

**ANALYZING THE EXTENT TO WHICH THE PATRIARCHAL NORMS PLAY A ROLE
IN HINDU PERSONAL LAW IN DIFFERENT REGIONS OF INDIA**

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ABSTRACT

This paper aims to highlight how important it is to keep in mind not just the patriarchal system that the Hindu community in India is a part of, but also how the Hindu society is a pluralistic one. Hence, what unifies Hindu women is the fact that they all face inequality while what diversifies them is the fact that the extent and type of discrimination they face varies depending upon their region, caste and class among other factors. Here, the regional aspect of diversification of Hindu women's right to property is analyzed, on the basis of their cultural history, codification of the Hindu Personal Laws by the British and to the present day Hindu Succession Act, and how it applies to women around in India. Here, the area of study is restricted only till the scope of Hindu Succession Act. The "Hindu Women" that are dealt with are only the cisgender Hindu women as the said Act is not inclusive of the transgender people.

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INTRODUCTION

When it comes to rights involving the inheritance of property, women have always struggled all over the world. India, like many other places, has come a long way but Indian women still continue to suffer, their properties being much lesser in quantity and quality just because of their gender, and thus has a long way to go in order to break the patriarchal norms that the governing rules of the nation adhere to.¹ An important fact to understand when it comes to analysing this problem of inequality in the property rights of women, is that India has not brought about a uniform civil code, and each woman is governed by the personal laws of their religion. Moreover, according to the Constitution, both the Central and State government can enact laws on succession, and many state governments have made laws of their own. Even within a religion, such as Hinduism, which the majority of the population of this secular nation follows, the patriarchal norms influencing inheritance varies from region to region. A valid claim over a property, is something that one must be entitled to despite of their gender. This title will help women tackle the financial and social insecurity she has to face. The plight of a Hindu women is unique to the region she belongs to and this paper aims to analyze *to what extent does the patriarchal norms play a role in Hindu Personal laws in different regions of India.*

The methodology used is analytical and conceptual legal research, and both primary sources such as statutory law and case laws, as well as secondary sources such as legal commentaries and articles have been used.

PRE-COLONIAL HINDU LAW

There was an absence of a single set of customs or even non-state legal structure before the British decided to codify the Hindu Law, hence, the extent to which women were declined equality to their male counterparts and their individual sufferings were placed on a varying scale, depending upon factors such as region, caste, and the sort of community they belonged to. The two important schools of Hindu law that were essentially recognized by the British were, Dayabhaga which had

¹Shruti Pandey, *Property Rights of Indian Women*, Women's Link Worldwide (2005), https://www.womenslinkworldwide.org/files/gjo_article_India_caseC.%20Masilamani_en.pdf

authority over the Bengal region and Mitakshara, which was more or less followed with variations across the rest of the colonized state.² Some of the distinct sub-schools under Mitakshara consisted of Mithila, Benares, Bombay and the Dravida schools.³

The Mitakshara school recognised the concept of coparcenary or joint ownership of the family property by its male members, while the Dayabhaga school did not. Because of this, under Mitakshara law the concept of Stridhana, or their specific property grew wider in scope than that of Dayabhaga, where women could only have gifts and movables in the form of stridhana. Moreover, the Bombay, Benaras and Dravida schools allowed for the property acquired by women through their own exertions to be a part of their stridhana.⁴ This sort of property had a very interesting line of descent, where a woman's daughter was given preference, and her son would only inherit in the absence of a daughter.⁵

In addition to the smritis provided by various schools of Hindu law, the local customs, that were followed, were also an important source of law and varied from one region to the other. The Dravidian regions followed practices of property inheritance that granted greater rights to women. For example, in Tamil Nadu, women's right to property was inclusive of their right to alienate it through gifts and sales. The Buddhists women were also allowed to own and gift property, as indicated by their literature.⁶ Among the Virasaiva community of Karnataka, women inherited property from their mother, the property was not given to the sons even when they were disinherited from their father.⁷ The Lingayat women too had the right to own property, amongst other rights. In the Malabar region, Tarwad and Tavazi are examples of Hindu joint families headed by females, following a matrilineal descent, where women enjoyed great freedom.⁸ The Marumakkathiyam and Aliyasantana customary laws, promoting this matriarchal society, were even in fact recognized judicially by the British.⁹ On the other hand, the women of the northern region belonging to the Brahmanical upper caste, experienced a graver form of inequality, as their custom focused on keeping the women 'under control' as they followed the notions of purity and

