

“Changes Brought in the Position of Hindu Women’s Right to Inheritance, Coparcenary & Property Rights Vis-À-Vis The Hindu Succession (Amendment) Act, 2005 and its Historical Context”

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Abstract

Improving women's position relative to men's desirable not only on ground's of equality but also on efficiency grounds in an argument often advanced in favour of policies targeted toward women. Developing countries continues to make improvements in equality of economic opportunity for women ,inheritance laws remains strongly biased amongst women in many societies. Because of low levels of development , land is a key asset and an essential source of livelihood . Women's right to inherit land is often restricted . Widows and daughters possess limited rights to land, which leads to lower productivity and greater likelihood of being affected by land conflict .Social and cultural dynamics are so complex , legal reform to improve women's inheritance rights could potentially provide a low cost way to improve a range of socioeconomic outcomes of women. State level amendments have been done in India which provide an interesting natural experiment for exploring whether and to what extent such efforts have been effective .The result of state level amendment could provide potentially important lessons for India , where similar national level changes were in 2005.

Introduction

Granting women inheritance rights equal to men’s increases their access to physical and human capital

The Constitution of India provides that every person is entitled for the equality before law and there by prohibits discrimination on the basis of caste, creed and sex. But the positive discrimination on the ground of sex is permissible for the upliftment of the female citizen as it ensures empowerment of women as they are vulnerable to gender discrimination since centuries. Empowerment of women leading to an equal status with men hinges among other things , on the right to hold and inherit property. It was believed that the reason behind the dependent and subservient status of Hindu women was because of her incompetent to perform scarifies and to read Vedas. Due to her dependent status women's right to acquire property was denied and disfavoured as there was general reluctance displayed by the ancient Rishis to allow females to acquire property .The reason of reluctance was that in Smritis, property was intended for the performance of religious ceremonies. The primary obligation of a person holding the property is to perform rites and ceremonies and a person was considered as a trustee for the performance of rites and ceremonies. According to **Smritikars** females

were incompetent to perform religious rites therefore the right to property was very nominal and whatever she used to get , that too was hedged with limitation.¹

Classification of Women's Property

The property of a Hindu women can be classified into two categories :

- (i) Those over which she has absolute ownership that is 'Stridhana'
- (ii) Those properties over which she has limited ownership that is 'Women's Estate'

(i) STRIDHAN

The word 'Stridhan' is composed of two words : **Stri** which means woman and **Dhana** means property .The literal meaning of the word stridhan is the property which belongs to the woman or we can say woman's property. In **Rajmma v. VaridarayulaChetti**² case a gift given to a woman after or before her marriage is a woman's property.

The conjunctively of the two words is the property over which the woman exercises absolute ownership.

(ii) WOMEN'S ESTATE

A widow who has limited heir , acquires the property for her lifetime but she is the owner of the property inherited as the tenant. But her right of alienation is limited, after her death the property does not go to the heirs , it goes to the heirs of the last full owner thereof . Therefore the feature of women's estate that female take it as a limited owner. Although she owns the property like that of another individual can be the owner of his / her property by there are certain limitations to it.

- (i) She cannot ordinarily alienate the corpus
- (ii) On her death it devolves upon the next heir of the last full owner³

In **Janki V. Narayaswami**⁴ , the privy council has observed :

“Her right is of the nature of right of property, her position is that of owner; her powers in that characters are, however, limited. So long as she is alive, no one has vested interest in succession.”

Her power to dispose property is limited and it is the limitation which states the nature of her estate. These limitations are not imposed for the benefit of the reversioners even if there are no reversioners , the estate continues to be limited estate.

¹Rakesh Kumari , Women's right to property under Hindu law: a socio legal study (April 2 ,2013)
<http://shodhganga.inflibnet.ac.in/handle/10603/7870> last seen on 5/04/2014
at 8 PM

²AIR 1957 Mad 198

³*Ibid.*

⁴(1916) 18 BOMLR 856

Under the Mitaksharalaw , the property of the Hindu male devolved through survivorship jointly upon four generation of male heirs. The ownership was by birth not by succession upon his birth he acquires the right to property. The basic characteristic of the joint property was its alienability of the property could not be easily disposed of sale , gift or will. Hence the joint ownership of male was more notional than actual . The property was managed by the karta of the family for the benefit of the family , including its female members. So in effect until the property was partitioned , the right of male members was essentially the right of maintenance. Even after the partition , the property is in the hands of each of the coparceners, continued to be joint property held in trust along with his male progeny for the benefit of the next line of descendents . The early **Smritikars, Manu and Gautama** enumerated six categories of stridhan property. Vishnu a later **Smritikar** added four more categories to the enumeration. The later stages **Yagnavalkya , Katyayana , Narada , Devala** etc. widened the scope further . **Yagnavalkya** (around AD second century) broadened the scope of stridhana by adding the words ' adhya' (meaning 'and the rest') to the enumerations of Manu and Vishnu⁵

