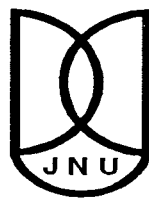


**GENDER, LAW AND THE STATE:
INHERITANCE RIGHTS OF HINDU WOMEN AND
THE JUDICIARY IN INDIA**

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in partial fulfillment of the requirements
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MASTER OF PHILOSOPHY

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Dedicated to Ma, Baba and Sonu

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INTRODUCTION

Within the broad framework of understanding the linkage between gender inequality and command over property this dissertation focuses on the inheritance rights of Hindu women as the pivot of power relations in society. Effective rights in property are one of the crucial determinants of women's economic, social and political empowerment in India. This is largely because the ownership and control over property signifies command over productive resources, which enables individuals to make choice regarding livelihood, provides security against poverty and promotes autonomy. However, one of the most intractable issues in the debate over and programmes for gender equality has remained the unequal access and control that women as compared to men have over productive resources, particularly property. The main argument of the study is located in the re-examination of the Hindu Succession Act of 1956 and a reading of a few landmark judgements of the Supreme Court and the High Court to illustrate how the legal system itself contribute to the gap between the formal guarantees of gender equality and substantive inequalities that women are faced with.

Inheritance rights are undoubtedly shaped by both gender and legal considerations. Gender has been and remains, a historically variable and internally differentiated relation of domination. It connotes and reflects the persistence of asymmetrical power relations. While law is established by a political authority and backed by state power, it is nonetheless generally sanctioned by the society in which it operates and is reflective of normative behavior. In other words, the legal system regulates the transfer of property, including land, and it generally reflects the dominant beliefs and values of society in which it operates.

Law has indeed evolved as an important institution in most contemporary societies as it regulates, controls and in other ways pervades almost all aspects of our lives. It has dual purpose and significance for women. It may modify and mitigate the discrimination or it may facilitate the forces of discrimination. The influence of law, particularly family law, has direct relevance for women. This is largely because majority

of Indian women have no meaningful alternative for family. Thus, the role of law needs to be considered from diverse vantage points: the functions of cultural imaginary created through state legislation, the cultural mechanism that inhibits legal reform and the ambivalence of turning to law for women's empowerment.

The main concern of the study is to examine women's relationship to property from the historical, political and socio-legal perspectives. The aim of this dissertation is to consider the pervasiveness with which inheritance rights of women to property are absent, the factors that facilitate such a phenomenon the extent of the role of the state, particularly, in the form of judicial intervention, in either enhancing or curtailing such rights. The central concern governing the enquiry is:

- (1) To critically evaluate the historical specificities that led to the formulation of the Hindu Succession Act which govern the inheritance rights of Hindu women and also identify the lacunae within the Act per se, which enable the dilution of women's rights to inheritance.
- (2) To understand whether legislation on its own, can confer genuine effective rights to women; if not what role does enabling social conditions provide for their enhancement.
- (3) To assess how the judgements of the Supreme Court and High Court has oscillated between the corrective approach and the protectionist approach in dealing with property cases.
- (4) To analyze the ideological construction of gendered identities within the legal-judicial framework and their implications for women's access to inheritance rights in both movable and immovable (landed) property.

Property is not a commodity equally accessible to all. The transfer of property is governed by a system of beliefs and practices integral to the family. The way in which property is transferred and to whom it is given, is an expression of cultural ideas. It is extraordinary that traditional patterns of property transfer, particularly, landed property,

through kinship-impregnated institution of inheritance have been maintained even in the face of global or dominant cultural and economic principles.

The gender-gap in the ownership and control of property is a crucial variable in the study to understand how the state through legal interventions in the form of formulation of laws as well as interpretation of laws by the judiciary transforms “gender” as the site for contestation for various political, cultural and economic issues and decides how property transmission reproduces hegemonic space. However, it is significant to note that law alone cannot effect changes in cultural practices and women themselves have to imbibe effective agency to question, analyse and act on the structures of patriarchal constraints in their lives.

Why is it that despite the Hindu Succession Act of 1956, having granted equal inheritance rights to sons and daughters, or brothers and sisters, in patrilineal communities women only occasionally inherit as widows and extremely rarely as daughters? Here, this study needs to be contextualised in the framework of debates about the multiple mechanisms- social, administrative and ideological- through which systems of property transmission are perpetuated and result in complex gender hierarchies within the family itself. This entails an elaborate understanding of the ideological and material grounds for the structure of dependence and gender difference that strengthen the patterns of gender inequality and women’s oppression.

The cultural construction of gender as well as the socialization process often discourages women from asserting inheritance laws. The unease with daughters’ rights of inheritance results in the activation of set of social controls which include emphasis on notions of daughters as transitory members for whom shares in natal property cannot be allowed; the strengthening of brother-sister ties by ensuring that sisters relinquish their inheritance rights, legitimization of the use of force to prevent breaches of the above norms and prejudices and finally, substitution of daughters’ inheritance claims by dowry. The socialization of daughters further ensures that they themselves accept their exclusion. Women often justify their voluntary forfeiture of family property to avoid being labeled as an “uncaring and greedy sister”. Women’s main concern therefore is to

establish themselves in the new family and acquire a status there; and dowry is considered to be contributing to that process of inclusion within the matrimonial family. Moreover, realizing the increasing 'heavy expenditure' involved in the marriage ceremony, women tend to view dowry and property as their due. "The only ideal and izzatwala (honourable) pattern of inheritance is acknowledged to be males to males. This basically means that daughters and sisters who are potential introducers of new blood and new descent lines through their husbands are to be kept from exercising their inheritance rights.¹ It is interesting to note that 'dowry' even finds a place in the judicial discourse on the question of gender equality.

The other social barriers to women's effective property rights including land can be identified as post marital residence location, sexual control over women and myths to reinforce the ideology that women should not plough. Post marital residence location determines women's inheritance in land. Women who have customarily had rights in landed property have had to reside within their paternal village and often home.² Sexual control over women as reflected in the remarriage customary rules show a strong tendency to keep property inherited within the family. Levirate marriage, in the form of 'karewa' as practiced in Punjab and Haryana lead to the forfeiture of the women's estate.³ Finally, women's subordination to men in agriculture has to be evaluated within the parameters of gendered division of labour and the invention of myths to create ritual taboos against women ploughing.⁴

Where traditionally women have been denied independent rights to manage and control land, their access to and control over productive resources takes on added

¹ P. Chowdhury, 'Enforcing Cultural Codes: Gender and Violence in Northern India', *Economic and Political Weekly*, May 10, 1997.

² U. Sharma, *Women, Work and Property in North-West India*, Tavistock Publication, London and New York, 1980.

³ P. Chowdhury, 'Conjugal, Law and State: Inheritance Right as the Pivot of Control in Northern India', *National Law School Journal*, Special issue, 1993.

⁴ M. Kishwar, 'Toiling Without Rights- Ho Women of Singhbhum', *Economic and Political Weekly*, January 31, 1987. According to this study in Bihar, if Ho women were seen to have accidentally touched the plough they were heavily fined by the Panchayat and in rare cases even stoned to death.

significance as it creates a space “ wherein a renegotiation of gender roles can occur such that women’s independent rights to land is acknowledged by the community as a socially legitimate one”.⁵ Though women may have considerable rights to own and inherit property in the laws, the recognition and legitimacy accorded to these rights at the societal level may often be missing. It is in this social reality that the study needs to be situated. Infact, from the above discussion, it becomes evident that question of gender equality in property rights is not only a political one but is also intertwined with aspects of social and historical realities. Patriarchies function at multiple levels to institutionalize women’s oppression and subordination both within and outside the domestic sphere of family. The denial of property rights to women is a significant instrument of patriarchy, especially, if one defines patriarchy as “historically developed cultural, ideological force giving gender relations their specific character in each situation”.⁶ Patriarchy thus understood leads to an explanation of the process by which gender is constructed and the role played by patriarchy in those processes.

Conceptual Categories

Feminist academics, writers and activists have long recognized the need for an appropriate vocabulary for the analysis of the ways in which structures in societies universally oppress women and for equipping women with the means to respond to and challenge the existing hierarchies. This has meant defining some concepts in very specific ways and inventing categories, which are more suitable to describe and examine women’s experiences. Some key conceptual categories that are used throughout this research therefore deserve to be spelt out here.

Gender is a powerful principle of social life. It is a multilevel system of social practices that produces distinctions between women and men and organizes inequality on the basis of those distinctions. Three features of this definition are important. First,

⁵ S.T. Jassal, *Daughters of Earth: Women and Land in Uttar Pradesh*, Manohar, New Delhi, 2001.

⁶ N. Banerjee, ‘The Structural Adjustment Programme and Women’s Economic Empowerment’, in N.Rao, L. Rarup and R. Sudarshan (Ed.). *Sites of Change- The Structural Context for Empowering Women in India*, FES and UNDP, New Delhi, 1996.

gender is being continually produced and reproduced. Understanding the mechanisms through which these occur is important. Second, gender is not simply a characteristic of individuals but a multi-level phenomenon occurring at all levels of the social structures. Third, this definition of gender refers to its importance in organizing relations of inequality. Whether gender differentiation must necessarily lead to gender inequality is however a subject of debate. As a principle of social organization, gender is indeed a critical dimension upon which social resources are distributed. The examination of the genesis of the term 'gender' will expose the cultural context of the concept and also highlight the distinctiveness of its Indian formulation. Oakley defines gender as the cultural expressions of sexual difference.⁷ Any given society at any given time prescribes a set of behaviour for each sex, which both women and men must follow. If sex is the algebraic sum of chromosomes, external and internal genitalia, gonads, hormonal states and secondary sexual characteristics, gender was socially and culturally produced. However, many dissenting voices⁸ have been raised to challenge such distinction between gender and sex, that is, sex as the body and gender as the consciousness. The body is not a substratum on which gender is overlaid; rather both body and gender are socially produced. The very concept of gender can produce certain kinds of bodies. One cannot therefore, treat the body as a passive given. However, nonetheless the distinction may be valid at a conceptual level. As Plumwood says, it may not be possible to de-gender, that is, get rid of gender all together but re-gendering can be an instrument of liberation from the system that insist not only on the construction of one as the complement of the other but it excludes it from the cultural values attached to the other.⁹ The meaning, scope and significance of 'gender' have enlarged over the years. Gender can be recognized as involving three elements, which are not autonomous but interacting. There is the aspect of meaning and signification; there is the organization of men and women in social relations and there is also the

⁷ A. Oakley, A., *Sex, Gender and Society*, Temple Smith, London, 1972

⁸ C. Delphy, 'Rethinking Gender', *Women's Studies International Forum*, Vol.16, No.1, 1993. She argues that the link between sex and gender and sexuality and procreation should be questioned by feminism because gender precedes sex. It is the social dimension of labour and associated hierarchical relations which lead to psychological sex being used to distinguish those who are assigned to be dominant from those who belong to subordinate gender and class.

⁹ V. Plumwood, 'Do We Need a Sex Gender Distinction?' *Radical Philosophy*, Vol.51, Spring, 1989.

component of personal identity. Correspondingly, there are three levels of experience-social, psychic and symbolic.

Patriarchy is a much contested concept in the social science literature. The term was originally used to refer to the rule of the father or the eldest male holding authority and power over women and junior males in an extended family in pre-capitalistic systems such as feudal Europe.¹⁰ This form is still present in many agrarian societies. The more widely accepted view defines patriarchy as a systematic arrangement of social, economic and political power in ways that benefits male members of society and ensure the subordinate status of women. These gender relations are integrated at multiple levels of society and with many different structure of society. Central to these patriarchal arrangements are kinship systems that determine the ways women are related to the whole system of production and social reproduction within and outside the family in a particularly subordinate ways.¹¹ Patriarchy has therefore, been a convenient tool of analysis to explain gender inequality, to explore how its constituent elements intersect with other axes along which power is distributed in society, like culture, class and ethnicity and to capture the depth, pervasiveness and interconnectedness of women's subordination. The plurality, which is embedded under the patriarchal modes of social organization, has led to the notion of patriarchies. Patriarchy is thus, an ideology and instrument for the subordination of female labour or production and reproduction. Yet by no means is the success of patriarchy to be attributed only to dominance. Infact, patriarchy achieved hegemony through seeking and obtaining consent, and not just obedience, especially by rewarding certain form of complicity or by deploying women themselves in enforcing essentially patriarchal norms.

