. All other definitions and identities of

¹⁷¹ Mrinalini Sinha, *'Refashioning Mother India: Feminism and Nationalism in Late-Colonial India'* (2000) 26 *Feminist Studies*.

¹⁷² Chitra Sinha, *Debating Patriarchy - The Hindu Code Bill Controversy in India (1941 - 1956)* (Oxford University Press 2012).

¹⁷³ This modern citizen was subsequently enshrined in the Indian Constitution by means of providing universal adult franchise to all citizens of India. For more details, see Mrinalini Sinha, *'Refashioning Mother India: Feminism and Nationalism in Late-Colonial India'* (2000) 26 *Feminist Studies*.

¹⁷⁴ For instance, during the Partition riots, about 1, 00,000 women were displaced from their homes and they belonged to Hindu, Muslim and Sikh Communities. The Governments of India and Pakistan decided to exchange these women and this exercise was carried out over almost 10 years and in most instances, against the wishes of the women themselves and to their personal detriment. This is an example of how the official discourse of the nation state tried to order family life as the means for legitimising the sovereign (Veena Das, 'The Figure of the Abducted Woman: The Citizen as Sexed' in H De Vries and LE Sullivan (eds), *Political Theologies: Public Religions in a Post-secular World* (Fordham University Press 2006).

family such as lived experiences, emotional ties, care or nurturing were lost in the notion of national identity in the initial years of independence.¹⁷⁵ The fundamentally religious and gendered character of governance, which was a feature of the colonial regime, became a feature of later governments in India.¹⁷⁶

Following the above discussions, it is evident that the nuclear conjugal family ideal, with gendering of the women's role as the ideal wife and mother, found favour in both the nationalist ideology and women's movements in late colonial India. These factors combined to produce the category of the new middle-class Indian woman who was modern and yet traditional in values and they further gave rise to the category of a citizen-subject who was unmarked by caste, gender or religion. These categories became the signifiers of India's modernity and life after colonial rule. While these were the overarching implications, the idea of gendering of roles in a Hindu family gained ground during this period and was subsequently incorporated into the Hindu code. In the next two chapters, I explore how this idea of gendering of roles is persistent in judicial reasoning in the cases under study and how this leads to the construction of a certain type of Hindu woman in judicial reasoning. In the next section, I examine the evolution of the Hindu personal law system in India, before and after independence from colonial rule, along with its implications for the definition of the Hindu family and prescribed gender roles within it.

¹⁷⁵Mytheli Sreenivas, *Wives, Widows & Concubines - The Conjugal Family Ideal in Colonial India* (Orient Black Swan, India 2009).

¹⁷⁶Rina Verma Williams, 'The More Things Change: Debating Gender and Religion in India's Hindu Laws, 1920 - 2006' (2013) 25 *Gender & History*.

3.5 Origins of the Hindu Code

The types of narratives that were specific to personal laws in India emphasised cultural diversity, position of women, position of minority communities' vis-à-vis majority community and channelizing personal law reforms to ensure a balance between cultural continuity and cultural change.¹⁷⁷ These notions were important for the construction of social and cultural norms of the nascent nation and for the creation of new subjects of law. The clamour for Hindu law reforms gained momentum in the 1930s. Persuaded by the critique of social reformers and Indian lawyers, the British government decided to reconsider the grounds for the Hindu Women's Right to Property Act, 1937. However, what provided impetus to this decision was the outbreak of the Second World War and its associated fiscal issues for the British, which prompted the colonial administration to codify and establish Hindu property laws for rigorous tax collection.¹⁷⁸ The interests of the colonial fiscal system and reform-minded Hindu legislators intersected to produce the Hindu Code Bill. Moreover, the Muslim League made its appearance on the political scene and there arose a competition between the Congress and the Muslim League for a position of prominence.¹⁷⁹ This condition, as well as the debate and modernising rhetoric surrounding the Muslim Shariat Application Acts and Dissolution of Muslim Marriages Act of 1939, prompted Hindu leaders to respond with a need for a Hindu code that would serve to assert the 'secular' and 'modern' nature of Hindu law and politics.¹⁸⁰ Hindu leaders wanted to portray themselves to be

¹⁷⁷ N Subramanian, *Nation and Family - Personal Law, Cultural Pluralism and Gendered Citizenship in India* (Stanford University Press 2014).

¹⁷⁸ Eleanor Newbigin, *The Hindu Family and the Emergence of Modern India - Law, Citizenship and Community* (Cambridge University Press 2013).

¹⁷⁹ There is a lot of scholarship on the Muslim League, its role in the Indian nationalist movement and in the creation of Pakistan. For instance, see Ayesha Jalal, *The Sole Spokesman: Jinnah, the Muslim League and the Demand for Pakistan* (Cambridge University Press 1994).

¹⁸⁰ Eleanor Newbigin, *The Hindu Family and the Emergence of Modern India - Law, Citizenship and Community* (Cambridge University Press 2013).

as liberal and progressive in their outlook as their Muslim brethren, especially with respect to property rights for women. This outlook made them welcome debates on Hindu law reforms, a possibility that would not have existed a couple of decades earlier. Creation of new categories of economic subjects, a changed ideal of Hindu family as well as a change in the outlook of Hindu leadership aided in the debate and reform of Hindu laws.¹⁸¹ It was against this backdrop that the attempts at codification of Hindu law were initiated.

The British administration of India was faced with the economic pressures of the Second World War and embarked on providing support and encouragement to the creation of the Hindu code, as it was perceived that this would establish new political, social, legal and economic subjects. Against this background, it established the Hindu Law Committee in 1941 under the chairmanship of B.N. Rau, then judge of the Calcutta High Court.¹⁸² The Hindu Law Committee was constituted in January 1941 and met intermittently until May 1941.¹⁸³ The report of the committee classified women, as potential property owners, into three categories –

¹⁸¹ Chitra Sinha, *Debating Patriarchy - The Hindu Code Bill Controversy in India (1941 - 1956)* (Oxford University Press 2012).

¹⁸² It is interesting to note that this committee, which was constituted to suggest changes to Hindu legislative policy on rights of women in Hindu law, was completely devoid of women. Initially, this committee was conceived to deal with the issues relating to the Hindu Women's Right to Property Act, 1937 and "to suggest such amendments to the Act as would resolve the doubts as to the construction of the Act and clarify the nature of the right conferred by the Act upon the widow; and remove any injustice that may have been by the Act to the daughters." (Government of India, 'Report of the Hindu Law Committee, Government Press, Madras'). As evidenced by the terms of reference above, there were divergent views on Hindu Law reform, especially with respect to the position of women in society and these were to be addressed by the committee.

¹⁸³ It prepared a three-part questionnaire. Part I of the questionnaire dealt with Hindu Women's Right to Property Act, 1937, parts II and III were about two bills that were being examined by the Committee. This questionnaire was distributed among judges, lawyers, prominent citizens, women's organisations, social reform organizations as well as traditional and orthodox groups, apart from being published in the popular newspapers of the time, to garner maximum public opinion. The Committee collated its findings and published them in the form of a report on June 19, 1941 (Chitra Sinha, *Debating Patriarchy - The Hindu Code Bill Controversy in India (1941 - 1956)* (Oxford University Press 2012).

1. Widow of a deceased person whose property is to be inherited
2. Widowed daughter-in-law
3. Daughter

It is significant that women were divided only into the three categories mentioned above, without being considered as legal persons by themselves. Further, the spotlight was not on gender inequalities or disparities, but on the notion of property rights among different categories of women within a Hindu family.¹⁸⁴ The key focus of the debate was on the excessive rights given to the widowed daughter-in-law, more than the daughter. This report also provided recognition to the role played by women's organizations across the country and applauded them for seeking a complete revision of the entire law as opposed to piecemeal legislation. The report served to portray the social currents of the time and polarised the debates on reforms between liberals and conservatives.

The Rau committee recommended that the complete codification of Hindu law should be undertaken to provide unification of legal practice, quicken the pace of modernization of the legal system and to incorporate ideas of gender equality in the Hindu corpus. It also recommended that such a code should be prepared in stages with consensual public opinion. It specifically sought the legal right for separate maintenance for Hindu women as well as abolition of polygamy, limited estate for women,¹⁸⁵ and inclusion of female heirs in inheritance of property.¹⁸⁶ While the Committee's recommendations were restricted to a certain view of women, it cannot be denied that if implemented,

¹⁸⁴ *ibid.*

¹⁸⁵ Women were allowed enjoyment of benefits from the property during their lifetime but did not possess the any rights of alienation by way of sale or transfer. After the death of the woman, the property reverted to the joint family.

¹⁸⁶ John Banningan, *'The Hindu Code Bill'* (1952) 21 *Far Eastern Survey* 173.

these recommendations would change the texture of Hindu families. This report was accepted by the Government and the Committee was asked to commence work on a Hindu code. The recommendations of the committee were viewed with suspicion by orthodox Hindus who contested the ability of women to manage property.¹⁸⁷ Mitter, one of the earliest members of the Committee, resigned from his position and the other members finalised the Hindu Code Bill and submitted their report to the Government in February 1947.¹⁸⁸ The code bill was drafted by an elite few and found acceptance due to the backing of the Government in power. This prospect caused alarm among legislators as they felt that the code was elitist in its outlook.¹⁸⁹ In this situation, the country obtained independence from colonial rule on 15th August 1947.

The period after independence from the colonial rule was one of immense change with the transfer of power and partition of the country, followed by the worst communal riots that the sub-continent had ever witnessed. It was thought necessary to create a unique Indian identity as the Indian leadership had agreed to retain Muslims as a minority community within its fold. State power shifted from the colonial ruler to the Hindu majority leadership, which

¹⁸⁷ While these bills were debated in the legislature, the Government moved a motion to refer the bill to a joint select committee. The Joint Select Committee tabled its report in November 1943 and proposed that the Hindu Law Committee be reconstituted to draft a comprehensive Hindu Code. Based on this recommendation, the Hindu Law Committee was reconstituted for formulating the code of Hindu Law, again under the chairmanship of Sir B.N. Rau. While the Chairman remained the same, the constituent members of the Committee were changed to include T.R. Venkatarama Sastry, an advocate of Madras High Court, apart from the earlier members, Dwarkanath Mitter, and J.R. Gharpure. Again, the committee had a glaring absence of women members. (Government of India, *Report of the Hindu Law Committee*, Government Press, Madras).

¹⁸⁸ This was a period of transition into Independence for India and the Government at the time was the interim government constituted by the British for the successful transfer of power to Indian hands.

¹⁸⁹ For a detailed discussion on this, see Eleanor Newbiggin, *The Hindu Family and the Emergence of Modern India - Law, Citizenship and Community* (Cambridge University Press 2013), Chitra Sinha, *Debating Patriarchy - The Hindu Code Bill Controversy in India (1941 - 1956)* (Oxford University Press 2012).

was keen to provide a “secular Indian national identity” (as opposed to the religious Pakistani identity), a euphemism for a Hindu identity in Indian politics.¹⁹⁰ This was implicit in the support provided by Indian leaders to codification of Hindu law, as it was widely perceived that such codification could be used as an example to highlight that the state could enter into the arena of personal laws so as to make them more secular in nature. State formation in post-colonial societies involves “balanced economic development, social cohesion, and political stability as well as creating national consciousness” through “legislation, adjudication and law enforcement”.¹⁹¹ This was the case in India where legislation was used to achieve economic, social and political order, while creating a new consciousness of India being a secular state.

The effects of the partition and bloodshed that followed served to underline strong feelings of religious affinity. The word “Hindu” (and by extension, the Hindu family), assumed religious overtones, in contrast to its earlier understated position. The Hindu family thus moved from the private to the public domain during the late colonial times and the early years of independence from the colonial rule, as seen in the sentiment behind the passage of the Hindu code in post-independent India. There was a perceived need to establish India’s secular credentials and provide protection to women and minority communities. This was visible in the automatic extrapolations made from the notion of the Hindu family to the Indian nation during the

¹⁹⁰ Eleanor Newbigin, *The Hindu Family and the Emergence of Modern India - Law, Citizenship and Community* (Cambridge University Press 2013).

¹⁹¹ Gopika Solanki, *Adjudication in Religious Family Laws - Cultural Accommodation, Legal Pluralism and Gender Equality in India* (Cambridge University Press 2011).

debates on the Hindu code.¹⁹² The position and role of women in Hindu families were often the subject of these debates.

While the role of women in families continued to be defined along the ideals of wifedom and motherhood, it was widely acknowledged that women needed to be provided rights equal to men. This created a tension between these two opposing notions. So, how could these two notions be balanced? This was resolved by providing gender equality as a fundamental Constitutional right, while simultaneously recognising women as a category with differential rights. The Indian Constitution provided for equality of all the citizens of India but acknowledged that women and marginalised communities have a lot of ground to cover in terms of equality. It provided guidelines to the Indian state to legislate on behalf of women and minority communities, so that their rights are protected, and they are brought on par as social equals to the upper and majority sections of society. The Constituent Assembly that deliberated on India's future constitution was set up in 1946 and the Congress obtained a majority in this assembly. The Hindu Code Bill was introduced and debated in this Constituent Assembly. Most legislators who were responsible for the Indian constitution were also responsible for the Hindu Code and there was an overlap of ideas. So, the tension between the idea of gender equality and protectionism of women and minorities originated in the drafting process of the Constitution and was passed on to the drafting of the Hindu code. This tension is still an insurmountable hurdle and is often reflected in judicial reasoning, as I explore in Chapter 4. In the next section, I discuss the events leading to the formation of the Hindu Code and its provisions with respect to gender.

¹⁹² Chitra Sinha, *Debating Patriarchy - The Hindu Code Bill Controversy in India (1941 - 1956)* (Oxford University Press 2012).

3.6 Formulation of the Hindu Code

In the previous section, I described the changes in the political landscape of 1940s India that had repercussions on the Hindu code bill, especially with respect to provisions on gender. In this section, I discuss the reactions to this bill and trace the evolution of the code during turbulent times of Indian independence. The Hindu Code Bill was introduced in the Constituent Assembly in 1948, as a part of the legislative process. The recommendations that were made to the Hindu Code Bill had the cumulative effect of changing the nature of the Hindu family, as these changes affected Hindu marriages, coparcenary and women's property rights, a point reinforced by Hindu conservatives repeatedly during debates on the bill.

The major provisions of the Hindu Code Bill were as follows –

1. Significant changes were introduced in marriage as the Hindu Code Bill attempted to introduce two types of marriage – sacramental marriage in accordance with scriptures (which was performed as ceremony or *Samskāra* along caste lines) and civil marriage with more individual freedom and choice. Civil marriages allowed persons within prohibited degree of relationship to marry and removed caste identity for marriages by permitting inter-caste marriages.¹⁹³ Also, divorce became an easier option for civil marriages. The bill provided that sacramental marriages could be registered as civil marriages and could also come under the

¹⁹³ For instance, it was forbidden to marry persons belonging to the same clan or Gotra, as they were considered *Sapindas* who have descended from a common ancestor. This implied that persons who had the same family name irrespective of whether they were remotely related, were not allowed to marry under customary Hindu law.

purview of divorce laws. The bill also advocated removal of polygamy, which was practised by Hindus to beget a son.¹⁹⁴

2. With respect to inheritance, the Bill proposed that heirs of intestate succession should not be treated as coparceneries but as individuals enjoying private or personal property, thereby acquiring an absolute right in the property. The Bill also stressed the lack of importance of blood relationship for inheritance, thereby including the widow, daughter and widowed daughter-in-law of a male Hindu as heirs on equal footing with direct male descendants. Also, it was proposed that a daughter should be entitled to half the share of a son in her father's property. This was due to the idea that if the daughter was qualified to hold *Stridhana* property by herself, then she was equally competent to own other property too. However, to maintain gender equality, it was proposed that the son would get half the share of the daughter in their mother's *Stridhana* property.
3. In the matter of adoption, the Bill provided for allowing inter-caste adoption. Earlier, while a widow could adopt a son to continue her deceased husband's lineage, the son could contest the mother's alienation of property. The bill proposed that an adopted son could not challenge the legal rights of his widowed mother, both to reduce litigation in this regard and to ensure that he could not divest his mother of her property.

¹⁹⁴ A son was and is considered very important in the patrilineal and patriarchal Hindu society for existence in this world and the other. A son ensured establishment of succession lines within the Hindu joint family and he was the person who offered libations for deceased parents, thereby granting them a place in heaven according to Hindu scriptures. The Sanskrit word for son, '*Putra*', literally denotes he who releases one from the confines of the hell of *Pitr*. The birth of a son was and is considered an auspicious occasion in a Hindu family. In the event of a couple being childless or having only daughters, they could adopt a son, usually from extended family or from outside. Hence, adoption constituted an important part of customary Hindu law. In view of this, it was acceptable for a Hindu male could remarry if his first wife was barren or did not beget a son.

Indirectly, this contributed to the widow acquiring absolute right in her deceased husband's property.

Sinha states that when the Bill was tabled in the legislature, it led to prolonged debates between liberal and conservative legislators.¹⁹⁵ The debates were reinvigorated in February 1951 and involved clause by clause discussion of the code bill. Several amendments were sought and there was a claim that the code would be accepted if it applied to all religions, rather than only Hindus.¹⁹⁶ Within the Congress party, Nehru and Ambedkar were the only liberals who wanted to proceed with the passage of the bill, while most of the hardliners and orthodox members of the Congress, such as Dr. Rajendra Prasad and Vallabhbhai Patel,¹⁹⁷ and conservative Hindus were determined to stall its

¹⁹⁵ To settle these debates, Ambedkar recommended that the bill be sent to a Select Committee of which he was a part. The Select Committee reviewed the code and suggested minor recommendations as follows –

- a. With respect to marriage and divorce, two clauses were added for restitution of conjugal rights and judicial separation
- b. It was recommended that in the event of a male Hindu changing his religion, his wife had the right to adopt so long as she remained a Hindu by religion. Therefore, change of religion by the father served to be a disqualification for adoption
- c. In terms of minority and guardianship laws, it was recommended that the power of the Hindu father as natural guardian should be curtailed if the father changed his religion.

The Select Committee recommendations were tabled before the legislature in August 1948 but were placed on the back-burner due to the necessity for addressing the issues of partition and the settling-in phase of the nascent nation (Chitra Sinha, *Debating Patriarchy - The Hindu Code Bill Controversy in India (1941 - 1956)* (Oxford University Press 2012)).

¹⁹⁶ It was suggested that the term 'Hindu' should include Buddhists, Jains and Sikhs. But this move was opposed by some sections of the Sikh community, who claimed that they were not Hindu and that they had different local customs. Moreover, the Hindu orthodox parties, such as the Hindu Mahasabha, were in staunch opposition to the bill and claimed that it threatened the fundamental beliefs and practices of Hindus, as it abolished practices such as polygamy. The Hindu conservatives also pointed out that such practices were allowed for Muslims while being prohibited for others, which smacked of partisan politics. Hence, there were intense debates for the creation of a Uniform Civil Code instead, in view of post partition riots and charged communal atmosphere of the time. The Uniform Civil Code debate continues to this date in India and has been co-opted as an argument for introducing Hindu ideals as 'secular' ideals in society and law. For more on this, see Ratna Kapur, 'A Leap of Faith: The Construction of Hindu Majoritarianism through Secular Law' (2014) 113 *The South Atlantic Quarterly*, Partho Chatterjee, 'History and the Nationalization of Hinduism' (1992) 59 *Social Research*, Z Hasan, 'Gender, Religion and Democratic Politics in India' (2010) 31 *Third World Quarterly* 939.

¹⁹⁷ Both Prasad and Patel were close friends of Nehru during the days of the Nationalist Movement. However, both opposed the Hindu Code Bill in principle. Rajendra Prasad was elected the first President of Independent India and he engaged in lengthy correspondence with Nehru on the Bill

progress. The bill also faced opposition from Sikhs, Muslims and Women's representatives.¹⁹⁸ Apart from the legislative and political spheres, the Code Bill faced widespread public opposition. Both Hindu and Muslim right-wing leaders encouraged opposition to the bill and leading newspapers of the time carried editorials opposing the bill. Indian political parties were to face their first general elections in 1952 and soon the Hindu Code Bill became a hotly contested election issue.¹⁹⁹

The Congress was voted to power with a resounding mandate in the first general elections of Independent India in 1952 and Nehru was sworn in as the Prime Minister. However, in view of the earlier opposition, he felt it was prudent to soft pedal on many of the former provisions of the Code Bill and the Cabinet also decided that the bill would be broken down into smaller components to facilitate easy passage in the Legislature.²⁰⁰ Many Common-Law concepts such as restitution of conjugal rights and welfare principle in deciding custody cases were retained, while customary Hindu law received token acknowledgment. The Hindu Code was thus a diluted version of its former self. While it retained very little of the features mentioned earlier, some new ones were introduced, such as –

urging him not to go through with it. When Nehru did not relent, Prasad threatened to withhold presidential assent for the bill to become an Act, triggering a constitutional face-off between the President and Prime Minister. Patel was the then Home Minister and he contributed to stalling the bill by disallowing time for discussing the bill in Parliament. Thus, the Prime minister did not find support even among his own party members for passing the bill (Reba Som, *Jawaharlal Nehru and the Hindu Code: A Victory of Symbol over Substance?* (1994) 28 *Modern Asian Studies*).

¹⁹⁸ Ambedkar resigned as the Law Minister then, as he was upset that the provisions introduced by him to fight caste discrimination were diluted in the debates. This left Nehru with the sole responsibility for the passage of the bill.

¹⁹⁹ Rajendra Prasad warned Nehru that his stance on the bill could prove a costly mistake in the elections and urged him to soft pedal the issue. Nehru relented and decided to wait for the electoral verdict before undertaking his reforms agenda. The Hindu code bill found a place in the manifesto of the Congress party as well as Nehru's election speeches across the length and breadth of the country (ibid, Chitra Sinha, *Debating Patriarchy - The Hindu Code Bill Controversy in India (1941 - 1956)* (Oxford University Press 2012)).

²⁰⁰ ibid, Renuka Ray, *'The Background of the Hindu Code Bill'* (1952) 25 *Pacific Affairs* 268.

1. The Hindu Marriage Act of 1955 prohibited polygamy and provided a uniform mechanism for dissolution of marriage. However, it allowed practices of custom and usage and was a compromise in the end. This proved to be detrimental to many communities that had unique divorce laws, especially in South India where women were free to walk out of their marriages with the consent of local authorities.²⁰¹
2. The Hindu Succession Act of 1956 tended to unite various schools of Hindu Law by trying to ensure that there is no discrimination between sons and daughters in matters of inheritance. The *Mitākshara* joint family property was upheld as a standard Hindu family and was the basis for 'modern' Hindu law. However, most parts of India continued to exclude daughters from inheritance rights, as they followed the *Mitākshara* coparcenary system of inheritance by sons.²⁰²
3. The Hindu Minority and Guardianship Act, 1956 and the Hindu Adoption and Maintenance Act, 1956 introduced the notion of one third of joint income being provided as maintenance to the wife post-divorce, but the onus of proof of income was on the wife. This led to cumbersome litigation.²⁰³

Collectively, these four acts were called the four pillars of Hindu Family Law. The common components of these enactments were that the approach to codification was modernist and influenced by the intellectual elite who disregarded traditional legal institutions advocated by Gandhi,²⁰⁴ the *Sāstric*

²⁰¹ Flavia Agnes, *Law and Gender Inequality -The Politics of Women's Rights in India* (Oxford University Press 1999).

²⁰² This was rectified after 50 years by way of Hindu Succession (Amendment) Act, 2005.

²⁰³ Currently, maintenance matters are provided speedy relief by way of Sec.125 of the Criminal Procedure Code of India that provides criminal relief.

²⁰⁴ Shakuntala Rao makes an interesting comparison between the political ideologies of Gandhi and Nehru and their impact on reforms for Indian women. She claims that Nehru, being committed to modernity and liberalism, did not account for religious or communal patriarchy and considered

tradition was not considered significant²⁰⁵ and for the first time, secular options for contracting marriage were made available, cutting across communal lines.²⁰⁶

The significant aspect of the Hindu Code Bill was that it generated much debate on the nature and role of women in Indian society. While the Nationalist movement had provided the platform for women to participate, it was the controversies surrounding the Code Bill that helped to highlight the perception of women and notions of gender in contemporary society. Moreover, the Hindu Law Committee debates laid bare the deep North-South divide in India, especially the contrasting perspectives on gender and role of women in Hindu families. However, due to an inherent northern bias in the political divisions, the northern view came to predominate and was finally accepted as the authority for preparation of the uniform Hindu code.²⁰⁷ This

gender equality to be necessary for Western style democracy and modernization of India. Gandhi had a deeper understanding of the social and religious forces in Indian society, conceived specific roles for women which would help in the nationalist cause and championed the subaltern cause by making his vision more androgynous and non-violent. However, post-Independence, Gandhi was assassinated, and Nehru implemented his modernist policies politically and legally. For a detailed discussion on this, see Shakuntala Rao, *'Woman-as-Symbol'* (1999) 22 Women's Studies International Forum.

²⁰⁵ The *Sāstric* tradition of Hindu law relied on interpretation of Hindu texts such as *Smṛiti-s* and *Dharmasūtra-s* and provided importance to regional customary practices. However, the codified Hindu law mentioned custom in passing and did not provide due recognition to the existence of local customs and usages.

²⁰⁶ PS Ghosh, *The Politics of Personal Law in South Asia - Identity, Nationalism and the Uniform Civil Code* (Routledge 2007).

²⁰⁷ During the debates, there was a state of conflict between the members from the northern and southern parts of the country with respect to local customs and practices. There were several debates with respect to provisions of the code, which were hotly contested between the two groups. Also, during the nationalist movement and after, politicians and legislators from the Northern part of India tend to dominate and take centre stage in Indian politics. All national parties of India tend to promote leaders from the northern and western parts of the country, i.e., the predominantly Hindi speaking belt. It is commonly perceived that Hindi is the national language of the country as it is spoken by maximum number of people and hence, any leader should emerge from the Hindi speaking belt. The North-South political divide is primarily linguistic and has perpetuated till date, as evidenced in every elected leader of government since Independence (South India has produced two of the 15 prime ministers in the last 70 years, of which one completed the full five-year term). This is despite the Southern states doing consistently better than their Northern and Western counterparts in social and economic development indicators.

resulted in a distinctive patriarchal slant to the Hindu code. The code, while not creating new rights, did erase existing rights for women in some parts of the country.²⁰⁸

Despite being criticised for subscribing to traditional concepts of gender, the Hindu Code was instrumental in arousing social consciousness on gender roles and gender relations. Gender was the key site on which Hindu personal law was constructed and the state was the key institution through which Hindu law was to be altered and negotiated.²⁰⁹ Hindu law reform reinforced certain patterns of family life, such as family as monogamous nuclear unit in which women enjoyed limited economic independence. It was also one of the earliest examples of making gender a central issue in the formulation of modern laws in India.

Perhaps the singular contribution of the Hindu Code Bill was the perpetuation of distinct legal subjecthood for Hindu men and women, which was in existence in the colonial times. As I discussed earlier, the Bill lost much of its liberal flavour and was passed as a watered-down version of its former self. Moreover, it was fragmented into four individual Acts, to facilitate the ease of its legislative passage. While some elements of liberal reform were incorporated, most were discarded so that the Acts would not face opposition from conservative Hindus in the legislature. Moreover, the Indian Constitution and the Hindu Code were drafted by the same legislative body and there was an overlap of ideas in both documents.²¹⁰ The notion of disparate subjecthood

²⁰⁸ For a detailed discussion on how women in South India enjoyed better rights compared to those in North India and how the Hindu Code altered this situation, see Flavia Agnes, *Law and Gender Inequality - The Politics of Women's Rights in India* (Oxford University Press 1999).

²⁰⁹ Rina Verma Williams, 'Hindu Law as Personal Law: State and Identity in the Hindu Code Bill Debates, 1952 - 1956' in T Lubin, DR Davis Jr. and JK Krishnan (eds) (First, Cambridge University Press, Cambridge 2010).

²¹⁰ During the period between independence from colonial rule and establishment of a Constitution for free India (1947 – 1950), the Central Legislative Assembly functioned as a parliament in the forenoon and the Constituent Assembly in the afternoon (Menaka Guruswamy, 'Crafting

based on gender was retained in the Acts of the Hindu code as well as the Indian Constitution. There was, and is, a constant tension in reconciling gender parity with differential treatment based on gender in both the Hindu Code as well as the Indian Constitution.

To summarise, the Hindu code favoured greater individualism, emphasised the concept of nuclear family, provided the possibility for divorce and advocated equality of castes by equal treatment of all Hindus in law, thereby attacking core Hindu traditional social systems such as caste, sacramental marriages, joint family and inheritance only by males.²¹¹ It provided greater right to individual ownership of property, as it changed the legal subjectivity of men from being coparceners in a joint family to absolute owners of individual property. Thus, it created a new property regime of separate and individual ownership, in which a woman's role of being the nurturer led to economic dependency.²¹² The premise of equality existed in the public sphere but did not carry forth into the private sphere of the Hindu family.²¹³ Moreover, it was considered necessary to subvert the rights of women to that of nation building in a newly independent nation.²¹⁴ Certain normative notions of gender roles were embedded in the code at the time of its formulation, which are found in its judicial interpretation subsequently. While I analyse the judicial interpretation of the code in the next chapter, I now outline the

Constitutional Values : An Examination of the Supreme Court of India' in Dennis Davis, Alan Richter and Cheryl Saunders (eds), *An Inquiry into the Existence of Global Values: Through the Lens of Comparative Constitutional Law* (Hart Publishing 2015).

²¹¹ *ibid.*

²¹² Eleanor Newbigin, *The Hindu Family and the Emergence of Modern India - Law, Citizenship and Community* (Cambridge University Press 2013).

²¹³ Brenda Cossman and Ratna Kapur, *Subversive Sites - Feminist Engagements with Law in India* (Sage Publications India Pvt Ltd 1996).

²¹⁴ Chitra Sinha, *Debating Patriarchy - The Hindu Code Bill Controversy in India (1941 - 1956)* (Oxford University Press 2012).

evolution of the code and the Constitutional provision for UCC in the next section.

3.7 The Hindu Code and the UCC

From the late 1950s onwards, the scene of action shifted from the Parliament to the Courts, which became the interpreters of the Hindu code. The Hindu code has been interpreted and developed through case law decided by courts. There have been periodic contributions from the Government on gender relations, by means of various enactments and reports. The question of whether a uniform civil code (UCC) was required was debated in the 1950s, at the time of formation of the Hindu code and was brought up again in the 1970s. The key argument in favour of a UCC was that there was a need for creating a modern political and legal community in an emerging nation. This tended to polarise the arguments for and against the UCC, along the lines of individual orientation towards communities of belonging, women's equal rights within (and outside) the family as well as minority rights. For instance, the Hindu Nationalist Movement (HNM)²¹⁵ envisaged this as the tool to create a Hindu nation, as the code would serve to wipe out the identities of Muslims and other minority groups, while the Indian women's movement in this period saw the UCC as an opportunity to correct gender imbalances within the family.²¹⁶

The 1980s and 1990s witnessed increasing communal and sectarian conflicts, including violence in the name of caste and religion as well as sectarian

²¹⁵ I am using the term Hindu Nationalist movement to define the cultural and religious nationalism that emerged in 1920s India, with a markedly pro-Hindu stance. HNM denotes a combination of several organisations and has survived to the present day in different forms. Paola Bacchetta calls it as "a micro-religious nationalism of elites", which is an accurate definition of the movement and its ideology (Paola Bacchetta, *Sacred Space in Conflict in India: The Babri Masjid Affair* (2000) 31 Growth and Change).

²¹⁶ While there are several other aspects to this debate, I have focused on those that are relevant to my thesis here.

movements. 1985 was a landmark year as it reopened debates on religious personal laws, after the Supreme Court of India's decision in the famous case of *Shah Bano Begum*.²¹⁷ The judgment in this case allowed Muslim women to claim maintenance under the Criminal Procedure Code, just like the members of any other community. The language of the judgment reinforced certain stereotypical notions of backwardness of the Muslim community and its treatment of women.²¹⁸ This judgment was protested by the Muslim community widely and resulted in the passage of the Muslim Women (Protection of Rights on Divorce) Act, 1985, by the then Congress Government. This Act nullified the Supreme Court's verdict by providing Muslim women maintenance according to Islamic law. It was actively opposed by the women's movement, moderates within the Muslim community and large sections of the civil society, as it did not provide sufficient rights to Muslim women and created more issues about women needing to assert their autonomy at the cost of giving up on their rights within the family. While the Constitution provided the state with the authority to legislate on personal laws, only Hindu laws were reformed and the personal laws of other communities were untouched.²¹⁹ However, this enactment was used by the HNM as an argument for the government indulging in appeasement of minority groups and the Muslim community was portrayed to be parochial and resistant to reforms as well as to the formation of a unified political community.²²⁰ These conditions led to the emergence of the women's movement and the HNM being strange

²¹⁷ In the case of *Mohammed Ahmed Khan vs. Shah Bano Khan (1985) SC 945*, Shah Bano Begum, a Muslim woman, claimed maintenance from her husband under Sec.125 of the Code of Criminal Procedure of 1973, instead of Muslim Personal laws. Her husband argued that he did not have to pay maintenance under the Muslim Personal law beyond the period of Iddat (three months and ten days), as prescribed in Muslim Customary Law.

²¹⁸ Zakia Pathak and Rajeswari Sunder Rajan, "'Shah Bano'" (1989) 14 Signs.

²¹⁹ Z Hasan, 'Gender, Religion and Democratic Politics in India' (2010) 31 Third World Quarterly 939.

²²⁰ Flavia Agnes, *Law and Gender Inequality - The Politics of Women's Rights in India* (Oxford University Press 1999), Rajeswari Sunder Rajan, 'Women between Community and State: Some Implications of the Uniform Civil Code Debates in India' (2000) 18 Social Text.

bedfellows (as both were demanding for UCC, albeit for different reasons) and there arose stark differences between Hindu and Muslim communities.

The Indian women's movement as well as moderate elements seeking UCC abandoned their initiatives after the Gujarat violence of 2002, as it was perceived that the HNM was using the UCC as a tool to establish an authoritarian Hindu state. The Women's movement has focused on amendments to rape laws, banning of practices such as dowry, female foeticide and sex determination tests that lead to foeticides, protesting violence against women and evolving laws to combat sexual harassment at the workplace. While the movement has repeatedly sought reforms for women across communities, it has moved away from the UCC and focused on securing gender justice while acknowledging the criticality of asserting differences.²²¹ The arguments of the movement have also focused on improving economic rights of women within families and marriages.²²² While the Indian women's movement has attempted to distance itself from the formulation of a UCC, the HNM has adopted its formulation wholeheartedly. In Chapter 6, I explore the feminist positions on RPLs and how my analysis of case law aligns and expands these feminist positions. Here, I provide a snapshot of existing political conditions in India that form the background for the RPL and UCC debates currently.

