

GENDER ISSUES AND LAND RIGHTS UNDER HINDU PERSONAL LAW IN INDIA

BY

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ABSTRACT

This article has been written to highlight the issue involved in gender disparity involving the right to property for Hindu women. The Hindu Personal Laws along with its amendments and the various Law Commission reports does provide for such a right to women but still lacks any sort of effective development. The conditions of Indian women have remained the same while their counterparts in the rest of the world continue to enjoy this right. There is a need for an effective social reform movement with the help of law and a sympathetic judiciary to achieve its objectives. Thus, Women empowerment, equal rights to both men and women, equal share of property, etc., are some of the issues which have been discussed in this article. However, till today, the male still dominates society especially in regard to property matters. The presence of numerous laws reveals simply that there should be no discrimination between the sexes, but in reality none are effective enough to actually bring about a change in the society. This article will highlight the opportunities that the constitutional design can provide to embed women's rights more securely and create an enabling framework that can subsequently be used to enhance all forms of women's rights, including property rights.

(208 words)

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INTRODUCTION

“Several legal reforms have taken place since independence in India, including on equal share of daughters to property. Yet equal status remains elusive. Establishment of laws and bringing practices in conformity thereto is necessarily a long drawn out process. The government, the legislature, the judiciary, the media and civil society has to perform their roles, each in their own areas of competence and in a concerted manner for the process to be speedy and effective.” Justice Sujata V. Manohar.³

The concept of Gender equality is defined as the goal of the equality of the genders or the sexes⁴, stemming from a belief in the injustice of myriad forms of gender inequality. It has been seen that the property rights of Indian women, like that of women of many other countries, have evolved out an on-going struggle between the status quoits and the progressive forces. It has been seen that the property rights of women at other places, are far more advanced than their Indian counterparts in terms of inequality and unfairness. Thus, while they women of other countries have come way ahead in the last century, women in India still continue to get lesser rights in property than the men, both in terms of quality and quantity.

What is slightly different in the property rights of the Indian women from that of women in other countries is that, along with many other personal rights, even in the matter of property rights the Indian women are highly divided within themselves. Being home to different religions and beliefs, till date, India has failed to bring in a uniform civil code⁵. Therefore the religious communities of India continue to be governed by their respective personal laws in several matters – property rights being one of them. In fact even within the different religious groups, there are sub-groups and local customs and norms with their respective and own rules regarding property rights.

³ Hon'ble Judge, Supreme Court of India.

⁴ United Nations Report of the Economic and Social Council for the year 1997. A/52/3.18 September 1997, at p. 28: “Mainstreaming a gender perspective is the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality.”

⁵For more information regarding Uniform Civil Code please visit <http://www.legalserviceindia.com/articles/ucc.htm> last accessed on 26th March 2011.

Thus Hindus, Sikhs, Buddhists and Jains are governed by one system of property rights codified only as recently as the year 1956⁶, while Christians are governed by another code whereas the Muslims have not yet codified their property rights, including neither the Shias nor the Sunnis. Also, the tribal women of various religions and states are governed for their property rights by the customs and norms of their tribes. To further complicate it, under the Indian Constitution, both the central and the state governments are competent to enact laws on matters of succession⁷ and hence the states can, and some have, enacted their own variations of property laws within each personal law.

There is no unified body of property rights of Indian women. The property rights of the Indian women get determined depending on which religion and religious belief she follows depends on whether she is married or unmarried, which part of India she comes from, if she is a tribal or non-tribal and so on and so forth. Ironically, what unifies Indian women is the fact that across all these divisions, the property rights of Indian women are immune from protection of the Constitution; the various property rights may be, as they indeed are in various ways, discriminatory and arbitrary, notwithstanding the Constitutional guarantee of equality of all. By and large, with a few exceptions, the Indian courts have always refused to test the personal laws on the touchstone of Constitution to strike down those that are clearly unconstitutional. The Courts in India have always been reluctant to touch upon the subject of personal laws due to the religious sentiments of the community attached and have allowed the community leaders to frame laws for the community and have left it to the wisdom of legislature to choose the time to frame the uniform civil code as per the mandate of a Directive Principle in Article 44⁸ of the Constitution.

THE INDIAN CONSTITUTION: FRAMEWORK OF EQUALITY

The Indian Constitution contains detailed provisions to ensure equality amongst citizens. It not only guarantees equality to all persons, under Article 14 as a fundamental right⁹, but also expands on this in the subsequent Articles, to make room for affirmative action and positive discrimination.

⁶ The Hindu Succession Act, 1956.

⁷ The subject is in the Concurrent list of the Constitution of India.

⁸ Article 44: The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.

⁹ Fundamental Rights are contained in Part III of the Constitution of India.