Feminism is a generalized, wide- ranging system of ideas about social life and human experience developed from a woman-centred perspective. It is woman-centred in three ways. First, its major object for investigation, the starting point of all its investigation is the situation and experiences of women in society. Second, it treats

¹⁰ A. Thorner and M. Krishnaraj, *Ideals, Images and Real Lives*, Orient Longman, Mumbai, 2000.

¹¹ G. Omvedt, 'Patriarchy: The Analysis of Women's Oppression', *The Insurgent Sociologist*, No. 13, Spring, 1986, pp 38.

women as the central subjects in the investigative process; it seeks to see the world from the distinctive vantage point of women. Third, feminist theory is critical and activist on behalf of women, seeking to produce a better world for women- and thus, it argues, for humankind. As a perspective it asserts that every aspect of human society is “gendered”, conferring very specific benefits or disadvantages to either of the social categories, men and women. It is an analytical tool as well as a liberating political perspective, which envisages and effects a through dismantling of patriarchal structures in ways that will give women greater power and control of their lives.

Chapterisation

The first chapter, *‘Hindu Code Bill Debates: Prelude to the formulation of the Hindu Succession Act of 1956*, focuses on the analysis and presents a penetrating discussion on the pre-colonial, colonial and post-independence engagements in reforming Hindu laws, particularly the inheritance laws pertaining to women’s rights. It explores in details the legislative historical trajectory of Hindu Law Reform proposals particularly the Hindu Code Bill debates. It describes how the first wave of Indian feminism forced the review of the unequal entitlements within the religious family laws and facilitated the introduction of more egalitarian statutes like, The Hindu Women’s Right to Property, 1937. It examines the so-called progressive Hindu Code Bill to show how in effect it proved to be quite regressive to the interests of women. It argues that traditional patriarchy in conjunction with the emphasis on individual property rights impoverishes women further in the way Hindu law works in practice. It demonstrates the way the enactments like the Hindu Succession Act of 1957 failed to live up to its promise of gender equality and how the larger politics of communities and nations postponed the question of gender justice. This chapter builds a linkage with the next chapter to understand the dynamics of the processes and the consequent negotiations through which Hindu laws were codified and finally, led to the formulation of various family laws, particularly the Hindu Succession Act, 1956.

The second chapter, *‘Hindu Succession Act of 1956’* begins with the simple but elaborate elucidation of the property laws governing the inheritance rights of Hindus

today. All the prominent clauses of the Act supported with examples of judgements of the High Court and the Supreme Court are dealt critically, along with explaining its repercussions for women's rights. The Hindu Succession Act of 1956 has been hailed as one of the most gender equal laws, which marked a shift from gross inequality to substantial equality. Under the Hindu Succession Act of 1956, Hindu women theoretically acquired equal rights to the "self-acquired" property of their parents in intestate succession only. They could be disinherited through wills and got at best a minimal share in property and usually nothing of the ancestral family land under Mitakshara Succession. In addition the Act gave Hindu widows absolute (as opposed to usufructuary) rights over affinal property they had received in lieu of maintenance- that is, the power to sell or gift property- whereas family property remain largely inalienable for male heirs.

The next chapter, '*Gender and Land Rights: Land as Property*', critically reflects on the broad set of issues that have been raised in both the academic literature as well as in policy debates between gender and land. Different aspects of gender and land question are explored by taking into account the contextual specificities as well as conceptual and methodological variations. The systematic exclusion of women from ownership and control of land and other productive resources and the gendered nature of the distribution of power is the main theme. It becomes evident from the study that a contradictory situation emerges, where acceptance of women's entitlement is on one hand recognized in the inheritance laws affecting private land, while the issue is generally ignored in development policies governing the distribution of public land. It further investigates on the problematic relationship between land and women at the micro-level and within the context of land reforms and land distribution drives in India, particularly in Kerala, Bihar and West Bengal.

Law is an important instrument of legitimation of the state apparatus to control and regulate gender relations at multiple levels in society. Finally, the fourth chapter, '*Gender and Law: Interface with the Judiciary*', looks through a gendered lens the way law emerges as a space to provide occasional entitlement to women but is unlikely to transform the entrenched structure of power, which operates through familial units. The

judicial interpretations of the legal cases dealing with property entitlement cases pertaining to the question of inheritance rights of women elucidate how the judicial approaches to gender equality oscillates between the protectionist and the corrective approaches in the disposition of gender justice. It identifies a few judgements of the Supreme Court and the High Court to illustrate how the legal system contributes to the gap between formal equality and the substantive inequalities that plagues women's lives. It also tries to analyze the cases dealing with succession in the light of their construction of gendered identities as well as the underlying cultural and ideological understanding of the judges about the "essential characteristics" of "womanhood" and "Indianness" that inform and consequently, determine legislative outcomes. On the whole this dissertation attempts to interweave numerous perspectives on Hindu women and their access to property rights, within systems of family laws, particularly, the Hindu Succession Act of 1956 and their judicial avatars into a meaningful whole.

Research Methodology

The research is grounded within the contemporary women's movement. The analysis of legal texts is undertaken within the framework of feminist jurisprudence. The study is indeed inter-disciplinary in nature as the entire discourse is located and contextualised within historical developments, anthropological insights and contemporary political events. The research depends on both primary as well secondary sources for information. The primary sources include legal texts, Constituent Assembly and Parliamentary debates, official documents, drafts and bills prepared by the Law Commission of India and other legal academicians, women's groups and the official for a. the secondary source consists of the law journals, media reportage, papers presented during Conferences and seminars, informal discussions with non-governmental organizations like International Council for Research on Women (ICRW), Lawyers' Collective and others.

Chapter I

HINDU CODE BILL DEBATES: PRELUDE TO THE FORMULATION OF THE HINDU SUCCESSION ACT OF 1956

In India, family laws are called personal laws. The laws are personal in that they relate to the sphere of personal relations but also in that they are person-specific. The specificity flows primarily from the religious affiliation though local custom is also important. As a result family laws are hived off from the main body of civil laws, codified separately for the four communities- Hindus, Muslims, Christians and Parsis- based on their religious prescriptions. In reality, the four codes are a mix of scriptural sanctions, heterogeneous customs, practices and most important, precepts forwarded and established through the political maneuverings of the powerful spokespersons of these communities. Thus, the laws necessarily reflect the patterns of social and political dominance based on caste, region, class and gender. Personal laws define the relationship between men and women within the family and control and direct marriage, divorce, maintenance, guardianship of children, adoption, succession and inheritance. All of them concern women intimately and treat women as subordinate and dependent on male kin.

Contemporary inheritance laws which are a part of the personal laws emerged through a complex process of interaction between the pre-colonial and colonial systems and different segments of population, the interplay of varying ideologies and interests and the conflicting pulls of scriptural rules and local customs. The history of personal laws, particularly, the Hindu law forms the background of the research. The interface between the women's movement in India and the colonial and post-colonial interventions of the state to legally remedy some of the most egregious forms of discrimination against women is relevant. The focus of this chapter is to explore whether the process that led to the formulation and codification of Hindu laws and consequently, Hindu Succession Act of 1956 permitted any space for negotiating women's rights.

This entails an analysis of the relevant aspects of *Mitakshara* and *Dayabhaga* systems of law which governed the rights of Hindu women in pre-colonial period and also exploration of the legislative history of Hindu Law Reform proposals, particularly the Hindu Code Bill to identify the gains made in women's legal rights at the initiative of the state. Infact, some of the legal principles of the *Mitakshara* and *Dayabhaga* systems have found a prominent place in the Hindu Succession Act of 1956.

Contemporary Indian law while purporting to extend rights and opportunities to all, who would be enfolded within its new nationhood, continues to be influenced by the shadow of its colonial origin. The contradictory approach to gender equality became most prominent in the Hindu Code Bill which was presented as being with the spirit of the new Constitution. The main shift that was underlying in the Hindu Code Bill debates was that personal laws which were considered to be sacrosanct in the colonial period could now be transformed in the name of "modernizing" the nation.

Unfortunately, the anomalies and anti- women bias within the Hindu Code were not discussed widely in public forum. They remained camouflaged in statute books and legal manuals. A latent conspiracy of silence underlying these inadequacies seemed to be apparent. This facilitated the construction of a fiction that the Hindu Code was 'modernized' and hence, under the rhetoric of 'liberation of women', it ought to be extended to other religious denominations. The aim of this chapter is to bring to the forefront the implications of the so-called progressive Hindu Code for women's rights as the background of the formulation of the Hindu Succession Act of 1956.

Hindu Inheritance Laws in Pre-Colonial Rule:

Mitakshara and Dayabhaga

Plurality of law and customs and the non-state legal structure were the essential characteristics of ancient Indian communities. Though the original texts were of Aryan origin, the assimilation of Aryan and non-Aryan tribes led to diverse customs and practices.

The origin of the scriptural law can be traced to divine revelations. There was no distinction between religion, law and morality during the early period. They were cumulatively referred to as Dharma. The three distinct sources of Dharma are Shruti (the divine revelations or utterances primarily the Vedas), Smriti (the memorized words- the Dharmasutras and Dharmashastras) and Sadachara (good custom).¹ Although the Vedas were treated as the fountainhead of Hindu laws they did not contain positive law.² Hence, the codified laws governing Hindu marriage and family relationships derive their roots from the Smriti and Nibandhas (commentaries and digests).³

Against this backdrop of the legal systems, the traditional Hindu law defining the inheritance practices can be traced to the ancient texts- the Dharmasastras and the Nibandhas. The two distinct and dominant schools validated under the Anglo- Hindu law- Mitakshara of Vijnaneshwar of the 11th century and Dayabhaga of Jimmutavahana of the 12th century significantly influenced the legal practices in the British period as well as the subsequent formulation of the contemporary Hindu law. In Hindu laws⁴ that is, Hindu Succession Act, the main broad features of the two legal systems, which are relevant, are discussed as the following:

The *Mitakshara* system distinguished between two types of property: joint family property and separate property.

Joint family property -

This included ancestral property, that is, property that was held jointly by four generations of male members- a man, his sons, son's sons and sons' sons' sons- all of

¹ S.T.Desai (ed), *Mulla's Principles of Hindu Law*, Asia Publishing House, Bombay,1994.

² S. Sarkar, *A Treatise on Hindu Law*, Banerjee and Co., Calcutta, 1993, pp-12.

³ A.N. Bhattacharjee, *Hindu Law and the Constitution*, Eastern Law House, Calcutta, 1994, pp-17. Here, Bhattacharjee has argued the Nibandhas has already replaced the Smritis at the time of colonial interventions and thus, Smritis could no longer be considered as the source of Hindu law.

⁴ The *Dayabhaga* system (12th century) was utilized in Bengal and Assam and the *Mitakshara* (11th century) was utilized in the rest of India. Those two commentaries differed on the subject of inheritance.

whom were designated as coparceners. Any property that was jointly acquired or was acquired separately but merged into the joint property was also included in it. A community of interests and rights was recognized in the joint family property for the coparceners on birth. Women were not entitled to be coparceners. Devolution was by survivorship: the living coparceners had an interest in the property of the deceased ones and the individual shares could be determined only in partition; these shares decreased in case of birth and increased in case of death among the coparceners. Property alienation was subject to strict restrictions. But each coparcener had the right to demand partition unilaterally at any time. Women were not entitled to be coparceners in the joint family property. They only had rights of maintenance as wives, widows or unmarried daughters.

Separate Property-

In contrast to the joint family property, a man had absolute right of ownership and disposal over his separate property. This included property, which was self-acquired, and any property inherited from persons other than his father, paternal grandfather or paternal great grandfather. Again, the share of ancestral property on partition provided he had no son, son's son or son's sons' son, was also included in his separate property. In the presence of these male lineal descendents, however, the partitioned share was still ancestral property, as far as he and any of these descendants were concerned and his rights of disposal over it stood curtailed.⁵ In this property, the widow could inherit a limited estate but only in the absence of sons, agnatic⁶ grandsons and agnatic great grandsons. A limited estate refers that the woman could enjoy the property during her lifetime but after her, it reverted to her husband's heirs. She could not alienate the property except under highly restricted circumstances, that is, in a period of severe necessity (later termed "legal necessity") and within reasonable limits for performing pious and religious acts. A daughter (with unmarried daughters preceding married

⁵ P.V. Kane, *History of Dharmashastras*, Asia Publishing House, Bombay, 1946.