In the 1990s, the HNM emerged as a strong political contender and managed to form a government at the national level. This period also witnessed several religious riots which started initially due to the destruction of the Babri Masjid by Hindu right-wing factions and continued with their active abetment until

²²¹ One section of the women's movement has asked for a UCC which premises itself on gender justice, instead of religion (ibid). More on this in Chapter 6.

²²² Flavia Agnes, *Law and Gender Inequality - The Politics of Women's Rights in India* (Oxford University Press 1999), Rajeswari Sunder Rajan, *The Scandal of the State - Women, Law and Citizenship in Postcolonial India* (Duke University Press 2003).

2002²²³, during which there was a massacre of 2000 Muslims by a predominantly Hindu Right mob in Gujarat, a Western Indian state. Since then, there are several instances of religion-based violence in pockets across the country. While there were some attempts at reform of religious laws,²²⁴ there have been no attempts to implement the UCC by any government in power. However, the HNM has emerged as a potent force trying to enforce strict social norms such as opposing inter-religious and inter-caste marriages, glorifying a rigid gender hierarchy within families, attempting to increase control over Hindu women by restrictions on dress and behaviour as well as cementing its notion of the Hindu family divided along strict gender lines.²²⁵ Any opposition to such impositions have been met with force and violence repeatedly. While the Indian women's movement moved away from the UCC question in recent years, the HNM has come to power and is in the process of attempting to establish a UCC, along the lines of the Hindu code.²²⁶ As is evident from the earlier discussions in this chapter, this attempt to make the Hindu code become the blue print for the UCC is very problematic. The Hindu code is premised on certain normative understanding of gendered roles within the Hindu family, in which the Hindu man enjoys complete legal and economic subjecthood while the Hindu woman has limited legal and economic subjecthood. While the disparity in gender roles helps to add weightage to the glorification of a gendered hierarchy within Hindu families by the HNM, this disparity would be detrimental to gender justice across all

²²³ The current prime minister of India, Narendra Modi, is from the HNM movement and heads the Bharatiya Janata Party (BJP). He was then chief minister of Gujarat and this carnage happened under his watch.

²²⁴ For instance, the Hindu Succession (Amendment) Act, 2005, which provided for pro-women change to Hindu inheritance rules.

²²⁵ Henrik Berglund, *'Hindu Nationalism and Gender in the Indian Civil Society'* (2011) 13 International Feminist Journal of Politics, Sikata Banerjee, *'Gender and Nationalism: The Masculinization of Hinduism and Female Political Participation in India'* (2003) 26 Women's Studies International Forum, Rajeswari Sunder Rajan, *The Scandal of the State - Women, Law and Citizenship in Postcolonial India* (Duke University Press 2003).

²²⁶ More on this in Chapter 6.

sections of Indian society if incorporated into a UCC. In Chapter 6, I argue why the Hindu code cannot be used as a blue print for a UCC, based on judicial reasoning in the cases under study and feminist positions on RPLs and UCC.

3.8 Concluding Remarks

From the above discussions, it is evident that the Anglo-Hindu law that evolved during colonial times creates a certain ideal of the Hindu woman, who is both modern and traditional simultaneously. While this woman is provided with limited rights, her location is within the private domain of the Hindu family. The Indian nationalist movement and the Indian women's movement develop this figure of the Hindu woman further, by altering it to include the features of the unmarked citizen with equal rights. The partition and its aftermath further change the definition of this category by emphasising the religious undertones of the Hindu family. The atrocities committed on women and religious polarisation during this time creates an emphasis on the protection of Hindu women in public discourse. This protectionist ideal is further cemented by incorporating it in the Indian constitution. The founding fathers of this document utilise the figure of the unmarked citizen to provide equality to all, while retaining the directive to governments to ensure the protection of women and minorities. This creates a tension between equal treatment of all citizens and protectionism of women and minorities.

Most legislators involved in the drafting of the Constitution, also drafted the Hindu code. Therefore, it is not surprising that the Hindu code tends to reflect some of the same values and ideals as the Constitution. The Hindu code follows a protectionist policy on women, while providing them equal rights, due to an inherently normative understanding of gender difference. While there were some proposals for a UCC in the past, these are shelved due to religious tensions of the post-independence period. The UCC is now included as a footnote in the Constitution. What is interesting is that this notion of

women being weaker and in need of protection in the Hindu code, has perpetuated for the next seventy years in judicial reasoning, as seen in my analysis of custody cases in the next two chapters. At this juncture, the Hindu code is being considered as the blue print for the UCC by the Hindu Right. This may be a problematic proposition as the Hindu code is premised on normative notion of gendered roles within the Hindu family and protectionist understandings.²²⁷

As discussed earlier, most reforms carried out in Hindu law utilise notions of liberalism and modernity, which results in the creation of gendered subjects with differential rights. The social and cultural constructs on which these subjects are based, have been carried forward from the colonial to later times. These constructs have found their way into judicial reasoning as well. After the enactment of the Hindu code, the Hindu family was redefined as a conjugal unit with well-marked gender roles, in which women need to perform certain roles and need to be protected. The crucial elements that are present in the judgments of custody cases decided from 2000 to 2014 under the Hindu Minority and Guardianship Act, 1956, include the ideal of the nuclear and heterosexual conjugal Hindu family consisting of parents and their children, in which each of the parents have well defined gender roles. This family is perceived to be a miniature representation of the ideals of the nation, as it uses the figures of Indian modernity, such as the middle-class Hindu woman and the unmarked Indian citizen. While the former figure needs to be provided protection, the latter must be accorded equal treatment. The judgments under study attempt to balance protection accorded to Hindu women and equal treatment envisaged by the Indian Constitution. This brings out the contradictions inherent in the notion of the Elite Dependent, a Hindu woman

²²⁷ I explore this proposition further in my arguments in Chapter 6.

who needs to be protected as well as treated as an equal to a Hindu man under law. In the next chapter, I explore the tensions of this balancing act in the judgments under study, while elaborating on the theme of judicial interpretation of gendered roles.

Chapter 4 – Gender in Judicial Reasoning

4.1 Introduction

In the previous chapter, I argued that the new category of elite, upper-class Hindu woman²²⁸ created in late nineteenth and early twentieth centuries intersected with the imagery of the unmarked citizen- subject in the Indian Constitution²²⁹ to produce a new type of woman. I called this woman the 'Elite Dependent' and I defined her as a privileged, upper class Hindu woman with rights equal to that of a Hindu man, but who needed to be protected by law for her own good. Further, I demonstrated that the Hindu code led to the creation of different legal subjecthoods in the Hindu family. The code provided male members of the Hindu family with economic and legal personhood and female members with legal personhood but limited economic personhood, which created a new kind of patriarchy.²³⁰ By the above analyses, I demonstrated how the Hindu code re-framed roles and responsibilities of individuals within the private sphere of the Hindu family, along the axis of normative ideas on gender roles.

In this chapter, I examine judicial reasoning in the custody cases decided between 2000 and 2014, under the Hindu Minority and Guardianship Act, 1956 (HMGA). In these cases, the courts premise the award of custody on the

²²⁸ For a detailed analysis on this category, see Tanika Sarkar, *Hindu Wife, Hindu Nation - Community, Religion and Cultural Nationalism* (Indiana University Press 2001), Partho Chatterjee, 'The Nationalist Resolution of the Women's Question' in K Sangari and Vaid.S. (eds) (Zubaan 1989).

²²⁹ For a detailed discussion on the unmarked citizen-subject, see Mrinalini Sinha, 'Refashioning Mother India: Feminism and Nationalism in Late-Colonial India' (2000) 26 *Feminist Studies*.

²³⁰ For more on this, see Eleanor Newbiggin, *The Hindu Family and the Emergence of Modern India - Law, Citizenship and Community* (Cambridge University Press 2013). However, this type of patriarchy in terms of defining the Hindu family was not unique to the Hindu code. It existed as a feature of customary Hindu law but in that system, the patriarch was responsible for the maintenance of all family members and held control of the joint family property for this purpose. What was significantly different was that in the Hindu code, latent patriarchal notions of protectionism, served to bifurcate the family along gendered roles and responsibilities.

Welfare principle predominantly.²³¹ The welfare of the child supersedes the rights of parents and is the paramount consideration in judicial decisions. However, there have been instances, such as the case of *Githa Hariharan*,²³² when parental rights have taken precedence. While *Githa Hariharan* is considered as a landmark judgment in this respect, I demonstrate in this chapter that the award of custody in the cases under study cannot be reduced to “parental right to equality vs. welfare of the child” arguments. I analyse the cases to answer my first research question - How have judges engaged with gender and gender roles in the custody cases decided from 2000 to 2014, under the Hindu Minority and Guardianship Act, 1956? My central argument here is that gender roles have been premised on normative notions in judicial reasoning in these cases. My sub-argument is that economic capacity of the parent is an important factor while deciding on custody in these cases and this capacity is also influenced by gendered norms. Through my analysis, I demonstrate how normative notions of gender, which formed one of the fundamental axes of the Hindu Code legislation, continue to manifest in judicial interpretation.

In the first section, I start with the landmark case of *Githa Hariharan*, where I analyse the judicial interpretation of gender equality. I argue that while this case is seemingly premised on the Constitutional notion of equality, judicial reasoning is grounded in normative notions of gender roles within a family. In the next section, I elaborate on the definition and criteria of the welfare principle and evaluate how gendered norms and welfare are closely linked to each other. I argue that welfare is premised on gendered reasoning, by examining the conditions under which the mother is considered as being able to take on the role of the father. The economic capacity of a parent, I argue,

²³¹ More on this in section 4.3.

²³² *Githa Hariharan v. Reserve Bank of India (1999) (2) SCC 228*, discussed further in the next section.

is an important criterion in judicial reasoning in these cases. I conclude this chapter by analysing how normative ideas about gender roles form the basis of judicial reasoning in the cases, both in expected and unexpected ways.

4.2 Githa Hariharan – Gender Equality or Gendered Norms?

4.2.1 The Case of Githa Hariharan

The case of *Githa Hariharan* sets a unique precedent in combining the custody and guardianship questions of a Hindu minor, with gender equality. In this instance, the Supreme Court of India was dealing with two cases. The first one was the divorce proceedings between Githa²³³ and Hariharan, in which the latter was seeking interim custody of their minor son as being the “only natural guardian” under Sec. 6(a) of the HMGA. Sec.6(a) states that the Hindu father is the natural guardian of a Hindu minor and ‘*after*’ the father, the mother.²³⁴ The second case was filed by both parties of the divorce against the Reserve Bank of India, India’s central banking institution. In the second case, the petitioners had jointly applied to the Reserve Bank of India for Relief Bonds in the name of their minor son, during the time of their marriage. They had mutually agreed that the mother would be named as the natural guardian of the child for investment purposes. However, when asked to discharge the bonds, the Bank refused to treat the mother as the natural guardian and cited Sec.6(a) of the HMGA (that the father was the natural guardian). Further, the Bank insisted that the mother should produce a certificate from a competent authority ascertaining her guardianship of the child.

²³³ Githa is a well-known writer, academic and an editor and has published several works of fiction as well as essays, newspaper articles and columns. For her detailed biography, see Githa Hariharan, ‘Githa Hariharan Bio’ (2015) <<https://www.githahariharan.com/biography.html>>, accessed 12 February 2017. In her divorce petition, Githa claimed that Hariharan was apathetic to their son but he was seeking the right to be her son’s natural guardian, without discharging any of the duties or obligations of a parent or a natural guardian.

²³⁴ Emphasis added.

The petitioners filed a Writ petition seeking Sec.6(a) of HMGA to be struck down as it was in violation of Articles 14 and 15 of the Constitution of India.²³⁵ It was contested that the term 'after' in this section, violated the provisions of Article 14 (equality before law) of the Indian Constitution. It was also discriminatory on the grounds of sex under Article 15, as the mother was being provided a secondary status after the father. The meaning of the terms 'after' and 'natural guardian' as well as the constitutionality of the legislation, was analysed in detail by the Supreme Court of India in this case. The Court concluded that the word 'after' did not necessarily imply 'after the lifetime of the father' but meant 'in the absence of the father' and both the term 'natural guardian' and the legislation must be interpreted to preserve the integrity of the legislative intent of the Indian Constitution.²³⁶ I now analyse individual aspects of this judgment to understand the explicit and implicit reasoning provided by the judges.

4.2.2 Reasoning in Githa Hariharan

The significant legal question that was addressed by the Supreme Court in this case was the interpretation of the term 'after' in Sec.6(a) of HMGA. The Court opted for a broad interpretation of the word 'after' and claimed that this interpretation "*would be in accordance with the intent of the legislation viz. welfare of the child.*"²³⁷ The Court held that –

"The word 'after' need not necessarily mean 'after the life time'. In the context in which it appears in Section 6(a) (supra), it means 'in the

²³⁵ Article 14 of the Indian Constitution states that the state shall not deny to any person equality before law or equal protection of the laws within the territory of India. Article 15 states that the state shall not discriminate against any citizen based on religion, race, caste, sex or place of birth. The Reserve Bank of India is the Central Bank of the country created by statute and falls within the definition of 'state'.

²³⁶ *Githa Hariharan v. Reserve Bank of India (1999) (2) SCC 228.*

²³⁷ *Ibid.*

absence of, the word 'absence' therein referring to the father's absence from the care of the minor's property or person for any reason whatever. If the father is wholly indifferent to the matters of the minor even if he is living with the mother or if by virtue of mutual understanding between the father and the mother, the latter is put exclusively in charge of the minor, or if the father is physically unable to take care of the minor either because of his staying away from the place where the mother and the minor are living or because of his physical or mental incapacity, in all such like situations, the father can be considered to be absent and the mother being a recognized natural guardian, can act validly on behalf of the minor as the guardian."²³⁸

The word 'after' usually implies to be behind someone or to follow in time. The normal use of this preposition in any sentence establishes a sense of hierarchy, either of persons or periods. What the Court attempts here is verbal gymnastics to provide a new interpretation to the term 'after', by providing a connotation of absence. While this can be considered creative interpretation, the underlying reasoning emphasises that the father must be proven unfit or absent, for the mother to be considered the guardian. The Court claims to provide equal treatment to both parents while it is creating as well as supporting the hierarchy of preference between parents.

In judgments preceding *Githa Hariharan*, the courts did not attempt a reconciliation between the rights of parents and the welfare principle and they always claimed that the welfare principle surpassed everything else.²³⁹ In the

²³⁸ Ibid.

²³⁹ For instance, in the famous case of *Rosy Jacob v. Jacob A. Chakramakkal*, the Supreme Court held that –

"This Court considering the welfare of the child also stated that, the children are not mere chattels: nor are they mere playthings for their parents. Absolute right of parents over the destinies and the lives of their children have, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal

case of *Githa Hariharan*, the judges use the welfare principle as the glue to bind their interpretation together, claiming that such an interpretation supports Constitutional notion of equality and furthers legislative intent. The Court observed that –

“The whole tenor of the Act of 1956 is to protect the welfare of the child and as such interpretation ought to be in consonance with the legislative intent in engrafting the statute on the Statute Book and not de hors the same and it is on this perspective that the word 'after' appearing in Section 6(a) shall have to be interpreted. It is now a settled law that a narrow pedantic interpretation running counter to the constitutional mandate ought always to be avoided unless of course, the same makes a violent departure from the Legislative intent-in the event of which a wider debate may be had having due reference to the contextual facts.”²⁴⁰

While the judges in this case claimed that they attempted to reconcile the tension between rights of parents and welfare of the child(ren), their efforts were more focused on ensuring that the statute is not rendered void. To this end, they chose to employ the welfare principle in their reasoning as the key to this reconciliation. In its closing remarks, the Court claimed that –

“In that view of the matter question of ascribing the literal meaning to the word 'after' in the context does not and cannot arise having due

balanced manner to be useful members of the society.” (Rosy Jacob v. Jacob A. Chakramakkal AIR (1973) SC 2090).

Another instance of considering welfare to be paramount is that of *Mrs. Umamaheswari vs. V. Sekar*, where the Court observed that –

“The concept of welfare of the child should be given a judicious interpretation and not merely following the ritual of giving the custody of a child to a mother for the simple reason that there can be no substitute for a mother to take care of the child howsoever affectionate the mother (father--Ed.) of the child might be.” (Mrs. Umamaheswari vs. V. Sekar AIR (1992) Mad 272).

²⁴⁰ *Githa Hariharan v. Reserve Bank of India (1999) (2) SCC 228.*

regard to the object of the statute, read with the constitutional guarantee of gender equality and to give a full play to the legislative intent, since any other interpretation would render the statute void and which situation in our view ought to be avoided."²⁴¹

The positive aspect of the reasoning in this case was the broadening of scope on gender parity of parenting and this was adopted as an important precedent in custody cases subsequently. However, this is one of the aspects in the reasoning and not the only one. The implicit assumptions made by the court in this case shows a different side to the reasoning of the judges, as I analyse below.

The judicial reasoning in this case expanded the understanding of the nature of guardianship and differentiated guardianship from custody. The court held that there are two types of guardianship possible in instances of custody – *de facto* and *de jure* guardianship. The court claimed that while Sec.6 (a) dealt with *de jure* guardianship, it was more important to consider the facts and circumstances of the case to decide the *de facto* guardianship.

*"It is an axiomatic truth that both the mother and the father of a minor child are duty bound to take due care of the person and the property of their child and thus having due regard to the meaning attributed to the word 'guardian' both the parents ought to be treated as guardians of the minor."*²⁴²

On the surface, this interpretation, that Sec.6(a) refers to *de jure* guardianship and that facts of the case should determine *de facto* guardianship, appears to be based on the Constitutional principle of equality. The Court also opines

²⁴¹ Ibid.

²⁴² *Githa Hariharan v. Reserve Bank of India (1999) (2) SCC 228.*

that India being a signatory to the Convention on Elimination of All Forms of Discrimination against Women (CEDAW), 1979²⁴³ and the Beijing Declaration on Women²⁴⁴, it is important to adopt gender equality of these international instruments. Further, judicial reasoning here converges with the notions of welfare, guardianship, constitutional equality and international conventions by using the method of harmonious construction to interpret the statute - a kind of a judicial win-win situation.

The reasoning on gender equality in this case is commendable as it was one of the first attempts to tackle the subject head-on. Moreover, the judges attempt to solve a knotty problem of reconciling the rights of parents with the welfare of the child in custody cases. That said, the judges do not provide in-depth reasoning on these topics nor do they concern themselves with the ground reality of gender inequities. They base their judgment on a formal approach to equality premised on the autonomous, liberal subject, rather than an attempt to understand gender difference.²⁴⁵ Moreover, is it possible to consider the parents on an equal footing when they are not placed thus in society? There is extensive literature on the unequal resource positions in Indian, specifically within Hindu families, which have repeatedly analysed how women have little or no control over the economic resources of the family, despite being entitled by law.²⁴⁶ The judges seem to gloss over these issues

²⁴³ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13. India is a signatory to CEDAW, having accepted and ratified it in June 1993.

²⁴⁴ Beijing Declaration and Platform for Action, in Report of the Fourth World Conference on Women UN Doc. A/CONF. 177/20 (1995).

²⁴⁵ For more on the autonomous, liberal subject and gender justice, see Ratna Kapur, *Challenging the Liberal Subject: Law and Gender Justice in South Asia* in Maitrayee Mukhopadhyay and Navsharan Singh (eds), *Gender Justice, Citizenship and Development* (Zubaan 2007).

²⁴⁶ For a detailed analysis on women's loss of control over economic resources, especially land, see Bina Agarwal, *Widows versus Daughters or Widows as Daughters? Property, Land, and Economic Security in Rural India* (1998) 32 *Modern Asian Studies*, Bina Agarwal, *Gender and Command over Property: A Critical Gap in Economic Analysis and Policy in South Asia* (1994) 22 *World Development*. For a detailed analysis of women and succession rights in Hindu families, see Vijaya Nagarajan and Archana Parashar, *My Brother's Keeper: Regulation of the Brother-Sister Relationship in the Religious*

and appear to have taken equality in the formal sense, while it is evident that gendered norms underlie their reasoning. In the next section, I elaborate on how gender is viewed by the judges in this case. Further, I demonstrate that this view of equality is premised on gendered norms, a fact that is glossed over in this judgment as well as the ones that came afterwards.

4.2.3 Aspects of Gender in the Judgment

While discussing the question of constitutional validity of the legislation in Githa's case, the Bench held that the courts must adopt a harmonious construction between the Constitution and other Acts, to reconcile any differences between the two. If any other interpretation is adopted, it would render the HMGA void, as this would violate the Constitutional guarantee of equality. Justice Bannerjee, one of the judges on the Bench,²⁴⁷ commented on the constitutionality of the legislation, as follows –

*"It is to be noted that validity of a legislation is to be presumed and efforts should always be there on the part of the law courts in the matter of retention of the legislation in the statute book rather than scrapping it and it is only in the event of gross violation of constitutional sanctions that law courts would be within its (sic) jurisdiction to declare the legislative enactment to be an invalid piece of legislation and not otherwise."*²⁴⁸

Personal Laws of India' (2013) 36 South Asia: Journal of South Asian Studies. For an extensive analysis on unequal resource positions in marriages, see Flavia Agnes, *Family Law Volume 2: Marriage, Divorce and Matrimonial Litigation* (Oxford University Press 2011).

²⁴⁷ This case was decided by an all-male bench of the Supreme Court of India - Dr. A.S. Anand (then Chief Justice of India), M. Srinivasan and U.C. Banerjee, Joint Judges. While the CJI and Justice Srinivasan delivered a joint judgment, Justice Bannerjee agreed with them but provided his independent reasoning.

²⁴⁸ *Githa Hariharan v. Reserve Bank of India* (1999) (2) SCC 228.

As discussed in the last section, the unequal treatment of parents in the statute is clearly indicated by the preposition 'after', which creates a hierarchy of preference between parents in issues of custody. If the Indian Constitution promises gender equality, then this preposition in the HMGA attempts to strike at the core of the premise of equality.²⁴⁹ However, while discussing the constitutional validity, this point is not addressed by the judges. Moreover, the Court reasons that it is adopting a harmonious construction as any other explanation would make HMGA violate the Constitution. Here, there is a negative acknowledgement that HMGA could be opposed to Constitutional guarantee of gender equality, but there is a need to presume that the Act is constitutionally valid. More significantly, the highest court of the land does not consider it to be a '*gross violation of constitutional sanctions*', when gender parity is being compromised by creating hierarchies, due to the use of the word 'after' in Sec.6(a) of HMGA.

The inability to provide an explanation for how Sec.6(a) of HMGA does not violate the Constitutional notion of equality is further demonstrated by the following observation of the Court -

"Whenever a dispute concerning the guardianship of a minor, between the father and mother of the minor is raised in a Court of law, the word 'after' in the Section would have no significance., as the Court is primarily concerned with the best interests of the minor and his welfare in the widest sense while determining the question as regards custody and guardianship of the minor. The question, however, assumes importance only when the mother acts as guardian of the minor during the life time of the father, without the matter going to Court, and the validity of such

²⁴⁹ This was pointed out by Githa's lawyer in her arguments.

an action is challenged on the ground that she is not the legal guardian of the minor in view of Section 6(a) (supra).²⁵⁰

Here, there is an explicit acknowledgement that the mother being the guardian is inherently problematic, in contrast to the father being the guardian of the minor. While the judges have held that HMGA is a valid legislation that aligns itself with the Constitution as seen earlier, they are also acknowledging that the mother's position is contentious in the cases under HMGA. They do not elucidate on how it can be construed to be supporting the premise of Constitutional equality, when the father and mother are treated unequally in the custody claims made under HMGA. So, the premise of gender equality in this judgment rests on shaky ground as the judges are unable to provide a reasonable counter to the argument of how HMGA violates the Constitutional provision of equality. Instead, they prefer to sweep it under the carpet, in the name of harmonious reconstruction. Moreover, there is a tacit nod to gender bias in the handling of cases under HMGA.

Apart from the above reasoning on gender parity and acknowledgement of differential treatment, there is an element of gendering of parental roles and an attempt to be protectionist of women in this case. I illustrate this using the following examples from the judgment. One of the judges in the Bench, Justice U.C. Banerjee, observed that –

“Though nobility and self-denial coupled with tolerance mark the greatest features of Indian womanhood in the past and the cry for equality and equal status being at a very low ebb, but with the passage

²⁵⁰ *Githa Hariharan v. Reserve Bank of India (1999) (2) SCC 228.*

*of time and change of social structure the same is however no longer dormant but presently quite loud.*²⁵¹

The language used here privileges the normative ideals of womanhood over equality and the latter is almost an afterthought, a nod to the current times. While the past witnessed the *'greatest features of Indian womanhood'*, the *'cry for equality and equal status'* was at a *'low ebb'*, but women seeking equality or equal rights/status are now *'loud'*. The premise here is that the women who exhibit noble qualities will not seek to establish their rights. The language betrays judicial anxiety about the women who seek an equal position in social structures and the need to keep them in check, else they will turn loud.

Lastly, while opining on the use of the word *'after'*, the judges state that –

*"The father by reason of a dominant personality cannot be ascribed to have a preferential right over the mother in the matter of guardianship since both fall within the same category and in that view of the matter the word 'after' shall have to be interpreted in terms of the constitutional safe-guard and guarantee so as to give a proper and effective meaning to the word's use."*²⁵²

Here, the father is referred to as the *'dominant personality'*, though neither the Act nor the facts and arguments in this case use this term. This is an acknowledgment in judicial reasoning that existing gender norms privilege the male over the female, within the Hindu family. While the statement claims to provide equal rights to both parents in matters of guardianship, it is premised on an understanding of the father as a dominant personality. As I discussed in the last chapter, the idea that the Hindu man enjoys a prominent

²⁵¹ Ibid.

²⁵² *Githa Hariharan v. Reserve Bank of India (1999) (2) SCC 228.*

position within the family and possesses full legal and economic subjecthood, as opposed to the Hindu woman who possesses limited legal and economic subjecthood, exists from the colonial times. This idea found its way into the Hindu code and is reflected in judicial reasoning, as we see in this case. The judicial reasoning here creates the hierarchy of the father being the dominant personality and the mother being the subservient one, in line with this normative definition of gender roles within the Hindu family.

The analysis of judicial reasoning in the case of *Githa Hariharan* provides an interesting point of entry into how judges reflect on gender. The judges are keen to acknowledge gender equality, in line with the Constitution of India and international conventions and want to ensure that the HMGA is not contradictory to the notion of gender parity. However, they do not provide any reasoning on gender difference and choose to highlight certain qualities of womanhood and fatherhood that are premised on gendered norms. They do not address the historically disadvantaged position of women in Hindu society and premise their reasoning on a formal notion of equality. The acknowledgement of gender equality in law does not automatically translate to social equality on the ground, an issue that is not considered in the judgment. Despite not providing an in-depth analysis or reasoning on gender equality, the case has been hailed as a landmark judgment on establishing the constitutional principle of equality and is used as a precedent for subsequent cases on awarding custody.²⁵³ More importantly, this case is an important decision in the way it attempted to reconcile rights of parents with the welfare principle, an aspect largely ignored in subsequent judgments. I now turn to these judgments and their handling of the welfare principle, to deepen the analysis on the gendered nature of judicial reasoning.

²⁵³ Asha Bajpai, *'Custody and Guardianship of Children in India'* (2005) 39 Family Law Quarterly.

4.3 Gendering of Welfare

4.3.1 Definition and Criteria of Welfare

The case of *Githa Hariharan* marked a turning point for the courts as subsequent cases had to consider the Constitutional principle of gender equality. However, gender parity was not the only consideration for the judges as the key legal principle for settling custody cases was that of welfare.²⁵⁴ The Welfare or Best Interests of the child is a Common-Law principle that is adopted in the Hindu code. In Common Law, the father's legal right of custody over a child born out of marriage was considered absolute and the best interests of the child were paramount.²⁵⁵ This idea of paternal power finds its way into Sec.6(a) of HMGA, as the father is privileged over the mother as the natural guardian of a Hindu minor. Moreover, during colonial rule, there was a selective appropriation of strands of normative literature, which led to a stereotypical understanding of 'Indian tradition'.²⁵⁶ The colonial invention of an Indian tradition had Common Law roots, as evidenced by the presence of welfare principle in the Hindu code. To this day, this concept of welfare provides a wide discretion to the judges to decide custody cases based on

²⁵⁴ The welfare principle is provided paramount consideration by the judges while deciding custody cases, to the extent of subsuming individual parental rights in the best interests of the child. In India, the concept of Welfare is dealt with in two legislations - The Guardians and Wards Act, 1890 and The Hindu Minority and Guardianship Act, 1956. While the Guardians and Wards Act of 1890 specifies that the Court shall consider age, sex and religion of the minor, as well as character and capacity of the guardian and the guardian's relationship to the minor or to the latter's property, the later enactment of 1956 is silent on these considerations and merely states that welfare of the minor is of paramount consideration, without providing context or definition of welfare. Moreover, the Act of 1890 also provides that the minor's preference may be considered if the minor is old enough to form such preferences, a provision that is again absent in the Hindu Minority and Guardianship Act, 1956. The 1956 Act seems to provide very wide leverage for interpretation of the notion of 'Welfare' and leaves its definition in the hands of the judges, depending on the facts and circumstances of the case. Very often, the courts use both these sections in conjunction while deciding what constitutes welfare of the minor child.

²⁵⁵ Savitri Goonesekere, *'The Best Interests of the Child: A South Asian Perspective'* (1994) 8 International Journal of Law and the Family.

²⁵⁶ Kanad Sinha, *'Be It Manu, Be It Macaulay: Indian Law and the "Problem" of the Female Body'* (2014) 5 Journal of Indian Law and Society.

best interests of the child and this is to be decided using common sense.²⁵⁷

Here, I analyse how the welfare principle is interpreted in custody decisions in the cases under study and demonstrate how this is linked to normative ideals of gender roles.

While deciding on the welfare of the child, judges tend to analyse the facts and circumstances of the case in minute detail. Most often, the courts consider the ability of parents to facilitate the growth and development of the child, emotionally, materially and physically. For instance, in the case of *Ram Murti Chopra and Anr vs Nagesh Tyagi*, the Court held that -

“Every Court, while deciding the custody matters, has to consider the welfare of the child as a prime factor. While considering the welfare of the child, the Court has to give due weightage to all the circumstances such as the child's ordinary comfort and contentment, his intellectual, moral and physical development, his health, education, general maintenance etc. Apart from that, the Court has also to give due weightage to the emotional considerations, social set-up, care, attention, career build-up and bringing up of a child as a good human being. The Court has to ensure that the child must live in an atmosphere which is congenial and healthy for his growth and inculcates values of life in his (sic). He gets proper love and affection necessary for his development; the guardians provide him necessary moral boosting etc. Where the child is under constant strain and his mind is full of questions which are not

²⁵⁷ Archana Parashar, ‘Paternalistic Law, Autonomous Child and the Responsible Judges’ in Archana Parashar and Amita Dhanda (eds), *Redefining Family Law in India: Essays in Honour of B. Sivaramayya* (Routledge 2008).

answered properly, and he is only shown one side of the picture, his development is bound to be affected."²⁵⁸

While the courts observe that the economic affluence (or lack thereof) of a parent is not the sole consideration,²⁵⁹ they have maintained that welfare has to be determined based on facts and circumstances of the case and would tend to include "*physical well-being, education, supplying the daily necessities such as food, clothing and shelter*"²⁶⁰ as well as "*child's ordinary comfort and contentment, his intellectual, moral and physical development, his health, education, general maintenance etc.*"²⁶¹ and "*emotional considerations, social set-up, care, attention, career build-up and bringing up of a child as a good human being*".²⁶² Further, the judges emphasise that the welfare of the child would include the "*child's ordinary comfort, contentment, intellectual development and favourable surroundings*" and that the "*physical comforts, moral and ethical value cannot be ignored*".²⁶³

²⁵⁸ *Ram Murti Chopra and Anr vs Nagesh Tyagi (2008) ILR (12) Delhi 169. This view is also reflected in other cases. For instance, in Nil Ratan Kundu and Anr. v. Abhijit Kundu, the Court opined that –*
"A Court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the Court is exercising parens patriae jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations." (*Nil Ratan Kundu and Anr. v. Abhijit Kundu (2008) (2) CHN 479*).

²⁵⁹ For instance, in *Surabhai Ravikumar Minawala Vs. State of Gujarat*, the Court awarded custody to the mother though the father was very wealthy and stated that –
"Merely because father of the child i.e. respondent no. 2 is in better financial position than the mother, it does not mean that the child's interest will best be served if it remained with father and his family. No amount of wealth and 'mother like love' can take the place of mother's care and love for the child." (*Surabhai Ravikumar Minawala Vs. State of Gujarat AIR (2005) Guj 149*).

Similar sentiment is expressed in *Dhanwanti Joshi vs. Madhav Unde (1998) (46(1)) BLJR 743* ("*Financial capacity being superior cannot be the sole deciding factor for welfare*").

²⁶⁰ *Smt. Pushpa and Another vs Smt. Anshu Chaudhary (2013) (6) ALJ 628.*

²⁶¹ *Ram Murti Chopra and Anr vs Nagesh Tyagi (2008) ILR (12) Delhi 169.*

²⁶² *Ibid.*

²⁶³ *Mohan Kumar Rayana vs. Komal Mohan Rayana (2009) (3) Bom CR 308.*

While better financial resources can be one of the deciding factors, the judges have held that it cannot be considered as the only factor for deciding the welfare of the child. For instance, in the case of *Mausami Moitra Ganguli vs. Jayant Ganguli*, the Bench of the Supreme Court of India mentioned that –

*“Better financial resources of either of the parents or their love for the child may be one of the relevant considerations but cannot be the sole determining factor for the custody of the child”.*²⁶⁴

The judges have stressed that the concept of welfare must be interpreted in its widest sense to include the physical, emotional, financial and moral needs of the child.²⁶⁵ The definition of physical and emotional wellness seems to largely include notions of care, financial resources to provide for the minor and most importantly, the education of the minor and overall well-being of the minor.²⁶⁶ Providing education and financial stability to the child is considered an important factor in determining the welfare of the child, as decided in several cases.²⁶⁷ In some instances, welfare is interpreted from a gendered perspective, as in the case of *Eshita d/o Hasmukhbhai Sitapara vs.*

²⁶⁴ *Mausami Moitra Ganguli vs. Jayant Ganguli AIR (2008) SC 2262*. This view is endorsed in other cases too. For instance, *Vikram Vir Vohra vs Shalini Bhalla 170 (2010) DLT 303*, *Smt. Pushpa and Another vs Smt. Anshu Chaudhary (2013) (6) ALJ 628*.

²⁶⁵ For instance, *Ruchirkumar Gajanandbhai Suthar and 2 Ors. Vs. Amitaben D/o Hasmukhlal Nanchanddas Mewada, Shiwani Kabra vs. Shaleen Kabra (2011) ILR 2Delhi 754*, *Murari Lal Sidana and Anr. Vs. Smt. Anita AIR (2013) Raj 100*.