Article 14 of the Constitution of India states that: *“The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”* In practice this guarantee has been read to infer ‘**substantial**’ equality as opposed to ‘**formal**’ equality, which has been judicially explained and discussed in several judgments of the Supreme Court of India as well as the High Courts.

The latter dictates that only equals must be treated as equals and that unequal may not be treated as equals. This broad paradigm itself allows the creation of positive action by way of special laws creating rights and positive discrimination by way of reservations in favour of weaker sections of the society. This view is further strengthened by Article 15¹⁰ of the Constitution, which goes on to specifically lay down that prohibition of discrimination on any arbitrary ground, including the ground of sex.

As can be seen, firstly, women are one of the identified sections that are vulnerable to discrimination and hence expressly protected from any manifestation or form of discrimination. Secondly, going a step further, women are also entitled to special protection or special rights through legislations, if needed, towards making up for the historical and social disadvantage suffered by them on the ground of sex alone.

The Indian Courts have also taken an immensely expansive definition of fundamental right to life under Article 21¹¹ of the Constitution as an umbrella provision and have included within it right to everything which would make life meaningful and which prevent it from making it

¹⁰ Article 15: Prohibition of discrimination on the grounds of religion, race, caste, sex, place of birth or any of them:

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, and place of birth or any of them.

(2) No citizen shall on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to:

a) access to shops, public restaurants, hotels and places of entertainment; or

b) The use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of state funds or dedicated to the use of general public.

(3) Nothing in this Article shall prevent the state from making any special provision for women and children.

(4) Nothing in this Article or in clause (2) of Article 29 shall prevent the state from making any special provision for advancement of any socially or educationally backward classes of citizens or for Scheduled Castes and Scheduled Tribes.

¹¹ Article 21 states: No person shall be deprived of his life or personal liberty except according to procedure established by law.

a mere existence, including the right to food, clean air, water, roads, health, and importantly the right to shelter/ housing.¹²

Additionally, though they are not justifiable and hence cannot be invoked to demand any right there under, or to get them enforced in any court of law, the Directive Principles of State Policy in Chapter IV of the Indian Constitution lend support to the paradigm of equality, social justice and empowerment which runs through all the principles. Since one of the purposes of the directive principles is to guide the conscience of the state and they have been used to constructively interpret the scope and ambit of fundamental rights, they also hit any discrimination or unfairness towards women.

However, as mentioned above, notwithstanding the repeated and strong Constitutional guarantees of equality to women, the property rights of Indian women are far from gender-just even today, though many inequalities have been ironed out in courts. Below are some of the highlights of the property rights of Indian women, interspersed with some landmark judgments which have contributed to making them less gender unjust.

THE PRESENT POSITION OF PROPERTY RIGHTS OF INDIAN WOMEN

➤ *Hindu women's property rights*

The property rights of the Hindu women are highly fragmented on the basis of several factors apart from those like religion and the geographical region which have been already mentioned. Property rights of Hindu women also vary depending on the status of the woman in the family and her marital status: whether the woman is a daughter, married or unmarried or deserted, wife or widow or mother. It also depends on the kind of property one is looking at: whether the property is hereditary/ancestral or self-acquired, land or dwelling house or matrimonial property.

¹² For instance in *Shantistar Builders v. Narayan Khimalal Tortame*: (1990) 1 SCC 520, *P.G. Gupta v. State of Gujarat* (1995) Supp 2 SCC 182, *Chameli Singh v. State of U.P.*: (1996) 2 SCC 549, *Nawab Khan's case* (Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan & Ors.: (1997) 11 SCC 121, *Right to Education* (*Bandhua Mukti Morcha v. Union of India* 1984 3 SCC 161), *Mohini Jain v. State of Karnataka* (1992) 3 SCC 666 and *Unnikrishnan J.P. & Ors. v. State of Andhra Pradesh & Ors. Union of India* (1993) 1 SCC 645, *right to health* (*C.E.S.C. Ltd. v. Subhash Chandra Bose* (1992) 1 SCC 441, *Consumer Education & Research Centre & Ors. v. Union of India & Ors.*: (1995) 3 SCC 42), *right to food* (*People's Union for Civil Liberties v. Union of India & Ors.*: Writ Petition No. 196 of 2001), *right to clean water* (*Attakoya Thangal Vs. Union of India* [1990(1) KLT 580].

Prior to the Hindu Succession Act, 1956¹³ ‘Shastric’ (Hindu Canonical) and customary laws that varied from region to region governed the Hindus. Consequently in matters of succession also, there were different schools, like Dayabhaga in Bengal in eastern India and the adjoining areas; Mayukha in Bombay, Konkan and Gujarat in the western part and Marumakkattayam or Nambudri in Kerala in far south and Mitakshara in other parts of India, with slight variations.