⁶ "Agnate" - One person is said to be an agnate of another if the two are related by birth or an adoption wholly through males. Such is the definition provided in the Hindu Succession Act of 1956.

ones) came even after a widow and a daughter's son⁷ after the daughter. In other words, for the daughter to inherit her father's estate required the absence of the male heirs as well as the widowed mother. However, the daughter like the widow could receive only a limited estate.

Under the *Dayabhaga* system, a man was the absolute owner of all his property and could dispose of it as he wished. The son did not acquire an automatic interest by birth in the father's ancestral property. Nor was there any principle of survivorship. Division of property among heirs could take place only at the man's death and the property went in the first instance equally to his sons. The share of the pre-deceased son would devolve on the son's son and failing this, on the sons' sons' sons. A "chaste" widow could inherit in the absence of male heirs but again as a limited interest with the right to manage but not alienate the property. Daughters came after the widow, unmarried ones getting first preference and inheriting only a limited interest. However, in contrast to Mitakshara law, women inherited an interest in all property, irrespective of whether it was ancestral or separate. This implied that under the *Dayabhaga* system, the widow or the daughter inheriting some property was more probable than in the *Mitakshara* system.

Under both the systems, female property rights were recognized in the concept of *Stridhana*. However, its scope was also limited since there were varied and changing interpretations of what constituted *Stridhana*, how much control could a woman access over it and also the rules of devolution after the woman's death. In the early Shastric texts, *Stridhana* consisted only of movables given to the woman by her parents, brothers or relatives, before or at the time of marriage and by her husband after marriage. Over the *Stridhana*, she was allowed absolute control. However, from the 7th century A.D. onwards there was much controversy about the scope of *Stridhana* and particularly the question of whether landed property should be included in the *Stridhana* and the extent and degree of control women should be allowed over it, were raised.

⁷ The daughter's son, unlike the daughter, received the property as an absolute estate. In the absence of daughter's son, the property went to the deceased man's parents and to his brothers and their sons.

According to some commentators, under *Mitakshara* law any landed property that was included in a woman's *Stridhana* as a result of it being acquired by inheritance or partition was of limited interest to her. But the Bombay sub-school held that property, which a woman inherited from a male of the family, in which she was born or inherited from a female, became her *Stridhana* and could be held by her as absolute interest.⁸ In contrast, under the *Dayabhaga* law, *Stridhana* was defined as one over which woman has full rights of disposal and absolute control over it. But this effectively included only movable property.

Thus, according to both *Dayabhaga* and *Mitakshara* system, Hindu woman could inherit unmovable property such as land only under certain restrictive circumstances and at best enjoyed a limited interest in it. Men however, enjoyed a primary right to inherit and control (unmovable) property. True that men too faced certain restrictions in their right of disposal over joint family property under the *Mitakshara* law but it was essentially related to their rights as individuals and not to their rights as a gendered identity. Gender, thus emerged a defining parameter of discrimination in property rights against women.

There is however, immense diversity in the actual practices of Shastric prescriptions/laws in concomitant to the variations in different regions and communities. Regionally, there has been tension between the *Shastras* and local customs and rituals on marriage, divorce and inheritance practices.⁹ It is argued that among patrilineal Hindus in pre-colonial India, some affluent women did possess landed property but little does it suggest that the average Hindu woman largely owned landed property. However, in spite of this, one can hardly ignore the gap in effective rights in property. Among the patrilineal tribal communities in eastern and northeastern India women enjoyed only usufruct rights in land and the land that was inherited was of limited interest. Only in some instance of matrilineal and bilateral inheritance in southwest India (Kerala) and northeast India (Meghalaya) were property rights

⁸ P. V. Kane, op. cit., pp-783.

⁹ J. D. M. Derrett, *Religion, Law and State in India*, Faber and Faber, London, 1968.

endowed on women. The Marumakkatayam and Aliyasantana systems customarily governed the matrilineal communities in south-west India.

The Formulation of the Hindu Succession Act of 1956:

The Hindu Code Bill Debate

Contemporary inheritance laws in India emerged through a complex process of interaction between the pre-colonial and colonial systems and different segments of the population, interplay of varying ideologies and interests and the conflicting pulls of scriptural rules and local custom. Although India gained independence from the British rule in 1947, the legislative activity immediately preceding Independence has to be understood as the relevant background for the Hindu Code Bill debates.

The history of the Hindu Law reform spans a period of fifteen years from 1941 to 1956. It was discussed in three Parliaments of historical significance that is, the federal Parliament, the provisional Parliament and the first Parliament of the newly independent nation. At each stage, it went through a dilution of rights till finally the political interests of the ruling party became the primary consideration. But the rhetoric continued to be 'liberation of women'.

The early decades of the 20th century witnessed the concerted efforts of especially women's organizations and progressive male reformers to seek changes in the legal status of woman. Among them principal women's organizations were the Women's India Association (WIA) founded in 1917., the National Council of Women in India (NCWI) established in 1925 and the All India Women's Conference (AIWC) set up in 1927. These organizations took systematic actions for social reform legislation, especially, women's right to divorce and to inherit and control property. As Forbes notes: "Throughout the 1930s, the women's organizations formed committees on legal status, undertook studies of the laws, talked with lawyers, published pamphlets on women's position and encouraged various pieces of legislation to enhance women's status. At first these demands were presented as part of organisations' general efforts to

uplift women but by 1934 the AIWC passed a resolution demanding a Hindu Code that would remove women's disabilities in marriage and inheritance".¹⁰

The reform of Hindu law was started by few social reformers who to begin, with did not have a systematic plan of action. Everett gives a list of federal legislative assembly members who were interested in making piecemeal changes to some aspects of the Hindu law.¹¹ It was only when the avenues of political participation of Indians were opened up by colonial governments that the legislature became a new arena for social reform efforts of a small band of liberals. The Government of India Act of 1935 provided for the first substantively representative legislature for the Indians as it expanded Indian participation in governance further.

Parallel to this, women had been campaigning for enfranchisement and for representation in the legislatures. In the 1920s Indian women won the right to vote in several provinces. In the provincial legislative assembly election in 1937, 4.2 million women were eligible to vote, constituting 14 percent of the 30 million electorate. Enfranchisement was however based either on the husband's tax status or on being literate. In the provincial legislatures, women were elected in 56 seats, making up 3.7 percent of these legislatures. In the federal legislatures too, women were given entry but in a limited way, that is, only 6 seats were reserved for women in the 260-member council of states and 9 in the 375 member federal assembly.

By the 1930s, many women's organization had initiated concerted efforts to enhance women's legal rights in property. A group of liberal male lawyers elected to the government's Central Legislative Assembly supported their efforts. A number of bills were introduced supporting Hindu women's legal rights but it encountered strong opposition from the orthodox Indian members of the Assembly and thus, was defeated.

In 1937, G.V. Deshmukh, a liberal introduced a bill in the Federal Legislative Assembly on Hindu Women's Rights to Property. It was passed but with some critical

¹⁰ G. Forbes, 'The Politics of Responsibility: Indian Women and Indian National Congress' in D.A. Low (ed.) *The Indian National Congress: Centenary Hindsight*, Oxford Publishing Press, Delhi, 1988.

¹¹ J.M.Everett, *Women and Social Change in India*, Heritage Publishers, Delhi, 1978.

limitations. The Act gave the Hindu widow a right to intestate succession¹² equal to the son's share in the man's separate property among those governed by Mitakshara and to all property among those governed by Dayabhaga. It also gave her the same interest as her deceased husband in the undivided Mitakshara coparcenary, with the same right to claim partition as male coparcener. But she could hold his share only as a limited interest, after which it went to her deceased husband's heirs and was also subject to forfeiture. On remarriage, the Act however excluded agricultural land on the ground that after the Government of India Act of 1935, agricultural property came under the provincial legislature and the daughter was left out altogether from the purview of the Act.

Though this was far from the comprehensive legislation that women's organization were seeking, nonetheless, it was indeed the foundation for a more wide ranging legal reform and codification of inheritance laws. Public opinion on the question of codification of personal laws was mobilized by publishing articles in periodicals, meetings with politicians, attending legislative assembly sessions and presenting resolutions to government officials. Some male liberal leaders also played a role in furthering this process. The October 1928 issue of 'stridhana' included an article by Sri Tej Bahadur Sapru, in which he advised women to demand changes in Hindu law to improve their status.¹³ V.V.Joshi, a Sanskrit scholar and member of the Baroda committee for Hindu Law Reform wrote an influential pamphlet arguing for comprehensive legislation on women's property rights.

In January 1944, Hindu Law Reform moved into a new stage with the appointment by the government of an expert committee to consider certain points of Hindu law relating to women's inheritance. The Rau Committee was directed to clarify the 1937 Deshmukh Act, particularly, the rights of the widow and deal with the question of enhancing the rights of daughters. Women's organizations supported this move but were unhappy about the absence of women members on the Committee. At the same

¹² "Intestate" – A person is deemed to die intestate in respect of property of which he or she has not made a testamentary disposition capable of taking effect.

¹³ J.M. Everett, op. cit. pp.16-24.

time, women faced a difficult choice between their struggle for gender equality and the national movement. This dilemma resulted from the fact that supporting a committee appointed by the British government was considered to be cooperation with the colonial rulers. Further, it became evident that not many among the nationalists were allies of the cause of the women when it came to codification the Hindu law because women's legal rights in property and divorce would be serious threat to male authority. As some women argued: "Today our men are clamouring for political rights in the hands of an alien government. Have they conceded to their wives, their own sisters, their daughters 'flesh to their flesh, blood of their blood', social equality and economic justice".¹⁴

The Rau Committee decided to solicit the views of interested groups and individuals and distributed questionnaires to a selected cross-section of elite opinion which included legal professionals, women's associations and social reform organizations and orthodox groups. Noting the many technical defects and ambiguities in the Hindu Women's Rights to Property Act of 1937, which could lead to varying interpretations of women's rights, the Committee felt that any attempt at piecemeal amendment would raise "all the controversies latent in the Act". It suggested that "the better plan would be to leave the Acts to their operation for the present and enact a comprehensive law".¹⁵

The First Hindu Law Committee Report was indeed instrumental in transforming the initial idea of modifying the rules of succession rights for Hindu women into a project for codifying the entire Hindu personal law which would give women legal equality. This decision to codify the entire Hindu personal law was a marked break from the policy followed successive British administrators as it did away with the policy of non-intervention in the religious personal laws of different communities.

¹⁴ G. Forbes, op. cit. pp.74.

¹⁵ Government of India, *Report of the Hindu Law Committee*, Government of India Press, Simla, 1947.

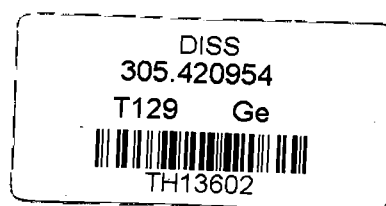
In January 1944, the Government reconstituted the Rau Committee for the purpose of preparing a Hindu Code. By doing so, the Government effectively postponed enactment of the reformed laws without revealing itself as having given up support for the principle. The Committee published a Draft Hindu Code on 5th August. The main provisions were as the following:

- (1) Abolition of *Mitakshara*, "right by birth (this meant that property would pass heirs instead of serving coparceners) and principle of survivorship;
- (2) Equal property shares for the sons and widow of the deceased;
- (3) Granting half a son's share to daughters in all intestate inheritance; ✓
- (4) An absolute estate for the widow;
- (5) Introducing monogamy as a rule of law;
- (6) Legislation of divorce under certain circumstances.

Once again however, women's succession to agricultural land was excluded from the scope of the Draft Code. ✓

The Second Rau Committee made vigorous effort to solicit public opinion on the idea of a Hindu Code. It classified public attitude to codification into three categories. According to this classification, at one end were the extremely orthodox people who opposed the entire idea of reform and codification and at the other end the ultra progressive who wanted one uniform territorial law for the entire population. However, the bulk of Hindu community occupied a middle position. It was decided that the 'quality' of opinion which favoured the codification decidedly outweighed that which was opposed to it. The Committee justified its position by claiming that this Code would meet the needs of modern Hindu society and would be in accord with the Constituent Assembly's 'Declaration of Fundamental Rights'.