²FLAVIA AGNES, LAW AND GENDER INEQUALITY: THE POLITICS OF WOMEN'S RIGHT IN INDIA 13 (2001)

³N.R Raghavachariar, *Hindu Law Principle and Precedents*, Madras 11(5) THE MADRAS LAW JOURNAL (1980)

⁴ SIR DINSHAW FARDUNJI MULLA, HINDU LAW 168 (1994)

⁵ SIR DINSHAW FARDUNJI MULLA, HINDU LAW 172 (1994)

⁶ M TALIM, WOMEN IN EARLY BUDHIST LITERATURE (1972)

⁷ L MULLATI, THE BHAKTI MOVEMENT AND THE STATUS OF WOMEN: A CASE STUDY OF VIRASAIVISM 106 (1986)

⁸ The Hindu Succession Act 1956;

The Kerala Joint Hindu Family System (Abolition) Act 1975

⁹ JOHN D MAYNE, TREATISE ON HINDU LAW 147 (13th ed.1991)

pollution. Among the lower castes, the women were independent as they worked. However, the practice of kanya sulka or bride price was widely followed, especially in the “southern region, north Himalayan regions and various tribes right up to the pre-independent period.”¹⁰

CODIFICATION OF HINDU LAW

The current Hindu Law followed by India has an Anglo-Saxon base. The British while trying to codify a single set of Hindu law completely disregarded the customs that were unique to each region, community and class. It did not take into consideration that Hindu society was a pluralistic society and not a homogenous community. They imposed the rules prescribed by the Brahmanical texts upon all the ‘Hindus’. They reversed the trend of moving away from Brahmanical Orthodoxy followed since ages - resulting in Buddhism and Jainism, and put everyone under the strict dominance of such laws.¹¹

There were a number of important property acts passed during the British period that impacted the lives of Hindu women. First, The Married Women’s Property Act of 1874 - which widened the scope of stridhan. The extension of the definition as provided by the act enabled women to secure their right to own and acquire property, which in turn provided them with an incentive “for being engaged in remunerative outside work.”¹² Second, The Hindu Law of Inheritance (Amendment) Act, 1929 - which widened the property rights for women and extended it to the whole of India, apart from the “Part B” states. Hence, the eight states that were exempted from this Act were - Hyderabad, Saurashtra, Mysore, Travancor-Cochin, Madhya Bharat, Vindhya Pradesh, Patiala and East Punjab States Union or popularly known as PEPSU, as they were all former princely states. This Act applied to those belonging to the Mitakshara School and only to those “property of males not held in coparcenary and not disposed of by will”. It gave recognition to “son’s daughter, daughter’s daughter, sister and sister’s son and they would be placed immediately after father’s father and before father’s brother”¹³ Third, was The Hindu Women’s Right to Property Act, 1937 - which was applicable to a Hindu dying intestate, and entitled a widow to the same share that a

¹⁰ M.N. SRINIVAS, CASTE IN MODERN INDIA AND OTHER ESSAYS 44 (1962)

¹¹ FLAVIA AGNES, LAW AND GENDER INEQUALITY: THE POLITICS OF WOMEN’S RIGHT IN INDIA 24 (2001)

¹² PRUTHI RAJ AND BALA RANI SHARMA, ENCYCLOPAEDIA OF WOMEN SOCIETY AND CULTURE 80 (1994)

¹³ *Id.* 91

son received. However, the property that she received was only restricted to a life-interest. This Act too, extended to the whole of India apart from the Part “B” states.