Mitakashara school of Hindu law recognises a difference between ancestral property and self-acquired property. It also recognises an entity by the name of “coparcenary”. A coparcenary is a legal institution consisting of three generations of male heirs in the family. Every male member, on birth, within three generations, becomes a member of the coparcenary. This means that no person’s share in ancestral property can be determined with certainty. It diminishes on the birth of a male member and enlarges on the death of a male member. Any coparcener has the right to demand partition of the joint family. Once a partition takes place, a new coparcenary would come into existence, namely the partitioned member, and his next two generations of males. For this reason coparcenary rights do not exist in self-acquired property, which was not thrown into the common hotchpotch of the joint family.

The Hindu Succession Act enacted in 1956 was the first law to provide a comprehensive and uniform system of inheritance among Hindus and to address gender inequalities in the area of inheritance. It was therefore a process of codification as well as a reform at the same time. Prior to this; the Hindu Women’s Rights to Property Act, 1937¹⁴ was in operation and though this enactment was itself radical as it conferred rights of succession to the Hindu widow for the first time, it also gave rise to lacunae which were later filled by the Hindu Succession Act (HSA). HSA was the first post-independence enactment of property rights among Hindus. It applies to both the Mitakshara and the Dayabhaga systems, as also to persons in certain parts of South India previously governed by certain matriarchal systems of Hindu Law such as the Marumakkattayam, Aliyasantana and Nambudri systems.

The main scheme of the Act is:

¹³ The Hindu Succession Act, 1956 is law that was passed by the parliament of India in 1956 to amend and codify the law relating to intestate or unwilled succession, among Hindus. The Act lays down a uniform and comprehensive system of inheritance and applies to persons, governed by both the Mitākṣarā and Dāyabhāga schools. It is hailed for its consolidation of Hindu laws on succession into one Act. The Hindu woman's limited estate is abolished by the Act. Any property, possessed by a Hindu female, is to be held by her absolute property and she is given full power to deal with it and dispose it of by will as she likes. The Act was amended in 2005 by Hindu Succession (Amendment) Act, 2005.

¹⁴ Act No. XVIII of 1937.

1. The hitherto limited estate given to women was converted to absolute one.
2. Female heirs other than the widow were recognized while the widow's position was strengthened.
3. The principle of simultaneous succession of heirs of a certain class was introduced.
4. In the case of the Mitakshara Coparcenary, the principle of survivorship continues to apply but if there is a female in the line, the principle of testamentary succession is applied so as to not exclude her.
5. Remarriage, conversion and unchastity are no longer held as grounds for disability to inherit.
6. Even the unborn child, son or daughter, has a right if s/he was in the womb at the time of death of the intestate, if born subsequently.

Under the old Hindu Law only the “streedhan” (properties gifted to her at the time of marriage by both sides of the family and by relatives and friends) was the widow's absolute property and she was entitled to the other inherited properties only as a life-estate with very limited powers of alienation, if at all. Even under the 1937 Act, the concept of “**limited estate**” continued. Section 14 of the Hindu Succession Act removed the disability of a female to acquire and hold property as an absolute owner, and converted the right of a woman in any estate already held by her on the date of the commencement of the Act as a limited owner, into an absolute owner. The provision is retrospective in that it enlarged the limited estate into an absolute one even if the property was inherited or held by the woman as a limited owner before the Act came into force. The only exception, in the form of a proviso, is for the acquisitions under the terms of a gift, will or other instrument or a decree, or order or award which prescribe a restricted estate.

Moreover, since the passing of the Hindu Succession Act, 1956, the one issue which was constantly agitated by the liberals was regarding the right of a daughter or a married daughter in coparcenary property of a Hindu Undivided Family. Some of the States which took the lead in liberalisation, passed State amendments to the Act, whereby an unmarried daughter married after the specified date was given a right in coparcenary property.

The provision of S. 6 of the Act, in relation to this article, as quoted below:

“6. Devolution of interest in coparcenary property. — (1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall, —

- a) by birth become a coparcener in her own right in the same manner as the son;
- b) Have the same rights in the coparcenary property as she would have had if she had been a son;
- c) Be subject to the same liabilities in respect of the said coparcenary property as that of a son,

and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener;

However, there have been disputes in lieu of the same which is evident from some notable cases like in *Pravat Chandra Pattnaik and Others v. Sarat Chandra Pattnaik and Another*¹⁵, was a case relating to partition of Hindu Mitakshara coparcenary property. After the decision was passed by the lower Court, an appeal was preferred to the High Court.