There were black flag demonstrations opposing the Code in five cities. Reactions from women were mixed. The AIWC supported the Draft Code. While advocating equal inheritance for sons and daughters, the NCWI, several other women's groups as well as many individual women also supported the Code. But women in orthodox association



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such as the All India Hindu Women's Conference opposed it. Among men, majority argued against it on grounds such as: abolishing the Mitakshara would adversely affect commercial enterprise; the divorce provision would undermine the family; women were incapable of managing property and were likely to be duped by male relatives if given an absolute estate; married daughters already received a share as dowry and unmarried daughters only needed maintenance and provisions of their marriage expense. Only about 7.5 percent of those whose opinions were recorded by the Second Rau Committee were women or women's organizations but the gender divergence, in those views were marked. As seen in Appendix I of the dissertation, only 7.1 percent of the women and only 35 percent of the men (or organisations other than women's organizations) supported the Bill.

In spite of the opposition, the Rau committee published a report endorsing the Draft Code and submitted the Hindu Code Bill (a revised Draft) to the Legislative Assembly in 1947. Four months later India became independent. In April 1948, a further revised Hindu Code Bill was introduced and was subject to intense debate in the Constituent assembly and subsequently in the Provisional Parliament. It was then referred to a Select Committee (Ambedkar Committee), which finished its report in August 1948. With regard to inheritance and succession the Ambedkar Committee Report had the following points:

- (1) Transformation of *Mitakshara* coparcenaries into tenancies-in-common;
- (2) Extension of uniform succession laws to areas of south India previously unaffected;
- (3) The fixing of a daughter's share as equal to son's shares;
- (4) Determination of order of succession based on "natural love and affection." 9

The Hindu Code Bill was extensively debated in 1949 and 1951 by the members of the Constituent Assembly. Since the Congress leadership was divided on the issue, party discipline was not invoked during the debate. The extent of Congress opposition can be seen by party affiliations of the legislators who gave speeches supporting or opposing the Hindu Code Bill in September 1951 as shown in the Appendix II of the dissertation. On the floor of the legislature the Hindu Code controversy was carried on

through substantive arguments and through parliamentary maneuvers- points of order, motions, amendments. The 1949 and 1951 debates show similar arguments.

There was strong opposition from male legislators. The opponents of the Hindu Code Bill asserted that changing position of women under Hindu law violated democratic ideals. They expressed the view that a majority of women were against the Hindu Code Bill and tried to show that women assembly members were unrepresentative of women's opinion. It was labeled as an elite demand. Pandit L.K. Mitra, a Congress legislator from West Bengal, who was most vociferous about this opposition, characterized those supporting the Bill as "a few ultra-modern persons who are vocal but have no real support in the country" and implied that only women of "lavender, lipstick, and vanity-bag variety" were interested in the Bill.¹⁶ He argued: "If daughters inherit ultimately the family will break up" and queried "Are you going to enact a code which will facilitate the breaking up of our household?"¹⁷

The Hindu Code Bill supporters tried to counter the charges of the majority of opposition in several ways. Jayashree Raiji, the Congress legislator from Bombay, asserted that it was incorrect to say that only a few women supported the Hindu Code Bill as the AIWC had received a favourable response in public meeting held all over India. However, the supporters were not able to divest the AIWC of its reputation of representing microscopic elite.

In their exchange on whether or not the Hindu Code Bill violated the democratic principle of fair treatment to all, opponents and supporters displayed different conceptions of proper organization of society. Opponents of the Hindu Code Bill asserted that men and women have different obligation which made it unfair for men and women to have the same property rights. They also pointed out that the Hindu Code Bill gave women double rights- both in her father's family and in her husband's

¹⁶ Government of India, *Report of the Hindu Law Committee*, Government of India Press, Simla, 1941.

¹⁷ Government of India, *Constituent Assembly of India (Legislative) Debates*, II, Part 2, Debates on Hindu Code Bill, March 1, 1949.

family. They were, in effect the Western egalitarian, individualistic conception of women's rights. Some opponents claim that women have equal rights under the Hindu law but that the Hindu conception of sex equality involved dissimilarity and identity. Other opponents claimed the women occupied a reserved position in Hindu society, and that identical property rights would mean a decline in their status. The Hindu traditional position was explained forcefully by several legislators who described the Hindu joint family as the proper unit of society and maintained that it provided for women's needs in a manner superior to the individualistic basis of Western society. Again Congress President, Pattabhi Sitaramayya was adamant and warned that the Hindu Code Bill would replace the socialistic structure of the joint family with an alien individualistic civilization.

The Hindu Code Bill supporters believed that the Indian society should be organized on the basis of equal rights for all citizens and they appealed to the 'Declaration of Fundamental Rights' in the Constitution as the authority behind their views. Ambedkar bitterly denounced Hindu sacramental marriage as being detrimental to the ideals of the Constitution. Many supporters including- Renuka Roy, Durgabai, Sucheta Kriplani- argued that political equality was meaningless without economic and social equality provided by female inheritance rights. Equal property rights were needed in order to make distinctive contribution to society, particularly in the social welfare field.

On the issue of Hinduism, opponents and supporters on the Hindu Code Bill blended religions and nationalistic arguments to attack each other. Opponents like Thakurdas Bhargava, a Congress legislator from Punjab declared: "Those who want to deal with Hindu law and the place of women in Hindu society should look at the question not through Western glasses but through the glasses of our own civilization". The supporters argued that the Hindu Code Bill reestablished old tradition by citing Smriti references to women's rights. Padmaja Naidu invoked the image of women's participation in Civil Disobedience Movement when she said: "Thousands of Hindu women for the first time in their lives left the precious sanctuaries of their sheltering homes. They came to the battle field and stood beside their brothers and faced jail and

lathi charges and often (enough), humiliation worse than death. If today....they are to be denied their just rights, then hard earned freedom is no more than a handful of dust".¹⁸ J.B. Kriplani, a Congress legislator from Uttar Pradesh claimed that his wife Sucheta lacked none of the ancient virtues of Indian womanhood and added that they did housework too.

In 1951, opponents also tried to attack the Hindu Code Bill by proposing amendments designed to sabotage the Bill. Their amendments could be classified into five main categories.

- (1) Making the Hindu Code Bill optional;
- (2) Applying the Hindu Code Bill to all Indians;
- (3) Requiring the Hindu Code Bill to be ratified by all state legislatures or by the public;
- (4) Excluding Sikhs etc. from the reach of the Hindu Code Bill;
- (5) Retaining customs;

Ambedkar rejected all these amendments. (However in the face of stiff ^{sentence} opposition, even from top Congress leaders like the Home Minister, Vallabhbhai Patel; President, Rajendra Prasad; Prime Minister, Jawaharlal Nehru.) Although committed to the Bill it was shelved in 1951. Ambedkar, law minister and framer of the Constitution resigned in protest. However in 1951, riding on the strength of Congress electoral victory, Nehru finally won the passage for the important aspect of Hindu Code Bill in four separate Acts.¹⁹ Of these, the Hindu Succession Act of 1956 forms the basis of Hindu succession laws today.

Everett provides contrasting images of the ideal Hindu woman that the supporters and opponents of the Bill appeared to hold: "From the (1940s and 1950s) debates on the Hindu Code Bill two different images of the ideal Hindu woman

¹⁸ Government of India, *Parliamentary Debates*, VII, Part 2, Debate on Hindu Code, February 5 - March 2, 1951.

¹⁹ These were the Hindu Marriage Act of 1955, The Hindu Succession Act of 1956, The Hindu Minority Guardianship Act of 1956 and The Hindu Adoptions and Maintenance Act of 1956.

emerged. The opponent's image resembled the view of women presented in the Manusmriti; she needed the protection of men during all the periods of her life (thus never capable of looking after property) and in this position of dependence thus, she was worshipped as a goddess. The proponent's image of the ideal Hindu woman was a competent, autonomous human being interacting with others on the basis of equal rights and individual freedom. This image stemmed from Western liberal thought, however, imperfectly it had been achieved in practice in the west.

The Hindu Code Bill opponents believed that the interest of men and women were better served when women occupied a dependent position and men and women played different social roles. The Hindu Code Bill supporters believed that everyone's interests were better served when men and women were independent and enjoyed equal rights....The Hindu Code Bill supporters operated within the equal rights perspective which had emerged as the dominant women's movement ideology since 1930s".²⁰

Thus, it is found that the British project of legal codification was used as a means to contest native elites' hold on discourse and the Indians themselves were implicated in the project in complex ways. The apparent debate between inclusion of modern versus traditional elements in law could be read along with the contemporary groups seeking public space or advantages. Examining the motive for Hindu law reform, Archana Parashar argues that the hidden agenda was unification of the nation through uniformity in law.²¹ National integration was of paramount importance. Establishing the supremacy of the state over religious institutions was yet another contradiction. This could be best achieved by re-defining the rights given to women. Through the re-orientation of female roles the state could replace the claim of religion and religious institutions over people's lives. While bringing in reforms the state relied upon two conflicting claims of tradition and modernity. On one hand, it considered the Constitution as the touchstone of rights of women and on the other hand, the state projected the continuity with the past by preserving the provisions from ancient sacred law. Consequently, it brought about selective reforms.

²⁰ J.M. Everett, op. cit. pp.166-167

²¹ A.Parashar, *Women and Family Law Reform in India*, Sage Publications, Delhi. 1992.

This contest was indeed exemplified par excellence in the Parliamentary debates over the claims for the new nation. The gender card was played repeatedly, the aim being not radical transformation within the social structure but the self-conscious construction of a progressive national imaginary that would reject regressive practices but retain certain traditional customs and the woman's circumscribed role within them. While the question of greater equality for women provided definite leverage for reforming some laws in line with the political and developmental initiatives, the process of reform was markedly piecemeal with little comprehensive socio-economic change to make legal provisions viable. The most prominent example was the contradictory approach to gender equality in which the aborted Hindu Code Bill was presented as being in accordance with the spirit of the new Constitution.

Though some of the most glaring discrepancies in the legal position of women were reformed, but it was a reform process in which the input of women themselves was marginalized and which the rights of women were subordinated to the modernizing impulse of the Indian state. Once more the task of modernization did not encompass the more democratic demand for complete sex equality. In any case, such a thorough going transformation of Hindu society was not even envisaged through these legal measures. If anything the laws may even has thwarted such an eventuality as Archana Parashar notes "The removal of sex disabilities and the replacement of the superior status of religion with the state laws are both aspects of modernization yet the latter was achieved by compromising the achievement of complete sex equality".²²

²² Ibid, pp.69.

Chapter II

HINDU SUCCESSION ACT OF 1956

The Hindu Succession Act, 1956 dealing with intestate succession among Hindus came into force on 19 June, 1956. This Act brought about changes in the law of succession and gave rights which were hitherto unknown, in relation to women's property. It was applicable to all states other than Jammu and Kashmir¹ and covered about 86 percent of the Indian population. The Act lays down a uniform and comprehensive system of inheritance persons governed by *Mitakshara* and *Dayabhaga* schools as also to those in certain parts of Southern Indian, who were previously governed by *Murumakkattayam*, *Aliyasantana* and *Nambudri* system.² The Act applies to any person who is a 'Hindu' by religion ~~is~~ any of its forms or developments including a Virashiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj; or to any person who is Buddhist, Jain or Sikh by religion; to any other person who is not a Muslim, Christian, Parsi or Jew by religious as per section 2.

The Hindu Succession Act of 1956 is often considered to have constituted a substantial move towards gender equality in many ways. It gave equal rights to males and females to succeed intestate property. It sought the unity of the *Mitakshara* and *Dayabhaga* systems and purported to lay down a law of succession whereby sons and daughters would enjoy equal inheritance rights, as would brothers and sisters.

Under the Act, in the case of a Hindu male dying intestate all his separate or self acquired property, in the first instance, devolves equally upon his sons, daughter, widow, and mother. In addition (and simultaneously with the mentioned four categories heirs), if there is a predeceased son, his children and widow get the share he would have received if alive: and the children and widow of predeceased son of predeceased son similarly inherit a share as representatives of the deceased son similarly inherit a share as representatives of the deceased in question. All these are the primary

¹ In Jammu and Kashmir, the Hindu Succession Act, of 1956 with some modification applies.

² There are however special provisions in the Act, for Hindu Matrilineal communities customarily governed by the *Murumakkattayam* and *Aliyasantana* system.

or Class I³ heirs under the Act. In the absence of Class I heirs, the property devolves on class II heirs and in their absence first ~~and~~ agnates and then on cognates. For joint family property, if the deceased male was earlier governed by the *Dayabhaga* system, the same rules of succession as relate to other types of property apply to this as well.