Women's right to acquire property is recognized to be an important developmental issue. Property rights for women can have impact on the decision making, income pooling , acquisition and improvement in the status of women in the society in other words it will give rise to women empowerment . Land is a resource for the women when the household breakdown and she is in extreme need for example in case of desertion of husband , illness or death of the husband , divorce, abandonment , polygamous , relationship, etc.⁶

Woman for long time have been subjugated in property inheritance and this can become the major concern in creating the right balance in gender equality. To look into the matters of women the Indian government have set up institution **like National Commission for Women , Department for Women and Child Development**, etc. In addition to this India follows guidelines set up by the International legal instruments such as :

- (i) International Covenants on Economic, Social and Cultural Rights and on Civil
- (ii) United Nations Commission on human Rights Resolution 2002/49
- (iii) International Convention like the Convention on Elimination of All forms of Racial Discrimination
- (iv) The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979, is often described as an International Bill of Rights for Women.⁷

The Convention highlights in Article 16 that " State parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure , on a basis of equality of men and women."

⁵Flavia Agnes, *Family Law and Constitutional Claims*, 33-34 (1st ed. 2011)

⁶Dr B. Madhana Rekha, *Property Rights of Women in Tamil Nadu*

http://ncw.nic.in/pdfReports/PROPERTY_RIGHTS_OF_WOMEN_IN_TAMIL%20NADU.pdf last seen on 7/04 / 2014 at 10 PM

⁷*Ibid.*

Meaning of Mitakshara Coparcenary

Coparcenary is a narrower body of persons within a joint family and consist of father son, son, son's son, son's son'sson . Like joint family to beganwith , it consist of father and his three male lineal descendents in its continuance the existence of the father son and grandson of brother of uncle and nephew and so on. The rule is so long that one is not removed by more than four degrees from the last holder of the property , howsoever if removed he may be removed from the original holder , one will be a coparcener . But if one is removed by more than four degrees one willnot be a coparcener . The last holder means the senior most living lineal male ancestor.⁸

The **Bengal , Mithila and Benarassubschools** of **Mitakshara** recognized only five family relation for being entitled to inherit property namely widow, daughter, mother , paternal grandmother and paternal great grandmother. The sub school of Madras recognized the heritable capacity of large number of females that is son's daughter , daughter's daughter and the sister as heirs who are named as heirs in the Hindu law of Inheritance Act ,1929. In **Madras and Bombay** the son's daughter and the daughter's daughter are recognized as **Bandhus**. The most liberal school is the **Bombay** school which recognized large number of female heirs which include half sister, father's sister and women married into such the family such as stepmother , brother's widow , son's widow and many other females are also recognized as **Bandhus**.⁹

Dayabhaga Joint Family

Under Dayabhagathere is no joint family like the way it exist in Mitaksharaschool. Similarly there is no coparcenary comprising of father , son, son's son and son's son's son. A Dyaybhaga coparcenary comes into existence for the first time after the death of the father when son inherits their property , they constitute a coparcenary. On the death of the father the succession inper strips that is branch of each of his son takes an equal share. But this does not mean that the share on succession belongs to each branch. When an heir takes up the property his female or male descendent doesnot have the right over the property and the heir takes it absolutely. When sons inherit property jointly and constitute a coparcenary, on the death of anyone of them his heir will succeed the property. And if a son dies leaving behind a widow or daughter , then she will succeed and become a coparcener .Thus under Dayabhaga school a female can also be a coparcener.¹⁰

Legislative Intervention

The Constitution of India give powers to both central and state governments to enact laws on the matter of succession . And some of the states have also enacted their variations of property laws within the personal law.

⁸Dr. Paras Diwan , *Family Law*,383-84 (9th ed. 2011)

⁹Dr B. MadhanaRekha, Supra note 6

¹⁰*Ibid* at 409

- The Joint Hindu Family Abolition Act ,1975 Kerala
- The Hindu Succession (Tamil Nadu Amendment) Act, 1989
- The Hindu Succession (Karnataka Amendment)Act, 1994
- The Hindu Succession (Maharashtra Amendment) Act ,1994

The **Hindu Succession (Amendment) Act , 2005** is a landmark . After 50 years the government addressed some of the existing gender inequalities in **Hindu succession Act, 1957** which itself was a path breaking.