The Court held that the Amending Act was enacted to remove the discrimination contained in S. 6 of the Act by giving equal rights and liabilities to the daughters in the Hindu Mitakshara Coparcenary property as the sons have. The Hon'ble high Court observed that¹⁶ -

The Amending Act came into force with effect from 9-9-2005 and the statutory provisions created new right. The provisions are not expressly made retrospective by the Legislature. Thus, the Act itself is very clear and there is no ambiguity in its provisions. The law is well settled that where the statute's meaning is clear and explicit, words cannot be interpolated. The words used in provisions are not bearing more than one meaning. The amended Act shall be read with the intention of the Legislature to come to a reasonable conclusion. Thus, looking into the substance of

¹⁵ AIR 2008 Ori. 133

¹⁶ See <http://taxguru.in/general-info/daughter%E2%80%99s-right-in-coparcenary.html> last assessed on 3rd September, 2011

the provisions and on conjoint reading, Ss.(1) and (5) of S. 6 of the Act are clear and one can come to a conclusion that the Act is prospective. It creates substantive right in favour of the daughter. Thus the daughter got a right of coparcener from the date when the amended Act came into force i.e., 9-9-2005.

However, the Court did not accept the contention that only the daughters, who are born after 2005, will be treated as coparceners. The Court held that if the provision of the Act is read with the intention of the legislation, the irresistible conclusion is that S. 6 (as amended) rather gives a right to the daughter as coparcener, from the year 2005, whenever they may have been born. The daughters are entitled to a share equal with the son as a coparcener.

The same issue also arose before the High Court of Karnataka in *Sugalabai v. Gundappa A. Maradi and Others*¹⁷. While considering the appeals the Amending Act was passed by the Parliament. The Court held that as soon as the Amending Act was brought into force, the daughter of a coparcener becomes, by birth, a coparcener in her own right in the same manner as the son. Since the change in the law had already come into effect during the pendency of the appeals, it is the changed law that will have to be made applicable to the case. The daughter, therefore, by birth becomes a coparcener and that there is nothing in the Amending Act to indicate that the same will be applicable in respect of a daughter born on and after the commencement of the Amending Act.

Thus, while coming to the conclusion, the Court referred to the following principles of interpretation of statutes as laid down by the Apex Court¹⁸:

- 1) Statutory provisions which create or take away substantive rights are ordinarily prospective. They can be retrospective if made so expressly or by necessary implication and the retrospective operation must be limited only to the extent to which it has been so made either expressly or by necessary implication.
- 2) The intention of the Legislature has to be gathered from the words used by it, giving them their plain, normal, grammatical meaning.

¹⁷ [ILR 2007 KAR 4790; 2008 (2) Kar LJ 406].

¹⁸ *Supra* note 14.

- 3) If any provision of a legislation, the purpose of which is to benefit a particular class of persons is ambiguous so that it is capable of two meanings, the meaning which preserves the benefits should be adopted.
- 4) If the strict grammatical interpretation gives rise to an absurdity or inconsistency, such interpretation should be discarded and an interpretation which will give effect to the purpose will be put on the words, if necessary, even by modification of the language used.

Thus we can see that from the aforesaid decisions of the Orissa and the Karnataka High Courts, the issue was presently settled and that the daughter of a coparcener becomes, by birth, a coparcener in her own right in the same manner as the son, irrespective of whether she was born before or after the Amending Act came into force. However, we need to understand the intricacies of section 14 of the Hindu Succession Act, before we can finish off a conclusive writing for the same.

➤ *A Critical Analysis of Section 14 of the Hindu Succession Act*

Section 14 of the Hindu Succession Act reads as follows:

Property of a female Hindu to be her absolute Property - (1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation - In this sub-section, “**property**” includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act.

(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property.

Under the Hindu law in operation prior to the coming into force of the Act, a woman's ownership of property was hedged in by certain delimitations on her right of disposal and also on her testamentary power in respect of that property. Doctrinal diversity existed on that subject. Divergent authorities only added to the difficulties surrounding the meaning of a term to which it sought to give technical significance. Women were supposed to, as it was held and believed, not have power of absolute alienation of property. The restrictions imposed by the Hindu law on the proprietary rights of women depended upon her status as a maiden, as a married woman and as a widow. They also depended upon the source and nature of property. Though there were some fragmented legislation upon the subject (regard being made to the Hindu Woman's Right to Property Act, 1937), the settled law was still short of granting a status to woman where she could acquire, retain and dispose off the property as similar to a Hindu male.