However, for those previously governed by *Mitakshara* law, the concept of *Mitakshara* coparcenary property devolving by survivorship continues to the recognized with some qualifications: in the case of a male who has in interests in *Mitakshara* coparcenary at the time of his death and who leaves behind Class I female heirs, his interest devolves not according to the *Mitakshara* principle of survivorship but according to the 1956 Act and his share in the joint property and hence the shares of his heirs are ascertained under the assumption of a 'notional' partition (that is, as if the partition had taken place just prior to his death). If the deceased does not leave behind Class I female heirs or male heirs claiming through female heirs, the devolution is according to the *Mitakshara* rules. Either way this does not affect the direct interest in the coparcenary held by male members of virtue of birth it affect only the interest the may hold in the share of the deceased.

Hindu Property Laws Today

The Hindu Succession Act has improved the position in favour of the widow and other owners by abolition of 'widow estate' or 'limited estate' and their conversion into absolute ones. The Act confers full heritable capacity on the female heir and recognizes her states as independent and absolute owner. This provision is embodied under Section 14 of the Hindu Succession Act, which enacts as:

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

³ 'Class I heirs' consists of son, daughter; widow; mother; son of a pre-deceased son daughter of a pre-deceased son; son of a pre-deceased daughter; daughter of a pre-deceased daughter son of a pre-deceased son; daughter of a predeceased son of a pre-deceased son; widow of a pre-deceased son of pre-deceased son.

In this sub-section "property" include both movable and immovable property acquired by a female Hindu by inheritance or device, or at a partition, or in lieu of maintenance or 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 terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property.

Thus section 14(1) of the Act makes the female Hindu as full owner or absolute owner. Absolute ownership means and connotes that the owner has certain unqualified rights over the property such as:-

- (a) The right to its possession,
- (b) The right to its management,
- (c) The right to its exclusive enjoyment,
- (d) The right of disposal by an intervivos or will at pleasure, and
- (e) On the death of the owner intestate the property should devolve by succession on the owner's own heirs.

Where any of these essentials of the content of absolute ownership is lacking the owner cannot be regarded as an absolute owner. The object of this section is to do away with the estate called 'limited estate' or 'widow estate' in Hindu law and to make a Hindu women, who under 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 and not revertible to the heirs of the last male holder. However, it does not in any

way confer a title on the female Hindu where she did not in fact possess any vestige of title.⁴

The Act propounds a definite and uniform scheme of succession to the property of a female Hindu who dies intestate after the commencement of the Act. Section 15 of the Act lays down general rules of succession in case of female Hindu and section 15(1) provides that her property shall devolve-

- (a) Upon the sons and daughter (including the children of any pre-deceased son or daughter) and husband;
- (b) Upon the heirs of the husband;
- (c) Upon the mother and father; ¹
- (d) Upon the heirs of the father, and
- (e) Upon the heirs of the mother.

Section 15(2) embodies two exceptions within it and provides that notwithstanding contained in sub-section (1)-

- (a) Any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) or upon the other heirs referred to sub-section (1) in the order specified therein but upon the heirs of the father; and
- (b) Any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section(1) in the order specified therein, but upon the heirs of the husband.

Hence after coming into force of this Act of 1956 the female becomes the full owner and after the death her property shall devolve upon the own heirs mentioned in section 15(1).

⁴ D.F.Mulla, *Principles of Hindu Law*, 15th Edition by S.T.Desai, N.Tripathi, Bombay, 1982, pp.980.

The word "possessed" is used ⁱⁿ section 14 in a broad sense and in its widest connotation. It means the state of owning or having in one's hand or power. It need not be actual physical possession or personal occupation of the property by the female but may be possession in law. It may be either actual or constructive or in any form recognized by law. ^{Thus} This for instance the possession of a license, lessee or a mortgagee from the female owner would be her possession for the purpose of this section. The section can have no application where a female Hindu never acquired any property at all or where having acquired it she happens to have lost her title there to by alienation, surrender or otherwise and of which she was not or could not be in judicial possession at the commencement of the Act.⁵

Sub-section (2) of section 14 must be read as a proviso or exception to sub-section (1) of section 14 of the Act. It is intended to make it clear that any such restricted estate created prior to the commencement of the Act will not be enlarged into full ownership by operation of sub-section (1) if the gift, will, other instrument, decree, order or award ^{prescribed} had prescribed a restricted estate. Its operation must be confined to cases where property is acquired for the first time as a grant without any pre-existing right under a gift, will, instrument, decree, order or award ^{the} terms of which prescribed a restricted estate in the property.

Illusory Inheritance Rights

While the Hindu Succession Act of 1956 codified the multiplicity of laws concerning the property rights of women and considerably broadened them, it cannot be denied that several major gender inequalities have remained. Equity by gender in Hindu property law lies within a very narrow compass. Janaki Nair rightly comments that the Succession Act "codified a power structure which continued to exclude women from having a direct control over assets".⁶

In the Hindu system, ancestral property has traditionally been held by a joint Hindu family consisting of male coparceners. Coparcenary is a narrower body of

⁵ R.L. Chaudhury, *Hindu Women's Right to Property: Past and Present*, Firma K L Mukhopadhyay, Calcutta, 1961.

⁶ J.Nair, *Women and Law in Colonial India*, Kali for Women, New Delhi, 1996.

persons within a joint family and consists of father, son, son's son and son's son's son. Again a coparcenary can also be of a grandfather and a grandson or of mothers, or an uncle and nephew and so on. Thus, ancestral property continues to be governed by a patrilineal regime wherein property descends only through the male line as only the male members of a joint Hindu family have an interest by birth in the joint or coparcenary property. A female cannot become a coparcener. She has no coparcenary rights. Sons' have a right to succeed to the deceased father's share of coparcenary if the father dies intestate in addition to the share he has on birth.

The retention of the *Mitakshara* coparcenary has indeed abrogated all safeguards for the protection of women's rights. If a joint family gets divided, each male coparcener takes his share and the female gets nothing. Only when one of the coparceners dies, a female gets a share of his share as an heir to the deceased. Thus, the law excludes daughter's participation in coparcenary ownership merely by nature of the sex. This has not only contributed to an inequity against females but has led to oppression and negation of their right to equality. It appears to be a mockery of the Fundamental Rights guaranteed by the Constitution of India.

Another related aspect of this gender discrimination apparent in the Hindu Succession Act is the clause that a coparcener can renounce his rights in the coparcenary property. This has also weakened the position of the female members. In such cases his sons would continue to maintain their independent rights to the coparcenary but daughters and other Class I female heirs would lose the possibility of benefiting from such property. Likewise, after partition, the father can make a gift of his share of the coparcenary property to his sons thereby defeating the rights of the female heirs.⁷

The daughter had equal rights only in the separate or self-acquired property of their father. But daughters could be denied a share even in this separate property by throwing the property back into the common stock, using the doctrine of blending or by forming new coparceners. In other words, a man can convert his separate and self acquired property to coparcenary property in which case his daughters, widow and

⁷ B.Sivaramayya, *Women's Rights of Inheritance In India: A Comparative Study of Equality and Protection*, Madras Law Journal Office, Madras, 1973.

neither who would otherwise have engaged equal shares with his sons in such separate and self acquired property, lose out. An incentive for such a move was provided by the state by conferring tax reliefs for coparcenaries, under the Income Tax Act.⁸

The Hindu Succession Act at best is a half-hearted measure to improve the position of women. Apart from the inherent discrimination against daughters arising out of the retention of the *Mitakshara* coparcenary, there are ways by which the purpose of the Act stands defeated. Notable among them are-

The patrilineal assumptions of a dominant male ideology are clearly reflected in the laws governing a Hindu female who dies interstate. The law in her case is different from those governing the Hindu males. Section 15 (1) of the Act makes it clear that the property of a female Hindu shall devolve first to her children and husband; secondly, to her husband's heirs; thirdly, to her father's heirs and lastly to her mother's heirs. In case of a male Hindu, the mother is also a class I heir and inherits equally with the children and wife of the deceased son. But the mother of a daughter stands excluded by the children and husband of the deceased daughter.

The provisions of Section 15 of Hindu Succession Act is indicative again of the bias towards the male as it provides that in the absence of children the order of succession in case of Hindu female would vary depending upon the source through which the property was acquired. Any property that she inherited from her parents would devolve not upon her own heirs but upon her father's heirs. Similarly, if the property were inherited from her husband or father-in-law, it would devolve upon her husband's heir. However, in case of a Hindu male's property, devolution does not depend upon the source of acquisition. These provisions highlight how property continues to be inherited by the male line from which it comes back either to her father's family or back to her husband's family. It also seems to perpetuate the concept that a woman is entitled only to limited ownership of her property and her dependence on males continues. This strikes a considerable blow to her economic independence.

⁸ Under Section 10.2 of the Income Tax Act an exemption is granted to income from the Hindu Undivided Family (HUF). Under SS.20 and 20A of the Wealth Tax Act, certain tax concessions are granted to members of HUF at the time of partition.

Another anomaly in the Hindu Succession Act as per Section 23 is the provision denying a married daughter the right to residence in the ancestral home. And while daughters who are unmarried, separated, divorced, deserted or widowed have residence rights, they cannot demand partition if males do not choose to partition. This right however is not denied to a son. The Supreme Court in its recent judgement in *Narshimhamurthy vs. Sushilabilla*⁹ held that the female heirs right to claim partition of the dwelling house of a Hindu dying intestate under Section 23 of the Hindu Succession Act will be deferred or kept in abeyance during the lifetime of even a sole surviving male heirs of the deceased until he chooses to separate his share or ceases to occupy it or lets it out. The idea of this Section, being to prevent the fragmentation and disintegration of the dwelling house at the instance of the female heirs to the detriment of the male heirs in occupation of the house and thus, rendering the male heirs homeless/ shelterless. The main object of the section is said to be the primacy of the rights of the family against that of an individual by imposing a restriction on partition. Why is it that this right of primacy of family is considered only in the case of a female member of the family?¹⁰

It we take this argument further then, the serious implications of this clause become even more evident. Infact this clause has facilitated the capitalist and consumerist forces to transform the ancient system of *Stridhana* into a modern distortion called dowry. Under its modern guise, daughters lost control upon their property, which was presumably given on her behalf, to secure her happiness in her matrimonial home. In fact the subsequent years, the demand for dowry became an instrument of violence and subjugation of the newly married bride.¹¹

unlike
needs elaboration

The right to will away property has also restricted women's inheritance rights under the Hindu Succession Act. A man has full testamentary power over all his property including his interest in the coparcenary. This freedom of testation, a legacy of English law in India, is an anomaly according to standards of comparative

⁹ *Narshimhamurthy vs. Sushilabilla*, AIR 1996 SC 1826.

¹⁰ Government of India, *Towards Equality: Report of the Committee on the Status of Women in India*, Department of Social Welfare, Ministry of Education and social Welfare, December, 1974.

¹¹ F. Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India*, Oxford University Press, Delhi, 1999.

jurisprudence. In fact, the English concept of alienation through testamentary succession was incorporated into Hindu Succession Act but the protection granted to the family members under the English law did not find mention here.¹² So, individual men could will away both their share in the joint family property as well as the whole of their separate property with absolute abandonment. In practice this was used to disinherit females. In fact, it led to a diminution in the status of a wife/widow.

Section 24 of the Hindu Succession Act provides that the three classes' widows specified in the section shall not be entitled to succession if they have remarried. This appears to be logical if one were to examine Section 25; 'unchastity' of a female here is no longer considered as a ground for exclusion. If a widow is living in adultery from the date succession opens, she would not be excluded from inheritance but would be excluded if she has married again. This law thus, appears to favour adultery but punish legal marriage. *unclear*

Allied to this is another clause in this section which states that a step mother who remarries is not excluded from the succession despite the fact that she succeeds not on the strength of direct blood but only as a father's widow and on remarriage she ceases to be such a widow. Unlike other three classes widows specified in Hindu Succession Act, she is not excluded from the inheritance. This is indeed discriminatory and violative of the right to equality as it amounts to unreasonable classification without any rational nexus. Thus, it is evident that differentiation among the category of 'women' has been discriminatory. Justice for one category of women cannot be secured at the expense of another. ?