A bill for the revision of the Hindu Code was put on the floor of the Constituent Assembly on the 9th of April, 1948. Being perhaps too radical for its time the bill was eventually dropped. The RSS went ahead and had called the code “an atom bomb on Hindu Society”.¹⁴ The laws that were passed later on were deprived of its radical ideas and appealed to the orthodox groups, which revealed that in a patriarchal society, the state has ambivalence to make social justice a reality.¹⁵ When it comes to the inheritance rights of women, the most important statutory law, in the post-independence era is the Hindu Succession Act, 1956 which was later amended in the year 2005. This act addressed the gender inequality in the society, and hence, was a process of reform. Some of the decisive changes that it brought about were, first, to abolish the difference between Dayabhaga and Mitakshara Schools and brought about uniformity in laws governing succession in India. While doing so, it left provisions for different Acts relating to succession for the matriarchal setup in the south. Second, abolished Hindu Woman’s limited estate and entitled her to absolute ownership of property, including existing properties. Third, the Act did not distinguish between male and female heirs, moreover, even remotest agnate or cognate could now be heirs. Fourth, the Act gave a male Hindu the power to dispose of his interest in a Coparcenary by will.¹⁶ Hence, this Act became a tool in the hands of the progressive forces of the Hindu Society. It was a blow on the face of traditional authoritarian male-dominated Hindu society as it gave women a somewhat equal footing to that of men when it came to the right to use and own property. It helped women to overcome their oppression with regards to property and inheritance rights and move a step closer in their struggle for equality in the patriarchal ladder that was, the Hindu Society.¹⁷

PROBLEMS LEADING TO THE 2005 AMENDMENT

While the Hindu Succession Act of 1956 was progressive and gave women a plethora of rights in terms of property, Hindu women were still deprived of equal rights as compared to their male

¹⁴ L. S. HERDENIA, *When RSS likened Hindu Code Bill to “a bomb in Hindu Society”* SABRANG (2017), <https://www.sabrangindia.in/article/when-rss-likened-hindu-code-bill-atom-bomb-hindu-society>.

¹⁵ RANJANA SHEEL, *THE POLITICAL ECONOMY OF DOWRY: INSTITUTIONALISATION AND EXPANSION IN NORTH INDIA* (1999)

¹⁶ Hindu Succession Act 1956, § 30.

¹⁷ PRUTHI RAJ AND BALA RANI SHARMA, *ENCYCLOPAEDIA OF WOMEN SOCIETY AND CULTURE* 93 (1994)

counterparts. Section 6 of the HSA, 1956 deprived the daughter of a Coparcener in a Hindu Joint Family to get the status of a Coparcener unlike the sons of the family, therefore, she could never demand partition and would get a lesser share compared to the male heirs who were coparceners. This was a right she was deprived of on the sole basis of her gender as she too was born into the same Hindu Joint Family and ideally, must enjoy the same rights. Moreover, Section 23 of the Act dealt with partition of a dwelling house and deprived women of their right to ownership of the property, and only allowed male heirs to seek partition. And lastly, Section 4(2) kept agricultural land out of the purview of the act, and this could have been used as a loophole to deprive women in terms of equal succession to agricultural property.

The Parliament's decision to amend the Hindu Succession Act in 2005 was heavily inspired by the necessary amendments made in the law of the five states including Maharashtra, Tamil Nadu, Karnataka, Andhra Pradesh and Kerala. The Kerala Act is the only law that has abolished the concept of Joint Hindu Family altogether including the systems of Mitakshara, Marumakkattayam, Aliyasantana and Nambudri. Section 4 (i) of the Kerala Joint Family System (Abolition) Act, lays down that-

“All members of an undivided Hindu Family governed by the Mitakshara law holding any coparcenary property on the day this Act comes into force shall, with effect from that day, be deemed to hold it as tenants-in-common as if a partition had taken place among all the members of that undivided Hindu family as respects such property and as if each one of them holding his or her share separately as full owner thereof...”