The Hindu Succession Act, 1956 and particularly section 14 brought substantial change, thus, upon the aspect of a right of a Hindu female over her property and thereby settled the conflict. The change being brought about by section 14 to the existing position of Hindu Law was such diverse and manifest that it was contended as a violation of Article 14 and 15(1) of the Constitution of India and to the contrary, incapable of implementation.¹⁹

➤ ***Multifarious effects of Section 14***

1. The Act overrides the 'the old law on the subject matter of stridhana in respect of all property possessed by a female, whether acquired by her before or after the commencement of the Act.
2. Section 14 declared a female as full owner of the property in her possession and thus removes all restrictions upon her rights which existed prior to the Act. Now she can sell, dispose and alienate the property without any restriction on her rights.²⁰
3. The Act confers full heritable capacity on the female heir and this section dispenses with the traditional limitations on the powers of a female Hindu to hold and transmit property.

¹⁹ Pratap Singh v. Union of India, AIR 1985 SC 1694; Amar Singh v. Baldev Singh, AIR 1960 Punj 666 (FB).

²⁰ In the case of Punithavalli v. Ramalingam, AIR 1970 SC 1730, the Supreme Court has held that the estate taken by a Hindu female under subsection (1) of section 14 is an absolute one and is not defeasible and its ambit cannot be cut down by any text or rule of Hindu law or by any presumption or any fiction under that law.

4. The object of this section is to declare a Hindu widow, in cases falling under this section, to be the absolute owner of the property; the section puts her in *aequali jura*.²¹

5. The section gives retrospective effect to the Act and thus any property acquired by the female whether before or after this Act but in possession of her at the time of the commencement of the Act shall become her and she shall have full ownership over it.²²

6. For the application of the section it is necessary that the widow must be in possession of the property on the commencement of the Act wherein the possession can be either actual or constructive. If, however, such widow has parted with her rights to the property by way of a gift or any devise which has the effect of extinction of her rights to the property before the commencement of the Act, the widow not being ‘possessed’ of the property on that date when the Act came into force, would not have any title over the property whatsoever and she cannot avail the beneficial effect of the provision.²³

7. The expression ‘full ownership’ is used in the section in the context of property and denotes a right indefinite in point of user, unrestricted in point of disposition, unlimited in point of duration and heritable as such a right by the heirs of the owner.²⁴

In the case of *Eramma v. Veerupana*²⁵, the Supreme Court, examining the ambit and object of the section observed, “the property possessed by a Hindu female, as contemplated in the section, is clearly property to which she has acquired some kind of title, whether before or after the commencement of the Act. It may be noticed that the Explanation to section 14(1) sets out the various modes of acquisition of the property to which the female Hindu has acquired some kind of title, however restricted the nature of her interest may be. The words “**as full owner thereof and not as a limited owner**” in the last portion of subsection (1) of the section clearly suggest that the legislature intended that the limited ownership of the Hindu female should be changed into full ownership. In other words, section 14(1) contemplates that a Hindu female, who, in the absence of the provision,

²¹ Vinod Kumar v. State of Punjab, (1957) PLR 337 (FB) cited by Mulla, Hindu Law (2), (Butterworths, New Delhi, 2001), 381.

²² Harish Chandra v. Trilok Singh, AIR 1957 SC 444. The court observed, ‘by reason of the expression “whether acquired before or after the commencement of the Act” the section is retrospective in nature.’

²³ Munshi Singh v. Sohan Bai, AIR 1989 SC 1179; Eramma v. Veeruppana, AIR 1966 SC 1879.

²⁴ Mulla, Hindu Law (2), (Butterworths, New Delhi, 2001), p. 392.

²⁵ AIR 1966 SC 1879.

would have been limited owner of the property, will now become full owner of the same by virtue of this section. The object of this section is to extinguish the estate called 'limited estate' or 'widow's estate' in Hindu law and to make a Hindu woman, who under the old law would have been only a limited owner, a full owner of the property with all powers of disposition and to make the estate heritable by her own heirs and not revertible to the heirs of the last male holder. It does not in any way confer a title on the female Hindu where she did not in fact possess any vestige or title."

The trend of the recent decisions of the Supreme Court whereby the law had finally been settled by Justice Bhagwati in *V. Tulasamma v. Sesshi Reddi*²⁶, is to lay stress on the Explanation to section 14(1). In the instant case, the Court adopted the approach giving 'a most expansive interpretation' to the sub section with the view to advance the social purpose of the legislation which is to bring about a change in the social and economic position of women. Upon this section, a full bench of Punjab High Court has held that the section provides enlarged rights over 'land' to Hindu females on the ground that it enacts law on the matter of special property of females.²⁷

➤ **Subsection (2)**

The object of this subsection is to confine the language of subsection (1) to its own subject and to stress its co-existence with sets of provisions in other enactments which may be applicable to Hindus.²⁸ The object of this subsection is also to make it abundantly clear that a restricted estate can, even after the commencement of the Act, come into existence in case of interest in property given to a Hindu female, by testamentary disposition (i.e. by a will), by decree or order of a civil court or under an award. It is also intended to make clear that any such restricted estate created prior to the commencement of the Act will not be enlarged into full ownership by operation of subsection (1) of the gift, will, other instrument, decree, order or award has prescribed a restricted estate.