²⁶⁶ For instance, *Smt. Pushpa and Another vs Smt. Anshu Chaudhary (2013) (6) ALJ 628*.

²⁶⁷ For instance, *Vijayaben Parshottam Kotak vs. Parshottam Kotak (2003) GLH (23) 323*, *Eshita d/o Hasmukhbhai Sitapara vs. Hiren Prabhudasbhai Brahmhatt, Special Civil Application No.10009 of 2009 (High Court of Gujarat at Ahmedabad, 18/12/2009)*, *Sardar Bhupendra Singh vs. Smt. Jasbir Kour AIR (2000) MP 330*, *K.M. Vinaya vs. B.R. Srinivas, Miscellaneous First Appeal No.1729 of 2011(High Court of Karnataka at Bangalore, 13/09/2013)*, *Ram Murti Chopra and Anr vs Nagesh Tyagi (2008) ILR (12) Delhi 169*. In *Kotholla Komuraiah and Kotholla Kondavva vs. Kotholla @ Bikkanuri @ Gorkladi Kanaka Laxmi*, it was observed that the Court must exercise its *Parens Patriae* jurisdiction and should consider minor’s “ordinary comfort, contentment, health, education, intellectual development and favourable surroundings” (*Kotholla Komuraiah and Kotholla Kondavva vs. Kotholla @ Bikkanuri @ Gorkladi Kanaka Laxmi (2014) (1) ALD 362*). Moreover, apart from physical comfort, moral and ethical well-being of the child was also considered to be important.

Hiren Prabhudasbhai Brahmhatt, where the role and guidance of the mother was important for the welfare of the minor girl child.²⁶⁸

While the legal principle of welfare is to be interpreted in its widest amplitude by the judges, welfare is often confined to the basics of day to day living at a practical level. The widest interpretation of welfare tends to make it indeterminate, value-laden, subjective, and it also tends to produce arbitrary outcomes, depending on the judges' background and/or biases.²⁶⁹ Often, welfare of the child is dependent on the capacity of the parent to provide basic amenities of life and education to the child. However, judicial reasoning on welfare in these cases, privileges the notion of providing for the child, especially providing better material comforts. This, when taken in conjunction with the gendered roles within the family, tends to privilege the position of the father as a provider of needs and wants. Hence, the underlying reasoning on the welfare principle supports the gendering of roles within the family. In the next section, I analyse some of the cases under study in which rights of parents form an important part of the reasoning in the judgment. I demonstrate how the judges premise these rights on normative notions of gender roles in these cases.

²⁶⁸ *Eshita d/o Hasmukhbhai Sitapara vs. Hiren Prabhudasbhai Brahmhatt, Special Civil Application No.10009 of 2009 (High Court of Gujarat at Ahmedabad, 18/12/2009)*. This case is discussed in detail in Chapter 5.

²⁶⁹ It has been argued by several scholars that the welfare principle rests on shaky theoretical grounds, as it tends to reinforce normative ideas about the family and works in favour of adults, rather than children. For instance, see Helen Reece, *'The Paramountcy Principle: Consensus or Construct?'*, (1996) 49 *Current Legal Problems*, Jane Fortin, *'Children's rights - flattering to deceive?'* (2014) 26 *Child and Family Law Quarterly*. However, a discussion on Welfare principle in relation to children's rights is outside the scope of this thesis. Here, I focus on how the judicial reasoning on welfare in these cases has its basis in normative ideas of gender, rather than on the actual welfare of children.

4.3.2 Welfare of the Child vs. Rights of Parents

In all the cases under study, welfare of the child is the fundamental principle on which the judges base their decisions of custody. As seen in the last section, welfare is often used as an umbrella term to denote several types of wellbeing of the child. While discussing welfare, judges tend to subsume rights of the parents to the best interests of the child. For instance, in the case of *Arun Grover vs. Ritu Grover*, the father was seeking visitation rights as natural guardian of his minor son, as he claimed that best interests of the child would be affected otherwise. However, the Court held that the father could not prove prima facie that the welfare of the child was affected by the mother's custody and observed that -

*"Petitioner never paid the school fee or made any contribution towards the education and other expenses of the child and even the child was averse even talk to the petitioner(sic)."*²⁷⁰

Here, the court dismissed the visitation rights of the father as he did not make any useful contributions to the expenses of the child and due to the child's behaviour. This case is an illustration of how welfare is the paramount consideration for deciding custody and judges often use the welfare principle to supersede parental rights. This has been stressed in several other cases as well, as elaborated below.

In the case of *Shamal Sharad Baride vs. Sharad Baburao Baride*, the father of three children was an alcoholic. The mother left the house with her youngest child to live with her father and left her older children in the father's custody.

²⁷⁰ *Arun Grover vs. Ritu Grover Civil Miscellaneous (Main) Petition No.936 of 2010 (High Court of Delhi at New Delhi, 28/07/2010)*. In some instances, welfare has been used to explain providing visitation rights to the non-custodial parent, like in the case of *R. Swaminathan Vs. Sivagowri, Review Application No.51 of 2009 (High Court of Madras, 03/08/2009)*. In either scenario, the emphasis has been on the welfare of the child over the rights of parents, in judicial reasoning.

As the father began to sell his agricultural property to feed his drinking habits, the mother filed a petition to ensure that the property was not squandered by the father. The father, in turn, sought custody of the third child as he claimed to be the natural guardian of the child and accused the mother of adultery. In this case, the Aurangabad bench of the Bombay High Court granted custody of the child to the mother and held that –

“Vital to custody is age of child and circumstances. Best interest of the child is basic consideration to which rights of parents have to yield.”²⁷¹

Here, the Court decided to supersede the rights of the father and chastised him in its closing remarks, as follows –

“The assessment of evidence indicate (sic) that welfare of the child to be paramount aspect, will be more looked taken care by the wife than father. The father's contention of unchastity of the wife is a stooge created to sabotage litigation. Consequently, I hold that the allegations of infidelity or illicit relations hurled at the wife with said Limbraj, are the product of fertile mind of the husband, not associated with any acceptable evidence. On the sole ground, the custody of the minor child cannot be restored to the father.”²⁷²

²⁷¹ *Shamal Sharad Baride vs. Sharad Baburao Baride (2009) (4) BomCR 669. Similar sentiment is expressed in Gaurav Nagpal vs Sumedha Nagpal AIR (2009) SC 557. In the case of Gaytri Bajaj vs. Jiten Bhalla, the Supreme Court stated that –*

“It is not the better right of the either parent that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the concerned parent to take care of the child are some of the relevant factors that have to be taken into account by the Court while deciding the issue of custody of a minor. What must be emphasized is that while all other factors are undoubtedly relevant, it is the desire, interest and welfare of the minor which is the crucial and ultimate consideration that must guide the determination required to be made by the Court.” (Gaytri Bajaj vs. Jiten Bhalla AIR (2013) SC 102).

²⁷² *Shamal Sharad Baride vs. Sharad Baburao Baride (2009) (4) BomCR 669.*

A more nuanced argument for considering welfare over the rights of parents is advanced by the judges in the case of *Chethana Ramatheertha vs Kumar V. Jahgirdar*. In this case, the mother remarried a famous cricketeer and the father argued that the mother would be incapable of taking care of the child due to her second marriage and jet-setting lifestyle. The judges held that either parent was equally capable, and that the custody of the child should be dependent on her welfare. The Court observed that -

"The question is not viewed any more from the angle of "which parent has a better right", but from the approach as to "the company of which of the two parents is better suited for the integrated development of the personality of the child" and "as to whether the child receives the necessary inputs if it is in the company of a particular parent, for a healthy growth and development of the personality of the child".²⁷³

This case, along with the other two mentioned earlier in this section, represents a positive moment in judicial reasoning on gender. The judges provide equal weightage to the capacity of both parents. They reason that it is the welfare of the child that overrides the rights of parents and not the right of one parent versus another. However, the above cases are an exception rather than a rule. In other instances, the rights of parents have been premised on normative ideas on gendered roles in the family, rather than gender parity, as seen below.

In the case of *Mohan Kumar Rayana vs. Komal Mohan Rayana*, the mother was an accomplished classical dancer and a television actress. The Court, while providing the mother custody, observed that -

²⁷³ *Chethana Ramatheertha vs Kumar V. Jahgirdar (2003) (3) KarLJ 530.*

*"On the other hand, the respondent-mother is a graduate in English literature and she is also into Fine Arts and Culture. She knows Marathi, English, Hindi and Telugu very well. She is also an accomplished classical dancer. She has categorically stated before the court that she has given up her career as an Actress and she will be available 24 hours of the day to take care and for upbringing Anisha."*²⁷⁴

Here, the Court acknowledges that the mother is an educated person who is proficient in several languages, classical dance and has a career as an actress. However, her right to be a successful professional was undermined, as custody was provided to her only when she agreed to give up her chosen profession. If the situation was reversed, a father would not be expected to give up the right to his profession. The reasoning in this judgment provides a clear example of how a mother's right is undermined for the welfare of the child, without any exploration of other options, especially in comparison to the father.

In the case of *Romani Singh vs. Lt. Col. Vivek Singh*, the father was an army officer and was in a transferable job. He was denied the right to custody of the child as he could be transferred to non-family stations and would be unable to look after the child. The father claimed that he would seek the help of his parents to take care of the child. But the Court turned this down by reasoning that the mother is a better guardian in the best interests of the child

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"Further, even though as per him his parents are looking after the child but when the natural mother is there and has knocked the door of the court without any delay and has all love and affection for the child and

²⁷⁴ *Mohan Kumar Rayana vs. Komal Mohan Rayana (2009) (3) Bom CR 308.*

is willing to do her duty with all love and affection and since the birth of the child she has been keeping the child. In these circumstances, she should not be deprived of her right especially considering the tender age and child being a girl child. The grandparents cannot be a substitute for natural mother. There is no substitute for mother's love in this world."²⁷⁵

In this case, the father is denied the right to his child due to the nature of his profession. While it may be justified to provide custody to the mother for the welfare of the child, the reasoning used by the judges is based on how a mother ought to be. The court based its reasoning on gendered norms, especially the normative role of a mother, while the gender of the child has also played a part in the judgment. This case offers another illustration of how gender and gendered norms impact judicial reasoning in the cases under study. In the next section, I elaborate on this idea by examining those cases in which the mother steps into the shoes of the father.

4.3.3 Mother in the Role of the Father

While the premise of welfare was posited above the legal rights of parents in several cases as seen above, there have been attempts to clarify and crystallise what constitutes welfare both before and after the case of *Gita Hariharan*. In considering the welfare of the minor child, both the mother and father were provided equal consideration by the judges in subsequent cases. But even in such instances of parity, the mother was preferred only if she could establish that she could step into the normative role of the father as provider. The Courts have consistently upheld the capacity of the mother to be the de facto guardian in several other instances. However, the logic of these decisions seems to rest in socially accepted, conventional models of parenthood. For

²⁷⁵ *Romani Singh vs. Lt. Col. Vivek Singh 201(2013) DLT 742.*

instance, in *Amrit Pal Singh vs. Jasmit Kaur*, the Delhi High Court ruled as follows –

“In my opinion, the children should not be deprived of the company of their natural mother who is educated, and I am given to understand, financially capable of taking care of the children.... I see no substitution, in the present case, for mother's love and affection nor do I find any justification in denying the children of the family from receiving love, care and affection of their natural mother, which to my mind, is essential for the integral development and personality of the children.”²⁷⁶

While the ideals of motherhood are glorified, what is significant here is that the mother is being provided custody as she is educated and ‘*financially capable*’ of providing care.²⁷⁷ To step into the father’s shoes, the mother must ‘become’ the father. This is illustrated in several cases, as shown below.

In the case of *Chethana Ramatheertha vs Kumar V. Jahgirdar*, the judges observed that –

²⁷⁶ *Amrit Pal Singh vs. Jasmit Kaur AIR (2006) Delhi 213*. In another instance of *Selvan.J v. N. Punidha*, the Court demarcated the doctrine of least detrimental alternative in the best interests of the children and provided the following to be the issues that are common to most custody cases –

“Issues that are common to all child custody disputes are:

- (a) Continuity and quality of attachments*
- (b) Parental alienation*
- (c) Education*
- (d) Parents' physical and psychiatric health*
- (e) Parents' work schedules*
- (f) Parents' finance*
- (g) Styles of parenting and discipline*
- (h) Social support systems*
- (i) Conflict resolutions*
- (j) Cultural and ethnic issues*
- (k) Ethics and values and religion –*

The crucial test would be ability and willingness on part of either parties to provide to minor children (a) healthy environment (b) good parental care and guidance (c) physical, emotional and financial support for development of their integrated personality” (Selvan.J v. N. Punidha (2007) (4) CTC 56).

²⁷⁷ Emphasis added.

“Gender equality is the accepted and developing trend and financial independence is as much the domain of the female members of the family with the female members also entering into different avocations and being in a position to earn. Many a times the wife is better off financially because of her superior skills and better employment than her husband. Particularly in situations where both parents are financially independent and need not necessarily depend on the other, the traditional concept of the father being the first guardian may not hold water.”²⁷⁸

As seen earlier, the Chethana judgment is a positive way forward for gender justice. The Court asserted the mother’s financial independence and ability to provide on par with the father. However, there is also an acknowledgment here that the father is traditionally considered in the role of the provider and the mother is stepping into the father’s shoes due to her achieving the status and financial capacity of the father.

In the case of *Vikram Vir Vohra vs. Shalini Bhalla*, the mother and father divorced by mutual consent. Their minor son was with the mother and the parents had an amicable visitation agreement. Subsequently, the mother wanted to relocate to Australia for employment. She wanted cancellation of the visitation right while the father contended that exposure to “Western culture” would harm the child. The Court held that -

“Much has been said regarding the Indian cultural environment in which the child is brought up in India to discard the claim of the respondent to take the child with her to Australia where she is employed for gain. It is not highlighted as to how the health, education or intellectual

²⁷⁸ *Chethana Ramatheertha vs Kumar V. Jahgirdar (2003) (3) KarLJ 530.*

development as well as physical comfort and moral values of the child would be affected if he is allowed to live with his mother in Australia. Rather, I am of the view that bringing up of the child in favourable surroundings as well as in physical comfort and protection of his mother, his education and intellectual development is likely to be more conducive for the welfare of the child."²⁷⁹

Here, the Court acknowledges that the mother, being employed for gain, is in a better position to take care of the child as she can be a better provider. That aspect overshadows the father's claims as the mother has become capable of performing the role of the father in providing for the child.

In the case of *Smt. Gundamma vs. Shivasharanappa*, the parents were living separately, each with one son. The second son, who was with the mother, did not know the father at all. The father was seeking custody of this minor. However, the mother was granted custody based on economic considerations. The Court opined that -

*"It is not the case of the respondent that the appellant does not have means to maintain herself and the ward.... Record of rights extracts produced by her indicate that she is the absolute owner in possession of the land measuring 12.24 acres. Further, it is shown that except she, there are no legal heirs to succeed the estate of her parents. Therefore, it could be said that the appellant is financially sound, and she is capable of giving good education and maintain the ward properly. Therefore, the Court below is not justified in passing the impugned order."*²⁸⁰

²⁷⁹ *Vikram Vir Vohra vs Shalini Bhalla* 170 (2010) DLT 303.

²⁸⁰ *Smt. Gundamma vs. Shivasharanappa* AIR (2004) Kant 357.

In this case, the mother being “financially sound” is the most important consideration for providing her custody of the child. For all intents and purposes, the mother must step into the role of the provider to obtain custody, a role traditionally held by the father.

The earning potential of the mother is highlighted even in those instances of absence of a father. For instance, in the case of *Baby Kavya Awasthi and Another vs. State of U.P. and Others*, the High Court of Allahabad stated that –

“The immediate welfare of the minor girl is of urgent concern of this Court in the particular circumstances of the case when her father is not alive. Her mother is an educated and earning lady, therefore the apprehension of the respondent No. 3 that she would not get proper care from her mother is unfounded. The natural mother can sacrifice anything and can cherish more love, affection and care in fact appears to have gone mad to have her custody for her welfare. It is not out of place to mention here that the mother is greater than earth and dearer than even the heaven. Her love and affection cannot be compared in any manner whatsoever to that of any man or women.”²⁸¹

In this case, the image of the Hindu middle-class woman emerges in detail. While the mother is recognised as an ‘educated, and earning lady’, the ideals of motherhood are also upheld to be natural and incomparable. While custody is granted to the mother instead of the paternal grandparents based on this normative construction of motherhood, the proposition that the mother is an ‘earning lady’ is emphasised, highlighting the importance of economic advantage. Here, welfare is premised on economic advantage while being

²⁸¹ *Baby Kavya Awasthi and Another vs. State of U.P. and Others* 2013(5) ACJ 72. This sentiment finds resonance in the cases of *Alamelu Sockalingam vs. V. Venkatachalam* (2012) (6) CTC 907, *Smt. Gundamma vs. Shivasharanappa* AIR (2004) Kant 357, and *R. Muruga Perumal vs. J. Radhamani* (2009) (4) LW 527.

reasoned on ideals of the Hindu family and motherhood. What is evident in this reasoning is that these judges feel a need to reconcile normative notions of gender roles with the realities of educated women capable of running their families. Whenever the mother is provided custody on this basis, there is an acknowledgement that she is an earning lady or is financially capable of taking care of the child, to justify that the decision is taken in the best interests of the child.²⁸²

Throughout the cases that I have analysed here, what emerges firstly is that economic advantage, in one form or another, is a key premise on which judicial reasoning is based in custody cases under Hindu law. Time and again, the judges seem to focus on the parent who can provide a better standard of life or education to the child and this tends to influence their decisions. They premise the reasoning for this preference on the idea that the mother is considered as the parent who can provide immense love and affection to the child in her “natural” role as the caregiver and the father is considered to be the breadwinner or provider for the entire family. The ideals of motherhood and womanhood are imposed on different types of women and all of them are measured using this yardstick. If the mother can provide for the child financially as well, then such a mother becomes capable of stepping into the father’s shoes and become the natural guardian of the child.²⁸³ However, in such instances, while the decision has been based on welfare of the child, the reasoning behind the decision has conformed to existing normative notions on gender roles in the family. Moreover, the mother must show sufficient proof that she is capable of stepping into the father’s role to be awarded

²⁸² This acknowledgment is found in several cases. For instance, *Baby Kavya Awasthi and Another vs. State of U.P. and Ors* (2013) (5) ACJ 72, *R. Muruga Perumal vs. J. Radhamani* (2009) (4) LW 527, *M. Udhayabanu Vs. K.S. Raja* (2007) (2) MLJ 246.

²⁸³ For instance, *R. Manivasakan vs. M. Vimala* (2012) (8) MLJ 547, *Smt. Gundamma vs. Shivasharanappa* AIR (2004) Kant 357.

custody. If the mother is incapable of financially supporting the child, she has been awarded maintenance in some instances. But, these grants of maintenance are not followed up by orders for effective execution.²⁸⁴ Such situations often lead to overburdening of the mother, as she is responsible for the upbringing of the child without having adequate means to support the child. In the event of non-payment of maintenance, she must approach the courts to seek a remedy and enter a complicated process for recovery of monies due.²⁸⁵ Therefore, my argument is that the mother stepping into the role of the father cannot be construed as gender parity, despite frequent references made to equality and *Githa Hariharan* in these cases. The Welfare principle, which is supposed to be individualistic and child centric, is hijacked to accommodate judicial reasoning based on gender roles in the family. Here, the reasoning based on normative ideas of gender roles tend to do more damage than good, as both parents are not treated on the same footing.

²⁸⁴ Under Hindu law, execution of maintenance needs to be undertaken by a separate process of seeking remedy for non-payment of maintenance. Maintenance cases underline the unequal resource positions within the Hindu family. However, these cases are outside the scope of the present study.

²⁸⁵ For instance, in the case of *N. Sreeramudu, S/o. N. Narayana Vs. Kum. N. Lahari, D/o. N. Sreeramudu, Minor rep. by her natural guardian mother Smt. N. Saraswathi*, the family court ordered a monthly maintenance of Rs.500 for the mother and Rs.250 for the daughter, when the mother (one of the respondents here, the other being the daughter) separated from the father (the appellant here). The father paid only the daughter's maintenance as the mother got herself a job as a health assistant, even though he was earning much more. The mother filed a petition for increasing the maintenance to Rs.1500 and the trial court allowed her application. However, the High Court of Andhra Pradesh allowed the father's appeal against this decision and lowered the combined maintenance. The Court observed that –

"This aspect of the question of maintainability of the suit for recovery of enhanced maintenance amount on behalf of the minor child by the mother when the father can be said to be the natural guardian was neither raised nor canvassed before the trial Court. Hence this question need not be seriously considered at the appellate stage." (N. Sreeramudu, S/o. N. Narayana Vs. Kum. N. Lahari, D/o. N. Sreeramudu, Minor rep. by her natural guardian mother Smt. N. Saraswathi (2004) (4) ALD722).

In some instances, the Court has considered maintenance to be outside the purview of HMGA and has claimed that the meaning of maintenance should be understood from the Hindu Adoptions and Maintenance Act, 1956 (*Tilak Kumari & Anr. Vs. Sh. Anand (2001) (59) DRJ 580*).

In judicial reasoning, marriage is fundamentally structured to be a partnership of inequality, where roles and responsibilities are gendered, and it follows that maintenance becomes the only avenue for women to stake financial claims or entitlements.²⁸⁶ Hence, a woman should get out of her marriage to obtain economic benefits from it. The impact of such situations is not addressed in the reasoning provided in custody cases. There can be more parity when the mother is economically viable of taking care of herself and her child or children. But the removal of the economic advantage tends to reduce the state of the mother to that of a person living on handouts from the benevolent stranger, who was once her spouse. While this situation not unique to India, it provides evidence of the subservient position of the Hindu woman within the Hindu family. Moreover, it lends credence to the 'dependent' part of the term "Elite Dependent", a category I explore further in the next chapter.

4.4 Concluding Remarks

As I demonstrated in the last chapter, codification in Hindu law utilised ideas of liberalism and modernity and resulted in the creation of gendered subjects with differential rights, within the Hindu family. The legal construct of these subjects was carried forward from the colonial times to the Hindu code and this construct found its way into judicial reasoning in custody cases. Lawmakers in India, like elsewhere, provided gender parity in legislation without questioning or exploring gender roles, which led to a gap between paper and practice.²⁸⁷ In this chapter, I analyse how a formal notion of gender equality is premised in the custody cases under HMGA by the judges, without sufficient explanation of underlying premises on gender roles or imbalances

²⁸⁶ Flavia Agnes, *'Conjugalilty, Property, Morality and Maintenance'* (2009) 44 *Economic and Political Weekly*.

²⁸⁷ Nivedita Menon, *Recovering Subversion - Feminist Politics Beyond the Law* (Permanent Black 2004).

of treatment meted out based on gender of parents. While the codification of Hindu law attempted to manage diverse expectations at several levels,²⁸⁸ it is not entirely successful in addressing the questions of gender imbalances within the Hindu family and this is reflected in judicial reasoning in these cases.

The key elements of judicial reasoning that emerge from the discussions above are, as follows –

1. Judicial reasoning in these cases is often premised on normative notions of gender. As evidenced in the case of *Githa Hariharan*, even in the instances when the judges draw on gender equality discourse, the underlying premise is that of normative understanding of gender roles in the Hindu family.
2. Most custody cases studied here are premised on the welfare or best interests of the child(ren). Post *Githa Hariharan*, the courts exhibit a leaning towards gender equality in the wording of the judgments in these custody cases. However, the logic of judicial reasoning equates financial capacity as gender parity, simultaneously emphasising protectionist and normative stances towards women. Here, the welfare principle is being hijacked to suit the gender-based reasoning employed by the judges.
3. In the cases under study, judicial interpretation portrays the Hindu woman as an “Elite dependent” as she is expected to be the educated, middle-class mother teaching normative values to her children as well as being dependent on her husband for economic resources. The Elite Dependent is a paradox, as she is treated as both an equal (legally) and

²⁸⁸ Werner Menski, *Slumdog Law, Colonial Tummy Aches and the Redefinition of Family Law in India* (2010) 30 Sage.

a subordinate (economically and socially). She represents the tension between formal notions of gender equality that is present in judicial reasoning and the need to protect her as she is subservient in her normative gender role within the Hindu family.

It is evident upon examining these cases that what we see is not what we get. While almost all the cases touch upon gender equality, the underlying reasoning by the judges is premised on normative gender roles in the Hindu family. The normative notions of gender are fundamentally entrenched in social praxis and they continue to play out in judicial reasoning as seen in the cases above. The courts exist within a cultural and legal framework of women's economic dependence in marriage and male control of women's decisions and movements.²⁸⁹ This is evident in the judicial language in these cases. Moreover, as an institution, the family's stability hinges on maintaining unequal resource positions between men and women and economic interest plays an important role in intra-family gender relations.²⁹⁰ This economic interest is displayed in the judgments when judges determine questions of welfare. Further, the Constitution provides a special status to women in India as they are perceived to need protection. This in turn leads to an anomalous situation in which women are to be treated equally, but also specially. In practice, women are often treated as inferior to men and gender equality is a mirage. These tensions between theory and praxis exist in the judgments under study and they are reconciled by using the trope of the "Elite Dependent".

²⁸⁹ Srimati Basu, *Judges of Normality: Mediating Marriage in the Family Courts of Kolkata, India* (2012) 37 Signs.

²⁹⁰ Bina Agarwal, *'Bargaining' and Gender Relations: Within and Beyond the Household* (1997) 3 Feminist Economics 1.

Indian feminists have worked towards using law as a tool for women's empowerment and managed to achieve landmark changes in legislation. They increased the bargaining power of women by legal innovation of mixing and matching existing laws or by creating / providing parallel legal options.²⁹¹ However, legal reforms have their own limitations as they did not translate well into realities on the ground. There has been a constant attempt by the state to domesticate gender through its policies, as women are important for stability and reproduction of patriarchal family values and property systems.²⁹² The courts perpetuate this attempt and provide a normative framework for gender, as argued by several Indian legal feminists.²⁹³ By way of my case analysis, I have provided evidence of this argument that the judicial engagement on gender is premised on normative notion of gendered roles within the Hindu family.²⁹⁴ Even in those instances in which there seems to be progress made on gender equality, it is but a fleeting impression and the reasoning reverts to these normative notions of gender. In the next chapter, I take these arguments further to demonstrate how the judges engage with gender roles in the context of the Hindu family, and how this leads to the creation of a new category of Hindu woman, namely, the Elite Dependent.

²⁹¹ Gopika Solanki, *'Beyond the Limitations of the Impasse: Feminism, Multiculturalism, and Legal Reforms in Religious Family Laws in India'* (2013) 40 *Politikon*.

²⁹² Nivedita Menon, *'Sexuality, Caste, Governmentality: Contests over "gender" in India'* (2009) 91 *Feminist Review*.

²⁹³ For instance, see Srimati Basu, *The Trouble with Marriage - Feminists Confront Law and Violence in India* (First, University of California Press 2015), Flavia Agnes, *Law and Gender Inequality - The Politics of Women's Rights in India* (Oxford University Press 1999), Srimati Basu, *'Judges of Normality: Mediating Marriage in the Family Courts of Kolkata, India'* (2012) 37 *Signs*, Maitrayee Mukhopadhyay, *Legally Dispossessed: Gender, Identity and the Process of Law* (Stree, Calcutta 1998), Nivedita Menon, *Seeing like a Feminist* (Zubaan, India with Penguin UK 2012).

²⁹⁴ I take this argument further in Chapter 6.

Chapter 5 – The Elite Dependent in Judicial Reasoning

5.1 Introduction

In the last chapter, I examined how normative notions of gender roles undermine formal ideas of equality that are often reflected in the judgments under discussion. These judgments are mediated through the perception of the judges and can be considered as “acts of legal translation that revise and recreate gender.”²⁹⁵ While I have explored the larger idea of how judicial reasoning is premised on gendered norms there, I now deepen this analysis by looking at how aspects of gender are reasoned in the cases and how they create a certain figure of the middle-class Hindu woman, namely, the Elite Dependent. I discussed some features of the Elite Dependent in the last chapter. For instance, in the section on how the mother becomes the father, I demonstrated how judicial reasoning is quick to give the mother custody, especially in those instances in which she is financially sound and capable of providing for the needs of the child(ren). In this chapter, I take my argument further to demonstrate that judicial reasoning in the cases under study, envisages the Hindu woman to possess a second order status compared to the Hindu man, within the family.

In this chapter, I argue that judicial reasoning in the cases under study creates a certain figure of the Hindu woman, i.e., the Elite Dependent. My sub-argument is that this category has legal rights but a secondary status in the Hindu family. In doing so, I address my second research question – How have judges conceptualised the Hindu woman in the cases under study? I elaborate on this question by analysing different aspects of gender that have been discussed in these cases, with a focus on the expectations of the judges on

²⁹⁵ Srimati Basu, *She Comes to Take Her Rights* (State University of New York Press 1999).

how a woman ought to be acting as a parent. From this analysis, I demonstrate that judicial reasoning in these cases creates the category of the Elite Dependent – the upper-class Hindu woman who is subservient and who adheres to a gendered role of motherhood within the family.

In the following section, I analyse how the judges construct notions of marriage, home and family life in the judgments under study. Further, I demonstrate how a gendered notion of the father being the provider for the family is constructed by the judges in these cases. In the next section, I analyse the cases to show that judges construct the mother as the nurturer and caregiver and denounce any deviation from this established norm, while no such deviation is discussed or denounced for the father. In the last section, I demonstrate how this differentiation in treatment between the father and the mother constructs the category of the Elite Dependent.

5.2 Judicial Construction of Marriage and Family

In most judgments under study, the legal presumption is that marital relationships are the exclusive sites of legitimate sexuality.²⁹⁶ As I elaborated in Chapter 3, this presumption helped to establish normative gendered roles within the Hindu family as the idea found its way into the legislation of the Hindu code, due to a confluence of several factors. The idea of gendered roles within a Hindu family is often reflected in judicial reasoning, as I demonstrated in the last chapter. In this section, I analyse how judicial reasoning views marriage and family in the cases under study and how this reasoning reproduces the gendering of roles within the Hindu family.

²⁹⁶ For a detailed analysis on this, see Brenda Cossman and Ratna Kapur, *Subversive Sites - Feminist Engagements with Law in India* (Sage Publications India Pvt Ltd 1996). Also, none of the judgments under study pertain to unmarried couples.

The idea that a normative family, created through the institution of marriage, is the basic building block of society, finds mention in some of the judicial decisions. For instance, in the case of *Sumedha Nagpal v. State of Delhi* (wherein the mother was seeking custody of the children), the Supreme Court observed that -

*"The basic unit of society is the family and that marriage creates the most important relation in life, which influences morality and civilization of people, than any other institution. During infancy and impressionable age, the care and warmth of both the parents are required for the welfare of the child."*²⁹⁷

Here, the judges consider family and marriage to be important relationships and directly extrapolate them to morality and civilization, emphasising the normative basis of their reasoning. There is no explanation provided in the reasoning to demonstrate how such an extrapolation is possible. Further, they observe that it is difficult for courts to decide on custody issues but that such a decision must be made without being "repugnant to normal concepts of family and marriage".²⁹⁸ Here, there is an underlying presumption that there exists "normal" concepts of family, indicative of normative premises about family and marriage. This shows how deeply entrenched the ideal of the conjugal Hindu family is, in the minds of these judges.²⁹⁹

²⁹⁷ *Sumedha Nagpal v. State of Delhi* (2000) (9) SCC 745.

²⁹⁸ "But a decision there must be, and it cannot be one repugnant to normal concepts of family and marriage" (*Sumedha Nagpal v. State of Delhi* (2000) (9) SCC 745).

²⁹⁹ For a detailed analysis on how the state recognised only the dominant family norm of the patriarchal heterosexual family and how in the course of time, this emerged as the only norm, see Brenda Cossman and Ratna Kapur, 'Women, Familial Ideology and the Constitution: Challenging Equality Rights' in Ratna Kapur (ed), *Feminist Terrains in Legal Domains: Interdisciplinary Essays on Women and Law in India* (Kali for Women, New Delhi 1996), Brenda Cossman and Ratna Kapur, *Subversive Sites - Feminist Engagements with Law in India* (Sage Publications India Pvt Ltd 1996).

In *Gaurav Nagpal vs Sumedha Nagpal*, the father held on to the custody of the son, despite the lower court granting mother custody and increased maintenance.³⁰⁰ He violated the orders of the lower court and had contempt proceedings initiated against him. The father claimed that it was in the best interests of the child to be in his custody as he could provide better financially. He also claimed that the child hated his mother. After considering both sides, the Supreme Court granted the mother custody and the father visitation rights. The court claimed that –

*“Matrimonial discords are on the rise at an alarming rate. The sanctity of marriages is under cloud, which in a great way affects the society at large. Individuals can in no way be segregated from the society to which they belong. The cultural heritage of a country is greatly influenced by a pattern of behaviour of individuals and more so in matters of matrimony. Home can be a wonderful place to live. But continuous fights between the partners of a marriage disturb the atmosphere at home and create havoc on the members of a family.”*³⁰¹

The judges in this case consider it important to save marriages at any cost as it is perceived that the breakdown of marriages would lead to a fall in social and cultural values, especially impacting children of such marriages. The judgment further frames marriage as a “physical and mental union”, that “the home should not be an arena for ego clashes and misunderstandings”, while ignoring the fact that this may not always be possible in circumstances such as this one.³⁰² While the court held that the father cannot benefit from his own

³⁰⁰ This case had the same parties as the last, as the parents were fighting for custody simultaneously.

³⁰¹ *Gaurav Nagpal vs Sumedha Nagpal AIR (2009) SC 557.*

³⁰² *“Marital happiness depends upon mutual trust, respect and understanding. A home should not be an arena for ego clashes and misunderstandings. There should be physical and mental union. Marriage is something, Ibsen said in “The League of Youth” you have to give your whole mind to. If marriages are made in Heaven as Tennyson said in Ayloner’s Field, why make matrimonial home hell is a big question” (Gaurav Nagpal vs Sumedha Nagpal AIR (2009) SC 557).*

wrong, it failed to reflect on how generalisations on marriage or home are ineffective, not to mention detrimental, under such circumstances. The judgment appears to be a series of generalisations on how the judges perceive home, marriage and family life ought to be, rather than providing in-depth analysis of the case and its circumstances. But these generalisations help to understand the basis of the reasoning employed by the judges.