While the other four states did not abolish the joint family system - and recognise the concepts of coparcenary and rights to ancestral property by birth, they have made an active effort to remove the gender disparity promoted by the Mitakshara system. These four states through their laws made the daughter of a coparcener, a coparcener in the family, having the same rights as that of a son. The basic features of the legislatures of all the four states are similar in aspect. First, “the daughter of a coparcener in a Joint Hindu Family governed by Mitakshara law, shall become a coparcener by birth in her own right in the same manner as the son and have similar rights in the coparcenary property and be subject to similar liabilities and disabilities.”¹⁸ Second, “On partition of a joint Hindu family of the coparcenary property, the daughter will be allotted a share equal to that of a

¹⁸Shruti Pandey, *Property Rights of Indian Women*, Women's Link Worldwide (2005), https://www.womenslinkworldwide.org/files/gjo_article_India_caseC.%20Masilamani_en.pdf

son. The share of the predeceased son or a predeceased daughter on such partition would be allotted to the surviving children of such predeceased son or predeceased daughter, if alive at the time of the partition.”¹⁹ Third, “This property shall be held by the woman with the incidents of coparcenary ownership and shall be regarded as property capable of being disposed of by her by will or other testamentary disposition.”²⁰

HINDU SUCCESSION (AMENDMENT) ACT 2005 AND THE PROBLEMS THAT REMAINED

The Law Commission's 174th Report entailed amendments from the states of Andhra Pradesh, Karnataka, Maharashtra and Tamil Nadu, it aimed to establish provisions that would enable women to acquire social justice by securing their right to property. The Hindu Succession Act incorporated the suggestions and made an attempt to fix the gender discrimination that prevailed due to the previous 1956 Act. Section 6 of the Act gave the daughters of a coparcener the title of a coparcener as well. A daughter had absolute rights over this property and she could dispose of it according to her free will. The Hindu joint family property would now devolve by intestate or testamentary succession and no more by survivorship. In *Naraini Bai (Smt) v State of Haryana*, it was clarified that a daughter's marital status would not affect her rights as a coparcener.²¹

Thus, the Amendment of 2005 revolutionized the succession rights of Hindu Women across India. However, certain problems still remained and it is far from being gender-neutral and is still patriarchal in the broader sense. Just like the southern states, which were comparatively progressive, there remained a reluctance to allow a woman to be the Karta of the house, implying that her gender perhaps does not make her fit to be the leader of the Hindu Joint Family and manage the property and decision-making requirements of the family. The condition of the society was perhaps not ripe enough, or still engrained in the patriarchal mindset to view a female as a leader. However, the Delhi High Court has turned this position in the case of *Sujata Sharma v Shri Manu Gupta* by holding that the eldest woman of the household can be the Karta.²² When it comes to

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Naraini Bai (Smt) v. State of Haryana*, P&H 206 (2004)

²² *Mrs Sujata Sharma v. Shri Manu Gupta & Ors*, 226 DLT 647(2016)

Section 23, the Amending Act of 2005 omitted it even though it was clearly depriving women to seek partition of a dwelling house, and only allowing the men to do so. In *Rathnakar Rao Sinda v Leela Ashwath*, it was held that restriction on female heirs to seek partition in respect of a dwelling house ceased to exist from 9th of September, 2005.²³ The other problems with the Amendment were that deceased class I female's such as mother's and widow's share would now reduce, and the inequality within folds would remain. The devolution of intestate property is also unfair towards a woman's family.²⁴ Moreover, Section 30 was a Lacuna in the Act, and unrestricted testamentary rights would be used to disinherit widows and reduce the shares of the daughter as a result of the prevailing male bias in the society.²⁵

DISPARITY IN THE INHERITANCE OF AGRICULTURAL LAND

The Hindu Succession Act, 1956 kept agricultural land out of its purview through Section 4(2). The devolution of tenancies of agricultural land was governed in accordance with the legislation of individual states.²⁶ The bulk of real property in India comprises of agricultural land²⁷ and thus, letting each state control the inheritance rights of agricultural property, led to Hindu women around India facing inequality in terms of their property rights. Nevertheless, soon the importance of woman's right to agricultural property was realized - with women constituting as the major working force in agricultural industries - which is one of the key economic sectors of India. Women's ownership over property went hand in hand with their wellbeing. And hence, the 2005 Amendment repealed Section 4(2) of the Act in order to ensure that Hindu women were not deprived of their rights.