The general rule is, as the Supreme Court has laid, that subsection (2) must be read only as a proviso or exception to subsection (1) of section 14 and its operation must be confined to cases where property is acquired by a female Hindu as a grant without any pre-existing right

²⁶ AIR 1977 SC 1944 at 1945-47; *Vijaya v. Thakorbahi*, AIR 1979 SC 993; *Jagannathan Pillai v. Kunjithapadama Pillai*, AIR 1987 SC 1493.

²⁷ *Joginder Singh v. Kehar Singh*, AIR 1965 Punj 407 (FB).

²⁸ Mulla, *Hindu Law* (2), (Butterworths, New Delhi, 2001), 394.

under a gift, will etc. which prescribes a restricted estate.²⁹ As to the application of this subsection, the Supreme Court has held that it would depend upon the facts of each case whether the same is covered by the first or second subsection.³⁰ If however, the property is acquired by a Hindu female in lieu of right of maintenance, it is by virtue of a pre-existing right, such acquisition would not fall within the ambit of subsection (2) even if the instrument or award allotting the property prescribes a restricted estate in the property.³¹

The position as to pre-existing right of maintenance has been made clear by the Supreme Court in *Raghuvar Singh v. Gulab Singh*³² and it has been held that by the operation of section 14, the pre-existing right of maintenance of the widow shall transcend into an absolute right and subsection (2) would not have any application in such cases of pre-existing right.

➤ *Agricultural Land*

Another continuing area of discrimination is that Section 4(2)³³ of the HSA exempts significant interests in agricultural land from the purview of the Act and the agricultural lands continue to be covered by the existing laws providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings. Hence, interests in tenancy land devolve according to the order of devolution specified in the tenurial laws, which vary by state.

Broadly, the states fall into three categories:

²⁹ V. Tulasamma v. Sessa Reddi, AIR 1977 SC 1944. Justice Bhagwati giving the judgment observed, “(B)eing in the nature of an exception to a provision which is calculated to achieve a social purpose by bringing about change in the social and economic position of women in the Hindu society, it must be construed strictly so as to impinge as little as possible on the broad sweep of the ameliorative provision contained in subsection (1). It cannot be interpreted in a manner, which would rob subsection (1) of its efficacy and deprive a Hindu female of the protection sought to be given by her by subsection (1).”

See also Champa Devi v. Madho Sharan Singh, AIR 1981 Pat 103; A. Venkataraman v. S. Rajalakshami, AIR 1985 Mad 248.

³⁰ Badri Prasad v. Kanso Devi, AIR 1970 SC 1963.

³¹ V. Tulasamma v. Sessa Reddi, AIR 1977 SC 1944; State of Uttar Pradesh v. Nand Kishore, AIR 1977 SC 1267; Santhanam v. Subramanya, AIR 1977 SC 2024; Vajia v. Thakorbbhai, AIR 1979 SC 993; Sellammal v. Nellammal, AIR 1977 SC 1265; Krishna Das v. Venkayya, AIR 1978 SC 361.

³² (1998) 6 SCC 314; following the same, Smt. Beni Bai v. Raghubir Prasad, AIR 1999 SC 1142.

³³ Section 4(2): For the removal of doubts it is hereby declared that nothing contained in this Act shall be deemed to affect the provisions of any law for the time being in force providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings.

- (i) In the southern and most of the central and eastern states, the tenurial laws are silent on devolution, so inheritance can be assumed to follow the ‘personal law’, which for Hindus is the HSA.
- (ii) In a few states, the tenurial laws explicitly note that the HSA or the ‘personal law’ will apply.
- (iii) In the north-western states of Haryana, Punjab, Himachal Pradesh, Delhi, Uttar Pradesh, and Jammu & Kashmir the tenurial laws specifies the order of devolution, and one that is highly gender-unequal. Here (retaining vestiges of the old Mitakshara system) primacy is given to male lineal descendents in the male line of descent and women come very low in the order of heirs. Also, a woman gets only a limited estate, and loses the land if she remarries (as a widow) or fails to cultivate it for a year or two. Moreover, in Uttar Pradesh and Delhi, a ‘tenant’ is defined so broadly that this unequal order of devolution effectively covers all agricultural land. Agricultural land is the most important form of rural property in India; and ensuring gender-equal rights in it is important not only for gender justice but also for economic and social advancement. Gender equality in agricultural land can reduce not just a woman’s but her whole family’s risk of poverty, increase her livelihood options, enhance prospects of child survival, education and health, reduce domestic violence, and empower women.