Another critical source of gender inequality which will be dealt with in details in the Chapter III of this dissertation, is the question of agricultural land. The Hindu Succession Act of 1956 in Section 4(2) exempts significant interests in agricultural land. Section 4(2) of the Act provides that: ".... Nothing contained in this Act shall be deemed

¹² The English Statute, Inheritance Act of 1958 (subsequently re-enacted as Matrimonial Causes Act, 1965)-placed a divorced wife in a superior position vulture to the surviving spouse. A further stature was enacted entitled as inheritance (provision for family and d dependent) Act, 1975 through which the surviving spouse could claim not only maintenance but also share in the capital

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.”

Hence, interests in tenancy land devolve according to the order of devolution specified in tenurial laws, which vary by state. Broadly, states fall into three categories- (i) In most central and eastern states, the tenurial laws are silent on devolution, so that inheritance can be assumed to follow the personal law, which for Hindus is governed by the Hindu Succession Act of 1956.¹³ (ii) In a few states, the tenurial laws explicitly note that the Hindu Succession Act or the personal law will apply.¹⁴ (iii) In north western states of Haryana, Punjab, Himachal Pradesh, Delhi, Uttar Pradesh and Jammu and Kashmir the tenurial laws not only specify an order of devolution that is highly gender unequal, ^{Here,} retaining the vestiges of the *Mitakshara* system, primacy is given to male lineal descendants in the male line of descent and women come very low in the order of heirs. Also, a woman gets any a limited estate, and loses the land if she remarries (as a widow) ^{or} as 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. needs elaboration

Agricultural land is the most important form of rural property in India and ensuring gender equal rights in it is significant not only for gender justice but also for economic and social empowerment. Gender equality in agricultural land can reduce not just 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. It is thus critical to bring all agricultural holdings within the Act’s purview. too general
development

On the whole, it becomes evident the underlying motive of the Hindu Succession Act of 1956 which is still projected as the ideal piece of legislation for having ‘liberated’ Hindu women was consolidating the powers of the state and building an integrated

¹³ E.g. Andhra Pradesh, Karnataka, Kerala, Tamil Nadu, Bihar, Gujrat. Maharashtra, Orissa, West Bengal.

¹⁴ E.g. Madhya Pradesh and Rajasthan.

nation. This crucial objective could be achieved only by diluting women's rights, to arrive at a minimum level of consensus so that the agenda of reform could be effected without much opposition.

Coparcenary-Relevance and Alternatives

It is apparent from the previous section of the study that discrimination against women is writ large in relation to property rights. The retention of the *Mitakshara* coparcenary has indeed abrogated all safeguards for the protection of women's rights.

Equal treatment for women in both social and economic sphere is essential for women's empowerment. The exclusion of daughters from participating in coparcenary property ownership merely by reason of their biological identity (i.e. sex) is unjust. A long felt social need is thus to radically reform the *Mitakshara* law of coparcenary to provide equal distribution of property not only with respect to the separate or self acquired property of the deceased male but also in respect of his undivided interest in the coparcenary property.

There are five states in India - Kerala, Andhra Pradesh, Tamil Nadu Maharashtra and Karnataka¹⁵- have taken cognizance of the fact that this right by birth and the discrimination inherent in it can be amended. According to the law of four of these states, excluding Kerala, in a joint Hindu family governed by *Mitakshara* law, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son. Kerala, however has gone one step further and abolished the right to claim any interest in any property of an ancestor during his or her lifetime founded on the ground that he or she is born in the family. Infact, it has abolished the joint Hindu family system altogether including the *Mitakshara*, *Marumakkattayam* *Aliyasantana* and *Nambudri* systems. Thus, enacting that joint tenants be replaced by tenants-in-common.

→ This comparison with coparcener was important to explain

¹⁵ The Kerala Joint Family System (Abolition) Act, 1975.

The Hindu Succession (Andhra Pradesh Amendment) Act, 1986.

The Hindu Succession (Tamil Nadu Amendment) Act, 1989.

The Hindu Succession (Maharashtra Amendment) Act, 1994.

The Hindu Succession (Karnataka Amendment) Act, 1994.

Andhra Model

The approach of the Andhra Pradesh, Tamil Nadu, Maharashtra and Karnataka state legislature is distinct from that of Kerala. These four states instead of abolishing the right by birth have strengthened it but at the same time they have broadly removed gender discrimination in the *Mitakshara* coparcenary. Barring essential changes, the texts of the amending Acts are the same while Karnataka effected marginal changes only. These state legislations provide equal rights to a daughter in the coparcenary property and contain a non-obstante clause. In these four states:

The daughter of a coparcenary in the joint Hindu family governed by *Mitakshara* law-

- (a) shall become a coparcener by birth in her own right in the same manner as the son and shall have similar rights in the coparcenary property and be subject to similar liabilities and disabilities.
- (b) On partition of the Joint Hindu family of the coparcenary property, she will be allotted a share equal to that of a 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 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 partition.
- (c) This property shall be held by her with the incidents of coparcenary ownership and shall be regarded as property capable of being disposed off by her by will or other testamentary disposition.
- (d) The state enactments are prospective in nature and do not apply to a daughter who is married prior to or to a partition which has been effected before the commencement of the Act.

However, these four Hindu Succession (Amendment) Acts have not been fool proof as they have given rise to multiple difficulties at various levels of operationalisation. These Acts have in fact, altered the concept of the *Mitakshara* joint

family and coparcenary by elevating the daughter to the position of a coparcener. The underlying assumption of these Acts is that these legislatures are clearly of the view that *Mitakshara* right to birth^(re) violates equality before the law.¹⁶ Again, once a daughter becomes a coparcener she naturally continues to be a member of the natal joint family and after marriage, she will also be a member of her marital joint family.¹⁷

It may be mentioned that during the parliamentary debates on the Hindu Succession Bill, 1955, Pataskar, the then Minister of Law, observed "to retain the *Mitakshara* joint family and at the same time put a daughter on the same footing as a son with respect to the right by birth, right of survivorship and the right to claim provide for a joint family unknown to the law and unworkable in practice".¹⁸

In a much broader context, the issue of making daughters coparceners at birth in ancestral property raises some critical questions. To begin with, the amendment will benefit those women who are born into families that have ancestral property there is no precise definition of 'ancestral property'. Given the fact that the families have long since been fragmented and the fact that joint family is on the decline, it is not at all clear whom the law will benefit.

The position of women married into the joint family will actually become worse under this Act. All women of the family, be they daughters or wives, were members of the Hindu Joint Family they had an absolute right to the maintained out of the joint family properties. Daughters have a right to *Stridhana* and marriage expenses. Wives and widows had the right to be maintained for life out of joint family property. It was this regime of property laws among Hindus that was sought to be 'reformed' by Hindu Succession Act, 1956 and by other Hindu laws. It was in the 1950s that this unqualified right to be maintained was eroded, with the introduction of the right to divorce. Under unmodified Hindu law, a woman's marital status could not be altered by divorce, as

¹⁶ B. Sivaramayya, 'Of daughter, Sons and Widows Dissimilation in Inheritance Laws', *Manushi*, May-June, 1997.

¹⁷ B. Sivaramayya, 'Coparcenary Rights to Daughter-Constitutional and Interpretational issues', 3 SCC (J), 1997, pp 25.

¹⁸ *Ibid*, pp 27-34.

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how much explanation
Chapter II

divorce was not permitted. This right to maintenance could be secured by a charge on the property of the joint family. However, the reforms in the 1950s introduced the right to divorce without simultaneously giving the divorced wife the right to her share of the joint family property. Divorce meant an expulsion from the joint family and the loss of the right to be maintained. Thus, the seemingly progressive right to divorce has turned out to be nothing more than the right to divorce along with the loss of the right to the use of joint family property. The right of daughters to become coparceners makes the position of the female members of the joint family worse with the daughter along with the sons acquiring a birth right, which she can presumably partition at any time, the rights of other members of the joint family get correspondingly diminished. While the reforms of the 1950s disadvantaged a divorced wife, the Andhra model disadvantages married women as well. Until now, the only protection women had in the marital home was the status of being married, which carried with it the right to be maintained, not only by the husband, but by the joint family and its assets as a whole. Thus, married women who lived in joint family property had the protection of the family home. This protection gets eroded, to the extent that the total divisible amount gets reduced.

These state enactments explicitly lay down that the right of a daughter who was married prior to the commencement of the Act will be excluded from the coparcenary property. However, a daughter who is married after the coming into force of the Amendment Act is spared of such discrimination. One can only surmise the reasons behind the exclusion of a married daughter from the scope of the Act. The patriarchal notion that the married daughter belongs to another family or the practice of giving dowry and sometimes property at the time of marriage may account for the practice of excluding daughters. But it is undoubtedly true that the share of property or material wealth which daughters receive is smaller in value compared to what the son inherits. Infact, the gifts that parents give seldom include immovable property. It becomes apparent that there is no persuasive justification for the blanket exclusion of the married daughters. Again, the distinction between a married and an unmarried daughter is not a reasonable classification and is grossly unfair. A recent Supreme Court decision lends

support to this view. In *Savita Samvedi vs Union of India*¹⁹ it was held that the distinction between a married and an unmarried daughter may be unconstitutional. The observation made by Justice Punchi is relevant:

“The eligibility of a married daughter must be placed on par with an unmarried daughter (for she must have been once in that state), so as to claim the benefit.....”²⁰

Another infirmity of these state enactments is that conferment of equal coparcenary rights on sons and daughters implies that the widow's successional share gets reduced. This is because with the increase in the number of coparceners, the interest of the husband decreases. This is unfortunate as it goes against the concept of marriage as equal partnership of the husband and wife.

It is definitely birth right, in Hindu laws that is the root of the problem. Birth rights as we have discussed, is by definition a conservative institution, belonging to the era of feudalism, coupled as it was with the rule of primogeniture and the inalienability of land. When property becomes disposable and self-acquired, different rules of succession have to apply. It is in the making of those rules that gender justice has to be located. What the Andhra Model does is reinforce the birth right without working out its consequence for all women. Justice cannot be secured for one category of women at the expense of another.

Succession
Statute

Kerala Model

Kerala was the first state to vehemently criticize the right by birth and the gender inequalities embedded in it. It enacted the Kerala Joint Family system (Abolition) Act, 1976 which abolished the concept of coparcenary following the recommendation of the Hindu Law Committee called B.N. Rau Committee. The logic behind this move is clear in the observation of P.V. Kane²¹: “And the unification of Hindu law will be helped by the abolition of the right by birth which is the cornerstone of the *Mitakshara* School and which the Draft Hindu Code seeks to abolish.”

¹⁹ *Savita Samvedi vs. Union of India*, AIR 1996 680.

²⁰ *Ibid*, Para 7, pp 683-684.

²¹ M.P.V.Kane, *History of Dharmashastras*, Vol. III, 1946, pp. 823.

The Kerala Joint Hindu Family System (Abolition) Act, 1975 abolished the right of birth of males under the *Mitakshara* as well as the *Marumakkattayam* law. It states that after its commencement, a right to claim any interest in any property of an ancestor, during his or her life time founded on the mere fact that the clamant was born in the family of the ancestor, shall not be recognized. Thus, the Act is wholly prospective and fails to confirm rights of daughters in the existing coparcenary property unlike the Andhra Model legislation. Section 4 (1) of the Kerala Act lays down that all the members of *Mitakshara* coparcenary will hold the property as tenants-in-common on the day the Act comes into force as if a partition had taken place and each holding his or her share separately. The major drawback in the legislation is that it fails to protect the share of the daughter from being defeated by the making of a testamentary or other disposition.

It was conceded that the Kerala Model probably results in maintenance of greater family harmony and it appears to be a fair decision as in Kerala both matrilineal and patrilineal joint families existed. If the joint family was abolished today in the other states then a deemed partition would take place and women not being coparceners would get nothing more. Whereas if they were made coparceners, then they would become equal sharers.

However, one common drawback of both the Kerala Model and the Andhra Model is that it fails to protect the share of the daughter, mother or widow from being defeated by making a testamentary disposition in favour of another, or by alienation. This criticism of course against testamentary disposition can be also used to disinherit a son.

more needed

It is noteworthy, that there is hardly a case of a daughter claiming equal rights to property in the parental family, even though her dowry may not be equal to the son's share. This is mainly due to overweighing consideration of modesty and desire for amity and the fear of social disapproval. A study prepared for the Ministry of Education and Social Welfare²² on the succession rights of women in Andhra Pradesh, is very revealing in this regard. It is observed that 38 percent of women in Godavari and 12 percent of

²² Law Commission of India, *Property Rights of Women: Proposed Reform under the Hindu Law*, 174th Report, No.6 (3) (59) / 99 LC (LS), May 5, 2000.

women in Krishna district, 27 percent of the respondents in both the district reported consideration of getting bad name among the relatives and others, for not taking resort to the court of law in getting their due share in property. Cost of litigation, complicated procedures of law and uneconomic nature of the deal in terms of cost involved in property are the other reasons stated by respondents.