Further, the judges made generic observations that matrimonial disputes impact girl children adversely as a girl child from a broken home is shunned by prospective suitor's parents for no fault of her own, thereby reinforcing gendered social perceptions.³⁰³ However, they made no mention of the effect matrimonial disputes can have on boy children. Normative yardsticks are applied for girls and boys, as the judges state that it is the girl child whose marriage prospects would be hampered by the parents' divorce. The reasoning in this case is coloured by gendered norms, rather than an understanding of the impact of social and psychological issues upon all family members, in the event of a divorce. This is especially evident from the judicial insistence on saving marriages of parents as well as girl children, at any cost.

Another instance of judicial interpretation of what home and family life ought to be is found in the case of *Amit Beri and Anr. Vs. Smt. Sheetal Beri*, decided by the Allahabad High Court. In this case, the Court observed that the father and mother of the child had a "love marriage"³⁰⁴ and subsequently moved to

³⁰³ *"It is unfortunate that in their fight more often on account of egoism the children suffer, more particularly when the child is a girl. It is not uncommon to see that at the time of negotiation of marriage, the boy's parents shy away because the girl is from a broken family and/or the parents are divorced."* (*Gaurav Nagpal vs Sumedha Nagpal AIR (2009) SC 557*).

³⁰⁴ "Love marriage" is an Indian-English term used to denote the exercise of choice to find a marital partner, as opposed to the dominant social practice of "Arranged marriage", where one's family decides on one's marital partner based on caste and social status. In popular imagination, love marriages are on shaky ground as they have no family/parental backing or support and this term is often used in a disparaging sense to indicate socially unacceptable marriages. The judges choose to use this term in some of the judgments and claim that the parents have had a "love marriage", as if

Dubai. The mother was working in Dubai and left the child in a care home while she worked, just like thousands of mothers all over the world. Her sister, who was divorced, also lived and worked in Dubai. The parents of the child separated due to marital discord and the child remained with the mother. The father (along with his father, i.e., the child's paternal grandfather), sued the mother for custody claiming that he could provide a better financial environment for the child. The father also accused the mother of inappropriate behaviour as she used to go to night clubs. In this context, the judge, while initially glorifying the mother,³⁰⁵ observed that –

“However, in this connection, it is material that she admitted in cross-examination that whenever she used to come late in the night from the parties, her husband used to torture her and used to lock himself in the room to deprive her from the sexual relation. This statement clearly shows that the respondent used to attend such clubs and the appellant No. 1 had suspicion regarding her character and, therefore, forcibly used to keep himself aloof from her. The Indian culture is entirely different. I have already stated regarding the family background of the respondent No. 1 and her sister. She is also in the habit of attending night clubs and coming late to her house. During this period, the minor child has to be left in some care house for children. As the child will grow and attain the age of maturity, he is likely to come in contact with undesirable elements. Therefore, for proper brought-up of the child and that he may become a

that is reason enough for the marital breakdown (For instance, *Amit Beri and Anr. Vs. Smt. Sheetal Beri AIR (2003) All 78, Mausami Moitra Ganguli vs. Jayant Ganguli AIR (2008) SC 2262*).

³⁰⁵ The observations made in this judgment about the role of the mother are discussed in detail in Section 4.4.1.

*good citizen and may have good character, it is necessary that he may not be left with the respondent”.*³⁰⁶

Here, the judge reasons that the mother, who has taken care of the child from birth, is unsuitable to have custody as she stays out late at night and is influenced by her sister, who is a divorcee. There is a judicial assumption here that the woman who is a divorcee would somehow lead her sister down the same path. Moreover, the judge states that the mother’s behaviour is opposed to the idea of “Indian culture”.³⁰⁷ Here, there is an assumption that there is such a thing as a common Indian culture in a land where language and cuisine changes every 50 kilometres. This decision is a good example of a deeply entrenched normative thinking of the judges, as it makes assumptions on the character and behaviour of the mother and her sister who do not confirm to normative ideals of womanhood or motherhood. The court assumes that the child who is left in care homes would somehow grow up to associate with ‘undesirable elements’, without any actual evidence for making such presumptions. The court makes a moral judgment on the mother for visiting night clubs and links this to the fiction of Indian culture to provide justification for its reasoning, rather than basing it on any point of fact.

In these cases, it is evident that the judges’ reasoning on the Hindu family reveals deep-seated normative notions in the judicial thinking that subscribes to set gender roles of parents. This thinking does not problematise gender relations and has an approach of inevitability towards understanding gender. However, there are some instances in which some judges have attempted to

³⁰⁶ *Amit Beri and Anr. Vs. Smt. Sheetal Beri AIR (2003) All 78*. This judgment went on appeal and was overturned by the Supreme Court of India. It was then sent back to the High Court for revision. In the revision order, the blatantly gendered assumptions made in the original judgment were set aside and the mother was awarded custody.

³⁰⁷ The term “Indian culture” is used in popular parlance to establish a common cultural idiom for India, especially to distinguish it from “Western” culture that is considered more ‘promiscuous’.

adopt a gender- neutral tone, thereby attempting gender justice, as evidenced in the following cases.

For instance, in the case of *Chethana Ramatheertha vs Kumar V. Jahgirdar* discussed in the last chapter, the mother remarried a famous cricketeer and she claimed custody of the child. The father's counsel argued that the father had dedicated his life to the welfare of the child and that the mother was selfish to have remarried, along the lines of common social perception and normative notions of gender. The Court, however, quashed this argument and observed that -

"The mother getting married again after the divorce, cannot be termed as an act of selfishness as is sought to be projected by the learned Counsel for the respondent-father. Developments and progress in law is very slow and tardy. Changes brought about by codified law to any customary or conventional practices are always opposed and decried as lowering the values in the society. We, at any rate, cannot attribute any virtue to the father who has remained not married subsequent to divorce and/or attribute any selfishness to the mother for her marriage after her divorce with the respondent. We cannot also accept the submission on behalf of the respondent-father that the father has remained unmarried after his divorce with the present appellant only with a view to promote the welfare of the child. We merely accept that it is a fact that he has remained unmarried so far and as to what could be the outcome on the aspect of the welfare of the child in the context of deciding the entrustment of custody of the child and nothing beyond."³⁰⁸

³⁰⁸ *Chethana Ramatheertha vs Kumar V. Jahgirdar* (2003) (3) KarLJ 530.

Here, the Court rightly points out that mother's remarriage has little or no bearing on the case as it would be incorrect to assume that a mother is incapable of looking after her child, only because she is remarried. The father remaining unmarried cannot be touted as a virtue or a point in his favour. The Court also acknowledges that in a conflict between customary and codified law, it is common to claim that codified law is in opposition to customary practices and that it erodes social values, without any reflection on whether this is true. What is evident is that the Court adopts a gender-neutral stance, rather than painting the mother as someone who has failed in her parental role due to her remarriage.

In another case, *Smt. Imarti Devi vs. Madhu Devi*, the father died, and the mother of the child remarried. The child was living with the mother and her second husband. The paternal grandmother of the child claimed custody in its best interests, based on a precedent that the mother's remarriage made the child appear to be in the foster care of the step-father.

*"The argument that as respondent has remarried, custody of the minor should be entrusted to the appellant is abhorrent to the very concept of parenthood and a throwback to feudal times in our social past. The right of a widow to remarry, is absolute and not circumscribed by any condition, that requires her to give up her minor child as a condition precedent to a second marriage"*³⁰⁹

The court references the legislative history on widow remarriage in India, which was hard-won after many battles with conservative Hindus. It takes the side of the widow and ascertains that her rights of being a parent remain intact, despite her remarriage. The cases of *Chethana Ramatheertha* and *Smt.*

³⁰⁹ *Smt. Imarti Devi vs. Madhu Devi* (2013) (172) PLR 373.

Imarti Devi constitute a moment of potential where the judges attempt to break free from normative traditions and customs. They provide glimpses of a gender-neutral reasoning adopted by the judges, but such instances are few and far between. In most cases, normative notions of marriage and family are repeatedly reinforced by the judges, as seen earlier.

What emerges from these cases is that the judges favour normative notions of home and family life and perceive them as they ought to be, rather than as they are, even as late as 2009. The ideal of the heterosexual family with gendered roles for parents is considered the norm. Home and family life is constructed around this ideal. Any rupture in this ideal form is considered to cause adverse effect on society, culture, morality and civilisation. The cultural assumptions with respect to gendered roles are emphasised repeatedly and any deviation from the standard is harmful to the system and a threat to the cultural ethos.

More importantly, we can see the emergence of a certain type of Hindu middle-class woman in these decisions – a woman who is expected to stay true to her traditional roots, while being educated and/or financially capable.³¹⁰ This woman has the advantages of privilege, usually in the form of education and/or employment. She confirms to the definition of being elite, as she can determine the conditions of her own life and that of her children. This is a significant achievement in a country where most of the female population live in sub-par conditions. However, while enjoying the privilege

³¹⁰ For a detailed discussion on the education and financial capacity of the mother, see Chapter 4. Some of the cases that support this point are *Baby Kavya Awasthi and Another vs. State of U.P. and Ors* (2013) (5) ACJ72, *Smt. Gundamma vs. Shivasharanappa* AIR (2004) Kant 357, *Amrit Pal Singh vs. Jasmit Kaur* AIR (2006) Delhi 213, *Chethana Ramatheertha vs Kumar V. Jahgirdar* (2003) (3) KarLJ 530, *Vikram Vir Vohra vs Shalini Bhalla* 170 (2010) DLT 303, *R. Muruga Perumal vs. J. Radhamani* (2009) (4) LW 527, *R. Manivasakan vs. M. Vimala* (2012) (8) MLJ 547, *Nibha Kumari vs. State of Bihar and Ors* (2003) (2) PLJR 60 and *Mohan Kumar Rayana vs. Komal Mohan Rayana* (2009) (3) Bom CR 308. In all these instances, the mother is suitable for gaining custody of the child as she can provide for the needs of the child(ren) and is usually educated, with a career of her own.

of being an elite, this woman is also expected to confirm to her traditional roots and obediently follow normative ideas of home, marriage and family life. This makes her position paradoxical in the social and familial hierarchy. I elaborate more on the role of this woman within the family subsequently in this chapter. Before doing this, I demonstrate how the father is constructed in judicial reasoning in the next section. This helps in understanding how the treatment of the mother is different from that of the father, in the eyes of the judges.

5.3 Judicial Construction of Father

With respect to the roles and responsibilities of a father, the courts tend to take a normative stance on the father's role as a provider. The father is the preferred natural guardian of the child as per Sec.6 of HMGA and he is also considered the dominant parent in the judgments.³¹¹ The judges consider the father to be the provider of all needs, especially those which are economic in nature. The father is presumed to be the natural bread winner of the family by the judges and he is ready to undertake any kind of hardship to ensure that the material needs of the child are met.

For instance, in one case, the maternal grandparents had custody of a four-year old child, as the mother committed suicide. The child's surname was changed, and he was not told that he had a natural father by his grandparents. The father sued the grandparents, seeking custody. He claimed that he was coerced into signing an affidavit relinquishing custody to the maternal

³¹¹ See *Githa Hariharan v. Reserve Bank of India (1999) (2) SCC 228*, discussed in Chapter 4. While this idea was present in *Githa Hariharan*, it appears to be a well-entrenched proposition appearing in many judgments earlier too. For instance, in *N. Palanisami vs. A. Palaniswamy*, the Madras High Court held that –

“A father will always be proud of and passing on his tradition to his children and the children also will have more interest in inheriting the tradition from the paternal side, rather than the maternal side.” (*N. Palanisami vs. A. Palaniswamy AIR (1998) Mad 264*).

grandparents. He also contended that he had to face criminal proceedings subsequently and was denied access to the child. Here, the Court observed that –

“A father would do all extra effort to see that his son/daughter does better in life than he himself has done. This normally cannot be expected from any other person howsoever affluent he may be, howsoever rich he may be and howsoever related he may with the child”³¹²

This is an example of the type of positive presumptions that have been made in favour of the father, to the extent that the court ruled that even emotional disturbances caused to the child are not valid considerations as they would be short-lived -

“The emotional disturbances of the child would have been for a short period and the child would have adopted to the new circumstances.”³¹³

Here, the court does not consider the father’s suitability to take care of the child on his own. The father is virtually a stranger to the child, but this is overlooked by the judges. The only factor under consideration is that the father is the natural guardian of the child and even the welfare of the child takes a back seat.

In some instances, the judges provide a gendered interpretation of the father’s role as the provider. In the context of arranged marriages in India, the father of a girl child is responsible for her marriage expenses as well as the payment of her dowry. For this reason, Indian society considers a daughter to be a burden on the family, in contrast to sons who earn for their parents. The

³¹² *Ram Murti Chopra and Anr vs Nagesh Tyagi (2008) ILR (12) Delhi 169.*

³¹³ *Ibid.*

normative notion that the father is responsible for providing for a daughter's marriage finds its way in the judicial reasoning, as seen below –

“Welfare will be protected socially and financially if custody is provided to father. Also, child will be approaching marriage in a few years and father will definitely take care of her education, marriage, etc which would obviously ensure her welfare. Though father left minor in the care of maternal grandparents since age one, he still is entitled to custody as natural guardian.”³¹⁴

In this case, the father had entrusted the care of his one-year old daughter to his father-in-law, after the demise of his wife. He filed an application for custody of his daughter when she was about 8, which was rejected by the trial judge. On appeal, the High Court overturned the trial judge ruling and entrusted the custody of the child to the father. At the time of this judgment, the child was almost 13 years of age. The maternal grandparents contended that the father of the child was responsible for the mother's death, as he tortured her mentally and physically leading to her illness and death. The child stated under oath to the trial judge that she did not want to go with her father. However, the court considered this to be tutored by her grandparents and was deemed incapable of forming her own opinions by the Court. However, the child's claim that her father provided for her maintenance and educational expenses was deemed correct. The maternal grandparents were unable to prove their source of income though they claimed to own a small shop. The court observed that –

“Since Ku. Roshani has been staying with her maternal grand-parents since her infancy she must have developed affinity and affection for

³¹⁴ *Ashok Kumar Jatav vs. Ku. Roshani and Anr. (2005) (3) MPHT 364.*

them. However, same cannot be given undue weightage or importance so as to deprive her natural father from seeking restoration of the custody of his daughter.”³¹⁵

Here, like in the case of *Ram Murti Chopra*, there is a positive presumption that the father is the provider and will be able to provide for the daughter’s education and marriage. The grandparents’ claim as well as the child’s opinion, were overturned in favour of the father. Also, the welfare of the child took a back seat to the rights of the father, as the child was forced to live with a father who was a stranger to her.

While the above case is an example of how a father is looked at in relation to a girl child, I now analyse a case in which the judges describe the importance of a father in the life of a boy child. In this case, the role of the father is supposed to be positive and influential for a boy child who was about 12 ½ years old and approaching adolescence, the Court held that -

“Father's care and love has a powerful and positive impact upon the development and health of a child. In addition, numerous studies have found that children who live with their father are more likely to have good physical and emotional health to achieve academically and more likely to exhibit self-control and pro-social behaviour. It is important that the minor has his father's care and guidance, at this formative and impressionable stage of his life.”³¹⁶

While the court provided joint custody of the child to both parents with equal visitation rights, it saw fit to make the above observations only with respect to the father. There was no professional evidence from child psychiatrists to

³¹⁵ Ibid.

³¹⁶ *K.M. Vinaya vs. B.R. Srinivas, Miscellaneous First Appeal No.1729 of 2011(High Court of Karnataka at Bangalore, 13/09/2013).*

substantiate the studies mentioned in the judgment. These observations were made, despite the mother having custody of the child from birth in this instance. It appears that the Court accepted the role of the father unconditionally. The judicial presumption here appears to be that the father can do no wrong. He is the natural guardian assigned under Hindu law and he is taken at face value, despite the Welfare principle and the judgment in *Githa Hariharan*.

In the case of *Nallamala Padmaja vs. Nallamala Ramesh*, the mother sought custody of a female child who was 12 years of age and studying in a residential school. The mother claimed that the father of the child harassed her, and she then separated from him. The father contravened the court order and committed contempt of court. However, the Court held that –

“Though the father contravened court order and committed contempt, it was held to be in the interest of the minor girl and according to her wishes. Held that the custody of minor girl should be with her father as it was in her welfare.”³¹⁷

The contempt committed by the father is condoned and he is handed over custody, without any enquiry into his suitability. Moreover, the Court provides weightage to the wishes of the child in deciding her custody. This is one of the few instances in which the voice of the child plays a prominent role. The mother’s claim of harassment is not paid much heed by the Court and the father is provided custody, despite acting in violation of the lower court order.

In the case of *Shailesh Khandelwal vs. Meenakshi Khandelwal*, the parents obtained divorce by mutual consent and custody of the minor daughter was with the mother, though the family court did not pass any order on custody.

³¹⁷ *Nallamala Padmaja vs. Nallamala Ramesh (2008) (6) ALD 726.*

As the mother was working and staying alone at Hyderabad, she left the child in the care of her father (i.e., the child's maternal grandfather). The father of the child took her away on a vacation with the grandfather's permission, but without the mother's consent. He did not return her, claiming that the child was looked after well by his family. The mother claimed custody, and this was allowed by the trial court. In this instance, the father went on appeal to the High Court of Chhattisgarh, which granted custody to the father and visitation rights to the mother. The Court observed that -

"There is nothing on record to suggest that the Welfare of the child is in any way peril in the hands of the father. The statutory presumption that the father being the natural guardian is better suited for the child is also a relevant consideration. The child was given in the custody of the Respondent by learned trial Court on the sole criterion of her more sound financial position but the trial Court ignored other aspects of the matter as also did not call her to ascertain her wishes as to with whom she wants to stay. The trial Court over looked the fact that the mother is living alone at Hyderabad and is not in a position to look after her daughter all the time. How a child of such a tender age could survive alone was not considered. Moreover, the child being in the custody of natural guardian i.e. father it cannot be said that an unauthorized person has removed the child from the custody of her natural guardian."³¹⁸

Here, once again, the father's actions are perceived as the norm by the judges. Moreover, the father being the natural guardian under HMGA excused his actions of taking the child away without the mother's consent. The child was supposedly happy with the father and her paternal grandparents, which was also in favour of the father. The fact that the mother worked in a bank in a big

³¹⁸ *Shailesh Khandelwal vs. Meenakshi Khandelwal (2011) (2) CG.L.R.W. 187.*

city seemed to have worked against her, as the judges concluded that she would be unable to look after the child. Here, the father's actions are condoned easily, while the mother is held accountable for having a career.

In the case of *Niranjan Singh Huda and Anr vs. Tavinder Pal Singh Bhatia and Anr*, the judges held that it was in the interest of the minor if the custody is provided to the father, despite the latter being criminally convicted. Here, the father of the child was convicted to seven years of rigorous imprisonment, as he was found guilty in the case lodged against him for the death of the mother due to burn injuries. The father was released on bail subsequently. The maternal grandparents of the child claimed custody as the father was criminally convicted for the death of the mother. The child was about seven years of age at the time of the judgment. She wished to remain with the father and claimed that she did not recognize her grandparents. The High Court of Chhattisgarh held that –

“The fact that the father has been convicted and presently his appeal is pending before High Court would not dis-entitle him to keep his daughter with him, if otherwise the welfare of the daughter lies in residing with her father. Here, it cannot be forgotten that the Appellants are aged and the child has never resided with them in the past.”³¹⁹

While this case is one of extreme circumstances, what emerges from the analysis of these cases is that the father is judged on normative notions of being the provider for the child(ren) and is excused in several instances due to his legal position as a natural guardian of a Hindu minor. The judicial reasoning in these cases appears to have an underlying assumption that the father is the dominant parent. If this is the judicial construction of the father,

³¹⁹ *Niranjan Singh Huda and Anr vs. Tavinder Pal Singh Bhatia and Anr (2011) (2) CGLJ 417.*

how is the mother constructed in judicial reasoning? Is she treated any differently in these judgments, when compared to the father? These are the questions that I explore in the next section.

5.4 Judicial Construction of Mother

5.4.1 The Caregiving Mother

In this section, I analyse how the mother is provided the gendered role of the caregiver in the family. Further, I argue that this role is used in judicial reasoning to legitimise gender norms. The female members in a Hindu family, especially in the role of mothers, are considered nurturers and care-givers by the judges. The role of the mother as the natural nurturer and care giver is accepted unquestioningly in several judgments.³²⁰ For instance, in the case of *Amit Beri and Anr. Vs. Smt. Sheetal Beri* discussed earlier, the judges held that

–

*"When it comes to Mother v. Father for custody of the child, we should in normal circumstances lean towards the Mother. Mother's love is proverbial. Every religion, every culture, every civilization has acknowledged this. The love, affection and care, which a mother can bestow on her child, cannot be given by anyone else, including the father."*³²¹

While the judges waxed eloquent about the generic role of the mother in this case, they chose to provide custody to the father as the mother was considered not to conform to her traditional role, as she went to late night parties and clubs.

³²⁰ For instance, *Ruchirkumar Gajanandbhai Suthar and 2 Ors. Vs. Amitaben D/o Hasmukhlal Nanchanddas Mewada, Shiwani Kabra vs. Shaleen Kabra* (2011) ILR 2 Delhi 754, *Smt. Pushpa and Another vs Smt. Anshu Chaudhary* (2013) (6) ALJ 628, *Baby Kavya Awasthi and Another vs. State of U.P. and Ors* (2013) (5) ACJ 72, *Chethana Ramatheertha vs Kumar V. Jahgirdar* (2003) (3) KarLJ 530.

³²¹ *Amit Beri and Anr. Vs. Smt. Sheetal Beri* AIR (2003) All 78.

A similar theme is evident in the case of *Baby Kavya Awasthi and Another vs. State of U.P. and Ors*, where the judges observed that –

*“The natural mother can sacrifice anything and can cherish more love, affection and care in fact appears to have gone mad to have her custody for her welfare. It is not out of place to mention here that the mother is greater than earth and dearer than even the heaven. Her love and affection cannot be compared in any manner whatsoever to that of any man or women.”*³²²

Normative notions of gender are very prominent in the instances where the judges choose to define the role of the mother within the family. The judicial reasoning repeatedly stresses the importance of the mother in the care of a young child. As seen earlier, the mother is presumed to be the caregiver and nurturer, playing a pivotal role in the education and upbringing of her children. The mother’s care and company are perceived to be the most “natural” state for the child. But, at the same time, the judges also observed that the custody cannot be granted to the mother if she is financially, morally or otherwise incapable of taking care of the child.

*“The role of the mother in the development of a child's personality and her ability to do so can never be doubted. In fact, a child gets the best protection and education only through the mother even in nature.....Neither the father nor any other person can endow the same kind of love, affection, care and sympathies to a child that as of a mother.”*³²³

³²² *Baby Kavya Awasthi and Another vs. State of U.P. and Ors* (2013) (5) ACJ 72. Similar sentiment is expressed in *Chethana Ramatheertha vs Kumar V. Jahgirdar* (2003) (3) KarLJ 530.

³²³ *Chethana Ramatheertha vs Kumar V. Jahgirdar* (2003) (3) KarLJ 530.

The affection and care provided by the mother is held by the judges to be unrivalled and even the father is not considered to be able to provide the same care.³²⁴ It is presumed by the judges that it is in the welfare of the child to provide custody to the mother, unless the mother is disqualified by her own mistakes.³²⁵ For instance, in the case of *Master Shobhit Vs. State of U.P. and Ors.*, the mother was accused of killing the father of the children with the help of her paramour. The Court held that –

“There has been no divergence of views that if mother is a drunkard, or she is a licentious lady, having extra marital relationship, or that she is unable to look after required welfare of the child or that she is morally unfit, she cannot be given custody of a child.”³²⁶

In the definitions of the mother in the earlier cases, there is evidently a strong nod by the judges to the ideals of motherhood and womanhood. In this case, such deviations are outlined and the court states categorically that she cannot be given custody of the child in these instances. The circumstances of this case were extreme. However, the judges have used an extreme instance as an opportunity for moral policing of mothers in general.³²⁷ The same standard does not apply to a father, while deciding his fitness for custody.

³²⁴ For instance, *Baby Kavya Awasthi and Another vs. State of U.P. and Ors (2013) (5) ACJ 72*. This is echoed in *Chethana Ramatheertha vs Kumar V. Jahgirdar (2003) (3) KarLJ 530*.

³²⁵ In the case of *Smt Bhabani Mallick vs. Swapan Kumar Mallick*, the High Court of Calcutta held that –

“There is no whisper in the said application that the mother i.e. the petitioner herein is incapable to up bring the said daughter or the welfare of the daughter would be in not keeping her in the custody of the mother either because of her behaviour, chastity or character” (Smt Bhabani Mallick vs. Swapan Kumar Mallick (2012) 1 CALLT 57 (HC).

³²⁶ *Master Shobhit Vs. State of U.P. and Ors. (2011) (89) ALR 136*.

³²⁷ A similar instance is found in the case of *Smt Radha alias Parimala v. N. Rangappa*, in which the father accused the mother of adultery and the mother claimed that the father harassed her for dowry. The Court stated that –

“The father's right to the custody of the minor children is neither an absolute nor an indefeasible one. The welfare of the child should be the paramount consideration. The mother can also be given the custody of the minors, if their welfare or interest should require

On a different note, when the custody involves an older female child, the judges vigorously advocate that the mother is the ideal companion and care giver for such a child. According to the judges, the mother is in a better position to aid and assist a female child in the turbulent years of adolescence and puberty, which is beyond the scope of the father. For instance, Abhilasha Kumari, Judge of the Ahmedabad High Court, ruled that a mother's care is important for the well-being of a girl child nearing her teens -

*"A different dimension comes into focus when the minor is a girl child. Given her inherent sensitivity, a minor girl is, normally, emotionally attached and attuned to her mother. A minor girl, especially, requires a physically, financially and emotionally stable and secure environment. Soon, she may be nearing the threshold of adolescence when the special guidance and care of a mother is necessary, for her overall wellbeing"*³²⁸

Here, there seems to be a distinct perception of gendering of parental roles, as the judges stress the importance of having the company of the mother during adolescence. There is no reasoning provided as to why a father may not be able to be supportive of his daughter entering adolescence; the judges

it, even if the father is otherwise fit to act as guardian." (*Smt Radha alias Parimala v. N. Rangappa AIR (2004) Kar 299*).

However, along with this, the Court also observed that the divorce decree was obtained by the father on grounds of adultery and the mother had not sought to set aside the decree, thereby casting aspersions on the mother's claim. This is one more instance of the man and the woman being subject to double-standards in the name of morality.

³²⁸ *Eshita d/o Hasmukhbhai Sitapara vs. Hiren Prabhudasbhai Brahmhatt, Special Civil Application No.10009 of 2009 (High Court of Gujarat at Ahmedabad, 18/12/2009)*. A similar idea is expressed by the Court in *Prabhat Kumar Vs. Himalini and Himalini Kashyap Vs. Prabhat Kumar (2010) 166 DLT 469*. In some instances, these gendered norms are expressed by the parties to the suit. One such instance is that *Sheila B. Das Vs. P.R. Sugasree*. Here, the mother, a paediatrician by profession, sought custody of the child by stating that –

"The appellant submitted that the minor child would soon attain puberty when she would need the guidance and instructions of a woman to enable her to deal with both physical and emotional changes which take place during such period." (*Sheila B. Das Vs. P.R. Sugasree AIR (2006) SC 1343*).

This was stated ahead of her claim of being a doctor and being in a better position to care for the child.

thereby undermine the role of the father. While the welfare principle is presumed to focus on the interests of the child, the judges hijack the notion of welfare to facilitate their reasoning based on gendered norms here.

Moreover, the Courts have envisaged the mother's role to be one of teaching the girl child a healthy respect for tradition as well as the values of marriage in some cases. They have delineated that, a girl child as well as her mother, are to be confined to the traditional roles of being cultured and well-groomed women equipped for the institution of marriage, without any place for other goals that they may aspire to have, as seen in the case of *Venugopalan vs. Beena* -

*"A mother's constant presence can instil in a minor's mind qualities of fidelity in life, and faith in the institution of marriage as well as solemn relations, essential for community life. In areas where lessons are to be imparted, for example in hygiene, grooming, selection of companions and the like, a father will be a poor substitute. An educated mother, who has made express offer, as could be seen from the order of the Family Court, for attending to her educational needs, according to us, is more suitable person to be entrusted with custody, if not guardianship."*³²⁹

Here, the court reasons that a mother must be educated or well-versed in the arts of domesticity and she is the best person to pass on these values to her daughter, the education of both mother and daughter being limited to this sphere. It is also ironic that a mother who is undergoing a divorce and seeking custody of her children (which is the circumstance in most of these cases) is

³²⁹ *Venugopalan vs. Beena* ILR (2006) (4) Kerala 583. The idea of an educated mother having custody of a female child finds resonance in several cases. For instance, *Chethana Ramatheertha vs Kumar V. Jahgirdar* (2003) (3) KarLJ 530, *Ruchirkumar Gajanandbhai Suthar and 2 Ors. Vs. Amitaben D/o Hasmukhlal Nanchanddas Mewada, Shiwani Kabra vs. Shaleen Kabra* (2011) ILR 2Delhi 754, *Nibha Kumari vs. State of Bihar and Ors* (2003) (2) PLJR 60 and *R. Muruga Perumal vs. J. Radhamani* (2009) (4) LW 527.

upheld as a model for educating her daughter on the values of marriage. The reasoning operates on underlying presumptions on gender and gendered norms, without considering the realities of the situation.

The notion that the mother is important to the growth and well-being of a female child is reflected in other cases as well. For instance, in *Chethana Ramatheertha vs Kumar V. Jahgirdar*, the judges observe that –

*“Company of a mother may be in fact much more valuable particularly to a growing up female child and until and unless there are compelling and justifiable reasons, a child should not be deprived of the company of the mother. The question is not so much as to whether father or mother gets the custody of the child, but as to whether the child should be deprived of the company of the mother.”*³³⁰

What is significant is that in all these cases, the gender of the child (i.e., the child being female) plays a key role in deciding custody. While some of the judgments are progressive like *Chethana Ramatheertha vs Kumar V. Jahgirdar*, most of them are examples of gendered iterations of the role of the mother in a child’s life. There is a tendency to glorify motherhood over all other types of relationships that a child has, and it appears that such glorification is a convenient mechanism to ensure that a woman performs the role of the mother and acts as the repository of culture and traditions that need to be passed on to the next generation of women.³³¹ As seen in chapter 3 earlier, social norms dictated that a woman’s chastity has a very real value. She was

³³⁰ *Chethana Ramatheertha vs Kumar V. Jahgirdar* 2003(3) KarLJ 530. Similar ideas about female child requiring the company and guidance of the mother is found in these cases - *Romani Singh vs. Lt. Col. Vivek Singh* 201(2013) DLT 742, *Alamelu Sockalingam vs. V. Venkatachalam* (2012) (6) CTC 907 and *R. Muruga Perumal vs. J. Radhamani* (2009) (4) LW 527.

³³¹ Flavia Agnes, *Law and Gender Inequality - The Politics of Women’s Rights in India* (Oxford University Press 1999). See also, Brenda Cossman and Ratna Kapur, *Subversive Sites - Feminist Engagements with Law in India* (Sage Publications India Pvt Ltd 1996).

considered as the repository of culture and traditions that kept the family system together during the colonial times, an idea that is also seen in these cases.³³²

What is evident in these examples is that the judges promote a certain normative ideal of the Hindu mother. She is a nurturer and care-giver for a young child and becomes the preserver of tradition and culture for older children, especially when the children are female. Judicial reasoning tends to be reductionist in these cases and imposes a one-size-fits-all notion of womanhood and motherhood, without considering the diverse contexts of the cases as well as the parties involved. The idea of a universal standard for Hindu womanhood and motherhood occupies central position in judicial interpretation, without much room for other positions. The roles of the mother and the father in a Hindu family are perceived to be inherently gendered by the judges and the mother is placed in a subservient position within the family. Such a premise tends to be debilitating to both men and women as they are confined to traditional roles and social hierarchies. While there is glorification of the mother's role in the child's life, what happens in those instances in which the mother deviates from this role? Is she still glorified as the mother of the child?

5.4.2 The Deviating Mother

In this section, I analyse a set of cases in which the mother of the child(ren) contends for custody but her claim is refused by the judges. The refusal is premised on the mother's 'deviating' behaviour from the accepted standard of motherhood, in the minds of the judges. The mother, in these instances,

³³² For a detailed of how this was portrayed in colonial Indian society, see, Tanika Sarkar, *Hindu Wife, Hindu Nation - Community, Religion and Cultural Nationalism* (Indiana University Press 2001), Partho Chatterjee, 'The Nationalist Resolution of the Women's Question' in K Sangari and Vaid.S. (eds) (Zubaan 1989). This has been discussed in detail in Chapter 3.

treads an anomalous path that is unacceptable to the judicial imagination. What is evident in these instances is that the mother is held to a high normative standard and any divergence from this is unacceptable.

In the case of *Murari Lal Sidana and Anr. Vs. Smt. Anita*, the respondent and her husband were married in 1997 and had two children in 1999 and 2000. Subsequently, there was matrimonial discord and the respondent left her marital home, leaving behind her two children (the boy was three and half years and the girl was two years at the time). A year later, the husband/father committed suicide and the children continued to remain under the care of the paternal grandparents. In 2004, the mother filed for custody and was granted the same by the Trial court in 2007. However, the grandparents filed an appeal the same year and this was decided on 19th of September 2012 by the High Court. The timelines in this case underline the slowness of the judicial process, due to which the children were thirteen and a half and twelve years respectively and had lived with their grandparents through their entire lives. The grandfather passed away during the pendency of this suit and the grandmother was awarded custody. The time taken to resolve the case had an impact on the children, as illustrated below.

The judge observed in this case that –

“For them, she (the mother) continues to be a mirage, a figment of imagination, a total stranger. To consign their custody to her is to rip them from their secure surrounding, to subject them to a psychological trauma. Such an act would amount to making guinea pigs of the children in a judicial experiment. It would cause them a grave injustice if their custody were to be handed over to the mother” ³³³

³³³ *Murari Lal Sidana and Anr. Vs. Smt. Anita AIR (2013) Raj 100.*

The judge does not consider that the mother has become a stranger due to the time taken for the judicial process, though she was prompt in filing an application for custody after the demise of her husband. The children refused to talk with their mother or go with her, as she was not familiar to them. The judge uses this as the reason for denying the mother custody as well as visitation rights.³³⁴ Moreover, the fact that the grandfather died during the pendency of the proceedings and the grandmother is too old to take care of the children is not considered.³³⁵ While there is no explicit reasoning on her failure to perform the role of the caregiving mother, there is an implied normative reasoning at play here. The spectre of welfare is raised as an excuse to deny the mother her rights, while not acknowledging that the situation arose from a lag in the judicial process. The mother is being penalized for leaving her marital home by denying her both custody and visitation of her children, while acknowledging that the grandparents prevented her from meeting or interacting with the children. Though the reasoning is to ensure that the best interests of the children are protected, this seems to be an instance of application of the legal principle, without considering the context. Here, the judicial reasoning considers the mother to have deviated from her expected role and denies her custody, though the underlying reasons for her behaviour are very different. What this case emphasises is that the perception of adhering to the gendered role of a mother is as important as actual adherence to the role, in judicial reasoning. While the father was a stranger to

³³⁴ The judge denies the mother custody and states –

“It would not serve any beneficial purpose to give the respondent-mother visiting rights. For, the children are adamant that they do not wish to interact with her. Simultaneously, the appellants have not encouraged the children to interact with her. If the visiting right were given to the respondent-mother, it may cause emotional and psychological trauma to the children who would have to comply with a court order that they are absolutely uncomfortable with” (Murari Lal Sidana and Anr. Vs. Smt. Anita AIR 2013 Raj 100).