As more men shift to urban or rural non-farm livelihoods, a growing number of households will become dependent on women managing farms and bearing the major burden of family subsistence. The percentage of de facto female-headed households is already large and growing. Estimates for India range from 20 to 35 percent. These include not just widows and deserted and separated women, but also women in households where the men have migrated out and women are effectively farming the land. These women will shoulder (and many are already shouldering) growing responsibilities in agricultural production but will be constrained seriously by their lack of land titles. These aspects have been totally ignored in the amendment bill.

➤ ***Rights of tribal women***

It is also pertinent to mention here that as far as property rights of the tribal women are concerned, they continue to be ruled by even more archaic system of customary law under which they totally lack rights of succession or partition. Infact the tribal women do not even

have any right in agricultural lands. What is ironical is that reform to making the property rights gender just are being resisted in the name of preservation of tribal culture!

In *Madhu Kishwar & others v. State of Bihar & others*³⁴ there was a public interest petition filed by a leading women's rights activist challenging the customary law operating in the Bihar State and other parts of the country excluding tribal women from inheritance of land or property belonging to father, husband, mother and conferment of right to inheritance to the male heirs or lineal descendants being founded solely on sex is discriminatory. The contention of the Petitioner was that there was no recognition of the fact that the tribal women toil, share with men equally the daily sweat, troubles and tribulations in agricultural operations and family management. It was alleged that even usufructuary rights conferred on a widow or an unmarried daughter become illusory due to diverse pressures brought to bear brunt at the behest of lineal descendants or their extermination. Even married or unmarried daughters are excluded from inheritance, when they are subjected to adultery by non-tribals; they are denuded of the right to enjoy the property of her father or deceased husband for life. The widow on remarriage is denied inherited property of her former husband. They elaborated further by narrating several incidents in which the women either were forced to give up their life interest or became target of violent attacks or murdered. Therefore the discrimination based on the customary law of inheritance was challenged as being unconstitutional, unjust, unfair and illegal.

In the judgment in this case the Supreme Court of India laid down some important principles to uphold the rights of inheritance of the tribal women, basing its verdict on the broad philosophy of the Indian Constitution and said:

“The public policy and Constitutional philosophy envisaged under Articles 38, 39, 46 and 15(1) & (3) and 14 is to accord social and economic democracy to women as assured in the preamble of the Constitution. They constitute core foundation for economic empowerment and social justice to women for stability of political democracy. In other words, they frown upon gender discrimination and aim at elimination of obstacles to enjoy social, economic, political and cultural rights on equal footing.”

In the same judgement it was quoted, whereby the desirability of flexible and adaptable laws, even customary law, to changing times, was emphasized, is:

³⁴ (1996) 5 SCC 125).

“Law is a living organism and its utility depends on its vitality and ability to serve as sustaining pillar of society. Contours of law in an evolving society must constantly keep changing as civilization and culture advances. The customs and mores must undergo change with march of time. Justice to the individual is one of the highest interests of the democratic State. Judiciary cannot protect the interests of the common man unless it would redefine the protections of the Constitution and the common law. If law is to adapt itself to the needs of the changing society, it must be flexible and adaptable.”

The Court declined to be persuaded by the argument that giving the women rights in property would lead to fragmentation of land:

“The reason assigned by the State level committee is that permitting succession to the female would fragment the holding and in the case of inter-caste marriage or marriage outside the tribe, the non-tribal or outsiders would enter into their community to take away their lands. There is no prohibition for a son to claim partition and to take his share of the property at the partition. If fragmentation at his instance is permissible under law, why is the daughter/widow denied inheritance and succession on par with son?”

Accordingly it was held that the tribal women would succeed to the estate of their parent, brother, husband, as heirs by intestate succession and inherit the property with equal share with male heir with absolute rights as per the general principles of Hindu Succession Act, 1956, as amended and interpreted by the Court and equally of the Indian Succession Act to tribal Christian.

In a substantially concurring but separately written judgment another judge of the Bench supplemented another significant principle to strengthen the tribal women's right to property by reading the right to property into the tribal women's right to livelihood. The judge reasoned that since agriculture is not a singular vocation, it is more often than not, a joint venture, mainly, of the tiller's family members; everybody, young or old, male or female, has chores allotted to perform. However in the traditional system the agricultural family is identified by the male head and because of this, on his death, his dependent family females, such as his mother, widow, daughter, daughter-in-law, grand-daughter, and others joint with him have to make way to a male relative within and outside the family of the

deceased entitled there under, disconnecting them from the land and their means of livelihood. Their right to livelihood in that instance gets affected, a right constitutionally recognized, a right which the female enjoyed in common with the last male holder of the tenancy. It was thus held:

“It is in protection of that right to livelihood, that the immediate female relatives of the last male tenant have the constitutional remedy to stay on holding the land so long as they remain dependent on it for earning their livelihood, for otherwise it would render them destitute. It is on the exhaustion of, or abandonment of land by such female descendants can the males in the line of descent take over the holding exclusively”.