In view of limited assertion of equal rights to property by women, it is necessary to understand that unless there exists majority awareness and approval of the majority of the people, it cannot be realized by a section of women socialized in the tradition of inequality, thus, there is need to create social awareness and to educate people to change their attitude towards the concept of gender equality.

The present debate about the United Progressive Alliance government's proposed amendments to the Hindu Succession Act needs to be located within the critical re-examination of the Hindu Succession Act as well as the consequences of the modified versions of it which are operational in some states like Kerala, Andhra Pradesh, Tamil Nadu, Maharashtra and Karnataka.

The Hindu Succession (Amendment) Bill, 2004 was cleared by the Union Cabinet and was introduced in the Rajya Sabha on 20th December, 2004. The Statement of Objects and Reasons of the proposed law refer to the guarantee of equality for women under Article 14 and 15 as a justification for the amendments. Though the government's intention of amending the Hindu Succession Act of 1956 ~~is~~ towards gender equality welcome but the amendments proposed are partial and will leave several critical sources of gender inequality²³ intact, in addition to introducing inequalities among different categories of female heirs. Given that this reform is being undertaken almost five decades since the Hindu Succession Act of 1956 was passed, the government needs to take into consideration all the lacunae in the legislation or else it will be a major

²³ . The persisting gender inequalities emerge from-

(i) inequality in rights in agricultural land;

(ii) unequal interests in coparcenary ;

(iii) implicit inequality from a person's unrestricted rights to will away his property;

These sources have been extensively dealt with elsewhere in Chapter Three of this Dissertation.

opportunity lost. The most important feature of the proposed bill is to make daughters coparceners in the Hindu joint family along with son. But in doing so, it will alter the shares of other Class I female heirs of the deceased such as the deceased's mother and widow. The effect on the share of the widow (and mother) will vary according to whether the state allows the wife (mother) to take a share on partition of joint family property. As already discussed, the Andhra Model shows how the conferment of coparcenary rights on the daughters as envisaged by these legislations are not the best way to end discrimination. (It will enhance the share of daughters by making daughters coparceners on the same basis as sons in the *Mitakshara* coparcenary) Furthermore, for gender equality the proposed amendment has to bring all agricultural land on par with other property, abolish joint family property and partially restrict the testamentary rights.²⁴

Since the 2004 Bill is based on the recommendations of the Law Commission's 174th Report, 2000, it reproduces its shortcomings. In 1999, the Law Commission had fielded a questionnaire to NGOs and (individuals and individuals) with legal or social science backgrounds soliciting responses to alternative proposals, such as whether or not to bring all the agricultural land under the Hindu Succession Act; whether to abolish joint family property altogether or make daughters coparceners on the same basis as sons and whether to partially restrict testation rights. 80 percent of the responses favoured gender equality in inheritance of agricultural land, 73 percent supported abolishing the *Mitakshara* coparcenary altogether, and 63 percent supported some restrictions on freedom of testation. But on all counts the Commission took a conservative route. It did not touch agricultural land, only recommended making daughters coparceners and placed no restrictions on the right to will.

It is impossible to deal with succession laws in isolation. One has to simultaneously look at laws of matrimonial property, divorces and succession to ensure gender just regime of laws. A critical observation made by Indira Jaising in this regard is that the exercise undertaken to reform succession laws only of Hindu women will

²⁴ These were the suggestions made by Bina Agarwal and supported by the Human Rights Law Network and the Housing and Land Rights Network.

enforce the system of separate and discriminatory personal laws. Reforms must be sought in those commonly agreed areas that will benefit women. "There is no law concerning the family that does not have a negative impact on women of all communities".²⁵ The major gap in our laws is the absence of rights of women within marriage. Thus, reform in marital property law and succession law must be discussed simultaneously. Thus, the Hindu Succession Act has ample lacunae which can be amended to end the gender discrimination which results from the asymmetrical property relations in which women and men have differential access to resources and distinct degrees of control over property.

Too little development of the analysis
of the relations between gender law
and state;

²⁵ Jaising, I. (2004): 'Unequal Reforms', *Communalism Combat*, Vol. no.104, January.

Chapter III

GENDER AND LAND RIGHTS: LAND AS PROPERTY

Property is a central source of power in farming. Land is perhaps the most important resource of all: men rely on it for their very existence and it forms the basis for most human activity and development. Gender and land question has to be placed within a broader context to understand the dynamics of the interface between the two. This in turn requires moving beyond "the critical assumptions that gender power relations are embedded in conjugal household relations alone".¹ The structure of power that women confront, operate at multiple levels (global, national and local) and within diverse institutional arenas (communities, social movements, markets, state, kin groups, households and so on.)

However, the structure of farming culture affords men more power than women. Firstly, property ownership is a source of power. Owning land provides economic power as well as varying degrees of social, cultural, and political power. Secondly, there is power associated with customs and practices that hold traditional patterns of land transfer in place. Women in farming fare badly in both the aspects of power that has been mentioned. There are precisely two reasons for that. Firstly, because women rarely own land, they have limited independent access to land as an economic resource and the consequent status, prestige and political power land ownership brings. Secondly, the legitimacy of traditional patterns of land transfer implies that women's disinherited position is relatively unquestioned.)

Land ownership is the central issue in India where agriculture forms the mainstay of the economy and engages approximately sixty per cent of the total population. Apart from being one of the most durable assets that can be used as collateral security in rural areas, land holds a 'broader social value' by installing a sense

¹ G. Sen, 'Engendering Poverty Alleviation- Challenges and Opportunities', *Development and Change*, 30(3), 1999, pp.695-692.

↳ livelihood first; subsistence and then collateral

of identity and belonging within the village setting and providing political power.² While agriculture is the foundation of the rural economy, the tasks involved in land cultivation differ significantly for women and men. The division of labour can be sex-segregated, in which all production tasks related to the cultivation of a single crop are undertaken by one sex, or sex-sequential, in which the labour of both sexes is required at different stages of production to yield output. In India women's labour is largely sex-sequential and under the control of the male household head, which limits women's ability to exercise control over the time and intensity of their workload and over the distribution of intra-household resources.

In this context, it becomes evident that land rights for women in terms of ownership and control can be the most crucial instrument for women's empowerment. The major sources of gender inequalities which lead to a disjunction between legal rights in property in general and their rights in agricultural land can be located within the discourse of land transfer from the state through land legislation and land distribution programmes. The area of concern in this chapter is the state's direction on inheritance of agricultural land and the principles on which land is distributed. In the recent years, the deflationary macroeconomic policies and processes associated with economic liberalization are impacting rural livelihoods and agrarian transitions differently in diverse contexts and there are gender specificities of these impacts. In fact, this thrusts a new urgency to the land question further and needs to be posed in a new light. Land reforms need to be understood as a means to create conditions in which people can construct livelihoods from a variety of sources, both agricultural and non-agricultural in more effective and productive ways. Given women's centrality to these diversified livelihood strategies as well as their increasing political agency, their interests in land are more politicised today than two decades ago.

And yet, while the trends towards democratization have revitalized the national debate on agrarian reform and provided greater voice to women's advocates, the

² R.Mearns, *Access to Land in Rural India - Policy Issues and Options*, World Bank Policy Research Working Paper 212, World Bank, Washington D.C, 1999.

dominant anti-state rhetoric does not bode well for women and nor are there any reasons to believe that, in such a situation, processes of devolution and decentralization will necessarily enhance equity and gender justice in access to resources. These trends raise many urgent questions about power configurations at the local level, and the political and institutional obstacles in ensuring greater gender equity in access to resources, particularly land.

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Land Transfers from the State: Gender Biases in Land Legislation and Land Distribution

As already discussed, potentially there are three important channels through which India's women are most likely to become landowners-family, state and market. All the three sources of land rights are skewed- in the structure and operation-against the equal participation of women. With some revision of the structural underpinnings and execution all of them offer potential for an increasing women's participation in the future. In this section, the focus is on the land transfer from the state through land legislation and land distribution programmes.

Land Legislation: There are mainly two factors that have led to a distinct disjunction between women's legal right in property, in general and their rights in agricultural land. First, legislature powers are divided between the Union and State legislatures under the federal principle and on enactments relating to agricultural land, the state governments continue to have considerable legislative powers. Legislation affecting women's rights in certain categories of agricultural land varies by states reflecting regional differences in social histories, norms and practices. Second, land reform policies have been undertaken with the primary twin objectives of ensuring redistributive justice and on arguments regarding efficiency but interestingly both overlooked the inherent gender inequalities in such public land distribution efforts of the state.

Since independence, state legislatures have been entrusted with the power to enact land laws but subject to some restrictions. Under the Constitution of India, if the

state legislature wants to modify any laws on topics which have been included in the 'Concurrent List' of the Constitution and which have already been enacted by the Parliament, the modification need the assent of the President of India. The Hindu Succession Act of 1956 is one such piece of legislation. Hence, if states want to pass laws modifying the Hindu succession rules for owned agricultural land this will need the president's consent. However, state legislatures can continue to enact laws relating to tenancy rights, ceiling laws, etc. (which are excluded from the Hindu Succession Act.), without needing such assent. What this has meant is that women's legal rights in agricultural land still shows vast disparity by region, especially in relation to two factors:

- (1) Devolution rules for land deemed to be under 'tenancy'; and
- (2) Rules regarding the fixation of ceilings and the forfeiture of surplus land above the ceiling limit.

Devolution of Agricultural Land under 'Tenancy':

Land The Hindu Succession Act of 1956 exempts from its purview tenancy rights in agricultural. Consequently, there is a major problem in several states between state land enactments affecting the devolution of certain categories of agricultural land and the personal laws affecting the devolution of all other property. The orders of devolution relating to land held under tenancy differ both according to succession rules and the personal laws in many states. As noted in Appendix III of the dissertation, the tenorial laws ~~of~~ North -west Indian states like Haryana, Himachal Pradesh, Jammu and Kashmir, Delhi and Uttar Pradesh the specificities of devolution shows a strong preference for agnatic succession, with the priority for agnatic males. In all these states the tenancy devolves in the first instance on the male lineal descendants in the male line of descent. The widow inherits only in the absence of male heirs.³ In addition, in the first four states mentioned, daughters and sisters are actually excluded as heirs. In Delhi and

³ In U.P. although the deceased man's widow comes only after the male lineal descendents in the male line, the sonless widow of male lineal descendent counts among the first order heirs and inherits her deceased husband's share provided she has not remarried.

Uttar Pradesh daughters and sisters are recognized but are placed low in the order of heirs. Moreover, in these six states, a woman can hold only a limited interest in land, in that after her death the holding goes not to her heirs but to her heirs of the last male landowner. She also loses the land if she remarries or abandons the land that is she fails to cultivate for a specified period, usually a year or two.

There are states where the personal laws determine the devolution of tenancy laws. These states include Rajasthan and Madhya Pradesh. Here, personal laws apply to all communities. In the Telengana region of Andhra Pradesh, the Hindu Succession Act applies to the Hindus.⁴ Daughters have however been recognized as heirs in a few judgements in Rajasthan. Again, there are states such as Gujrat, Bombay region of Maharashtra⁵, West Bengal, Karnataka, Kerala, Karnataka, Andhra region of Andhra Pradesh and Tamil Nadu, in which personal laws apply as they do not specify the order of devolution in their laws dealing with tenancy land. Bihar and Orissa are two such state where tenancy acts specify that occupancy rights shall devolve in the same manner as other immovable property, " subject to any custom on the contrary".⁶

Second, in most states, the land reform laws dealing with owned land do not mention the order of devolution at all. There are some states which broadly provide a definition of 'tenants'. For example in Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, there is preference given to male lineal descendants. In fact, it is interesting to note that Uttar Pradesh which contains one-sixth of country's population, has majority of its agricultural land as legally inheritable principally by males.