³³⁵ As evidenced from the facts mentioned in the judgment.

the child in the case of *Ashok Kumar Jatav vs. Ku. Roshani and Anr.*,³³⁶ the Court awarded the father custody as he needed to provide for his daughter's wedding. However, the same courtesy was not extended to the mother in the case of *Murari Lal Sidana and Anr. Vs. Smt. Anita*.

The facts in the case of *Chhotibai vs. Sunita Kushwah* are similar to that of the above case. This was a case in which the mother fought with the paternal grandmother for the custody of her daughter. The mother and father of the child had separated due to discord. The father died of an illness after the separation and the child was residing with the grandmother since then. The grandmother contended that the mother was of unchaste character and was claiming custody to usurp her son's property. The mother refuted these claims and contended that there were issues of dowry harassment for which a First Information Report (FIR) was launched with the police but this was settled later. The child refused to go with the mother during the hearing of the case. The judge held that –

*"Apart from the aforesaid it is worth noting that the respondent did not have good marital relationship with her husband. There was marital discord as an FIR was lodged in connection with demand of dowry. True it is, there was a compromise, but as we perceive the said efforts did not bring in harmony and compatibility between the spouses. During serious ailment of the husband the respondent did not come to see him. She was away at her parental home on the excuse that she was suffering. We have only stated the aforesaid facts with regard to the emotional bond of the mother with the child"*³³⁷

³³⁶ *Ashok Kumar Jatav vs. Ku. Roshani and Anr.* (2005) (3) MPHT 364. For more on this, see Section 5.3.

³³⁷ *Chhotibai vs. Sunita Kushwah* (2009) (3) MPHT 175.

The reasoning focuses on how the mother does not build a good marital relationship and did not fulfil her role as the good wife, though there is an acknowledgement of the dowry demand by mention of the FIR. The judge in turn connects this to her ability to bond with the child and uses this as an excuse to deny her custody, as it would impair the welfare of the child. When a woman fails to fulfil the normative roles expected of her, she is considered unsuitable for custody, as in this instance. The universal standard of womanhood and motherhood that I demonstrated in the last section, holds good here as well. While the judicial presumption in most cases is that the mother is unique in providing care and affection to the child, she is considered for custody when the judges want to reinforce normative notions of gender (such as custody of older girl children) and rejected when she refuses to confirm to normative gender role of the good wife and mother.

In the case of *Dr. Seema Kumari Vs. The State of Bihar and Ors.*, the father and mother of the child were doctors pursuing their post-graduate studies. The father of the child died in mysterious circumstances in the hostel room of the mother. The paternal grandparents of the child believed that the mother was responsible for the death of their son. So, they refused to give up custody of the child, in favour of the mother. The Court provided custody to the paternal grandparents claiming that -

“On the other hand, the petitioner also claimed that she would not marry again and hence the child would be happy with her. This was in response to our suggestion that she has a long future and being young and talented she should consider to marry again with a suitable person. Although the apprehension of the respondents 3 and 4 may be mistaken but there is every possibility that in the present modern era the petitioner may find a suitable person to marry and resettle in a life in which the child may not have very welcome or healthy place.... With great difficulty

but without any doubt we come to the conclusion that change of custody of the concerned minor, a one and half year-old child, in the aforesaid facts and circumstances is unwarranted. It is most likely to be traumatic and may not be conducive to his welfare. Being a male child, he is a coparcener in the Hindu Family of his grandfather and he has legitimate claims upon the family which is expected to honour such claims with utmost care and devotion.”³³⁸

Here, the mother, a highly qualified professional, states categorically that she would not marry again and would take care of the child, but the Court opines that she is less likely to do so. Moreover, there is no judicial reflection as to why her remarriage would be harmful to the child’s welfare in any way. The grandparents’ allegation that she was responsible for the father’s death weighs more in judicial reasoning, than the condition of the mother. Another reason mentioned is that the child, being male, is a coparcener in the grandfather’s family. However, this is not a correct legal premise as custody decisions are based on the child’s welfare, rather than any legal right to property. So, it is unclear how the child’s right to the coparcenary can be used as a deciding factor in this case.

In this section, I have analysed cases in which the mother deviates from the ideal standards of womanhood and motherhood that is set by the judges in the cases studied in the last section. When we compare these two sets of cases and contrast them with the cases dealing with the construction of the father, what emerges is that there are differing yardsticks used by the judges to measure the father and the mother in a Hindu family. The father is the standard or norm and the mother is the other. The deviant behaviour of the

³³⁸ *Dr. Seema Kumari W/o late Dr. Shashi Shekhar and D/o Sri Rageshwar Prasad Sinha, Advocate, at present resident of Mohalla-Makhania Kuan Road, Patna Vs. The State of Bihar and Ors. (2012) (1) PLJR 186.*

father is excused or considered excusable, to the extent that custody is granted to the father in several instances. Moreover, the father being the natural guardian under Sec.6 of the HMGA is used as the basis for justifying custody in these instances. Such a privilege is not accorded to the mother. In most instances, the mother must justify how she is eligible to be awarded custody, especially in terms of welfare of the child. While the judges claim that welfare is the foundational principle for deciding custody, this is true only in instances where the mother confirms to the standard of ideal motherhood and does not deviate from it in any way. This differential and disparate treatment of the mother constructs the figure of the Elite Dependent, as I argue in the next section.

5.5 The Elite Dependent

As I discussed in the last chapter, judicial interpretation portrays the Hindu woman as an “Elite Dependent” as she is expected to be the educated, middle-class mother teaching normative values to her children as well as being dependent on her husband for economic resources in the cases under study. The Elite Dependent is a paradox, as she is provided equal legal treatment but subordinate economic treatment, within the Hindu family. She represents the tension between normative notion of gender roles and gender equality that is present in judicial reasoning. I have explored some aspects of how women in the cases under study are elite, in terms of their education and/or employment in some of the previous sections. In this section, I build on my argument from the last section to demonstrate that the Hindu woman holds a second-class status in the eyes of the judges, compared to the Hindu man, and I demonstrate how this disparate treatment constructs the figure of the Elite Dependent in judicial reasoning.

In the case of *Nibha Kumari vs. State of Bihar and Ors*, the mother and father separated, and the child was taken away from mother forcibly. The Court

awarded custody to the mother due to tender years of the child. In its reasoning, the Court observed that -

“Being an infant, 14 months old-an age at which he should be in the lap of the mother, there must be some cogent reason for allowing the custody to the father. There is no substitute for love and affection which a mother can give to her child, the lack of which may have an enduring effect.... She is an educated lady with ambition to start law practice, and we see no reason why she should be denied custody for the present”³³⁹

In this instance, the Court provides a normative justification for providing the mother custody, by presuming that the mother’s care of the child cannot be substituted. Simultaneously, there is an acknowledgement that the mother is an educated professional. What this signifies is that the woman holds a normative role in the family, while being an elite, educated lady. Here, the reasoning provides a striking contrast of opposing ideas, along with an attempt at establishing a legal equilibrium between the two.

In the case of *Venugopalan vs. Beena*, the father and the mother contested for custody of their daughter. The mother was provided custody based on the gender of the child and the Court reasoned that the educated mother is best placed to guide the girl child on matters of grooming and domesticity. The Court observed that -

“An educated mother, who has made express offer, as could be seen from the order of the Family Court, for attending to her educational needs, according to us, is more suitable person to be entrusted with custody, if not guardianship..... Definitely the age and gender of Raveena, who has

³³⁹ *Nibha Kumari vs. State of Bihar and Ors (2003) (2) PLJR 60.*

attained adolescence is a factor which requires the Court to opt her mother, contextually for acting as a governess."³⁴⁰

Here, the paradox of the Elite Dependent is visible once again in judicial reasoning. The mother is an elite, educated person but her sophistication or education is reduced to the act of being a governess for the child, thereby making the mother's role subservient to the father. The Court here claims that the mother needs to act as a governess for the child, which again raises questions about how the judges perceive the role of the mother in the Hindu family. Is the mother's role limited to that of a private tutor to her child/ren? Can the mother's contribution to a child's life be reduced to that of a governess? As I discussed earlier in the section on the judicial construction of the mother, judicial reasoning confines itself to normative notions of how a mother ought to be. Her education is to be used for helping her husband and children. In this case, the court takes this further to provide a reductionist reasoning that the mother of an adolescent girl is contextually her governess. However, we do not witness a similar reduction of the parental role of the father. The tension inherent in the role of the Elite Dependent, that of being educated yet subservient to the father, is exhibited in this instance.³⁴¹

³⁴⁰ *Venugopalan vs. Beena ILR (2006) (4) Kerala 583*. Similar sentiment is expressed in *Mr. T.L. Sivakumar Vs. Mrs. Sumithra @ Sumithra Sree Original Petition No.306 of 2010 (High Court of Madras, 07/02/2014)*.

³⁴¹ A similar tension can be seen in the case of *Amrit Pal Singh vs. Jasmit Kaur*, where the mother was awarded custody. In this case, the Court held as follows, using a normative premise of the mother's role along with her financial capability –

"In my opinion, the children should not be deprived of the company of their natural mother who is educated, and I am given to understand, financially capable of taking care of the children. She can also devote sufficient time to them, take care of their essentials, giving them a healthy growth and development. I see no substitution, in the present case, for mother's love and affection nor do I find any justification in denying the children of the family from receiving love, care and affection of their natural mother, which to my mind, is essential for the integral development and personality of the children." (*Amrit Pal Singh vs. Jasmit Kaur AIR (2006) Delhi 213*).

A similar reasoning is found in *Baby Kavya Awasthi and Another vs. State of U.P. and Ors (2013) (5) ACJ 72*.

While these cases are illustrative, they underline two key ideas I have discussed so far – judicial reasoning constructs a certain type of Hindu woman and this woman is treated disparately compared to the Hindu man. In most of these cases, the mother is defined by normative notion of a person who puts the welfare of her husband and children ahead of hers. She is expected to sacrifice her ambitions and/or her career, if they conflict with her family's interests. I have provided several examples of such cases throughout this chapter, in which the judges have called into question the mother's ability to look after her children, whenever she asserts her right to her own life. Whether it is the case of *Amit Beri* in Allahabad or that of *Dr. Seema Kumari* in Bihar, the judicial attitude is confined to a certain image of the educated mother who bows down to the needs of her family, rather than assert her independence. It is this conceptualisation of the Hindu woman that is upheld in most of the judgments under study. In most cases after *Githa Hariharan*, the judges seek to reconcile conflicting notions on the woman in the Hindu family. They attempt to balance the woman as the rights bearing individual with the woman as the ideal wife and mother. This constant push and pull reactions in the judicial voice leads to the construction of the category of the Elite Dependent as this woman has legal equality, while playing a subservient role in the family. This category of women occupies a conflicting and secondary position within the domain of the Hindu family.

In contrast, this kind of reasoning does not apply to the father in any of the judgments that I have studied. While the judges in some instances like that of *Chethana Ramatheertha* have attempted a gender-neutral tone, there are no attempts to ask a man why his education, employment, ambition or career goals should not be set aside in the interest of his wife and/or child(ren). As I have repeatedly demonstrated through the cases in the chapter, judicial reasoning exhibits a disparate treatment of gender.

5.6 Concluding Remarks

In this chapter, I first analyse the judicial perception of the Hindu family and argue that the Hindu family is premised on gendered roles, and this reflects in the reasoning of the judges. The judicial construction of the heterosexual family with defined gender roles, envisages that the mother is educated but adheres to her traditional roots. Using the cases, I then demonstrate that the judicial construction of the father is often that of the provider and dominant parent for the family. This reasoning by the judges often glosses over any anomalies in the father's behaviour and circumstances in several instances. However, the construction of the mother in judicial reasoning indicates a contradictory trend. The mother is often expected to conform to the ideals of womanhood and motherhood, thereby establishing a one-size-fits-all ideal of womanhood and motherhood. Any behaviour deviating from that which is expected of her, is not accepted by the judges. I then explain how the category of the Elite Dependent – the woman who is educated but subservient - is constructed by judicial reasoning. The cases that I analyse have indicated that this figure holds a subservient position compared to the Hindu man. This trope of the Elite Dependent is used to resolve the tension between the Constitutional idea of gender equality and protectionism of women in judicial reasoning, while simultaneously reinforcing the one-size-fits-all model of womanhood and motherhood that is adopted by the judges.

The judicial practice of reinforcing normative gender roles can be detrimental to the rights and existence of women in families and societies, irrespective of the communities they belong to. In this context, the Indian women's movement has repeatedly questioned these norms and has attempted to arrive at alternative solutions in their struggle for women's rights on the ground. Indian legal feminists have repeatedly raised this question - In a

hierarchical society like India, can equal laws apply to unequals? ³⁴² This is an important issue, as successive governments and the courts have relied on creation, interpretation and implementation of laws, without considering the lack of gender parity in lived experiences. Moreover, while I have analysed the category of the Elite Dependent within the private domain of the family, how does this category fit into the public domain? In the next chapter, I analyse how the Elite Dependent is related to the arguments on gender disparity and gender justice, within the feminist legal scholarship in India. I then use this analysis to argue that the judicial reasoning, premised on normative formulations of gender, impacts gender justice in the UCC.

³⁴² For more on this, see Nivedita Menon, *Recovering Subversion - Feminist Politics Beyond the Law* (Permanent Black 2004), Flavia Agnes, *Family Law Volume 2: Marriage, Divorce and Matrimonial Litigation* (Oxford University Press 2011).

Chapter 6 – Gendered Nature of Judicial Reasoning and the Uniform Civil Code

6.1 Introduction

In the last two chapters, I demonstrated that judicial reasoning is premised on normative ideas on gender, based on my analysis of custody cases. I established that the judges have often used gender-based presumptions, due to an inherently normative way of looking at the roles of the father and mother within a family. Moreover, I argued that they favoured a gendered hierarchy within families, while administering Hindu law. As I explained in the introductory chapters, Hindu law forms the largest body of law within Religious Personal Laws (RPLs) in India. Any aspect of judicial reasoning in Hindu law has a far-reaching consequence on the legal landscape in India, both in terms of gender parity and gender justice. So, it is important to situate the findings of the case analysis within the wider ambit of political and socio-legal debates in India. Why is it necessary to discuss the gendered nature of judicial reasoning and its impact on the Uniform Civil Code (UCC) in this thesis? The answer lies largely in two spheres - the feminist debates on the UCC and the current political climate in India - as I explore in this chapter.

Here, I analyse the relationship between judicial reasoning in the cases under study and Indian feminists' arguments on gender justice in RPLs. This relationship has often been uneasy and conflicted. Despite existing tensions, feminist theorisation is pivotal to this relationship, as it provides valuable insights for understanding how normative notions of gender in judicial reasoning impacts the cause of gender justice. I argue that the differential treatment of gender in judicial reasoning that I have discussed in previous chapters, furthers this aspect of feminist theorisation. I then examine the impact of this relationship on the formulation of a UCC to replace RPLs in

India. I locate my analysis of cases within the wider context of feminist debates on RPLs and demonstrate that the Hindu code may not be the ideal blue print for creating a UCC in the Indian context.

Most Indian feminists claim that RPLs tend to be gender discriminatory and treat women as second-class members within the family. These claims largely pertain to existing legislation and its impact on women in India. While feminist theorists and activists are largely engaged in analysis of how gendered roles create gender imbalances within families and in society, one area that is under-explored in scholarship is the influence of this normative view on gendered roles on judicial reasoning in personal laws. It is important to focus on this aspect, as such reasoning leads to the iteration of gendered hierarchies within families. As I explored in the last two chapters, judicial reasoning on families tends to assume a binary and idealised view of a family, with entrenched gender-based roles of caregiver and provider and tends to typecast women and men in these normative roles. While Indian feminist scholarship has repeatedly addressed how the law is gendered in legislation, there is a gap in the scholarship on how normative notions of gender have been applied in judicial reasoning. I address this gap in this chapter, by analysing how the definition and application of normative gender roles in judicial reasoning in the cases under study strengthens as well as deepens the Indian feminists' stance that RPLs are gender discriminatory.

The central idea in this chapter is that my arguments about the gendered nature of judicial reasoning help to develop and enhance the Indian feminists' position that the system of RPLs in India perpetuates existing gender inequalities. My sub-argument is that the gendered sub-text in judicial reasoning in these cases, decided under one of the key acts of the Hindu code, raises concerns about the egalitarian or uniform nature of the Hindu code. I

use these arguments to answer my third research question (consisting of two parts) –

- a. How does judicial reasoning on gender roles impact/inform the feminist debates on RPLs?
- b. Based on judicial reasoning in the cases under study, can the Hindu code be used as a blueprint for the UCC?

In the first section, I examine the Indian feminist positions on RPLs to establish the common denominator of these positions – that all religious personal laws are discriminatory and help to create a familial hierarchy based on gender. In the next section, I explain how I align with the Indian feminists' claim that RPLs are gender discriminatory, by way of my case analysis. I focus on the judicial reasoning and its treatment of gender and I demonstrate how my case analysis deepens and expands this position. Then, I analyse the positions adopted by feminist scholars on the UCC, while simultaneously providing some insights on how an egalitarian approach can be adopted and elaborate on the question of why the Hindu code may not serve as a good design for a UCC. In the next section, I demonstrate how my arguments segue into the feminist debates by analysing various aspects of the Indian feminists' arguments on RPLs and specifically the UCC.

6.2 Indian Feminist Positions on RPLs

In this section, I focus on the relationship between the Indian women's movement³⁴³ and RPLs, with a special emphasis on the role of law in that

³⁴³ The Indian women's movement has a rich and diverse history and is a confluence of several large and small movements (For more on this, see Radha Kumar, *The History of Doing - An Illustrated Account of Movements for Women's Rights and Feminism in India - 1800 - 1900* (Zubaan 1993). I have used the phrase to indicate the movement broadly, while acknowledging that it has several constituent parts.

relationship. The Indian women's movement is the first to view RPLs through a gendered lens and it examines RPLs from two angles – the differential treatment of different communities and the differential treatment of men and women of the same community.³⁴⁴ Both angles are considered important to any discussion on women's rights within and outside families in India and these are repeatedly explored in both feminist scholarship and activism over the last seven decades. Indian feminists often focus on RPLs as a source of gender discrimination across communities. I first outline the development of feminist positions on RPLs historically, as it helps to understand the debates in their political, social and legal contexts, and then situate my thesis within these theoretical debates.

As discussed in Chapter 3, the women's movement in India gained ground from the 1920s onwards. In 1937, the All India Women's conference discussed the possibility of a UCC to replace the personal laws of all communities. This idea was subsequently adopted by the nationalist leaders of the freedom struggle, as it was considered a method of providing uniformity and modernisation of RPLs. However, due to the volatile political climate after the partition of the country along religious lines, most nationalist leaders, like Nehru, thought it necessary to compromise with the minority communities.³⁴⁵

³⁴⁴ Tanja Herklotz, *'Religion-Based Personal Laws in India from a Women's Rights Perspective : Context and Some Recent Publications'* (2015) 5 *Südasien-Chronik - South Asia Chronicle*. She also provides a detailed analysis of the feminist discourse on RPLs, parts of which I have used in this section.

³⁴⁵ Agnes claims that at the time of India's freedom, the concern of the founding fathers was "formation of the new nation state and its smooth governance" and the UCC was debated within this context of 'authority of the state to regulate family relationships of citizens and rights of minorities' (Flavia Agnes, *'Nation Building through the Enactment of Hindu Code Bill – The Nehruvian Agenda'* (2007) 1 *Contemporary Perspectives*). See also, Shabnum Tejani, *'Between Inequality and Identity: The Indian Constituent Assembly and Religious Difference, 1946–50'* (2013) 33 *South Asia Research*. This view is also endorsed by Parashar, who stated that the hidden agenda was "unification of the nation through uniformity in law" (Archana Parashar, *Women and Family Law Reform in India* (Sage Publications Pvt Ltd, New Delhi 1992). Moreover, the nascent Indian government considered it better to continue the colonial policies and practices of law and governance, especially with respect to religious communities (Rina Verma Williams, *Postcolonial Politics and Personal Laws: Colonial Legal Legacies and the Indian State* (Oxford University Press 2006).

The newly formed Indian government backtracked on replacing personal laws with secular laws. This compromise was visible when the Constituent Assembly of India proposed (and later adopted) Article 44 of the Indian Constitution, which stated that the Indian state shall endeavour to secure a Uniform Civil Code (UCC) for its citizens.³⁴⁶ The idea of the UCC was thus confined to the pages of the Constitution. Initially, the public debates on a UCC and RPLs were primarily the subject of arguments on national integrity, secularism and modernity.³⁴⁷ The Indian Parliament formulated the modern Hindu Code, which combined Common Law principles with minimal aspects of customary Hindu law.³⁴⁸ The Hindu Code was hailed as a legislative milestone in modernising the Indian personal law system by the Indian legislators and the Indian woman's movement of the time, as several arguments on women's rights and their place in the family and nation started gaining ground during its passage in the 1950s.³⁴⁹

³⁴⁶ This provision was placed in the section on Directive Principles of State Policy, a non-justiciable part of the Indian Constitution, to ease minority anxieties - especially that of Muslim community and its leaders. (Siobhan Mullally, *'Feminism and Multicultural Dilemmas in India: Revisiting the Shah Bano Case'* (2004) 24 Oxford Journal of Legal Studies) The Uniform Civil Code (UCC) has been a bone of contention in the Indian political and legal spectrum for the last 70 years. Successive elected governments have failed to enact a uniform code to govern the entire population of the country, as they feared repercussions to their vote banks.

³⁴⁷ For instance, see Robert D Baird, 'Religion and Law in India: Adjusting to the Sacred as Secular' in Robert D Baird (ed), *Religion and Law in Independent India* (Manohar Publishers and Distributors 2005), Gerald James Larson, 'Introduction: The Secular State in a Religious Society' in Gerald James Larson (ed), *Religion and Personal Law in Secular India* (Indiana University Press 2001).

³⁴⁸ Agnes observes that "*Thus what emerges here is a duality of concerns for the newly evolving Indian State. At one level, it was deemed necessary that the various sects, castes and tribes of the vast majority from the erstwhile Princely States, territories under the control of various tribes and the British Raj - be integrated as one community by enacting a uniform set of family laws, by introducing a concept of 'legal Hinduism'. The flip side of this objective of smooth governance was an assurance to minorities (not just Muslim, but also Christian and Parsee) of their separate religious and cultural identity symbolised by the continuance of their personal laws.*" (Flavia Agnes, *'Nation Building through the Enactment of Hindu Code Bill – The Nehruvian Agenda'* (2007) 1 Contemporary Perspectives) To date, Muslims, Christians, Jews and Parsis in India are entitled to follow their religious laws to govern the sphere of the family.

³⁴⁹ *ibid.*

Through the 1960s and 70s and especially in the 1980s, the Indian women's movement worked towards addressing women's rights, specifically within the family. A significant change in the movement and gender scholarship occurred during the 1970s, with the publication of the "Towards Equality" Report in 1974 and the declaration of National Emergency in 1975, as the women's movement began to rethink questions of national integration and secularism.³⁵⁰ During this time, groups of women tried to engage both the state and civil society about social issues faced by women, by way of public protests, demonstrations and street plays and most feminist campaigns evolved around individuals or events.³⁵¹ This period also witnessed the idea that a secular code would both further the cause of gender justice and act as a counter to the rising force of Hindu nationalism.³⁵²

In the 1980s, women's groups began to move away from protests and plays towards forming personal relationships, exploring traditional sources of women's strength (rather than suffering) and celebrating courage and strength. This shift in attitude was especially pronounced after the *Shah Bano* judgment, as explained in the introductory chapter.³⁵³ The judgment was

³⁵⁰ For more on this, see Raka Ray, 'Introduction: The Politics of Knowledge - Gender Scholarship and Women's Movement in India' in Raka Ray (ed), *Handbook of Gender* (Oxford University Press 2012).

³⁵¹ Radha Kumar, 'Contemporary Indian Feminism' (1989) 0 Feminist Review.

³⁵² Tanja Herklotz, 'Dead Letters? The Uniform Civil Code through the Eyes of the Indian Women's Movement and the Indian Supreme Court' (2016) 6 *Südasien-Chronik - South Asia Chronicle*.

³⁵³ In the case of *Mohammed Ahmed Khan vs. Shah Bano Khan (1985) SC 945*, Shah Bano Begum, a Muslim woman, claimed maintenance from her husband under Sec.125 of the Code of Criminal Procedure of 1973, instead of Muslim Personal Law. Her husband argued that he did not have to pay maintenance under the Muslim Personal law beyond the period of Iddat (three months and ten days). The Supreme Court confirmed the judgment of the High Court and granted her a maintenance of Rs. 179.20 per month from her husband. The Court also dismissed her husband's appeal against awarding maintenance under the Criminal Procedure Code. This case had enormous consequences on the political and legal landscapes in India. The Supreme Court premised its judgment on certain perceptions on the backwardness of the Muslim community, especially in terms of women's rights (as the language of the judgment indicated). Simultaneously, the Court lamented the legislature's inability to pass the Uniform Civil Code. The Court's observations on Muslim personal law angered the Muslim community in India, which defeated the ruling Congress party in bye-elections. This, in turn, led to the passing of the Muslim Women (Protection of Rights in Divorce) Act, 1986. This Act was intended to save Muslim personal law and stated that Muslim women could claim divorce and

critiqued by feminists for the court's anti-Muslim rhetoric.³⁵⁴ After this judgment, it became clear to theorists and activists across the Indian feminist spectrum that they could no longer treat all Indian women as a monolithic or unitary block that needed legal reforms. What the *Shah Bano* case and its aftermath revealed was that Indian women had conflicting identities and obligations.³⁵⁵ They also realised what works for one community may not necessarily be good for another. They discerned that secularisation of laws may not be a universal remedy for all women, in theory and in practice.³⁵⁶ After the *Shah Bano* verdict in 1985, and the destruction of the Babri Masjid in 1992, Indian feminists moved away from the idea of a UCC, which was then viewed as tainted by association with the Hindu Right. It was a defining moment for Indian feminists, as this led to a period of self-critique and reflection.

The 1990s saw the establishment of autonomous women's groups and identities, especially for obtaining aid.³⁵⁷ The questions that arose from the feminists at this point were whether a UCC would replicate the gender-based issues found in the RPLs and whether the ideas of uniformity of laws or nationhood were relevant to gender justice.³⁵⁸ From the 2000s onwards, the

maintenance according to Muslim personal law. For a detailed discussion on the case and its aftermath, see Zakia Pathak and Rajeswari Sunder Rajan, "*Shah Bano*" (1989) 14 *Signs*.

³⁵⁴ The language in this judgment was critiqued by feminists widely, as it perpetuated certain negative stereotypes against Islam and commented on the poor situation of Muslim women. The judgment criticised the government for not passing the UCC as its passage would have strengthened national integration. The remarks in the judgment were widely considered to be directed against the Muslim Community, based on popular assumptions. For more on this, see *ibid*.

³⁵⁵ Geetanjali Gangoli, *Indian Feminisms: Law, Patriarchies and Violence in India* (Ashgate 2007).

³⁵⁶ Tanja Herklotz, *'Dead Letters? The Uniform Civil Code through the Eyes of the Indian Women's Movement and the Indian Supreme Court'* (2016) 6 *Südasien-Chronik - South Asia Chronicle*, Hyderabad Anveshi Law Committee, *'Gender Justice Only a Legal Issue? Political Stakes in UCC Debate'* [1997] *Economic and Political Weekly*.

³⁵⁷ This was popularly called the "NGOisation" of the women's movement – a reference to the number of Non-Governmental Organizations or NGOs that were set up for women's welfare.

³⁵⁸ Kumkum Sangari, *'Gender Lines: Personal Laws, Uniform Laws, Conversion'* (1999) 27 *Social Scientist*.

movement actively questioned the construction of a single category of 'women' in India.³⁵⁹ Now, there is an acknowledgment from Indian feminists that the women's movement is not confined to women's interests but it extends to minority identities and claims too.³⁶⁰ There is a clear shift in the Indian feminist scholarship against RPLs and a UCC since the 1990s. The issue of formulation of a UCC in place of RPLs lost its primacy in the scholarship and in the women's movement. It is now one of the many women's issues that the movement engages with, rather than being the only issue. So, why have most Indian feminists rejected the UCC? Perhaps the most important change has come from within, as they started to question the homogenised nature of the women's movement. While I explore the feminist positions on the UCC in the next section in detail, I now turn to important arguments put forth by Indian feminist scholars on the gendered nature of RPLs and more specifically on the Hindu code.

The common position that is consistently maintained by many Indian feminist scholars such as Nivedita Menon, Archana Parashar, Ratna Kapur and Flavia Agnes, is that all RPLs are gender discriminatory and are premised on exclusions.³⁶¹ These scholars claim that the notion that the Hindu code is more modern and gender-just than Muslim personal law has percolated through

³⁵⁹ One of the first to question the attitude of the Indian women's movement (represented by the urban, Hindu, upper caste-class women) towards Muslim and Dalit women and appropriation of their identities was the Women's Organisation called Anveshi Law Committee, Hyderabad. It provided a profound critique of the Indian women's movement which produced a normed woman who was called 'Indian', as the specific markers of individual identities were consolidated and made invisible. (Hyderabad Anveshi Law Committee, *'Gender Justice Only a Legal Issue? Political Stakes in UCC Debate'* [1997] Economic and Political Weekly). See also, Lakshmi Arya, *'The Uniform Civil Code: The Politics of the Universal in Post-Colonial India'* (2006) 14 Feminist Legal Studies.

³⁶⁰ Rajeswari Sunder Rajan, *'Women between Community and State: Some Implications of the Uniform Civil Code Debates in India'* (2000) 18 Social Text.

³⁶¹ For instance, see Nivedita Menon, *'A Uniform Civil Code in India: The State of the Debate in 2014'* (2014) 40 Feminist Studies, Archana Parashar, *Women and Family Law Reform in India* (Sage Publications Pvt Ltd, New Delhi 1992), Brenda Cossman and Ratna Kapur, *Subversive Sites - Feminist Engagements with Law in India* (Sage Publications India Pvt Ltd 1996), Flavia Agnes, *Family Law Volume 1: Family Laws and Constitutional Claims* (Oxford University Press 2011).

the legislative, judicial and public imaginations.³⁶² However, what was forgotten was that Hindu law was codified and therefore did not benefit from reform.³⁶³ For instance, women could not inherit property on equal terms with men in a Hindu joint family until 2005, a Hindu woman could not adopt a child in her own name, the Hindu marriage is sacramental in nature and principles such as restitution of conjugal rights were all gender discriminatory.³⁶⁴ In contrast, debates on Muslim personal law frequently depicted this law as being backward and discriminatory against women, despite Muslim law having a better position on women's rights compared to Hindu Law in India.³⁶⁵

As is evident from the above, Indian feminist scholars grapple with two aspects of RPLs I mentioned earlier, namely, the different treatment of different communities and the differential treatment of men and women of the same community. The literature on the arguments on differential treatment for different communities is extensive and it claims that such treatment is strongly centred on identity politics, specifically Hindu-Muslim politics, as well as

³⁶² Tanja Herklotz, *'Dead Letters? The Uniform Civil Code through the Eyes of the Indian Women's Movement and the Indian Supreme Court'* (2016) 6 *Südasien-Chronik - South Asia Chronicle*.

³⁶³ Nivedita Menon, *'A Uniform Civil Code in India: The State of the Debate in 2014'* (2014) 40 *Feminist Studies*.

³⁶⁴ For a detailed discussion on such practices, see Flavia Agnes, *'Has the Codified Hindu Law Changed Gender Relationships?'* (2016) 46 *Social Change*, Flavia Agnes, *Family Law Volume 1: Family Laws and Constitutional Claims* (Oxford University Press 2011), Flavia Agnes, *Family Law Volume 2: Marriage, Divorce and Matrimonial Litigation* (Oxford University Press 2011). See, also Tanja Herklotz, *'Dead Letters ? The Uniform Civil Code through the Eyes of the Indian Women's Movement and the Indian Supreme Court'* (2016) 6 *Südasien-Chronik - South Asia Chronicle*.

³⁶⁵ Flavia Agnes, *Family Law Volume 1: Family Laws and Constitutional Claims* (Oxford University Press 2011). While a Hindu woman is not considered equal to her brother in inheritance rights (a situation that was amended in 2005), she has a legal obligation to provide her husband with maintenance, in the event of a divorce. This is not considered to be unequal. Such a situation does not exist for Muslim women. Also, this view was incorrect at the everyday level, as there is not much difference in the plight of Hindu and Muslim women. In some ways, Muslim women enjoy better rights in the family. For instance, see Patricia Jeffery, *'A Uniform Customary Code? Marital Breakdown and Women's Economic Entitlements in Rural Bijnor'* (2001) 35 *Contributions to Indian Sociology*. Jeffery conducts an ethnographic study of Bijnor in rural Uttar Pradesh (India's most populous state). She analyses the mobilisation of Hindu and Muslim women at the grassroots level, on issues of gender equity and demonstrates the need to have economic viability for women outside marriage as a long-term remedy.

comparisons of forwardness or backwardness of the RPLs of these communities.³⁶⁶ However, there is limited scholarship and critique available on differential treatment within same communities, especially Hindus, as there is a perception that these laws are codified and hence forward-looking. Therefore, my focus is to provide a nuanced critique of disparate treatment of gender in judicial reasoning in a branch of Hindu RPLs and hence I confine myself to this area of scholarship, rather than indulge in comparative analysis between communities. In the next section, I demonstrate how my caselaw analysis supports the position of Indian feminists, while simultaneously expanding this position from the perspective of the judgments.

6.3 Gender in the Judgments - Bolstering the Indian Feminist Position on RPLs

As I demonstrated through the case analysis in the last two chapters, judges often express that the woman's right to equality as an individual is subsumed within her role in the family. Gendered premises in judicial reasoning tend to support behaviour of women compliant with normative notions of family, both implicitly and explicitly. It is only in some instances that such premises are questioned or avoided by the Courts. In this section, I analyse how the aspects of gender in judicial reasoning in the cases under study align with the Indian feminists' position on RPLs. I also analyse those areas in which my caselaw analysis deepens and strengthens the Indian feminists' arguments on RPLs.