While the 2005 Amendment Act should have brought about a change, and at least Hindu women ideally should not have been facing inequality in this aspect. To them, agricultural land should not have been anything different from other property, and legally they should be enjoying equal rights

²³ *Rathnakar Rao Sinda v. Leela Ashwath*, 941 KARN (2007);

Santosh Kumar v. Baby, 214 KER (2007);

Kaushalaya Bai Biharilal Pateriya v. Hiralal Bhagwandas Gupta, 136 BOM (2007)

²⁴ *Omprakash & Ors v. Radhacharan & Ors*, 15 SCC 66 (2009)

²⁵ Shruti Pandey, *Property Rights of Indian Women*, Women's Link Worldwide (2005), https://www.womenslinkworldwide.org/files/gjo_article_India_caseC.%20Masilamani_en.pdf

²⁶ DURGA DAS BASU, CONSTITUTIONAL LAW OF INDIA 496 (8th ed. 1977)

²⁷ Government of India Department of Social Welfare Committee of the Status of Women in India, *Towards Equality*, para 137 (1975) para 137

as their brother in accordance with the amendment. However, despite the amendment what makes agricultural land a grey area is the fact that Agricultural land falls within the exclusive domain of State Legislature as per List II of the Seventh Schedule in the Constitution of India while Inheritance and succession are the subject matter of the concurrent list or list III of the same schedule. Deletion of Section 4(2) has created confusion as the legislature has not clarified whether the Hindu Succession Act would take precedence over any state laws or not. On one hand, the Allahabad High Court held that “agricultural land is in the exclusive domain of the State Legislature and Parliament has no power to enact any law in this respect. Section 4(2) was only by way of clarification. On its basis, it cannot be said that after its deletion, Hindu Succession Act, 1956 *suo moto* applies to agricultural land”.²⁸ While on the other, the Delhi High Court in *Nirmala v Govt. of NCT of Delhi* had held that “the provisions of the HSA had an overriding effect over the Delhi Land Reforms Act and the rule of succession in HSA would apply”²⁹

The plight of women is worst in this regard, in the states of Haryana, Himachal Pradesh, Uttar Pradesh and Jammu & Kashmir where the teneorial laws strictly follow a patrilineal line of inheritance. In Uttar Pradesh, daughters and sisters can get agricultural land but only in the absence of widows, male lineal descendants, mother and father of the deceased. A married daughter will not get any of the property in the presence of an unmarried one. Section 107 of the UP Revenue Code, 2006 allows an owner to dispose of agricultural property through a will. But, whether this provision is used for the benefit of the daughters is questionable. Delhi has only given recognition to the inheritance rights of widows, and not those of a daughter’s. Overall, the northeastern states have a Mitakshara Patrilineal setup, women come at the bottom of the ladder of inheritance, a widow loses her land if she remarries or if she fails to cultivate it for two years.³⁰ Telangana has specific provisions that clarify that Hindu Succession Act will apply to Hindus with regard to all properties. While, in Rajasthan and Madhya Pradesh the personal laws legally apply to agricultural land, in practice that is not often the case, and there is reluctance to give women ownership of agricultural land. The laws relating to agricultural land in Gujarat, West Bengal, Andhra Pradesh, Tamil Nadu, Kerala and Karnataka stay silent on the order of inheritance, and thus, it is assumed that for Hindus, the personal law applies. Bihar and Orissa too, have a similar situation, however,

²⁸ Archana v. Deputy Director of Consolidation Amroha and Ors ,801 RD (2015)

²⁹ Nirmala and Ors v. Govt of NCT of Delhi and Ors ,2717 DEL (2010)

³⁰Shruti Pandey, *Property Rights of Indian Women* ,Women’s Link Worldwide (2005),https://www.womenslinkworldwide.org/files/gjo_article_India_caseC.%20Masilamani_en.pdf

the occupancy rights are subjected to any prevailing customs to the contrary, which again, gives scope for gender inequality.