Effect of State Amendments

Some the states such as Andhra Pradesh ,Kerala and Maharashtra realised the need and difficulty which arised by excluding the daughters from the right to claim coparcener property. To provide equal rights to Hindu women at par with male member of the coparcenary such laws were made . Under the Hindu Mitakshara Law, these state legislatures have amended the **Hindu Succession Act , 1956** inorder to achieve constitutional mandate of equality.

The clear perusal of the Andhra Pradesh Amendment insisted by **A.P. Act 13 of 1986** shows that, in the state of Andhra Pradesh.

(i) The daughter shall become coparcener and she holds equal status and rights as that of the son. She is entitle to all the rights of coparcener including the rights of survivorship . She also owes the duty and she will be subject to same liabilities and disabilities in respect of coparcenary property as the son.

(ii)She becomes the absolute owner of the property inherited by her as a coparcener

(iii)If a Hindu Female dies after the commencement of this amendment (i.e. after 5-9-1985)

having at that time interest in Mitakshara Coparcenary in her interest will be dissolved by survivorship upon the other coparceners . If the deceased dies living behind any children or children of any predeceased child at the time of death the devolution of property will be accordance to the provision of the Hindu Succession Act ,1956 and not by survivorship .¹¹

Similar amendments are being made in State of Tamil Nadu by the **Hindu Succession (Tamil Nadu Amendment) Act,1990** and in Maharashtra by the **Hindu Succession (Maharashtra Amendment) Act , 1994** (46 of 1994 w.e.f. 22-06-1994). These legislations are beneficial to the women who are deprived of the coparcenary property.

On the basis of recommendation of Law Commission, The **Hindu Succession Act,1956** was amended and **Hindu Succession (Amendment) Act, 2005** was passed for the empowerment of the women . Law Commission of India in its 174th Report has stated to provide equal property rights to women like that of men . Law commission drafted **the Hindu Succession (Amendment) Bill,2004**and the recommendation were made to it so that the government can implement on it . **Hindu Succession Bill ,2004** which was passed by both the houses of

¹¹RakeshKumari, Supra Note 1

Parliament on August 2005 and assented on 5th September 2005 and came into force on 9th September 2005 and then **Hindu Succession Act ,2005** came into being. During the process the joint committee of Rajya Sabha had an important role to expedite the amendment .¹²

Hindu Inheritance Act , 1929

In this Act, the scheme of inheritance was brought . This Act conferred inheritance rights on female heirs that is son's daughter, daughter's daughter and sister.

Hindu Women's Right to Property Act (xviii) of 1937

The law brought revolutionary changes in the Hindu Law of all schools and brought changes not only in coparcenary but also in the law of alienation of property , partition , adoption , inheritance. The **Hindu Succession Act,1937** enabled the widow to succeed along with the son and to take a share equal to that of the son . But the widow did not become the coparcener even though she possessed a right akin to a coparcenary interest in a property and was a member of a joint family. The widow has the limited estate in the property of the deceased with a right to claim partition . Virtually daughter has no inheritance rights despite these enactments having brought important changes in the laws of succession by providing new rights of succession to the female but despite of the amendments there was still found coherent and defective in many respects and give rise to anomalies and left untouched the basic feature of discrimination against women . These enactment now stand repealed.¹³

Hindu Succession Act,1956

Hindu Succession Act, 1956 applies to both Mitakshara and the Dayabhaga systems . The retention of the Mitakshara coparcenary, without including females in it meant that females inherit ancestral property as males do. If a joint family gets divided , each male coparcener takes his share and females gets nothing .When the coparcener dies the female gets a share as an heir to the deceased. Thus the law by excluding the daughter from participating in the coparcenary ownership has led to the violation of the fundamental right that is right to equality. And it appears to be mockery of the Fundamental Rights guaranteed by the constitution. Hence the need of amendment in the existing was fulfilled by the legislatures in the **Hindu Succession (Amendment) Bill, 2004**.¹⁴

The reason why gender inequality in inheritance rights becomes an important issue is because the law could potentially be used to inherit daughter in the following ways:

(i) Firstly , if the father renounced his rights in the coparcenary (joint) property his sons would continue to maintain their independent rights to the coparcenary but his daughters , widow daughter will not gain anything from such property.

¹²Ibid

¹³P K Das ,*Universal's Handbook on Hindu Succession Property Rights of Women and Daughters*,130 - 31(3rd Ed 2011)

¹⁴Dr.B. MADHANA REKHA,Supra note 5

(ii) Secondly, after the partition of the coparcenary if the father made any gift or willed his share in the coparcenary to his sons, then the rights of the female inheritors would be defeated.