I agree with most Indian legal feminist scholars on a significant aspect to argue that the gendered premise of judicial reasoning in Hindu custody law exposes

³⁶⁶ For instance, see Z Hasan, *'Gender, Religion and Democratic Politics in India'* (2010) 31 Third World Quarterly 939 and Flavia Agnes, *'Has the Codified Hindu Law Changed Gender Relationships?'* (2016) 46 Social Change, for a detailed discussion on portrayal of Muslim RPL vis-à-vis Hindu RPL.

gender-based discrimination that is inherent in RPLs. I now demonstrate this alignment, by using examples from my case analysis. The case of *Githa Hariharan*³⁶⁷ is the first instance in which judges used gender equality as an important premise in custody cases. As I analysed in Chapter 4, the Supreme Court of India considered right to equality provisions in the Indian Constitution and attempted to reconcile these provisions with the hierarchy of parental right to custody, as signified by the term 'after' in the Hindu Minority and Guardianship Act (HMGA), 1956. The Court decided that this term signifies that the mother is found to be a suitable guardian, only if the father is found incapacitated in some way. Moreover, the Court used the Welfare principle to add strength to this interpretation. This case is often used as a precedent in subsequent cases to emphasise gender parity between parents fighting for custody. However, the judicial reasoning in this case has reinforced prevalent notions of gendered roles, while espousing formal equality provided to all citizens in the Indian Constitution. The judgment attempts to camouflage the gendered nature of its reasoning with ideals of equality. But as I have demonstrated earlier, the gendered premise of judicial reasoning is very visible and evident when we unpack the reasoning in this case. This case is a good example of how the status of Indian women is mostly determined by a normative gender hierarchy, where a woman's position as a mother is defined by the father.³⁶⁸

Apart from *Githa Hariharan*, what are the key ideas that are expressed by the judges in other cases? To answer this question, I provide a summary of the themes that emerge from judicial reasoning in the cases I have studied. The idea of a normative family with defined gender roles for the parents, is

³⁶⁷ *Githa Hariharan v. Reserve Bank of India* (1999) (2) SCC 228. For a detailed analysis of the case, see Chapter 4.

³⁶⁸ For a detailed discussion on women's relationships in a traditional gender hierarchy, see Huma Ahmed-Ghosh, '*Chattels of Society: Domestic Violence in India*' (2004) 10 *Violence Against Women*.

emphasised by the judges repeatedly.³⁶⁹ What is more pronounced is the ideal of motherhood and the sacrifices that a mother can make in the interests of the child.³⁷⁰ In those instances where a mother broke the pattern of normative gender roles, she is denied custody for that reason.³⁷¹ The father is considered the dominant parent (despite gender equality emphasised in *Githa Hariharan*), in some instances. Moreover, it is significant that the way the father is judged differs vastly from the manner of judging the mother under similar circumstances, as there are positive presumptions made about the father.³⁷²

Moreover, the welfare principle, which is used by judges as the primary premise for determining custody, is based on gendered perspectives as the father is considered as the dominant personality and the main provider of the family. While welfare is often used to supersede parental rights, the embedded reasoning on welfare supports the gendering of roles in the Hindu family.³⁷³ In some instances, the judges consider the gender of the child to be an important consideration for determining custody.³⁷⁴ In those instances where custody is provided to the mother based on welfare, the judicial reasoning is that the mother is financially capable of addressing the needs of the child and steps into the role of the father as provider.³⁷⁵ In all these cases, gender is one

³⁶⁹ *Gaurav Nagpal vs Sumedha Nagpal AIR (2009) SC 557, Mohan Kumar Rayana vs. Komal Mohan Rayana (2009) (3) Bom CR 308.*

³⁷⁰ *Romani Singh vs. Lt. Col. Vivek Singh 201(2013) DLT 742, Baby Kavya Awasthi and Another vs. State of U.P. and Ors (2013) (5) ACJ 72, Amit Beri and Anr. Vs. Smt. Sheetal Beri AIR (2003) All 78.*

³⁷¹ *Murari Lal Sidana and Anr. Vs. Smt. Anita AIR (2013) Raj 100, Chhotibai vs. Sunita Kushwah (2009) (3) MPHT 175.*

³⁷² *Ram Murti Chopra and Anr vs Nagesh Tyagi (2008) ILR (12) Delhi 169, K.M. Vinaya vs. B.R. Srinivas, Miscellaneous First Appeal No.1729 of 2011(High Court of Karnataka at Bangalore, 13/09/2013), Niranjana Singh Huda and Anr vs. Tavinder Pal Singh Bhatia and Anr (2011) (2) CGLJ 417.*

³⁷³ *Mohan Kumar Rayana vs. Komal Mohan Rayana (2009) (3) Bom CR 308.*

³⁷⁴ *Romani Singh vs. Lt. Col. Vivek Singh 201(2013) DLT 742, Venugopalan vs. Beena ILR (2006) (4) Kerala 583.*

³⁷⁵ *Baby Kavya Awasthi and Another vs. State of U.P. and Ors (2013) (5) ACJ 72, Amrit Pal Singh vs. Jasmit Kaur AIR (2006) Delhi 213, Vikram Vir Vohra vs Shalini Bhalla 170 (2010) DLT 303, Smt. Gundamma vs. Shivasharanappa AIR (2004) Kant 357.*

of the important considerations in the reasoning of the judges. In most instances, financial capacity of a parent is considered as gender parity, but the underlying reasoning emphasises a protectionist and/or normative stance towards women.

While one key aspect of judicial reasoning on gender is the differentiation of gender roles within the family, another significant aspect is the differential treatment of individuals based on their gender. As I elaborated in Chapter 5, men and women are treated differently in judicial reasoning, even when they exhibit similar behaviour. Deviant behaviour of a father from the normative ideal is not treated in the same manner as the deviant behaviour of a mother. Such a mother loses her rights to custody and/or guardianship in most similar instances, but a father does not lose his rights. While the judges mention equality of gender provided in the Constitution, they do not consider gender justice to be the relevant approach to interpretation of the law nor do they reason based on gender parity, in most cases. What we see repeatedly is that judges determine gendered roles to be natural and inevitable and decide on cases based on this premise. From their reasoning, it emerges that the Courts provide disparate treatment to parents, based on certain presumptions on normative gender roles within a family. Thus, the notion of gender found in judicial reasoning tends to toe a normative and disparate line in spirit, while discussing gender equality in letter. Instead of paying homage to formal notions of equality, it would be both necessary and better in the interest of gender justice if the courts were to consider equitable treatment to both parents irrespective of gender – an aspect that is almost missing in judicial reasoning in these cases.

It is evident that the above arguments support the repeated claims made by Indian feminists that judges do not provide a fair treatment to women's issues and that there exists a constant struggle to balance gender parity and religious

rights within RPLs.³⁷⁶ Some feminists have questioned how Hindu law can be considered egalitarian or used as a role model for other RPLs, when it has several gendered aspects that are discriminatory to women.³⁷⁷ However, their questioning has been mostly confined to the legislative aspects of the Hindu code. I deepen their arguments by providing evidence from case law that gender-based discrimination exists not just in the letter of the law, but also in the reasoning employed by judges in these cases. As I argued earlier, such discrimination is evident in the judicial portrayal of the family ideal as well as in its disparate treatment of gender. The layered judicial reasoning premised on gendered norms has not improved or supported gender justice in many ways, as evidenced in the case analysis in this thesis. Even a cursory glance at the cases discussed in Chapters 4 and 5 earlier reveals that the courts may be more inclined to follow gendered constructions of roles within the Hindu family rather than engage with an open mind on family issues.³⁷⁸

While Indian feminist scholars have discussed this differential treatment in legislation, I deepen and nuance their analysis by contributing evidence from judicial reasoning that this disparate and gendered treatment is a lived reality for most women fighting custody cases in court. My argument is that the judges adopt certain gendered premises and these premises lead to a differential treatment of the father and the mother, as seen in the judgments.

³⁷⁶ For instance, see Shalina A Chibber, *Charting a New Path Toward Gender Equality in India: From Religious Personal Laws to a Uniform Civil Code* (2008) 83 *Indiana Law Journal*.

³⁷⁷ For instance, see Archana Parashar, *Women and Family Law Reform in India* (Sage Publications Pvt Ltd, New Delhi 1992). Flavia Agnes has carried out a detailed analysis of this aspect, using existing laws and judgments to support her arguments (Flavia Agnes, *Family Law Volume 1: Family Laws and Constitutional Claims* (Oxford University Press 2011), Flavia Agnes, *Family Law Volume 2: Marriage, Divorce and Matrimonial Litigation* (Oxford University Press 2011), Flavia Agnes, 'Has the Codified Hindu Law Changed Gender Relationships?' (2016) 46 *Social Change*).

³⁷⁸ This can be substantiated from the perspective of legal practitioners as well as the judgments. An ethnographic study among lawyers in different Indian cities who were engaged with women's issues revealed that most of the lawyers felt that the courtroom procedures were intimidating to women (especially victims) and that Hindu upper-caste, upper-class women had better access to justice (Aparna Rayaprol and Sawmya Ray, *Understanding Gender Justice: Perceptions of Lawyers in India* (2010) 17 *Indian Journal of Gender Studies*).

Moreover, such reasoning is adopted in most of the cases and hence it cannot be dismissed as an aberration. This gendered reasoning seems more of a rule, rather than exception, in the cases under study. *Githa Hariharan* is often used as a ploy to create an impression of supporting gender equality in most judgments (as it premised its reasoning on the Constitutional notion of gender equality) but it is more of a smokescreen for protectionist and normative notions of gender in the judges' reasoning. Repeatedly, it appears that *Githa Hariharan* has little or no effect on subsequent judgments, though it is praised as the first instance of discussing gender equality in custody cases. This disparate treatment based on gender strengthens the feminists' claim that RPLs are indeed gender discriminatory.

Further, feminist legal theorists like Nivedita Menon argue that viability of RPLs and the question of formulation of a UCC, are the outcomes of tension between two notions of rights provided in the Indian Constitution – the rights of a person as both an individual and a member of a collective.³⁷⁹ It is this tension which is difficult to resolve but needs to be resolved for the formulation of a UCC. Nowhere is this tension more evident than in the construction of the Elite Dependent in judicial reasoning. As I discussed in Chapter 5, the Elite Dependent is the educated woman who is connected to her traditional roots and is obedient.³⁸⁰ She is the personification of the normative and subservient position held by women in a gendered hierarchy. She symbolises the tension between rights of the individual and rights of the member of a collective as well as the tension between gender parity and normative notions of gendered roles. While she has formal equality as provided by the Indian Constitution as a woman, she is not treated on par with

³⁷⁹ Nivedita Menon, 'A Uniform Civil Code in India: The State of the Debate in 2014' (2014) 40 *Feminist Studies*.

³⁸⁰ *Nibha Kumari vs. State of Bihar and Ors* (2003) (2) *PLJR* 60, *Baby Kavya Awasthi and Another vs. State of U.P. and Ors* (2013) (5) *ACJ* 72.

the father in her role as a mother. The judges often reason that she must conform to normative ideals of womanhood and motherhood to qualify for sameness of treatment. Therefore, as an individual, she is entitled to Constitutional equality. However, her entitlement is not automatic. She is provided an equal treatment only if she adheres to her secondary status as a member of the collective and accepts her gendered role of a good mother and wife. Any attempt by her to establish her rights as an individual is considered as deviant behaviour and she is then labelled as not being a 'good wife' or a 'good mother'.

The Elite Dependent is representative of the Indian feminists' argument that while Indian women have legal and formal equality under the Constitution, they have a subordinate role in family and society. She is also emblematic of the feminist argument that the family exhibits a gendered hierarchy and disparate treatment based on gender. Thus, it is evident that judges envisage the Hindu family as a traditional and normative unit in which the father performs the role of bread winner and the mother performs the role of the nurturer. They do not consider other forms of family such as a single-parent family or a family with same sex or adoptive parents. They also turn a blind eye to the fact that the family ideal espoused by them tends to remain an ideal, while reality may be very different. Moreover, while there are some procedural provisions that allow for family counselling, such counselling is often used as a tool to ask women to adjust to the vagaries of family life and compromise with their husbands.³⁸¹ Judicial reasoning is often heavy-handed and adversarial and attempts to align families along normative gender roles,

³⁸¹ For instance, see Srimati Basu, *The Trouble with Marriage - Feminists Confront Law and Violence in India* (University of California Press 2015).

rather than considering stable and positive aspects of individual and collective relationships within a family.

So, what we see here is that gendered nature of judicial reasoning in these cases creates or corresponds to the gap between the letter of the law and its application. Ideally, the courts should attempt to reconcile the tension between rights of the mother as an individual and her position as a member of the collective in these cases. Instead, they focus on her conformity to existing norms and chastise her if she deviates from these norms. Even in instances such as *Githa Hariharan*, where the court attempts to reconcile individual right of equality to a mother's right *vis-à-vis* the father, it offers no explanation or solution to the clash of these rights and positions. Instead, it attempts to sweep under the carpet the disproportionate treatment accorded to parents under HMGA.

The attempt at stonewalling an important question on gender parity in RPLs is carried out using the welfare principle seemingly as an excuse, with the clear and stated aim that the provisions of the Act cannot be given an interpretation that would make them unconstitutional. The Constitution of India can itself be subject to amendments and has undergone 101 Amendments on several subjects in the 67 years since its inception. Considering the number and nature of these amendments, the claim of the judges, that HMGA cannot be interpreted in a manner that makes it unconstitutional, rings hollow. The judges in *Githa Hariharan's* case also make a claim that the word 'after' in Section 6 of HMGA implies absence or unfitness of the father and that it lends support to the welfare principle when interpreted this way. But how can the welfare principle, a measure for determining custody in the interests of the child, be used as a yardstick for ascertaining gender equality? Such interpretations highlight the inability of the courts to reconcile tensions between rights of a woman as a mother and her status as a member of the

family. The larger question of disparate treatment accorded to men and women under the same RPL is left unanswered in most instances. To summarise, I lend credence to the Indian feminists' argument that RPLs are gender discriminatory in the letter of the law and I expand on that argument to claim that disparity in treatment of gender is often not confined to legislation but that it extends to application and interpretation of law by judges. In the next section, I analyse the Indian feminist positions on UCC formulation and demonstrate why this disparate treatment would have adverse consequences if the Hindu code is considered as a draft for the UCC.

6.4 Gender Justice and Formulation of a UCC

As seen in the last section, the feminist positions on the RPLs and formulation of the UCC changed with time due to the internal and external factors that impacted the Indian women's movement. Until the Shah Bano verdict, the women's movement was keen on the implementation of a UCC for all citizens, as it perceived that the UCC would be a positive step towards gender justice. After *Shah Bano*, the women's movement gave up its claim for a UCC and instead, started to favour an egalitarian, gender-just code that addresses the lacunae in RPLs now. This shift happened due to the feminist understanding that the UCC has been usurped by the Hindu Right agenda as a cultural and communal issue, rather than being a political or legal issue. In this section, I analyse the current Indian feminist position on the UCC and the political context that favours the formulation of the UCC and demonstrate what's at stake for women if the UCC is formulated.

Perhaps one of the most significant developments in the work of most Indian feminist scholars post 1990s is the unanimous decision to drop the term "Uniform" in UCC. This is probably intended as a silent acknowledgement that the code cannot be uniform for all communities. Instead, they now term it 'common', 'gender-just' or 'egalitarian' code to characterise that the nature of

demands about the code have changed considerably.³⁸² So, the women's movement has evolved from a singular position of pro-UCC³⁸³ to plural positions to date,³⁸⁴ which I briefly outline below.

The first position is that of a compulsory and egalitarian civil code for everyone. However, while some scholars argue that the Hindu code could be used as a basis for this code, most feminist scholars claim that Hindu laws confirm to North Indian, upper caste practices and their codification has decimated liberal customary traditions.³⁸⁵ The second position envisages reforms from within communities with no state intervention. This kind of grassroots reform has found favour with some feminists as it accords more agency to women.³⁸⁶ The third position adopted by some feminist scholars' advocates reforms from within communities as well as legislation on areas outside personal laws. The fourth is for an optional egalitarian code, like the Special Marriages Act, 1954 that governs inter-religious marriages. This

³⁸² Srimati Basu, *The Trouble with Marriage - Feminists Confront Law and Violence in India* (University of California Press 2015).

³⁸³ For instance, Vasudha Dhagamwar critiqued minority leaders' (mostly Muslim) contention that the UCC would be harmful to minority as it may impose Hindu *Sāstric* law by suggesting that Hindus live under their personal law and not under secular laws, that personal law of a community will have nothing to do with outsiders, that if Hindu law exempted tribal customary law, other communities should do the same. She asserted that the UCC was the right way forward for all communities. (Vasudha Dhagamwar, *The Uniform Civil Code: Infant Terrible of the Constitution* in Upendra Baxi, Alice Jacob and Tarlok Singh (eds), *Reconstructing the Republic* (Har-Anand Publications Pvt Ltd 1999).

³⁸⁴ I have provided this overview based on the points outlined in Rajeswari Sunder Rajan, *The Scandal of the State - Women, Law and Citizenship in Postcolonial India* (Duke University Press 2003), Rajeswari Sunder Rajan, 'Women between Community and State: Some Implications of the Uniform Civil Code Debates in India' (2000) 18 *Social Text*, as Rajan provides a comprehensive summary of all the arguments. These arguments, or some parts of them, have been reflected in the writings of others. See also Z Hasan, *Gender, Religion and Democratic Politics in India* (2010) 31 *Third World Quarterly* 939, Nivedita Menon, 'A Uniform Civil Code in India: The State of the Debate in 2014' (2014) 40 *Feminist Studies*.

³⁸⁵ For instance, see Flavia Agnes, *Law and Gender Inequality - The Politics of Women's Rights in India* (Oxford University Press 1999), Archana Parashar, *Women and Family Law Reform in India* (Sage Publications Pvt Ltd, New Delhi 1992), Nivedita Menon, *Recovering Subversion - Feminist Politics Beyond the Law* (Permanent Black 2004).

³⁸⁶ For more on this, see Rajeswari Sunder Rajan, *The Scandal of the State - Women, Law and Citizenship in Postcolonial India* (Duke University Press 2003).

provides a secular option for those who do not wish to be governed by religious laws. The fifth position is that of a reverse optional code, in which all citizens are mandatorily covered by a gender-just code but have the option to choose to be governed by RPLs. This is a modification on the optional egalitarian code and is considered by some feminist scholars to be a better solution.

Of the above positions, most Indian feminists prefer the option to reform communities from within, with little or no state intervention, as localised methods of adjudication seem to yield better results.³⁸⁷ The imposition of a UCC is now considered to be a 'top-down' approach by many feminists, which would have little impact on the ground for women.³⁸⁸ Concepts such as 'citizenship', 'secularism', 'modernity', 'identity' 'community' as well as the 'women's movement' are being questioned due to the UCC debates.³⁸⁹ It is virtually impossible to separate these concepts from any discussions on the UCC and to focus on only its legal aspects. While feminists have adopted several positions on the UCC after 1995, there is consensus among all of them

³⁸⁷ For instance, see Gopika Solanki's analysis of local adjudication models using a legal pluralism framework in Gopika Solanki, *Adjudication in Religious Family Laws - Cultural Accommodation, Legal Pluralism and Gender Equality in India* (Cambridge University Press 2011). This view has been endorsed by Shalina A Chibber, 'Charting a New Path Toward Gender Equality in India: From Religious Personal Laws to a Uniform Civil Code' (2008) 83 *Indiana Law Journal* and Farrah Ahmed, 'Remediating Personal Law Systems' (2016) 30 *International Journal of Law, Policy and the Family*.

³⁸⁸ Tanja Herklotz, 'Dead Letters? The Uniform Civil Code through the Eyes of the Indian Women's Movement and the Indian Supreme Court' (2016) 6 *Südasien-Chronik - South Asia Chronicle*.

³⁸⁹ Hyderabad Anveshi Law Committee, 'Gender Justice Only a Legal Issue? Political Stakes in UCC Debate' [1997] *Economic and Political Weekly*. In some instances, the concept of secularism has been used as a tool to question the unwillingness of the Muslim community to reform their personal laws, very similar to Hindu Right position on this issue (Kushal Deb, 'Secularism, Personal Laws and Gender: The Indian Imbroglio' (2002) 2 *Studies in Ethnicity and Nationalism*). Secularism and political questions of identity have also intersected with communal and identity politics in India, with some endorsements provided to the Muslim Women (Protection of Rights on Divorce) Act, 1986 along these lines (PS Ghosh, *The Politics of Personal Law in South Asia - Identity, Nationalism and the Uniform Civil Code* (Routledge 2007). However, Indian feminists have unilaterally critiqued this Act as having negative consequences for Muslim women's rights in the family. For an in depth ethnographic analysis of how judges draw upon constructions of gender and class in personal law judgments, thereby 'reinventing legislative intent', see Srimati Basu, 'Shading the Secular: Law at Work in the Indian Higher Courts' (2003) 15 *Cultural Dynamics*.

that RPLs need to be reformed and there needs to be a long-term solution that favours gender justice for RPLs, either in the form of an egalitarian code or otherwise.³⁹⁰

While most of these feminist arguments are specific to the letter of the law, there is very little on the application or interpretation of the law by the courts. Gender equality may be established by the letter of the law. However, gender justice can be approached, and in some instances, achieved by judicial reasoning on the letter of the law. If the focus of feminist activism and scholarship is on gender justice, then it would be served by turning attention to how courts are interpreting the law. Some Indian feminist scholars have claimed that judicial reasoning provides an intersection of patriarchy with concepts of justice and this has largely affected gender equality and gender justice in judicial decisions.³⁹¹ However, such analysis has been made in laws relating to sexual violence and rape and not with respect to RPLs.

While I discuss the lacunae in feminist scholarship in the next chapter, here I confine myself to the argument that most Indian feminist scholars focus on rights of the woman as an individual, as provided in the letter of the law. They repeatedly point out how these rights are subsumed in the collective, due to inherent patriarchal notions in society and/or machineries of the state. The opposition of many Indian feminists to the UCC stems from the core idea that the UCC would not serve to enhance individual rights of women in India, irrespective of the communities to which they belong. To adopt an egalitarian

³⁹⁰ Working Group on Women's Rights (WGWR), *'Reversing the Option: Civil Codes and Personal Laws'* (1996) 31 Economic and Political Weekly, Rajeswari Sunder Rajan, *The Scandal of the State - Women, Law and Citizenship in Postcolonial India* (Duke University Press 2003), Rajeswari Sunder Rajan, *'Women between Community and State: Some Implications of the Uniform Civil Code Debates in India'* (2000) 18 Social Text.

³⁹¹ For instance, see Taisha Abraham, *'Sathin Bhanwari Revisited'* (2012) 19 Indian Journal of Gender Studies, Rachel Simon-Kumar, *'Sexual Violence in India: The Discourses of Rape and the Discourses of Justice'* (2014) 21 Indian Journal of Gender Studies.

approach to RPLs and the UCC, it is important to question disparate treatment of gender in legislation as well as in judicial reasoning. Instead of seeking a rights-based solution, it may be more effective to question normative and gender stereotypes used in judicial reasoning. If the Courts adopt an approach of treating persons of all gender on an equitable footing, this may lead to a gender-just approach of interpretation of custody and welfare. While this is my argument to advance the feminist position, I now turn to what the Courts have observed regarding UCC formulation.

Indian Courts have often claimed that it is the duty of the legislature to pass a UCC, as provided by Article 44 of the Constitution. For example, in the case of Shah Bano and several other judgments, the Supreme Court claimed that the legislature had failed to provide a comprehensive UCC as promised under Article 44.³⁹² Although some judges tried to use judicial activism to formulate common principles to aid gender justice and promote gender equality, there has been no concrete move by the courts towards directing the legislature to formulate a UCC.³⁹³ Some scholars on Hindu law like Menski have argued that the judges have attempted the process of harmonisation to arrive at better

³⁹² For instance, see *Danial Latifi & Anr vs Union of India (2001) (7) SCC*, *Sarla Mudgal vs Union of India (1995) (3) SCC 635*.

³⁹³ For a detailed discussion on this, see Tanja Herklotz, 'Dead Letters ? The Uniform Civil Code through the Eyes of the Indian Women's Movement and the Indian Supreme Court' (2016) 6 *Südasiens-Chronik - South Asia Chronicle*. The areas in RPLs, in which judges have shown some level of activism by questioning the constitutionality or reasonableness of RPLs, are as follows –

- a. Monogamy
- b. Restitution of Conjugal Rights
- c. Discriminatory grounds of divorce
- d. Discriminatory inheritance norms
- e. Right of maintenance upon divorce
- f. Discrimination in guardianship laws (The case of *Githa Hariharan*, discussed in Chapter 3, is an example for this category)
- g. Discriminatory nature of personal laws

For a detailed discussion on cases in each of these categories, see Ashok Wadje, 'Interface of Personal Laws & Indian Constitution- Complicity, Constraints, and Contradictions: An Appraisal through Judicial Insight' (2011) 193.

uniformity of personal laws.³⁹⁴ However, this may be an optimistic outlook on the courts and judicial activism that is reflected only in limited number of cases. While we can acknowledge the attempts made by some judges to use judicial activism as an instrument to deliver progressive judgments, we cannot ignore the predominantly gendered nature of their reasoning or their tendency to lay the blame at the door of the legislature for not drafting the UCC. While feminist scholars and the Courts do not engage with the formulation of a UCC in recent times, the current political climate in India favours a UCC formulation, albeit for different reasons.

As seen in Chapter 3, the post-colonial Indian polity constructed an increasingly intense opposition between secular politics and communal identity politics. This led to the rise of Hindu right-wing nationalist leaders to power post the general elections in 2014.³⁹⁵ The slow but steady shift from secular parties to Hindu right wing in the last seven decades is indicative of a deeper social shift of popular, especially majoritarian, endorsement of Hindu right-wing politics. This shift has implications for the emphasis on gendered norms within the family, society and nation. The Hindu Right,³⁹⁶ with its homogenized views on gender, community and nation, is now striving to implement the UCC.

³⁹⁴ Werner Menski, *Asking for the Moon: Legal Uniformity in India from a Kerala Perspective* (2006) 2 Kerala Law Times. Menski also critiqued activist elitism by academic scholars on gender issues by countering it with a legal pluralism framework and by insisting that good judges enact and perform legal pluralism (Werner Menski, *Still Asking for the Moon? Opening Windows of Opportunity for Better Justice in India* (2016) 49 *Verfassung und Recht in Übersee* VRÜ).

³⁹⁵ The current government is formed by the Hindu Right political party (Bharatiya Janata Party or BJP). This government has a majority in the Parliament and has managed to capture power in powerful state assemblies too. For instance, India's most populous state, Uttar Pradesh, is headed by a Hindu ascetic Chief Minister. BJP has recently won the elections for the posts of President and Vice-President of India and has consolidated its power in the executive and legislative branches of government. One of the chief promises in its manifesto is the formulation of the UCC and public opinion is being sought on this issue. For more on this, see chapters 1 and 3.

³⁹⁶ As I explained in Chapter 3, 'Hindu Right' is an umbrella term used to define the political, cultural and religious nationalist groups, with a pro-Hindu stance. It denotes a combination of several organisations and has survived to the present day in different forms.

The Hindu Right narrative views the UCC as an issue of national integrity and women's rights, with an emphasis that it is only the minority women who need saving as Hindus have already given their women "rights".³⁹⁷ This narrative promotes a homogenising and monolithic view of women's rights, without problematising issues such as power relations within families, treatment of lower-caste Hindu women and domestic violence. Moreover, the Hindu woman is never viewed as an individual but rather viewed as an extension of her family in this narrative.³⁹⁸ It claims that family is the basic social unit to which the individual must be subordinated, especially if that individual was a woman. Further, the Hindu woman is considered a part of the larger socio-cultural context by the Hindu Right and she is not expected to have an individual existence beyond the traditions of the community.³⁹⁹ Any questioning of her positions or assertion of her rights would spoil the delicate equilibrium of established gender-based norms in society. Clearly, the Hindu Right's position is to subvert the rights of the Hindu woman as an individual and focus on her position as a member of the collective, a position diametrically opposite to that of most feminist scholars. This tendency to

³⁹⁷ For more on this, see Z Hasan, *'Gender, Religion and Democratic Politics in India'* (2010) 31 Third World Quarterly 939, Zakia Pathak and Rajeswari Sunder Rajan, "'Shah Bano'" (1989) 14 Signs.

³⁹⁸ The BJP's earlier election manifesto issued in 1998 is a good example of the definition of gender roles and family values within the Hindutva ideology –

"In the Indian view of life, an individual is not an independent or sovereign being, but an integral member of the family, community, the nation and the human race. The basic institution that anchors the individual in society and the nation, as also links him to the past and the future, is the family. The BJP believes that the integrity of the family institution is the main guarantor of India's civilizational continuity. Hence, the importance of protection and nurturing of family values cannot be overstated in the context of nation-building. If the family is the brick, society is the edifice. (As cited in Henrik Berglund, 'Gender Relations and Democracy: The Conflict between Hindu Nationalist and Secular Forces in Indian Civil Society' (2009) 15 Nationalism and Ethnic Politics).

³⁹⁹ For more on this, see Henrik Berglund, *'Hindu Nationalism and Gender in the Indian Civil Society'* (2011) 13 International Feminist Journal of Politics, Runa Das, *'Encountering Hindutva, Interrogating Religious Nationalism and (En)gendering a Hindu Patriarchy in India's Nuclear Policies'* (2006) 8 International Feminist Journal of Politics.

subvert the rights of women is detrimental to UCC formulation, as the underlying premise is based on normative gender roles in the family.

While there is political momentum on formulating the UCC, most feminist scholars have attempted to counter this by questioning whether a UCC can provide gender justice in place of RPLs. Further, they argue that the Hindu laws that are being defended by the Hindu Right are colonial constructions of the late nineteenth and early twentieth centuries, which do not resemble customary Hindu law in any manner.⁴⁰⁰ Despite these arguments, the current party in power (Bharatiya Janata Party or BJP - the political arm of the Hindu Right) has stated that the UCC is one of the prime objectives in its manifesto. In line with this objective, the present government has instructed the Law Commission of India to conduct a survey of the lay public and law practitioners to gauge the public mood on the UCC.⁴⁰¹ However, the structure and format of the published questions raise serious concerns whether the government or the Law Commission have addressed the issues raised by feminist scholars and activists.

The Law Commission of India issued an appeal dated 7th October 2016, seeking public opinion on the Uniform Civil Code. This appeal sought to open a conversation about the formulation of a uniform civil code and it claimed that family law reforms should view women's rights as an end goal. The Commission invited people from all walks of life to participate in the process of family law reforms by completing and returning a questionnaire within 45

⁴⁰⁰ Nivedita Menon, *'A Uniform Civil Code in India: The State of the Debate in 2014'* (2014) 40 *Feminist Studies*, Eleanor Newbigin, *'Personal Law and Citizenship in India's Transition to Independence'* (2011) 45 *Modern Asian Studies*.

⁴⁰¹ I have included a detailed analysis of each of the questions in this questionnaire in Appendix 2. Here, I mention only those questions and areas that are relevant to this discussion. Currently, the Law Commission is processing the responses to the questionnaire and the outcome is yet to be published.

days.⁴⁰² While this appeal appears to be a genuine effort to solicit public participation in the drafting of the Uniform Civil Code, the accompanying questionnaire leaves much to be desired as the basis for deciding about the personal laws of 1.2 billion people. I analyse this questionnaire briefly below and lend credence to the position that RPLs are gender discriminatory and any attempt at formulating a UCC needs to address gender justice.

Question 4 of the questionnaire asks if the UCC or codification of personal laws and customary practices ensure gender equality. This question has a simple 'Yes or No' option, with no space for any additional reasoning. Another question that follows this pattern is question 5, which asks if the uniform civil code should be made optional, again with a 'Yes or No' option. It is ironic that the Law Commission of India, which is supposed to address legislative lacunae and suggest appropriate changes to the Parliament, thinks that a huge subject like the relationship between gender equality and UCC can be reduced to a yes or no answer. Feminist legal scholars in India have written vast swathes of literature discussing gender equality and gender justice and their relation to law. They have repeatedly addressed how law can be used as an instrument for social change. Moreover, this area of scholarship has also discussed exhaustively about optionality and reverse-optionality positions for the UCC. The Law Commission pays token respect to feminist theory and activism by relegating these important questions to a footnote.

The questionnaire attempts to deal with all categories of RPLs but fails to cover many key aspects. It has no questions related to custody cases in Hindu law and only a couple of questions regarding aspects of gender in Hindu law, such as property rights for Hindu women. Thus, the questionnaire fails to address

⁴⁰² The questionnaire consists of 16 questions (nine in multiple-choice format and seven with an additional space for providing reasons for the answer).

most of the major issues pertaining to religious personal laws, gender equality or gender justice. There is no provision to address those individuals who are atheists or agnostics and do not wish to follow any religion. Moreover, there is no mention of cultural minorities who may adopt specific customs or practices and how these would be reconciled within the larger paradigm of the code. At best, the questionnaire reflects the Law Commission's apathy towards understanding personal laws and, at worst, it reflects the Commission's antipathy to gender justice. This questionnaire cannot be considered a useful tool to gather public opinion and does not appear to address many of the pertinent gender issues raised by feminist activists and scholars. However, it serves as a good example of all that is wrong in the approach of the state machinery towards gender equality or gender justice. Perhaps, it may be a better approach to standardise the laws for marriage, divorce and custody for everyone, without any consideration of religion, gender or sexuality and broaden the scope of definition of a family.

As seen from my case analysis and the questionnaire above, there seems to be an almost universal adherence to gendered norms within the legal machinery, whether it is the judges of the Higher Courts or the Law Commission of India. While "religion is a crucial signifier of community identity and a player in state politics",⁴⁰³ judicial reasoning in the cases I have analysed is silent on aspects of religion. However, this silence merely emphasises the elephant in the room, i.e., the transmutation of the Hindu identity into the secular identity of the Indian citizen – a notion that has found much currency with the Hindu Right for the creation of a Uniform Civil Code. In the current political climate, the Hindu identity is often used interchangeably with the Indian identity by the Hindu Right and this is used as premise to exclude other

⁴⁰³ Rajeswari Sunder Rajan, *The Scandal of the State - Women, Law and Citizenship in Postcolonial India* (Duke University Press 2003).

communities. Moreover, the agenda of the present government is detrimental as it does not pay much heed to gender-just perspectives of feminist scholars or activists and this can be harmful to any form of the UCC that it may propose.

The Hindu code is often considered to be a blueprint for any secular civil code, as it is widely believed to be based on secular principles. However, the latent gender bias and disparate treatment of men and women in judicial reasoning exposes the lack of gender parity in the interpretation of the Hindu code. Under the circumstances, it is necessary to address the imbalances within the Hindu code first. Moreover, the Hindu code is not reformed but merely codified and this should be heeded as a warning for any argument for formulating the UCC along the lines of the Hindu code. At best, the Hindu code proves to be a facile blueprint and should not be considered to form the basis of the UCC.