This judgment is also noted for its extensive reliance on the mandate of international Declarations and Conventions, most notably the **Convention on Elimination of all Forms of discrimination against Women (CEDAW) and the Universal Declaration, of Human Rights** that call for gender just legal systems and equal rights for women.

CONCLUSION

As per a statement made by Hon'ble Justice Rajendra Babu which quotes that:-

*“Gender justice challenges the traditional rationality of law. The traditional rationality speaks of equality in the context of an assumed secondary role for women even concerning decision-making which affects their bodies and lives.”*³⁵

This quote fits aptly in the context of our study. The aim of every society is to come above any biasness for any section, composition or segment. The tradition debate over the rights of females as respect to and in parity to the males assumes importance where the question of rights vis-à-vis the position in the family arises in the context of property assigned. When women have a position equal to (if not higher as Manu originally propounded), other male members, why the rights of acquisition, ownership, enjoyment and disposition of property are not available as such to these female members upon the death of the intestate or otherwise. This opens the scope for criticizing the policy of the state which, though the enactment (in this case the Hindu Succession Act, 1956) seeks to prescribe the law that governs the matters of succession and inheritance and thereby perpetuate the seemingly upright but *defacto* back ridden status of the female in the family.

If one were to spell the duty of a rational and ideal following state, the first role of such state would be to establish an environment of equal basic rights i.e. the foundation of gender equality, especially with respect to family law, gender-based discrimination, property rights and other matters wherein the scope for discrimination purely with respect to gender basis exists. Though one may argue that gender gaps stem also from the family's desire to confine women's work due to norms and traditions, as from employers' prejudice against hiring women, yet, state cannot evade its responsibility of creating a balanced paradigm for parity based existence of males and females in the society.

Thus, in the light of the above remarks and the critical observations made in the study, the author seeks to propose that there must be suitable reforms in the Hindu Succession Act to modify the principles and rules of intestate succession, as they presently stand, such that the gender based discrimination which exist in the present day Hindu society, on

³⁵ Justice S. Rajendra Babu, Gender Justice - Indian Perspective, (2002) 5 SCC (Jour) 1.

account of the provisions of the Act, be done away with and an egalitarian society, as upon the terms of the ideals envisaged in the Constitution, be established.

Particularly in view of India's obligation under the United Nation's Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW) wherein **Article 15 of the Convention** necessitate the state parties to ensure equality of men and women before the law and in civil matters and Article 16(1)(h) which obliges the state parties to take appropriate measures to ensure that spouses have the same rights of 'ownership, acquisition, management, administration, enjoyment and disposition of property,' the state should review the Hindu Succession Act to remove the gender bias and equalize the provisions as far as succession of females is concerned under the Act, to bring them at par with the males in the line of succession and thus aim for a progressive society, being unfettered by the dominating principles of the ancient religion.

Thus, these being the suggestions and conclusion of the study, the authors hope that suitable changes shall be introduced in due course in the Hindu Succession Act and it shall be brought in more realistic terms of the present society and the gender bias which exists for almost five decades shall be done away with and an egalitarian society be established.

It has been observed that the law is strictly restricted in its capacity to deliver gender justice, which in itself is contingent on the nature of law and its functioning. In this connection it is worthwhile to recall that the law itself is not a monolithic entity, which simply progresses or regresses. Historically, the development of law has been an uneven one. That is to say, more than not, what law promises on paper cannot carry through in reality. Hence law-as-legislation and law-in-practice are most of the time in contradiction with each other. For example, the Indian constitution explicitly enshrines formal equality for women. However, the lives and experiences of India women relentlessly continue to be characterized by substantive inequality, inequity and discrimination.³⁶

To conclude, we would like to put the statement given by **Dr. Justice A.S. Anand** which is as follows:-

“Fight for gender equality is not a fight against men. It is a fight against traditions that have chained them – a fight against attitudes that are ingrained in the society – it

³⁶ See <http://www.experiencefestival.com/wp/article/gender-inequality> last accessed on 30th March 2011.

is a fight against system – a fight against proverbial ‘Laxshman Rekha’ which is different for men and different for women. The society must rise to the occasion. It must recognize & accept fact that men and women are equal partners in life. They are individual who have their own identity”.