(iii) Thirdly, if the father converted his self acquired or separate property to coparcenary property then daughter would have the equal share over the property with their brothers now would lose it.

Hence the **Hindu Succession Act, 1956** was by no means of gender neutral law. Moreover for millions in rural India, property takes form of land that is typically family owned which makes gender bias quite a significant phenomena.

Hindu Succession (Amendment) Act, 2005

The **Hindu Succession (Amendment) Act, 2005** came into force on 9th September 2005. **Section 23 and Section 24** of the **Hindu Succession Act, 1956** Act have been omitted. Likewise special provision relating to rights in respect to dwelling house and the disentitlement rights of widow's remarrying respectively omitted from the act. **Section 6** of the **Hindu Succession Act, 1956** has been extensively amended by **Hindu Succession (Amendment) Act, 2005**.

Primary changes brought in by the amendment Act, 2005 are as follows:-

(i) The Act deletes the provision relating to applicability of the **Hindu Succession Act, 2005** to the agricultural property, yet at the same time it does not clarify whether the agricultural law would be or would not be applied to this Act.

(ii) It abolishes the doctrine of survivorship in case of male coparcener who die as member of undivided Mitakshara Coparcenary.

(iii) Irrespective of the marital status it introduces daughter as coparcener in the Mitakshara coparcenary.

(iv) It abolishes the obligation of the son to pay off the debts of the father.

(v) It retains the concept of notional participation but modified the condition of application.

(vi) It abolishes the rules relating to the dwelling house that prevented Class 1 female heirs from partitioning their shares and imposed restrictions on the right of a married daughter to live in it.

(vii) It deletes **Section 24 of the Hindu Succession Act, 1956** which favoured the male members of the family.

(viii) It empowers a female coparcener to make a testamentary disposition of her shares in coparcenary property.¹⁵

¹⁵Dr. Poonam Pradhan Saxena, *Family Law Lectures law II*, 263-264 (3rd ed. 2013)

Property Rights of Hindu Unmarried Daughter

An unmarried daughter has been made coparcenar , she no longer can make any claim her marriage expenses out of the joint family property . The right to maintenance including marriage expenses was given to her because she was denied of the share in the property since conferment of the coparcenary rights . She can no longer claim both property and maintenance. The eligibility to claim maintenance is the person who has no resources and to sustain itself and a daughter who has an interest in the property is legally presumed to capable to maintain herself.¹⁶

P.S.Sairam V. P.S. Rama Rao Pisey¹⁷

The court held that the right of the unmarried daughter to claim a share in the independent right at the time of notional partition .The father died as a member of undivided Mitakshara coparcenary leaving behind the joint family business The issue was whether the daughters will be entitled to the share or not? The Supreme Court conceded the right of daughters to get a share at the time of notional partition but could not grant it due to technical reasons.

Amudhi Rani V. K Veeraraghavan¹⁸

A family comprised of the father , his four sons and three daughters was residing the State of Tamil Nadu. On the date of promulgation of the amendment , two his daughters were married but the third was unmarried .After the death of the father the issue was raised whether the daughter would be entitled to the share of the joint family property like that of the son ?

The brothers contended that a severance of status had already taken place with the father ascertaining his share and relinquishing the same in favour of the daughters . The daughters contended that there was no partition by metes and bounds and the Act only speaks about such a partition and not a mere severance of status.

The Court held that the unmarried daughter would be entitled to get the benefit of the amendment and would be guaranteed a share at the time of partition of the property in the same manner as a son . As only a severance of status had taken place and a partition by metes and bounds had not taken place it would not affect the right of unmarried daughter in the joint family property.

Property Rights of a Widow

A widow in an intestate takes a share which is equal to that of a son .If there is more than one provided they are party to valid marriage and takes one share equal to that of the son and divide the property equally among them , taking it as a tenant in common .As per **Mitakshara law** , they inherited together but took the property as joint tenants having a right

¹⁶ *Ibid at 266*

¹⁷ Appeal (civil) 817 of 2002

¹⁸ AIR 2008 Mad64

¹⁸ *Ibid at 266*

¹⁸ Appeal (civil) 817 of 2002

¹⁸ AIR 2008 Mad 64

to survivorship .Presently each of them take the share as an absolute owner, and enjoy the property and they have full power to dispose it also . When she is inheriting with a son and daughter she is entitle to the equal share to that of the son and daughter.