6.5 Concluding Remarks

In this chapter, I situate my thesis within a wider legal and political context and explain its relevance to feminist debates on RPLs and the UCC. I argue how my analysis of cases strengthens the argument of many Indian feminist scholars that RPLs are gender discriminatory, by proving that there exists disparate treatment of gender in judicial reasoning. I also trace the position of the Indian women's movement on RPLs and explore how feminist positions changed with time and intervening factors.

Further, I demonstrate that an underexplored factor that needs to be analysed in the scholarship is the content and logic of judicial pronouncements, which undermine feminist efforts for gender justice. I contribute to this body of scholarship by deepening and extending the analysis on judicial reasoning, I argue that judicial reasoning premises itself predominantly on normative ideas of gender roles and the judges' perception of gender, thereby being

detrimental to gender justice. While the disparate treatment of gender in the cases I analysed strengthens the feminist argument about gender-based discrimination in RPLs, I deepen this argument to show how application of law by the judges is gendered. Deeply embedded notions of gender roles continue to inform judges' reasoning, as seen in my case analysis. Further, I analyse various positions for the formulation of a UCC in the current political climate. I argue that the disparate treatment of gender evident in judicial reasoning is a significant reason why a UCC should not be formulated based on the current Hindu code and its interpretation by the Courts.

My argument here is that it is necessary to ask if Indian citizens, especially women, need equality or uniformity in the prevalent social and political conditions. Religion, gender and caste are three important axes that create and perpetuate identities in India. Having lived with the constant influence of these axes, I often witnessed that equality is an idealised notion, especially for women in India. It is more important to have uniformity of treatment, rather than equality on paper. Judicial reasoning, political will as well as social structures need to address and improve disparity in treatment, rather than using rhetoric on equality. In the next and concluding chapter of this thesis, I address the outcomes of this research and its implications for women in the Indian context.

Chapter 7 – Concluding Remarks and the Road Ahead

The core ideas that I have explored in this thesis are – How have judges engaged with gender and specifically, gender roles in the custody cases under study? How have judges conceptualised the Hindu woman in the cases under study? How does judicial reasoning create or reproduce disparate patterns of gender? What is the impact of such reasoning on the legislative formulation of a Uniform Civil Code (UCC) in India? As I mentioned in the introduction chapter, my explorations have not been on the concept of equality. Rather, I have analysed how inherent normative notions of gender roles in judicial reasoning undermine the notion of gender equality and are thereby an impediment to gender justice. I have contributed to the existing feminist legal scholarship in India by expanding and deepening their argument that religious personal laws are gender discriminatory in nature. While most of the existing scholarship focuses on socio-legal theory and/or activism on the ground, I have focused on the analysis of case law, an under-explored area in the scholarship. So, the key contribution of my thesis is that I have strengthened the Indian feminists' argument that the Hindu code should not be considered as the blueprint for the UCC, as law is gendered in judicial reasoning in case law. It is evident from the feminist analysis of legislation as well as my analysis of caselaw that there are inherent undertones of gender-based reasoning, even though legislation and caselaw purport to be based on principles of neutrality.

I have demonstrated how the gendered nature of judicial reasoning creates the Elite Dependent, who is a mirror image of the female citizen-subject created by the Hindu code. Both these figures have legal personhood with limited economic rights, in contrast to their male counterparts who have legal personhood and complete economic rights. I have argued that the judges exhibit a gendered approach to their reasoning in these cases and this has

proven detrimental to women's interests in custody litigation. Further, my analysis strengthens the claim of feminist theorists and activists in India that religious personal laws iterate existing normative notions of gender and deny women their legal due. While there are instances of judges trying to provide a more gender-balanced approach in some of the cases, most of the cases exhibit underlying gendered assumptions. I have argued that the gendered nature of these judicial pronouncements exposes law's disproportionate treatment on gender and this factor should be taken into consideration if a UCC is formulated in India. My thesis, while supporting the feminist stance on religious personal laws, seeks to create an awareness of the disparate treatment of treatment of gender in judicial reasoning.

As I explained in Chapter 1, the starting point of my thesis was my lived experiences as an upper-caste, upper-class Hindu woman. It was these experiences, which gravitated me towards the concept of the Elite Dependent. The Indian women's movement have adapted an intersectional approach since the 1990s and 2000s and has questioned why the focus should be on the middle-class and often elitist Hindu woman, who is the default image for 'Woman' in India. This change of focus is necessary and appropriate, considering the pluralistic nature of Indian society and issues of caste and gender. However, my argument is that in doing so, the prototype of the upper-caste, upper-class Hindu woman should not be abandoned totally, as this woman symbolises the legal citizen in India. Moreover, this figure serves as a useful tool for discussions of legal change and reform. My argument is that if a socio-economically privileged person such as this one is being treated disparately in judicial reasoning, it does not bode well for the condition of the not-so-privileged. Therefore, I focus on this category of the Hindu woman and trace its position in judicial reasoning in the subsequent chapters.

In Chapter 2, I presented the process of my case analysis, explaining the choice of cases and the criteria for making these choices. I demonstrated the process of the analysis by explaining the activities I engaged in as well as the scholarship that I dealt with during the process. In Chapter 3, I provided the background for the creation of a certain ideal of the upper caste, upper class Hindu woman during the colonial period, due to the interaction of several discourses at that time. This ideal provided the foundation for the unmarked Indian Citizen, which was later adopted in the Indian Constitution. The Indian Constitution as well as the Hindu Code were both formulated by the same legislature, so it is not surprising that they were based on identical legal reasoning. The unmarked liberal subject gained marked preference in both documents. Moreover, the Partition of the country on religious lines had its effect on the legislators and they considered it necessary to do a balancing act between effective legislation and respecting religious sentiments. In the end, the Hindu code was a product of this balancing act. I argued that the Code created differential legal personhood between Hindu men and Hindu women and these formulations continue to impact judicial reasoning in the cases under study, several decades later.

In Chapter 4, I proceeded to the substantive part of my thesis - the analysis of custody cases. Here, I used gender as a category of analysis to understand how gender equality and gendered roles are defined by judges in these cases. I argued that while the judicial reasoning accepts the formal notion of gender equality per the Constitution of India in the case of *Githa Hariharan* as well as several others, this reasoning is premised on normative understanding of gender roles within a family. Further, I argued that the underlying gendered assumptions were also evident in judicial reasoning on the welfare principle. Moreover, the Hindu woman is often portrayed to be the educated, middle-class mother who teaches normative values to her children, while being

economically dependent on her husband. There are two key themes that emerge from the application of the welfare principle in judicial reasoning – Firstly, the judges equated economic well-being as welfare and this reasoning tends to be detrimental to women, considering their reduced economic status within the Hindu family. Secondly, judges adopted the reasoning that gender of the child impacted the child's welfare and awarded custody of girl children to their mothers and boy children to their fathers. Both these themes employed in judicial reasoning indicate how judges hijack the welfare principle intended for the benefit of children to justify protectionist and normative approaches towards gender roles and attempt to construct a one-size-fits-all model of gender roles. This type of reasoning omits the issues women face in obtaining property and/or maintenance, following their divorce.

In Chapter 5, I furthered the use of gender as a lens of analysis and explored different aspects of gender in these judgments. I explored how judges construct or conceptualise the Hindu woman in these cases. I analysed the notions of marriage, home and family life in judicial reasoning and argued that these notions were premised on normative understanding of gender roles. Further, I argued that the same standards did not apply to men and women when they were exposed to similar circumstances within the family. Women who deviated from the standard ideals of motherhood or womanhood were denied custodial rights while men in similar situations were not, clearly indicating that differential standards were applied by the judges in their reasoning, based on their normative ideas of gender roles. I argued that the judges construct the image of the Elite Dependent in these judgments and this woman had to adhere to the normative notions of gender roles – she can have a privileged existence but needed to be subservient to the men in her family. This figure symbolises the tension between normative assumptions on gender roles and gender parity, as is evident from the cases. The Elite

Dependent personifies the inherent disproportionate treatment of gender in judicial reasoning.

In Chapter 6, I explored the relationship between the Elite Dependent and the feminist arguments on gender roles and gender equality, especially in the context of the formulation of a UCC. I demonstrated that the gendered nature of judicial reasoning in these cases strengthened the feminist position that all religious personal laws are gender-discriminatory. Further, I argued that since the judicial reasoning in these cases under the Hindu Code did not support gender justice, it would be detrimental to use the Hindu code as a blueprint for the UCC. To summarise, I demonstrated, through my analysis of case law, that judicial reasoning tends to construct a one-size-fits all model of womanhood and motherhood for all women who fight for custody, rather than account for diversity and context of the cases under study. This is carried out by the judges by using the trope of the Elite Dependent to resolve the tensions between the unmarked citizen-subject of the Constitution and the idea of protectionism of women. Further, judicial reasoning hijacks the child-centric welfare principle to reinforce normative gender roles in the family, as seen in the use of the argument of economic well-being to undermine women's right to custody and by awarding custody to the parent with the same gender as the child. It is evident from my arguments that the gendered nature of judicial reasoning proves that there exists a disproportionate treatment of gender in the machineries of the state, which impacts gender justice. If the state intends to evolve more gender-just laws, then it should consider the impact of such gendered reasoning on lived experiences of women.

7.1 Reflections

In this section, I present my reflections on my learning and experiences, during my journey with this thesis. The first point that struck me through this process

is that the name 'Hindu code' or 'Hindu law' is a misnomer, as it has nothing in common with customary Hindu law. It is based on Common Law principles, which are derived from Christian ways of thinking. The object of this codification was to ensure uniformity in a diverse society and create a common Hindu identity, along the lines of a modern, liberal framework. This aim goes against the grain of the syncretic Hindu tradition, which is willing to assimilate different, and often conflicting, traditions. As a practising Hindu, what struck me most was how inflexible and static the Hindu code is, compared to the customs and traditions of the religion. Having said that, I am not glossing over inherent issues like an ossified patriarchy and caste that plague Hindu society. My emphasis is more on the positive aspects of the faith that find no place in the legal spectrum. Hindu law is not religious law by any stretch of imagination and it corresponds to secular family law in almost every aspect.

In these cases, the judges are interpreting Anglo-Hindu law which is situated in a framework of Christian values but are claiming this to be Indian or specifically Hindu in nature. It appears as if there was no alternative judicial language to describe situations that did not fit into the standard of "Indian culture" or "Indian values". In some cases, the judges claim that there is an erosion of Indian values due to Western influence. However, there was almost no explanation on what constitutes an Indian culture, in a sub-continent that exhibits vast diversity and plurality. The idea of a common Indian culture and a sense of Indianness was created by Indian nationalist leaders during the freedom struggle, to unite the masses. This idea was carried forth after independence from colonial rule as the fiction of unity was necessary to knit a plural nation together, especially in the shadows of the Partition. Perhaps the only common or national identity that Indian citizens have is the idea of constitutional citizenship for all Indians. But instead of asserting any notions

of equality based on the Constitution, there is an emphasis on archaic notions of gender in judicial reasoning. In most cases, the judges do not conduct a critical enquiry into their own positions and tend to adopt normative ways of thinking, thereby devaluing their reasoning.

Another key aspect of these cases was the category of 'Woman' they represented. As I mentioned in Chapter 6, Indian feminist legal theory considers this an important theme in the last two decades. It claims that the general categorization of 'Woman' or 'Women' is incorrect, as it considers the upper-caste, upper-class Hindu woman as the norm, thereby reducing the experiences of women from the lower class or minority communities. This is my point of departure from existing feminist theory, as I think it is important to highlight the plight of all women. While the upper-caste Hindu woman has symbolised the Indian woman for several decades, this is more a problem of representation. It is necessary to opt for course correction and focus on the issues of gender and caste faced by women of other backgrounds and communities, as the upper caste woman has better access to resources as well as recourse to justice. But it is also necessary to highlight gender-based issues faced by all women. My argument here is that gender related issues have a common ground and it does not matter if the cage is gilded or muted.

On the face of it, what was evident to me from my analysis of the case law were the entrenched gendered norms. I encountered these norms at every turn, as most of the cases I studied were resonating with gendered presumptions and stereotypes. In some instances, even the gender of the judges did not make an impact on the way gender norms were viewed. Even in those instances in which the judges questioned gender norms or tried to establish gender equality, they reverted to a conventional stance subsequently. Discussing language in law, Lucinda M. Finley claims that the important features of legal language are that it reflects conservative norms

that help to shape the context and worldview of law, thereby exposing the patriarchal bias and male norms in legal language.⁴⁰⁴ This accurately captures the language used by the judges in the cases under study. In these cases, men are the norm and women, the deviation from the norm. The level of internalisation of gendered norms by the judges in these cases is quite significant. Some of the cases, like that of *Chethana Ramatheertha*, exhibited moments of potential where the judges attempted a gender-balanced approach and applied the law without preconceived biases. But these moments were few and far between. However, the fact that these moments existed present some hope for the future.

Perhaps the most disturbing aspect of judicial reasoning in these cases are the silences, especially the silences where the judges accept normative ideas on gender as a given. There is no questioning or critique of those instances in which women have been cast in gendered roles and this is considered acceptable. These silences help in perpetuating embedded norms and patriarchal bias, as they exist in those places where speech is necessary. Another aspect of silence has been on the question of religion. There is no mention of the Hindu religion in any of the cases under study, though they are decided under Hindu law. Here, the silence of the judges can be interpreted as a tacit understanding that they are interpreting so-called secular Common law, rather than religious personal law. It is interesting to note that the judges practice a unified theory of law in a country that symbolises diversity. It is difficult to generalise or make assumptions on any topic in India, as it is a land of paradox. But judicial reasoning manages to

⁴⁰⁴ Lucinda M Finley, '*Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*' (1989) 64 *Notre Dame Law Review*.

make generalised assumptions in speech and silence and does not engage in unpacking the law or context, in these cases.

My focus in this thesis has been on the gendered nature of judicial reasoning, rather than on discussions of equality. However, it cannot be denied that in these cases, and in cases dealing with religious personal laws in general, the question remains whether the Courts favour diversity or equality. This question raises further questions – for instance, what constitutes equality in the family or in the nation? Can unequals be treated equally? Should equality be considered as a treatment of sameness or difference? Should religious personal laws be equal laws or uniform laws? These questions offer scope for further research. I see this thesis as the first step in that direction, by questioning the impact of gendered nature of judicial reasoning on personal laws, especially on the formulation of a uniform civil code. I also question if the Indian legal system needs a uniform code or an egalitarian code, to redress its gender imbalances. The inherent patriarchy and gender bias in the machineries of the state need to be interrogated and rectified to establish a gender-just legal system in India.

7.2 The Road Ahead

I have discussed earlier that the Hindu code today has no basis in customary Hindu law and is almost entirely based on English Common Law, barring a few exceptions. There has been extensive research on how Common Law is premised on Christian principles. This opens an avenue for exploring the Christian basis of Hindu law. The interface between the ideology of the Hindu Nationalist Movement, especially its normative stance on gender, and the gendered nature of judicial reasoning would be another area of exploration, along with the Christian basis for Hindu law. It would be both interesting and ironic if a Hindu nationalist government in India chooses to pass a uniform civil code, premised on a Hindu code with underlying Christian values.

During my analysis of the cases under study, there is a lacuna in the scholarship that caught my attention. While I align myself with the Indian legal feminists and their stance on personal laws and gender justice, this scholarship concentrates on the political, socio-cultural and economic relations within the Hindu family. A family is essentially centred around relationships and the underlying emotions that make these relationships. Both the literature and the judicial reasoning barely focus on emotional angles that contribute to familial relationships. For law to be more effective for the individual, it is important to focus on the gossamer-thin strands that bind families together and help in connecting human beings together. The family cannot and should not be treated as a mechanical entity, as it involves the lives and emotions of human beings at an everyday level.

Another important area that needs more work is to arrive at alternative resolutions in personal law. The Indian feminist scholarship and my thesis have proved beyond doubt that personal laws are gender discriminatory. Moreover, Indian Courts are notorious for pendency of cases over years due to the low ratio of judges to population.⁴⁰⁵ These cases are being fought by many women for several years, before they get satisfactory or adequate resolution. Considering this situation, it is difficult for Indian women, especially those in rural areas, to get speedy or effective justice. The feminist argument in the last two decades is to do away with any notion of a UCC and instead focus on localised methods of delivering legal resolution, especially for matrimonial disputes. More research is necessary on alternative dispute resolution

⁴⁰⁵ India has only 13 judges for a million people, as opposed to 50 or more per million in developed countries. The Law ministry of India gets one of the lowest budget allocations and appointments of judges to High Courts and the Supreme Court is not done on time, leading to stagnation of cases at every level. About 27 million cases are pending in Indian Courts. It is not uncommon for maintenance cases to last between 3 to 20 years, depending on the tiers of Courts that they have to pass through, before maintenance is provided to separated or divorced women (Kirti Singh, *Separated and Divorced Women in India: Economic Rights and Entitlements* (Sage Publications India Pvt Ltd 2013).

mechanisms based on personal laws as well as policy changes that will facilitate such entities, rather than a reliance on law as an instrument of social change. Another emerging area of research is that of custody cases of Indian diaspora (who may or may not be Indian citizens). Mostly, these involve elements of Hindu law with concurrent laws from the country of residence (UK, USA, Australia, Canada to name a few). This category shows potential for comparative research on how Hindu law on custody is translated across jurisdictions. Further, the Feminist Judgment Project has been launched in India recently and some of the judgments I have analysed here can be rewritten as a feminist judgment as they offer a lot of scope in terms of contribution to feminist theory in India.⁴⁰⁶

In conclusion, I wish to state that in many ways, Indian feminists have questioned and critiqued fundamental notions of family or nation in the present forms consistently.⁴⁰⁷ I have attempted to take this conversation forward by way of my case analysis. It should not be forgotten that it takes a lot of strength for Indian women to defy familial and social structures in a country steeped in patriarchal tradition. Due to the liberal notion of rights residing in individuals, the Constitution and other Acts passed in India tend to adopt an approach of gender parity in the letter of the law. However, women do not envisage themselves as rights-bearing individuals despite the existence of such laws.⁴⁰⁸ While it is easy to remain within social and economic structures that provide a sense of security and comfort as well as social standing, it is difficult to break free of them and fight a lone battle. For most women,

⁴⁰⁶ For more on this, see the website of Feminist Judgment Project in India (2017) <https://fjvindia.wixsite.com/fjpi> (accessed 31 January 2018). One of the cases mentioned on the website is that of *Githa Hariharan*, the starting point of my case analysis.

⁴⁰⁷ For instance, see Archana Parashar, *Women and Family Law Reform in India* (Sage Publications Pvt Ltd, New Delhi 1992), Flavia Agnes, *Family Law Volume 2: Marriage, Divorce and Matrimonial Litigation* (Oxford University Press 2011), Rajeswari Sunder Rajan, 'Women between Community and State: Some Implications of the Uniform Civil Code Debates in India' (2000) 18 *Social Text*.

⁴⁰⁸ *ibid.*

asserting their individual rights implies that they need to confront their relatives in the natal or marital families, a prospect that threatens them with loss of support systems. Many women choose to stay within such constricting structures at great personal cost, so that they do not lose the ground they are standing on. One of the significant contributions of the Indian women's movement has been the ability to make women step out of these situations and take back control of their lives.

As I have demonstrated in this thesis, judicial reasoning in custody cases is like a repainted old house. It looks bright on the outside. It is only when one examines it closely that the cracks in the foundation and loose hinges on the doors and windows become visible and one can determine the extent of damage to its interior. Similarly, in judicial reasoning, the superficial layer uses appropriate legal terminology and appears to be supporting gender parity. However, when we peel away the layers, the embedded gender norms become visible. Judicial reasoning tends to create, reproduce and iterate gender norms, thereby reflecting social conditions. Old houses need repair – they must be stripped clean and overhauled, from foundation of the building upwards. While we may have to wait for such a drastic overhaul, what the situation needs now is basic repairs to make the house habitable. There is a need for an exploration of multiple and textured approaches from gender sensitization of judges to alternative ways of resolving family disputes, to aid in restoring symmetry to the judicial process.

Appendix 1 - Courts in India

The nature of Indian polity is that it is a federal union. It consists of 29 states and 7 union territories (which do not have the status of full statehood), each with their own governments. Apart from these, there is a union government at the centre, which administers the country. Each of the states and union territories are divided into districts for administrative convenience. The Indian judicial system is a colonial legacy from the British and is mostly based on Common Law principles. The Indian Constitution drafted after the independence of the country, provides an elaborate court structure to serve as the judiciary of the country. At the apex of the Indian judicial system is the Supreme Court of India, headed by the Chief Justice of India (CJI). The CJI is appointed by the President of India on the advice of the Government of India (Executive). The CJI in turn advises the President for appointing other judges to the Supreme Court Collegium. The Supreme Court of India has original, writ, appellate and advisory jurisdictions. It hears original petitions filed between various arms of the government or between the Central Government and one or more State Governments. It has original jurisdiction to hear writ petitions and public interest litigations and acts as an advisor to the President of India on interpretation of constitutional provisions. The Court also functions as the highest appellate Court under the Indian Constitution and hears all types of cases on appeal from the lower Courts.

Below the Supreme Court of India, there are eighteen High Courts across the country, which are at the head of a State's judicial administration.⁴⁰⁹ Each High Court has a Chief Justice, along with several judges (the number varies from

⁴⁰⁹ Some states have a joint High Court. For example, Punjab and Haryana. The Union territories are affiliated to the nearest High Court based on geographical proximity. Only Delhi, a Union Territory, has a High Court of its own. (Source: 'Indian Judiciary' <<http://indiancourts.nic.in/>> accessed 12 November 2016)

state to state). The Chief Justice of the High Court is appointed by the President of India, in consultation with the Chief Justice of the Supreme Court. The Chief Justice of each High Court is consulted by the President and Chief Justice of India for the appointment of the other High Court judges for the state. The High Courts have original, writ and appellate jurisdictions for the geographical territory under their jurisdiction. The High Courts can deal with civil and criminal matters within their territories and act as appellate authority for the decisions of the lower courts.

Further, there are civil and criminal courts set up in each district of the country, which have delineated lines of civil and criminal jurisdiction. While the civil and criminal jurisdictions are distinct at the level of the lower courts, the High Courts as well as the Supreme Court of India handle civil, criminal, family law and a variety of other laws as they have appellate jurisdictions. The legal system also consists of Tribunals (such as the Income Tax Tribunal, Administrative Tribunal, etc.) set up for adjudicating specific cases as well as the Lok Adalats or Peoples' Courts which act as alternative dispute resolution forums at the local level and are on par with the Tribunals.⁴¹⁰ Each district also has family courts which adjudicate matters of personal law, especially those dealing with divorce and custody of children, for that district. The judgments of these family courts can be appealed first to the respective High Court and finally to the Supreme Court of India, wherever there is a contest. The Indian judicial system recognises both statutes and precedents as well as established principles of law, in their decisions. The Constitution of India provides for a system of checks and balances by making the executive accountable to the

⁴¹⁰ *ibid.*

judiciary but in turn, allowing the executive to make the judicial appointments as well.

Appendix 2 - Questionnaire on Uniform Civil Code

1. Are you aware that Article 44 of the Constitution of India provides that “the State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India”?
 - a. Yes
 - b. No

In your view, does this matter require any further initiatives?

2. The various religious denominations are governed by personal laws and customary practices in India on matters of family law, should the UCC include all or some of these subjects?
 - i. Marriage
 - ii. Divorce
 - iii. Adoption
 - iv. Guardianship and Child custody
 - v. Maintenance
 - vi. Successions and
 - vii. Inheritance
 - a. Yes, it should include all these
 - b. No, it should exclude_____
 - c. It should further include_____
3. Do you agree that the existing personal laws and customary practices need codification and would benefit the people?
 - a. Yes

- b. No
 - c. Personal laws and customary practices should be replaced by a uniform code
 - d. Personal laws and customary practices should be codified to bring them in line with fundamental rights.
4. Will uniform civil code or codification of personal law and customary practices ensure gender equality?
- a. Yes
 - b. No
5. Should the uniform civil code be optional?
- a. Yes
 - b. No
6. Should the following practices be banned and regulated?
- a. Polygamy (Banned/ Regulated)
 - b. Polyandry (Banned/ Regulated)
 - c. Similar customary practices such as *Maitri-karaar* (friendship deed) et al. (Banned/ Regulated)
7. Should the practice of triple *talaq* be _____?
- a. Abolished *in toto*.
 - b. Retained the custom
 - c. Retained with suitable amendments
8. Do you think that steps should be taken to ensure that Hindu women are better able to exercise their right to property, which is often bequeathed to sons under customary practices?

- a. Yes, Hindu women must be made aware of this right and measures should be taken to ensure that women, under pressure from family do not forego their property.
 - b. No there are adequate protections in the existing law.
 - c. Legal provisions will not help in what is primarily a cultural practice, steps have to be taken so sensitise the society instead.
9. Do you agree that the two-year period of wait for finalising divorce violates Christian women's right to equality?
- a. Yes, it should be made uniform across all marriages
 - b. No. This period is sufficient and in-keeping with religious sentiments.
10. Do you agree that there should be a uniform age of consent for marriage across all personal laws and customary practices?
- a. Yes.
 - b. No, customary laws locate this age at the attainment of puberty.
 - c. The prevailing system of recognising 'voidable' marriages is sufficient.
11. Do you agree that all the religious denominations should have the common grounds for divorce?
- a. Yes
 - b. No, cultural difference must be preserved.
 - c. No, but there should be the same grounds for divorce available for men and women within personal law.

12. Would uniform civil code aid in addressing the problem of denial of maintenance or insufficient maintenance to women upon divorce?

a. Yes

b. No

Give reasons:

13. How can compulsory registration of marriages be implemented better?

14. What measures should we take to protect couples who enter into inter-religion and inter-caste marriages?

15. Would uniform civil code infringe an individual's right to freedom of religion?

a. Yes

b. No

Give reasons:

16. What measures should be taken to sensitize the society towards a common code or codification of personal law?

Remarks:

Please provide us with your name, contact number and address.

Appendix 2 (Continued) - Analysis of the UCC Questionnaire

The first question asks the reader if they are aware that Article 44 of the Indian Constitution instructs that the state shall secure a uniform civil code for citizens throughout the territory of India. It provides a yes or no choice, along with an add-on question asking if the reader thinks that this matter needs further initiatives. So, the basic premise is to formulate a Uniform Civil Code with no option to question whether such a code is necessary in the first place. However, question 3 tries to address this point to some extent by asking if the reader agrees that the existing personal laws and customary practices need codification. But the answer to this question is confined to 4 choices – Yes, No, Personal laws and customary practices should be replaced by a uniform code or Personal laws and customary practices should be codified to bring them in line with fundamental rights. These options seem too simplistic to address the issue of whether a uniform civil code is needed at all – a question that has remained unanswered in public debate for seven decades now.

Question 4 of the questionnaire asks if the UCC or codification of personal laws and customary practices ensure gender equality. This question has a simple 'Yes or No' option, with no space for any additional reasoning. Another question that follows this pattern is question 5, which asks if the uniform civil code should be made optional, again with a 'Yes or No' option. It is ironic that the Law Commission of India, which is supposed to address legislative lacunae and suggest appropriate changes to the Parliament, thinks that a vast subject area of gender equality and law can be reduced to a yes or no answer. Feminist legal scholarship in India has written vast swathes of literature discussing gender equality and gender justice and their relation to law. They have repeatedly addressed how law can be used an instrument for social change and cannot be relied upon to be the only instrument. Moreover, this area of scholarship has also discussed exhaustively about optionality and reverse-

optionality positions for the UCC. The Law Commission pays token respect to feminist activism by relegating these important questions to a footnote.

Questions 6 to 9 of the questionnaire address specific religious/customary practices and legal positions. Question 6 asks if practices such as polygamy, polyandry and customary practices such as Maitri-Karaar (Friendship deed) should be banned or regulated. Question 7 asks if practice of Triple Talaq⁴¹¹ should be abolished in toto, retained as is or retained with suitable amendments. The questions on polygamy and triple talaq pander to populism as there is a strong belief in popular (predominantly Hindu) discourse that Muslim personal law is detrimental to women and women's rights.⁴¹² This view is often reflected in judgments as in the case of Shah Bano. There is vast scholarship to prove that Muslim personal law is not as backward as it is often portrayed, but this is beyond the scope of my current thesis. It is sufficient to mention here that these questions reflect a populist approach, rather than any well-researched legal method.

Question 8 addresses the Hindu woman's right to property which is often denied as property is bequeathed to sons. The options to answer this question are that Hindu women should be made aware of this right and measures taken to ensure that their families do not deprive them (or) that no steps should be taken as there are adequate provisions in existing law (or) whether legal provisions will not help as it is a cultural practice, which can be prevented by better sensitisation. Hindu women have the right to inherit property on paper

⁴¹¹ Triple Talaq refers to the practice of divorcing one's wife by Muslim husbands, in which the husband can utter the word 'Talaq' three times and he is considered to have divorced his wife. This practice did not find any resonance in Sharia law but was considered as customary among Indian Muslims.

⁴¹² For more on this perception, see Tanika Sarkar, 'Violent and Violated Women in Hindu Extremist Politics' in Wendy Doniger and Martha C Nussbaum (eds), *Pluralism and Democracy in India - Debating the Hindu Right* (Oxford University Press 2015), Flavia Agnes, *Family Law Volume 1: Family Laws and Constitutional Claims* (Oxford University Press 2011).

but in practice, most families do not provide an equal share in the property to daughters, citing the provision of dowry to be in lieu of immovable assets. While this is a significant issue in Hindu law, it is not the only area in which there is no gender equality. All the four enactments of the Hindu code contain provisions that are not gender just and need to be addressed. Again, this question is indicative of populist tendencies, as popular discourse tends to portray Hindu law to be problem-free and egalitarian, especially in contrast to Muslim law.

Question 9 asks if the two-year waiting period for finalising a Christian divorce violates Christian women's right to equality. The answer options for this question are Yes and that it should be made uniform across all marriages or No as this period is sufficient and in keeping with religious sentiments. It is unclear which part of Christian canonical law specifies this two-year wait period and how this waiting period is justified under any circumstances. It seems superfluous to even ask the question if such a period violates women's right to equality. The only question asked about Christian Personal law shows no understanding of this body of law or gender equality in any way.

After addressing a few questions to Hindu, Muslim and Christian personal laws and ignoring the laws of other communities such as Buddhists, Parsis, Sikhs or Jains, the questionnaire then turns to generic questions on marriage, divorce and maintenance. Question 10 asks whether there should be a uniform age of consent for marriage across all personal laws. The answer options for this question are Yes, no (as customary laws locate this age at the attainment of puberty) or the prevailing system of recognising 'voidable' marriages is sufficient. This question is significant from the perspective of the Hindu Minority and Guardianship Act, as this Act recognises the husband of a Hindu minor girl to be her natural guardian in Sec. 6(b). While age of marriage for a woman in India is fixed at eighteen, it is common knowledge that girls as

young as 10 are given away in marriage. India has a third of the world's child brides and about 47% of Indian women are married before they turn eighteen.⁴¹³ This makes them vulnerable to physical, emotional and economic problems at a young age. A problem of this magnitude is smothered in the questionnaire by a single, inadequate question.

Question 12 asks if the UCC will help in addressing the denial of maintenance or providing insufficient maintenance to women upon divorce. The answer options are yes or no and an option to provide reasons. Similar options are provided for question 15, which asks if the UCC would infringe on an individual's right to freedom of religion. Neither of these questions can be answered without a knowledge of the provisions of the UCC, making them arbitrary in this sense. Questions 13 and 14 pertain to registration of marriages and measure to protect inter-religious/inter-caste marriages. India has a secular legislation, the Special Marriages Act, which addresses these points already, albeit with some constraints on marriage registrations. It is unclear why the Law Commission seeks responses when there is an existing legislation already providing the measures which are being sought by these questions. The last question seeks remarks from the public as to what measures can be undertaken for societal sensitisation towards a common code or codification of personal laws. This leaves no room for any critique of the code itself and presupposes the existence of the code, bringing the questionnaire back to where it started.

⁴¹³ India UNICEF, 'Child Marriage' (2017) <<http://unicef.in/Whatwedo/30/Child-Marriage>> accessed 23 August 2017.