The main argument behind depriving women of their right to inherit agricultural property is fragmentation of land, as women after getting married move away socially, if not physically from their natal family, thus, giving them the land would mean that her in-laws would get to control the land. This argument has a highly misogynistic connotation, and views women to be incapable of being independent. In *Sucha Singh Biswas v The State of Punjab* it was held that traditionally there is a distinction between daughters and sons, the rationale used was that “a daughter will leave her parental home to join another family after her marriage”.³¹ The misleading argument in question, only selectively disinherits women, in the present day reality it is mostly men who migrate from rural to urban areas while the women in the family are the ones taking care of the land. Hence, if men get to inherit the agricultural property despite job-related migration it is highly unfair that women do not get a claim over the same for marriage-related migration. Moreover, in practice many rural families continue to cultivate jointly even when parts of the land are owned individually.

In *Pritam Kumar v. State of Pepsu* the court struck down restrictions that prevented women from owning land as they were discriminatory and unconstitutional as they violated Article 15.³² Women’s deprivation of agricultural land acts as an hindrance for India to climb out of poverty. Data shows that women channel to provide for the nutrition and educational needs for their children. Thus, women are inheriting “poverty not property”³³ Women are the ones primarily taking care of the land and managing it, and a lack of title is a serious constraint they have to face, a backlash despite their constant efforts. Women become highly vulnerable due to the lack of independent resources, especially if they are also facing desertion, divorce or widowhood additionally. Equal property rights to women would be meaningless if they do not include agricultural property as it is the major source of property in rural India. An egalitarian law in agricultural rights is the need of the hour, and would benefit millions of women - including widows and daughters.³⁴ This sort of gender-justice will have a holistic impact, and apart from economic

³¹ *Sucha Singh Biswas v The State of Punjab*, 162 P&H (1974)

³² *Pritam Kaur v State of PEPSU*, 9 PUNJ (1963)

³³ Ashok Sircar, *Women’s Right to Inherit Land in India* COUNCIL ON FOREIGN RELATIONS (2013), <https://www.cfr.org/blog/emerging-voices-ashok-sircar-womens-right-inherit-land-india>,

³⁴ BINA AGARWAL, *LANDMARK STEP TO GENDER EQUALITY* (2005)

welfare, will also act as a tool for women to achieve social security and have a direct impact on the domestic abuse and the sense of insecurity they face.

CONCLUSION

It is evident that the Hindu community of each region in India, has a history and culture unique to their own, to say the least. As a result, the extent and the type of discrimination Hindu woman of each region faces in terms of inheritance depends on the kind of patriarchal structure that exists in each region, the sort of property that is in question and how each regional community views property. Even within the unified legal framework of Hindu Succession Act which applies to most of the Hindus in India, there are several loopholes such as the one discussed about the agricultural land, where women face a discrimination depending upon the state legislature she is under. There are several customary practices that are also in existence, which while not breaking the law definitely bend it towards serving the patriarchal agenda. For example, in Punjab and Haryana the practice of Karewa, which comes from the Rig - vedic niyog. Under this practice, the widow is taken into the shelter of her husband's brother or closest male heirs in order for the family to retain the property. The practice is prevalent even today and has in fact intensified because of the benefits awarded to war widows by the Indian State.³⁵

Despite of the change brought about in the legal position, in practice there still exists an unacceptance for the woman to be the Karta of a household despite of proving themselves in the modern society to be capable of having management and business skills as well as leadership qualities. Moreover, there remains a need to check the laws that are explicitly detrimental towards women. The personal laws put the liability of illegitimate children entirely on the women, as they only have a claim over their mother's property. When the laws make women take up all the responsibility, they must also be assured appropriate inheritance of property. The legislation is highly Brahmanic centric and often dismisses the reality of a pluralistic Hindu society. Moreover, the social reality of the execution of the laws that are ensuring women their rights must also be checked, especially for those states that are practicing customs that are more detrimental towards women.

³⁵ PREM CHOWDHARY, CONJUGALITY, LAW AND STATE: INHERITANCE RIGHTS AS PIVOT OF CONTROL IN NORTHERN INDIA IN DOWRY AND INHERITANCE 182 (2005)