Badri Prasad V. Kanso Devi¹⁹

After the husband's death a Hindu female inherited property under the **Hindu Women's Right to property Act, 1937**. Later on there was partition in the family and a settlement about the division of shares was reached by the arbitration. The widow received in the property and remained in its possession at the time commencement of this Act .The Court held that such property became her absolute property under **Section 14(1) of Hindu Succession Act, 1956**.It was further observed that the term " possessed" includes cases of simple possession as well as constructive possession where a person has been illegally disposed off any property.

Conclusion

The role of law is guarantor and generator of rights. However when the aim is the achievement of justice for women and providing equal and actual enjoyment of their property rights , the law substantially fails to achieve its aim. To the extent law is a specialist and particular framework among other in society , such shortcomings may be seen by some to the marginal to the overall project of increasing women's access to property. On the other hand the role of law is an instrument for change may also be exaggerated because of its power to confer legitimacy and thereby order social relations. For law to effectively enable and contribute to women's empowerment , it should neither be over reliant nor to be ignorant of its potential impact. It is equally important to critically evaluate the ways and extent to which law is both constructed by and constructs existing social and gender relations by doing this we can develop strategies for change at relevant points of coherence.²⁰

The **Hindu Succession Act , 1956** is a landmark legislation which get all the Hindus under one kind of joint family coparcenary system that is Mitaksharacoparcenay. The enactment didnot consider the daughter as a coparcener . By excluding daughter from participating in coparcenary ownership it has contributed discrimination against females which has led to violation of the Fundamental Rights guaranteed by the Constitution. On the basis of recommendation of law commission ,**The Hindu Succession Act , 1956** was amended and **Hindu Succession (Amendment) Act, 2005** was passed for the empowerment of the women.**Hindu Succession (Amendment) Act , 2005** introduces daughter as coparcener in a Mitakshara coparcenary irrespective of their marital status . **Section 23 and section 24** have been omitted . Special provisions relating to rights in respect of dwelling houses and the disentitlement rights of widow's remarrying respectively omitted from the Act. **Section 6** of the **Hindu Succession Act , 1956**has been amended by the **Hindu Succession (Amendment)**

¹⁹AIR 1970 SC 1963

²⁰Reena Patel ,Hindu Women's Property Rights in India: A Critical Appraisal (2006, October)
<http://www.jstor.org/stable/4017753>accessed on 29th July at 3:34 AM

Act , 2005. It also empowers a female coparcener to make a testamentary , disposition of her share in coparcener property.

Suggestions

- Education should be given on International Human Rights and special focus should be given on women's right and on social, economic and cultural rights including Hindu Women's Right to Property to all sectors of society such as men , women, NGO's , legislators, Government officials, Judges, etc.
- Legal provision should be made to restrict the freedom to will away property to protect the interest of Hindu Women's Right to reside in the natal home.
- The draft should be formulated stating Basic Principles for Hindu Women's Right to Property to promote , protect and enforce women's right to property at the local , regional and national level.
- Fast track courts need to set up property related cases immediately.
- Network of people should be created who could monitor whether the policies are being implemented or not in regard to Hindu women's property rights and inheritance rights.
- Free legal awareness for women programmes must be included to make them aware of their rights.
- Scheme should be designed by financial institution for better loans and the credit should be provided to the women which is better , affordable and easily accessible for building up asset for women , especially housing.
- The Government should appoint the Anthropologists as field officer to evaluate and to monitor the implementation of the scheme in the tribal villages . This will ensure that programmes remains effective and culturally sensitive.
- Effective system need to be developed to disseminate timely , up to date information on women property and inheritance rights.
- In depth exploration can be done by doing micro study to gain more insights in specific factors that aid and constraint women's access, control and effective ownership over different forms of assets including property.
- After marriage same right should be given to her in the property of her in-laws. A married spend maximum of her life with her inlaws and husband therefore she must also be given property there.
- Mother should also be included in coparcenary .A mother is entitle to an equal share with other Class 1 heirs from the separate property of the father at the time of notional partition. Many other heirs have been included by the amendment in the list of class 1 heirs the actual share of the mother will go down . Therefore this discrimination should be removed to give equal treatment to all the women members of the family .
- The testamentary succession in respect to self acquired / separate property own by the father shall be restricted because there is no such law to protect the rights of the daughters in regard to self acquired / separate property.

- After the amendment father's widow becomes Class II heir but a mother was already there in Class I heir .It is not possible among Hindus to have more than one wife . Therefore the anomalies regarding the mother's position should be removed.
- In the Amendment Act the overlapping made it difficult to understand who is Class I heir and who is Class II heir .Therefore the overlapping should be removed to make it understandable.