Appendix 3 – Case Analysis Spreadsheet Samples

3.1- Analysis on Welfare Principle

S.no.	Case	Keywords	Comments
1	Mausami Moitra Ganguli vs. Jayant Ganguli	Welfare, Rights of parents, financial resources	Welfare as stability and security
2	Amit Beri son of Hardaya Narain Beri and Hardaya Narain Beri son of Jai Narain Beri vs. Smt. Sheetal Beri wife of Amit Beri D/o Raj Kumar	Welfare, Mother, Indian culture (night clubs)	Welfare as a point of fact and not of law
3	Arun Grover vs. Ritu Grover	Welfare, No contact with child	Welfare by derivation - father didn't meet the child or bear his expenses
4	Shamal Sharad Baride vs. Sharad Baburao Baride	Welfare, Rights of parents, motherhood	Welfare dominates over rights of parents, custody is not permanent
5	Chethana Ramatheertha vs. Kumar V. Jahgirdar	Guardianship, Role of parents, motherhood, Remarriage of mother	Guardianship only if father is disqualified but this can be superseded by Welfare. Welfare as upbringing -necessary facilities, quality education, enlightened and healthy personality, happy, content and responsible member of society - which parent is better suited for integrated development of the child
6	Gaurav Nagpal vs. Sumedha Nagpal	Matrimonial discord, Family, marriage	More on marriage, matrimonial discord and cultural norms
7	Mohan Kumar Rayana vs. Komal Mohan Rayana and Komal Mohan Rayana vs. Mohan Kumar Rayana	Welfare, Mother's career choices	Welfare is not clearly defined here. However, it is clear from the precedents cited and counsellors' advice that gender is an important consideration
8	Smt. Pushpa and Another vs. Smt. Anshu Chaudhary	Welfare, Mother	Welfare by negation - not economic affluence nor emotional concern but facts and circumstances - physical

			wellbeing, education, daily necessities
9	Ram Murti Chopra and Anr. Vs. Nagesh Tyagi	Welfare, Father	Welfare - child's ordinary comfort and contentment, intellectual, moral and physical development, health, education, general maintenance, emotional considerations, social set-up, care, attention, career building, good human being, proper love and affection
10	Romani Singh vs. Lt. Col. Vivek Singh	Welfare, Mother	Welfare - mother's natural love and affection for child of tender age and a girl child. Mother is educated, working, earning a good salary and can spend time with child after school (father in the army)
11	K.M. Vinaya vs. B.R. Srinivas	Welfare, Rights of parents, Father	Welfare - moral, ethical, physical wellbeing. Welfare to balance parents' rights
12	Ruchirkumar Gajanandbhai Suthar and 2 Ors. Vs. Amitaben D/o Hasmukhlal Nanchanddas Mewada	Welfare, mother	Welfare - mother has preferential claim due to tender years and gender of child
13	Ashok Kumar Jatav vs. Ku. Roshani and Anr	Welfare, Rights of guardian	Welfare - protected socially and financially if child is with father (as opposed to grandparents). Gender of child - father can take care of education, marriage
14	Smt. Bhabani Mallick vs. Swapan Kumar Mallick	Welfare, financial capacity, maintenance	Welfare - not just financial capacity but ethical and moral values, contentment, health, education, intellectual development and favourable surroundings. Social, moral and statutory obligation of father to provide maintenance for child
15	Eshita D/o Hasmukhbhai Sitapara vs. Hiren Prabhudasbhai Brahmhatt	Welfare, Mother	Welfare - Not only economic, academic or physical but also emotional and psychological, holistic development. Gender of child considered

16	Kotholla Komuraiah and Kotholla Kondavva vs. Kotholla @ Bikkanuri @ Gorlakadi Kanaka Laxmi	Welfare, Remarriage of mother, Rights of guardian	Welfare - physical comfort, moral and ethical well-being
17	Shyamrao Maroti Korwate vs. Deepak Kisanrao Tekam	Welfare, Rights of guardian	Welfare - Construed literally and taken in widest sense
18	Niranjan Singh Huda and Anr vs. Tavinder Pal Singh Bhatia and Anr.	Welfare, Father	Welfare - best protected by father (father's conviction and pending appeal did not alter this)
19	Nil Ratan Kundu and Anr. Vs. Abhijit Kundu	Welfare, Father	Welfare - parens patriae jurisdiction, child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. Not as a negative test of father being unfit but a positive test of welfare "A Court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents."
20	Sardar Bhupendra Singh vs. Smt. Jasbir Kour	Welfare, Vedic Hindu law, Mother	Welfare - emotional wellbeing, parental love and sympathy
21	Dr. Seema Kumari W/o late Dr. Shashi Shekhar and D/o Sri Rageshwar Prasad Sinha, Advocate, at present resident of Mohalla-Makhania Kuan Road, Patna, P.S.-Pirbahore, District-Patna vs. The State of Bihar & Ors	Welfare, Remarriage of Mother	Welfare - premised on the possibility of mother being remarried (though she said she will not, petitioner being a doctor), male child is the coparcener of the grandfather's Hindu Undivided Family
22	Shailesh Khandelwal vs. Meenakshi Khandelwal	Welfare, Father	Welfare - Utmost care, admitted in a reputed school, love and affection of father and grandparents (mother living alone), child sweet and above average in intelligence. Statutory presumption of father as natural guardian
23	Murari Lal Sidana & Anr. Vs. Smt. Anita	Welfare, Mother as a stranger	Welfare - physical, psychological, emotional,

			financial and moral needs, emotional bonding, family environment, school and neighbourhood. No visitation to mother to avoid emotional and psychological disturbance to children
24	Shiwani Kabra vs. Shaleen Kabra	Welfare, Mother	Welfare - cannot be measured by position of father, social status or academic degrees, physical comfort. More dependent on care, protection and guidance, psychological and emotional needs
25	Vijayaben Parshottam Kotak vs. Parshottam Kotak	Welfare	Welfare - education, financial stability, age of the children, natural love and affection of the parties, the moral character as well as social status and the wish of minor if they are capable enough of taking proper decision
26	Venugopalan vs. Beena	Welfare, educated mother	Welfare - having regard to age, sex and religion of minor, character and capacity of guardian (personal guidance on physiological changes, fidelity in life, faith in the institution of marriage, relations for community life, lessons on hygiene, grooming, selection of companions, educational needs)
27	Vikram Vir Vohra vs. Shalini Bhalla	Welfare, Rights of parents, Indian culture	Welfare - physical custody, health, maintenance, education, protection of mother, intellectual development
28	P. Senthil Kumar vs. R. Sunitha	Welfare, Father, Maintenance	Welfare - Negative definition - father who fails to pay maintenance
29	Neelam Rani vs. State of Haryana and Ors.	Welfare, mother	Welfare - tender years, daily needs
30	Smt. Imarti Devi vs. Madhu Devi	Welfare, Remarriage of mother	Welfare - not being neglected by mother or second husband

31	Tilak Kumari & Anr. Vs. Sh. Anand	Welfare, Maintenance	Obligation of maintenance on father
32	Smt. Gundamma vs. Shivasharanappa	Welfare, Financial capacity	Welfare - financially sound, good education
33	Nibha Kumari vs. State of Bihar and Ors	Welfare, Mother	Welfare - tender years, mother educated
34	Alamelu Sockalingam vs. V. Venkatachalam	Welfare, Remarriage of father	Welfare - crucial age of child (underlying presumption about gender of child), growth and maintenance, Father remarried
35	Baby Kavya Awasthi and Another vs. State of U.P. and Ors	Welfare, Mother	Welfare - educated and earning mother, love, affection, care of mother presumed
36	R. Muruga Perumal vs. J. Radhamani	Welfare, Mother	Welfare - child is female, living in a remote place, mother a teacher and child can get admission in her school immediately
37	Govind Sahai Bagarhatta and Ors. Vs. Santosh Mishra	Welfare, legal rights of guardians	Child's opinion to live with grandparents
38	R. Manivasakan vs. M. Vimala	Welfare, 'after'	Father and mother well-educated academics but bickering due to family issues. Githa Hariharan used as precedent
39	Amrit Pal Singh vs. Jasmit Kaur	Welfare, financial capacity, mother	Welfare - presumption of care by mother, educated and financially capable, sufficient time, take care of essentials, integral development and personality
40	S. Amutha vs. C. Manivanna Bhupathy	Welfare, Rights of parents	Neither father nor mother can claim suzerainty over the child
41	Chhotibai (Smt.) vs. Sunita Kushwah (Smt.)	Welfare, Mother as a stranger	Welfare - good financial status (of grandmother), healthy, happy, going to school
42	Gaytri Bajaj vs. Jiten Bhalla	Welfare, Mother as a stranger	Welfare - Looking after, educational facilities, proper and congenial manner
43	Master Shobhit Vs. State of U.P. and Ors.	Welfare, Mother accused	Moral basis for welfare for a mother
44	Mousami Moitra Ganguli vs. Jayant Ganguli	Welfare, Father	Welfare - father working member and head of the family,

			better financial resources, love and affection
45	Smt Radha alias Parimala v. N. Rangappa AIR 2004 Kar 299	Welfare, Father	Welfare - financial, educational, physical, moral and religious welfare. Balance between welfare and rights of parents. Aspersion on mother for adultery but not on father for bigamy
46	Githa Hariharan & Anr. Vs. Reserve Bank of India & Anr.	'after', Gender equality, Guardian	After as in the absence of, father as a dominant personality

3.2 - Sample Analysis of Cases

S.No.	Cause Title	Date of Decision	Case facts	Observations in the judgment
1	Amit Beri son of Hardaya Narain Beri and Hardaya Narain Beri son of Jai Narain Beri vs. Smt. Sheetal Beri wife of Amit Beri D/o Raj Kumar	17.05.2006	Custody of male minor child over 10 years of age. Trial court awarded custody to mother, but High Court reversed decision	<p>"When it comes to Mother v. Father for custody of the child, we should in normal circumstances lean towards the Mother. Mother's love is proverbial. Every religion, every culture, every civilization has acknowledged this. The love, affection and care, which a mother can bestow on her child, cannot be given by anyone else, including the father. There may be cases where the father is comparatively more affectionate, but they are exceptions to the general Rule.".....</p> <p>The respondent is earning sufficient, money to maintain herself and her minor children but it alone is not sufficient to record finding regarding the welfare of the child. The allegation of the appellants is that she is a lady of bad character.... The Indian culture is entirely different. I have already stated regarding the family background of the respondent No. 1 and her sister. She is also in the habit of attending night clubs and coming late to her house. During this period, the minor child has to be left in some care house for children. As the child will grow and attain the age of maturity, he is likely to come in contact with undesirable elements. Therefore, for proper brought-up of the child and that he may become a good citizen and may have good character, it is necessary that he may not be left with the respondent"</p>
2	Shamal Sharad Baride vs. Sharad Baburao Baride	20.04.2009	Husband alleges wife committed adultery, wife claims that husband has drinking habits. They have 3 children between them. Wife initiated proceedings for	<p>"The shelter of the mother, at such tender age, where apart from education, ways of life are also to be etched on mental screen of ward is more effective in the situation to nourish the child.... The question is the</p>

			<p>partition and possession of property and husband demanded custody of child. Father did not visit the child for about 2 to 3 years. Husband known to have been at rehab for detox program. He was also prone to selling his fields and tractor etc to fund his habits. Two elder children technically with husband but maintained by his brother's wife. Child with mother making progress in education but not the other two. Mother claimed 10 acres of property on behalf of minor child, Custody awarded to mother</p>	<p>case of custody and not appointing guardian as the child can desire to stay with either parent. Custody is not of a permanent nature. Vital to custody is age of child and circumstances. Best interest of the child is basic consideration to which rights of parents have to yield."</p>
3	<p>Chethana Ramatheertha vs. Kumar V. Jahgirdar</p>	<p>27.01.2003</p>	<p>Female child of 8, parents divorced by mutual consent. Mother's application of custody rejected, and father given custody. Mother appealed. Mother married Anil Kumble, a famous cricketer and the child was then living with mother and stepfather. Father lived alone with his ailing father and hence the environment not conducive for caring for the child. Father claimed that mother was not providing good care, "she was not a good mother", Also that father had independent means to take care of the child while the mother did not possess such means.</p>	<p>"The historical concept that the father of a minor child is in a better or superior position to take care of the child has as of now given way to the modern thinking that it is not necessarily so; that either parent is equally capable of taking care of the child; that the question of custody should always be decided by taking into consideration the facts and circumstances that prevail in each case; the ability of the parents to provide necessary facilities--environmental, companionship, love and affection, are all factors, which Courts have to bear in mind in deciding the question. The question is not viewed any more from the angle of "which parent has a better right", but from the approach as to "the company of which of the two parents is better suited for the integrated development of the personality of the child" and as to whether the child receives the necessary inputs if it is in the company</p>

				<p>of a particular parent, for a healthy growth and development of the personality of the child.....The mother getting married again after the divorce, cannot be termed as an act of selfishness as is sought to be projected by the learned Counsel for the respondent-father. Developments and progress in law is very slow and tardy. Changes brought about by codified law to any customary or conventional practices are always opposed and decried as lowering the values in the society. We, at any rate, cannot attribute any virtue to the father who has remained not married subsequent to divorce and/or attribute any selfishness to the mother for her marriage after her divorce with the respondent. We cannot also accept the submission on behalf of the respondent-father that the father has remained unmarried after his divorce with the present appellant only with a view to promote the welfare of the child. We merely accept that it is a fact that he has remained unmarried so far and as to what could be the outcome on the aspect of the welfare of the child in the context of deciding the entrustment of custody of the child and nothing beyond."</p>
4	Gaurav Nagpal vs. Sumedha Nagpal	19.11.2008	<p>Father having custody of minor son by flouting lower court orders (Contempt proceedings against him) Father claims to be in a better position to take care of child financially and that the child hates the mother. However, lower court granted custody to mother and increased maintenance. Father was married earlier, and first wife committed</p>	<p>"Matrimonial discords are on the rise at an alarming rate. The sanctity of marriages is under cloud, which in a great way affects the society at large. Individuals can in no way be segregated from the society to which they belong. The cultural heritage of a country is greatly influenced by a pattern of behaviour of individuals and more so in matters of matrimony. Home can be a wonderful place to live. But continuous fights between the partners of a marriage disturb the</p>

			<p>suicide due to torture and harassment by family and several criminal cases pending against him. Discussion on using Habeaus Corpus for child custody cases. Mother granted custody and father visitation rights. Father could not take advantage of his own wrongs.</p>	<p>atmosphere at home and create havoc on the members of a family. One does not need a mansion to lead a happy marital home. The foundation of a happy home is love, sharing of joys and sorrows, and not in that sense bricks and concrete. There should be cementing of hearts and not cementing of floors and walls.... Life is a series of awakening. The happiness which brings enduring worth to life is not the superficial happiness that is dependent on circumstances. Ultimately, in the fight between the partners, the victims more often than not are the children. It is unfortunate that in their fight more often on account of egoism the children suffer, more particularly when the child is a girl. It is not uncommon to see that at the time of negotiation of marriage, the boy's parents shy away because the girl is from a broken family and/or the parents are divorced. The child has practically no role in breaking of the marriage, but he or she suffers".</p>
5	<p>Mohan Kumar Rayana vs. Komal Mohan Rayana and Komal Mohan Rayana vs. Mohan Kumar Rayana</p>	16.01.2009	<p>Father and mother married by Hindu law and daughter born to them. Mother moved back to her parents' home due to alcohol problems of her husband, husband claims desertion. Mother also alleged that the father forcibly kept the daughter in his custody and hence she filed application for custody of child. Mother was TV/Film star and in public interviews, she did not acknowledge the presence of her child or that she was married. Thorough examination of counselling records and parents' status</p>	<p>"Female child on the advent of puberty primarily requires mother's care and attention. Absence of female company in the house of the father is relevant factor... (About the mother) "On the other hand, the respondent-mother is a graduate in English literature and she is also into Fine Arts and Culture. She knows Marathi, English, Hindi and Telugu very well. She is also an accomplished classical dancer. She has categorically stated before the court that she has given up her career as an Actress and she will be available 24 hours of the day to take care and for upbringing Anisha. Her other family members are also educated. Moreover, the counsellors' reports show that Anisha is happy in the company of the</p>

			<p>conducted. Custody given to mother, with the proviso that if she tries to poison the child's mind against the father, the decision may be reversed</p>	<p>respondent mother and her educational and social needs are being well taken care of by the mother. Looking to overall facts and circumstances of the case and the evidence on record, it is clear that Anisha is doing well with the mother and she is a happy child...We are aware that initially the access period may temporarily cause flutter and Anisha may not be able to immediately adjust herself at the home of the appellant-father, but it does not mean that mere willingness of Anisha would be decisive factor. Looking to her age and hostile attitude towards the appellant, her wish, insofar as access/visitation right is concerned, need not be given importance or any weightage. The Court is not supposed to act as executor of the wish expressed by the minor."</p>
6	Smt. Pushpa and Another vs. Smt. Anshu Chaudhary	10.04.2013	<p>Appellants are grandparents of minor girl aged 6 years, and respondent is mother of the child. Respondent married son of appellants, who died in a car accident when the child was 3. The appellants took the child and entered into an agreement of compromise with respondents. Subsequently, the mother got a job and wanted to take custody of the child. Trial court held res judicata as earlier compromise agreement was in operation. Custody given to mother in child's welfare</p>	<p>"The welfare of a child is neither determined by economic affluence nor a deep mental or emotional concern. The welfare of the child is all round welfare which is to be considered taking into consideration entire facts and circumstances. The physical wellbeing, education, supplying the daily necessities such as food, clothing and shelter is the primary consideration. Welfare of child lies in providing good education to the child to create surroundings which may give an atmosphere to overall development of personality...There has to be very strong reason to deny the custody of minor child to mother who is regarded as first teacher of a child. Selfless affection, the care and nursing which a child can feel with her mother is unparalleled."</p>
7	Ram Murti Chopra and	25.09.2008	<p>Maternal grandparents had custody of child after suicide</p>	<p>"Every Court, while deciding the custody matters, has to consider the</p>

Anr. Vs. Nagesh Tyagi			<p>of mother. Father is respondent seeking custody. He claimed that he was coerced into signing an affidavit providing custody of child to grandparents and had to face subsequent malicious criminal proceedings, as well as being denied access to child. Child's surname changed, and he was not aware of his father.</p>	<p>welfare of the child as a prime factor. While considering the welfare of the child, the Court has to give due weightage to all the circumstances such as the child's ordinary comfort and contentment, his intellectual, moral and physical development, his health, education, general maintenance etc. Apart from that the Court has also to give due weightage to the emotional considerations, social set-up, care, attention, career build-up and bringing up of a child as a good human being. The Court has to ensure that the child must live in an atmosphere which is congenial and healthy for his growth and inculcates values of life in his. He gets proper love and affection necessary for his development, the guardians provide him necessary moral boosting etc....Grandparents cannot substitute the love and affection which is given by a father or mother and the anxiety which a natural father would have to see that his son rises in life and chooses a career of his own choice. A father would do over time/part-time job to earn some extra money so that his son/daughter may study in a better school. Poor parents normally see to it even if they have to go hungry their children get proper food even at the cost of their own health. They see to it that their children get milk even if they can hardly afford it. A father would do all extra effort to see that his son/daughter does better in life than he himself has done. This normally cannot be expected from any other person howsoever affluent he may be, howsoever rich he may be and howsoever related he may with the child."</p>
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8	Romani Singh vs. Lt. Col. Vivek Singh	02.04.2013	<p>Wife alleges dowry harassment, drunkenness and assault by husband. Husband claims that wife is verbally abusive and drunken. Husband retained custody of child as wife left matrimonial home. Minor girl aged 5 years. Trial court provided custody to husband. High Court held that considering father is in army and may be transferred to non-family stations, it is in the welfare of child to provide mother custody</p>	<p>"Further, respondent is an Army Officer. During the course of his service he will be also getting non--family stations and it will be difficult for him to keep the child. Further, even though as per him his parents are looking after the child but when the natural mother is there and has knocked the door of the court without any delay and has all love and affection for the child and is willing to do her duty with all love and affection and since the birth of the child she has been keeping the child. In these circumstances, she should not be deprived of her right especially considering the tender age and child being a girl child. The grandparents cannot be a substitute for natural mother. There is no substitute for mother's love in this world. The grandparents are old. Old age has its own problems. Considering the totality of facts and circumstances, the welfare of the child lies with the mother i.e. appellant who is educated, working and earning a good salary and after school hours has ample time to spent with the child. In these circumstances, impugned order is set aside and the request of the appellant for the grant of custody of the said child to her being natural mother is allowed and the appellant is also appointed as guardian of her child being a natural guardian/mother"</p>
9	K.M. Vinaya vs. B.R. Srinivas	13.09.2013	<p>Father and mother fighting for custody of 12 1/2-year-old son. Child suffers from spinal malfunction and had surgeries for the same. Mother has custody and father visitation rights, father challenged custody. Joint custody provided and child</p>	<p>"There should be a proper balance between the rights of the respective parents and the welfare of the child. The moral and ethical welfare of the child must also weigh with the court as well as its physical wellbeing. The child requires love and affection of both father and mother.....The father is a friend, philosopher and guide to the child. The overall development of the</p>

			to spend six months of the year with each parent.	child can be possible with the love and affection of the father. No allegation has been made regarding ill-treatment of the child in the father's house and congenial atmosphere is available in the house of the respondent for the sustainable growth and grooming of the child.... Father's care and love has a powerful and positive impact upon the development and health of a child. In addition, numerous studies have found that children who live with their father are more likely to have good physical and emotional health to achieve academically and more likely to exhibit self-control and pro-social behaviour. It is important that the minor has his father's care and guidance, at this formative and impressionable stage of his life. Nor can the role of the father in his upbringing and grooming to face the realities of life be undermined. It is in that view father's care is important for the child's healthy growth."
10	Ruchirkumar Gajanandbhai Suthar and 2 Ors. Vs. Amitaben D/o Hasmukhlal Nanchanddas Mewada	05.12.2006	Marital dispute between Petitioner - Husband and Respondent - wife, Reconciliation failed, Respondent filed application of custody of minor child (female, below 5 years of age), District judge allowed application and directed petitioner to handover custody of minor child to respondent, Civil revision application filed by petitioner	"In this case the female child is below five years, custody of child should ordinarily be with the mother unless the welfare of the child demands otherwise. Such a child needs most a tender affection, the caressing hand and the company of his natural mother. This Court is of the view that neither the father nor his female relations, however, close, well-meaning and affectionate towards the minor, can appropriately serve as a proper substitute for the minor's natural mother. In this connection the mother is rightly endowed with a preferential claim in regard to the child's custody. The interest of the minor will be well served by keeping him with his mother." "The child Hemali will get best care, protection, nourishment and upbringing from her mother. This

				Court is of the view that looking to the age of the child mother is the best person in the world to take care of the child and there is no alternative or substitute of mother so far as child is concerned at this stage."
11	Ashok Kumar Jatav vs. Ku. Roshani and Anr	24.06.2005	Appellant was the natural father of respondent 1 and employed with Railways. After his wife's death, appellant sent his one-year old daughter (resp 1) to his father in law. Later, he filed application for custody of resp 1, which was dismissed by the trial judge (held that he had not looked after respondent and taken steps for custody), Present appeal considered appellant's financial position as sound, his mother and widowed sister lived with him, his sister expressed her willingness to take care of her niece. Held that appellant being natural father of respondent 1, has natural affection and care for his daughter. Child willing to go with her father. Hence, appeal allowed. Maternal grandparents given periodic visitation and take minor for about 3 to 4 days, for up to one year from date of judgment	"Welfare will be protected socially and financially if custody is provided to father. Also, child will be approaching marriage in a few years and father will definitely take care of her education, marriage, etc which would obviously ensure her welfare. Though father left minor in the care of maternal grandparents since age one, he still is entitled to custody as natural guardian"
12	Eshita D/o Hasmukhbhai Sitapara vs. Hiren Prabhudasbhai Brahmbhatt	18.12.2009	Petitioner wife seeks custody of minor daughter. Petitioner married an already married man, who had a son through his first wife. Respondent involved in 29 criminal cases and petitioner unaware of his background. He was	"It is not only the economic, academic and physical welfare that is to be seen but also the emotional and psychological welfare and wellbeing of the minor child. After all the minor, whether a boy or girl, is an innocent, budding human being, caught unawares in the crossfire of the bitter

			<p>taken into judicial custody and remained there for 5 years after the birth of the girl. Petitioner took care of the child from birth and put her in school. They executed a deed of divorce giving the father custody, unless he remarries / lives in with another woman or vice versa. Child came to live with father and mother was with her parents. However, father brought strange women to his house. Family court disregarded the activities of the petitioner, his criminal background, his drinking habits as well as the fact that he was not paying the school fees of the child. Deed of divorce not equal to divorce decree by court and cannot override welfare of minor. Child refused to talk against father in his or his advocate's presence but was able to articulate that the circumstances in father's house was not conducive and that she wanted to live with her mother. Lower court lost sight of welfare of minor. Custody given to mother with visitation rights to father.</p>	<p>marital relationship between his/ her parents. The intrinsic need of every minor child is a foundation of love, affection, security and trust, on the basis of which his or her personality, talent, intelligence and holistic development will take place. A good education helps in the flowering of the minor child's latent potential, but it is physical and emotional security and love and affection, that are most essential. An affluent background or palatial mansion, without the above qualities would hardly be conducive to the minor's welfare. A different dimension comes into focus when the minor is a girl child. Given her inherent sensitivity, a minor girl is, normally, emotionally attached and attuned to her mother. A minor girl, especially, requires a physically, financially and emotionally stable and secure environment. Soon, she may be nearing the threshold of adolescence when the special guidance and care of a mother is necessary, for her overall wellbeing."</p>
13	<p>Nil Ratan Kundu and Anr. Vs. Abhijit Kundu</p>	08.08.2008	<p>Appellants are maternal grandparents of minor and respondent is the father. Dowry case, Mother harassed and assaulted and died due to assault. Criminal case against respondent and his mother pending, Respondent came out on</p>	<p>"In our opinion, in such cases, it is not the `negative test' that the father is not `unfit' or disqualified to have custody of his son/daughter is relevant but the `positive test' that such custody would be in the welfare of the minor which is material and it is on that basis that the Court should exercise the power to grant or refuse custody of minor in</p>

			<p>bail and filed for custody of 5-year-old minor son. Trial court ordered for child to be handed over to father immediately and this was endorsed by High Court. Appeal against HC orders by grandparents. Alleged that torture of mother had traumatised the child and he was found by grandparents in a very sick condition. Child interviewed, and custody provided to maternal grandparents</p>	<p>favour of father, mother or any other guardian...A Court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents."</p>
14	<p>Dr. Seema Kumari W/o late Dr. Shashi Shekhar and D/o Sri Rageshwar Prasad Sinha, Advocate, at present resident of Mohalla-Makhania Kuan Road, Patna, P.S.-Pirbahore, District-Patna vs. The State of Bihar & Ors.</p>	21.10.2011	<p>Petitioner is mother of one and half year-old son and she alleges that the respondents 3 & 4 (paternal grandparents) have kept the child in illegal detention. Petitioner and her husband were medical PG students studying at separate places and child was being brought up by grandparents. Petitioner's husband committed suicide in her hostel room, while she was alleged to have been assaulted by him and admitted in hospital. Grandparents having custody of child and child has mild heart condition. Court granted them custody</p>	<p>"The grandparents of the child could not be persuaded to opt for giving up custody in favour of the petitioner. They believe that petitioner was the reason for the unnatural death of their son in her hostel room under mysterious circumstance. They believe that the custody of the child is only a tool which may be used by the petitioner for mala fide reasons. On the other hand, the petitioner also claimed that she would not marry again and hence the child would be happy with her. This was in response to our suggestion that she has a long future and being young and talented she should consider to marry again with a suitable person. Although the apprehension of the respondents 3 and 4 may be mistaken but there is every possibility that in the present modern era the petitioner may find a suitable person to marry and resettle in a life in which the child may not have very welcome or healthy place. These practical aspects of life are difficult to be ignored and we have taken them into consideration, even at the risk of some conjecture, only for coming to a conclusion as to whether change of</p>

				<p>custody of the minor child would be conducive to his all-round welfare or not. With great difficulty but without any doubt we come to the conclusion that change of custody of the concerned minor, a one and half year-old child, in the aforesaid facts and circumstances is unwarranted. It is most likely to be traumatic and may not be conducive to his welfare. Being a male child, he is a coparcener in the Hindu Family of his grandfather and he has legitimate claims upon the family which is expected to honour such claims with utmost care and devotion."</p>
15	<p>Murari Lal Sidana & Anr. Vs. Smt. Anita</p>	19.09.2012	<p>Two minor children, boy of 13 and girl of 12, brought up by appellants, their paternal grandparents. Respondent mother claims custody. Grandfather died during pendency of appeal and contest between mother and grandmother. Mother developed discord with father and left matrimonial home, father committed suicide subsequently. Children in the custody of grandparents since birth. Trial court awarded custody to mother.</p>	<p>"In the present case, it is an admitted fact that initially both the children lived with their parents. However, after the couple split in 2002, the children have lived with the grandparents. They lost their father in 2003, ever since then it is the grand-parents who have been looking after the children. Thus, for almost a decade now, the grand-mother has looked after their physical, psychological, emotional, financial and moral needs. Obviously, over this period, the children have developed an emotional bonding with the grand-mother, have gotten used to the family environment, have settled in their school, have gained friends and admirers in the school and the neighbourhood. In contrast, they have faint memories of having a mother. They have never inter-acted with her. They have no emotional bonding with her. They have never lived in a large city like Jaipur. To them, the mother is a stranger, her city, an unfamiliar terrain...However, the fact remains that the children have no emotional bonding with the mother. For them, she continues to be a mirage, a figment of imagination, a total</p>

				<p>stranger. To consign their custody to her is to rip them from their secure surrounding, to subject them to a psychological trauma. Such an act would amount to making guinea pigs of the children in a judicial experiment. It would cause them a grave injustice if their custody were to be handed over to the mother.... It would not serve any beneficial purpose to give the respondent-mother visiting rights. For, the children are adamant that they do not wish to interact with her. Simultaneously, the appellants have not encouraged the children to interact with her. If the visiting right were given to the respondent-mother, it may cause emotional and psychological trauma to the children who would have to comply with a court order that they are absolutely uncomfortable with. Since children should be permitted to develop their personality without too much of emotional and psychological disturbance, it would be in the interest of the welfare of the children to deny the visiting rights to the mother. For the reasons stated above, this appeal is hereby allowed."</p>
16	Venugopalan vs. Beena	08.11.2006	<p>Father and mother contesting for custody of minor aged about 10. Mother provided custody</p>	<p>"Father and mother contesting for custody of minor aged about 10. Mother provided custody Raveena here is aged about 10 and is situated like Shobhana, referred to in the decision cited above. Very shortly she might be in need of a close, personal guidance, including monitoring of her physiological changes. A mother's constant presence can instil in a minor's mind qualities of fidelity in life, and faith in the institution of marriage as well as solemn relations, essential for community life. In areas where lessons are to be imparted, for example in hygiene, grooming, selection of</p>

				companions and the like, a father will be a poor substitute. An educated mother, who has made express offer, as could be seen from the order of the Family Court, for attending to her educational needs, according to us, is more suitable person to be entrusted with custody, if not guardianship."
17	Vikram Vir Vohra vs. Shalini Bhalla	27.07.2009	Mother and father divorced by mutual consent, minor son with mother and had amicable visitation agreement. Mother wanted to relocate to Australia for employment and wanted cancellation of visitation.	"Much has been said regarding the Indian cultural environment in which the child is brought up in India to discard the claim of the respondent to take the child with her to Australia where she is employed for gain. It is not highlighted as to how the health, education or intellectual development as well as physical comfort and moral values of the child would be affected if he is allowed to live with his mother in Australia. Rather, I am of the view that bringing up of the child in favourable surroundings as well as in physical comfort and protection of his mother, his education and intellectual development is likely to be more conducive for the welfare of the child."

Appendix 4 – The Hindu Minority and Guardianship Act, 1956

An Act to amend and codify certain parts of the law relating to minority and guardianship among Hindus.

BE it enacted by Parliament in the Seventh Year of the Republic of India as follows: -

1. Short title and extent –

(1) This Act may be called the Hindu Minority and Guardianship Act, 1956.

(2) It extends to the whole of India except the State of Jammu Kashmir and applies to Hindus domiciled in the territories to which this Act extends who are outside the said territories.

2. Act to be supplemental to Act 8 of 1890 - The provisions of this Act shall be in addition to, and not, save as hereinafter expressly provided, in derogation of, the Guardians and Wards Act, 1890 (8 of 1890).

3. Application of Act –

(1) This Act applies-

(a) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj.

(b) to any person who is a Buddhist, Jaina or Sikh by religion and

(c) to any person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi, or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

Explanation - The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be: -

- (i) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion;
- (ii) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhists, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged; and
- (iii) any person who is convert or re-convert to the Hindu, Buddhist, Jaina or Sikh religion.

(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any scheduled Tribe within the meaning of clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

(3) The expression 'Hindu' in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is nevertheless, a person to whom this Act, applies by virtue of the provisions contained in this section.

4. Definitions - In this Act, -

(a) "minor" means a person who has not completed the age of eighteen years;

(b) "major" means a person having the care of the person of a minor or of his property or of both his person and property, and includes-

(i) a natural guardian,

(ii) a guardian appointed by the will of the minor's father or mother,

(iii) a guardian appointed or declared by a court, and

(iv) a person empowered to act as such by or under any enactment relating to any court of wards;

(c) "natural guardian" means any of the guardians mentioned in section 6.

5. Over-riding effect of Act- Save as otherwise expressly provided in this Act, -

(a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act.

6. Natural guardians of a Hindu minor - The natural guardians of a Hindu, minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are-

(a) in the case of a boy or an unmarried girl-the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(b) in the case of an illegitimate boy or an illegitimate unmarried girl-the mother, and after her, the father;

(c) in the case of a married girl-the husband;

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section-

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi)

Explanation. - In this section, the expressions 'father' and 'mother' do not include a stepfather and a step-mother.

7. Natural guardianship of adopted son - The natural guardianship of an adopted son who is a minor passes, on adoption, to the adoptive father and after him to the adoptive mother.

8. Powers of natural guardian -

(1) The natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realization, protection or benefit of the minor's estate; but the guardian can in no case bind the minor by a personal covenant.

(2) The natural guardian shall not, without the previous permission of the court, -

(a) mortgage or charge, or transfer by sale, gift, exchange or otherwise any part of the immovable property of the minor or

(b) lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date on which the minor will attain majority.

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

(4) No court shall grant permission to the natural guardian to do any of the acts mentioned in sub-section (2) except in case of necessity or for an evident advantage to the minor.

(5) The Guardians and Wards Act, 1890 (8 of 1890), shall apply to and in respect of an application for obtaining the permission of the court under sub-section (2) in all respects as if it were an application for obtaining the permission of the court under section 29 of that Act, and in particular-

(a) proceedings in connection with the application shall be deemed to be proceedings under that Act within the meaning of section 4A thereof.

(b) the court shall observe the procedure and have the powers specified in sub-sections (2), (3) and (4) of section 31 of that Act; and

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

(6) In this section, "Court" means the city civil court or a district court or a court empowered under section 4A of the Guardians and Wards Act, 1890 (8 of 1890), within the local limits of whose jurisdiction the immovable property in respect of which the application is made is situate, and where the immovable property is situate within the jurisdiction of more than one such court, means the court within the local limits of whose jurisdiction any portion of the property is situate.

9. Testamentary guardians and their powers -

(1) A Hindu father entitled to act as the natural guardian of his minor legitimate children may, by will appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property (other than the undivided interest referred to in section 12) or in respect of both.

(2) An appointment made under sub-section (1) shall have not effect if the father predeceases the mother, but shall revive if the mother dies without appointing, by will, any person as guardian.

(3) A Hindu widow entitled to act as the natural guardian of her minor legitimate children, and a Hindu mother entitled to act as the natural guardian of her minor legitimate children by reason of the fact that the father has become disentitled to act as such, may, by will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property (other than the undivided interest referred to in section 12) or in respect of both.

(4) A Hindu mother entitled to act as the natural guardian of her minor illegitimate children may; by will appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property or in respect of both.

(5) The guardian so appointed by will has the right to act as the minor's guardian after the death of the minor's father or mother, as the case may be, and to exercise all the rights of a natural guardian under this Act to such extent and subject to such restrictions, if any, as are specified in this Act and in the will.

(6) The right of the guardian so appointed by will shall, where the minor is a girl, cease on her marriage.

10. Incapacity of minor to act as guardian of property - A minor shall be incompetent to act as guardian of the property of any minor.

11. De facto guardian not to deal with minor's property - After the commencement of this Act, no person shall be entitled to dispose of, or deal with, the property of a Hindu minor merely on the ground of his or her being the de facto guardian of the minor.

12. Guardian not to be appointed for minors undivided interest in joint family property - Where a minor has an undivided interest in joint family property and the property is under the management of an adult member of the family, no guardian shall be appointed for the minor in respect of such undivided interest: Provided that nothing in this section shall be deemed to affect the jurisdiction of a High Court the welfare of the minor shall be the paramount consideration.

13. Welfare of minor to be paramount consideration -

(1) In the appointment of declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor.

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