⁴ Section 40 of the Andhra Pradesh (Telengana area) Tenancy and Agricultural Land Act 1950 says that the tenancy of the protected tenant will devolve on "his legitimate lineal descendants by blood or adoption and in the absence of any such descendants, his widow for so long as she does not marry". In case of conflict with the Hindu Succession Act of 1956 the succession the separate property of the Hindu tenant will be according to the Hindu succession Act.

⁵ For the region of Maharashtra also, there is no clear specification of the order of devolution

⁶ For Bihar refer to the Bihar Tenancy Act 1885 and The Chotanagpur Tenancy Act of 1908

Fixation of Ceilings and Assessment of Surplus Land :

Land reform enactments have not been gender neutral. In fact, the fixation of ceilings has reflected assumptions of a male ideology, which systematically undermines women's agency.⁷ There are some general characteristics, which are found in these enactments. First, a ceiling is fixed in relation to a family unit consisting up to five members. Additional land is however, allowed to families of over five members, subject to a specified maximum. Again, in most states special consideration is given to adult sons. The definition of 'family', additional allotments for adult sons but not daughters and in not allowing the wife to be counted as an independent unit where the husband is counted as one- are some of the factors responsible for the entrenchment of gender inequalities in land reform legislation. *explain*

There is inter-state variation in the definition of 'family'. Appendix IV of the dissertation shows the definitional differences on the operational concept of 'family' in land reform enactments across the country. In the state like Haryana , Punjab, Delhi, Rajasthan ,Uttar Pradesh and Andhra Pradesh, the 'family' is defined as constituted by the cultivator and his or her spouse, minor sons and unmarried minor daughters. In other states like Bihar, Himachal Pradesh and Madhya Pradesh., 'family' includes the cultivator and his or her spouse and minor children. In Tamil Nadu, it includes the cultivator and his or her spouse, minor sons, unmarried daughter and orphaned minor grand-sons and orphaned unmarried grand-daughter in the male line of descent. In Kerala it includes the cultivator his or her spouse and unmarried minor children.

In almost all states adult sons get special considerations. In Delhi, Haryana, Punjab, Uttar Pradesh, the parental household can hold additional land on account of

⁷ 'Agency' is defined as the ability to define one's goal and act upon them. Agency is about more than observable action; it also encompasses the meaning, motivation and purpose, which individuals bring to their activity, their sense of agency, or 'the power within'. While agency tends to be operationalised as decision making in the social science literature, it can take a number of other forms. It can take a number of other forms. It can take the form of bargaining and negotiation, deception and manipulation, subversion and resistance as well as more intangible, cognitive process of reflection and analysis. It can be exercised by individuals as well as collectivities.

Daughters always remain minor and there is no advantage of -52- Adult unmarried daughters, as they are not counted as independants, so additional lands cannot be acquired to bypass ceiling

each adult son.⁸ In some states like Himachal Pradesh, Bihar, Gujrat, Madhya Pradesh, Maharashtra, Andhra Pradesh and Tamil Nadu, each adult son counts as a separate unit and is entitled to hold a specified extent of land in his own right. However, in Kerala, both the unmarried and adult son and the unmarried adult daughter count as a separate unit. Unmarried adult daughters have usually not received any recognition at all. They neither count as a part of the family unit nor as separate units. Even daughters do not figure in these enactments. There continues to be no uniformity across states on these counts and gender discriminatory ceiling laws continue to prevail.

The assessment of ceiling surplus land is also gender discriminatory. The aggregation of the holdings of the land of both spouses in the category of 'family land' is indeed problematic. Although there have some guidelines which recommends that "where both husband and wife holds lands in their own names, the two will have rights in the properties within the ceiling in proportion to the value of the land held by each before the application of the ceiling",⁹ there has been arbitrariness in deciding how much land would be declared surplus and forfeited. As a result the wife's right in land has been forfeited without her having a say in the matter.

From this discussion it is evident that there is a strong case for re-examining and amending the existing land related laws across the country to ensure uniformity and gender equality in rights to this critical economic resource.

Agrarian reform and Gender: Marginalisation of Women in Land Reforms

The state distributes land in various ways: as part of traditional land reform measures, typically taking away land from those owning more than specified ceiling and endowing the landless with the ceiling surplus land and in resettlement schemes as

⁸ In Haryana, the allotment for the adult son is made to the parents if the son is living with the parents but he counts as a separate unit if living separately.

⁹ Government of India, *Report of the National Commission on Agriculture, 1976*, 15, Agrarian Reforms, Ministry of Agriculture and Irrigation, New Delhi, 1976.

compensation for land lost due to displacement. Both these forms of distribution are gender biased. The macro-level analysis in this section of land redistribution programmes to bring visibility to the problems connected with women's struggles for land and survival.

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The experience of land reforms in India reflected some structural contradictions which thwarted the realization of women's equal rights to productive resources in the agrarian contexts. Land reforms were introduced in India in the decade of the 1950s. While the national guidelines were laid down and many of these measures could not be challenged by any state in the Indian Union, land reform was made a state subject. Each state could decide on the procedure and implementation within these broad national principles. The land reform measures adopted by the Indian Union or respective states are not in accordance with any personal law of any community. In matters of inheritance, marriage, divorce, adoption and maintenance or spousal support, personal laws prevail over their jurisdiction. However, the study revealed that women across communities continue to share similar experiences when it comes to being recognized as individuals or equal citizens of the nation. Again, in matters of women's rights to inheritance of agricultural land, states either have their own policy or refer it to the principles of personal laws. The task of the study is to understand the implications of these contradictions in realizing the demand for women's equal rights to land and productive resources and towards the goal of individuation of rights of women.

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In comparison to the amount of privately owned land in India, the amount of land available for distribution by the government is minimal. The effects of redistribution of land have not been gender neutral. Land reforms in India have been seen to have differential impact on men and women.¹⁰ However, the effect of prior land

¹⁰ K. Bardhan,, 'Women's Work, Welfare Tradition and Change in India', *Economic and Political Weekly*, December 24-28, 1985.

distribution programmes on women's land ownership is worth reviewing both as a cautionary tale and because opportunities may still exist in some state to amend titles for land already distributed.

What underlies the gender bias in land reform? In classic land reform terms the claimant is identified as the one who tills. As Daniel Thorner elaborated: "We may begin [land reform]....by putting forward one fundamental principal : land and the fruits thereof are to belong to those who do the tilling, the tillers being defined as those who plough, harrow, sow, weed and harvest".¹¹

With the gender division of labour, such a definition is not all encompassing. It may hold well if applied to the household but not for individuals. Since women do not plough, they get excluded from it. Thus, the legitimate claimant of land is seen as the male head of the household. Again, the land reform endorses the unitary household model where transfer to male is assumed to benefit all family members. The social perception underlying these policies is that women have lesser capabilities.

In the 1970s, the Committee on the Status of Women in India received many representations from women regarding the discriminatory features of some of the new land laws. In a camp of women agricultural labourers in 1980, in Bankura district in West Bengal, similar comments were made by a number of poor peasant women. In another study of land reforms in Bihar¹², it has been agreed that though various progressive land reform laws¹³ have been passed, rather than enforcing the legislations the state machinery has been such as to encourage violation of the ceiling laws. There is an assumption of women's dependency, which underlies the fixation of ceiling as well as land distribution in resettlement schemes. However, women's interests were

¹¹ D.Thorner and A. Thorner, *Land and Labour in India*, Asia Publishing House, Bombay, 1962.

¹² P.H. Prasad and G.B. Rodgers , 'Class, Caste and Landholding in the Analysis of Rural Economy', *International Labour Organisation, Working Paper*, Geneva, 1987.

¹³ Bihar was the first state to introduce legislation for abolishing the Zamindari system. However, The Zamindari Abolition Law was passed in 1952. besides, there were other progressive laws like the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act , 1961; Bihar Tenancy Holding (Maintenance of Record)Act,1973; and The Minimum Wages Notification.

invariably compromised particularly because of the patriarchal and patrilineal forms of the family existing in the greater part of the country. Intra family relations were not the concern of land reform.

The Bihar Kisan Samiti, which supervised in Basuhari land distribution programme towards the end of 1989, gave a formal explanation for the tokenist extension of land rights to women. "During the struggle there had been discussion among the village committee about distributing land separately to women or in the joint names of both men and women. This was also discussed with the local administration at the time of distribution. But the local officials said it would not be possible and the point was not pressed. As a result, it was only as 'special' cases that some women got land in their names- the young girl who had lost a hand, a divorced women and a widow....Certainly women were not part of the land distribution in their own right. They had been no less active in the struggle but were denied any separate existence in the distribution. Women activists were present in the meeting to decide the principle of land for separate or even, joint titles. What all this shows is that without a separate organization women would not be able to push for recognition for their specific position in the class".¹⁴

There has been considerable activity at the policy level in West Bengal regarding women's land rights in the context of the reforms. Following a central government recommendation on joint titles under the Eighth Five Year Plan, the state government issued a directive in 1992 to grant joint land titles to the extent possible and to female members of the beneficiary families where they were found to be eligible. Another directive in 1994 re-emphasised the issue and now the government is considering the grand of retrospective effect to the joint title provision.¹⁵ Nevertheless, it has been near impossible to confirm the claim made in 1999 by the minister of land reforms of West Bengal that four lakh joint pattas had been distributed until then. Gupta in her study

¹⁴ D.N., 'Land Struggle in Basuhari Continues', *Economic and Political Weekly*, August 25, 1990

¹⁵ J. Gupta, 'Voices break the silence' in N. Rao and L. Rurup (eds.), *A Just Right: Women's Ownership and Natural Resources and Livelihood Security*, Friderich Ebert Stiftung, New Delhi, 1997, pp135-69.

found that of nearly 800 pattas distributed in the Bankura district after the circular, not one included the name of the spouse.¹⁶ Peasant unions, which decided the criteria for identification of beneficiaries, had failed to assign land or share cropping rights to women, making exceptions only in cases they recognized as 'distress', that is, deserted, divorced, unmarried women who lived alone and female-headed households with no sons. Despite this, Gupta contends that single women were the most neglected in the implementation of the programmes and the few instances of titles being given to them owed to the repeated efforts of the women's organizations.¹⁷ A recent statewide survey of the beneficiaries of land reforms conducted several years after the circular, found that less than 10 percent of the pattas were in the joint names of the spouses, with a high of 19 percent in Bankura and a low of less than 3 percent in Darjeeling and South 24 Parganas. Single pattas in women's names constituted barely 5 percent of the total pattadars.¹⁸

Crucially where joint titles had indeed been distributed, women were completely unaware of the fact. In the three rounds of research between 2000 and 2002, Brown and Das Chowdhury encountered few cases of titles allocated by the government to women alone or jointly with husbands. Members of beneficiary families who received titles after 1994 stated that the land was in the name of the male head.¹⁹

Another programme in West Bengal that wished to address the question of securing rights to productive resources especially the landless and the land-poor was Operation Barga. West Bengal's agriculture was carried out by millions of share croppers. However, these share croppers did not enjoy permanent tenure of their

¹⁶ Ibid, pp. 159.

¹⁷ In a village in Midnapur, studied in 1987, Gupta found that of the 107 khas holding (where titles were disputed in Court and not yet cleared but usufruct given by the peasant union) distributed, 98 were recorded in the names of the husband or son of the household. Of 10 female-headed that received khas land, 9 were given to the son and out of 18 single women, and only 8 had received land that was distributed. (Ibid: 161).

¹⁸ A.K.Chakraborti, A.K. Mukhopadhyay and D. Roy, *Beneficiaries of Land Reforms: The West Bengal Scenario*, State Institute of Panchayats and Rural Development, Kalyani, Spandan, Calcutta, 2003.

¹⁹ J.Brown and S. Das Chowdhury, 'Women's Land Rights in West Bengal: A Field Study', *RDI Report on Foreign Aid and Development*, No. 116, Rural Development Institute, Washington, 2002.

tenancies and were the worst victims of fluctuating rent and uncertainty. The West Bengal government sought to solve this problem by making share-cropping a hereditary right and the landowner or the lessor could only resume his or her land on fulfilling certain strict conditions. One such condition was that the owner would have to prove that the land resumed would be cultivated by family labour. These cases of resumption vary from situation to situation. The status of women as share-croppers was clearly overlooked. The policy makers weakly defended this oversight by pointing out that the sharecrop arrangement which had been recorded were old contracts which had been entered into by the men of the households. The Left Front government has only secured those existing rights. However the lacunae became evident when there is no clear answer to be given on the question of guidelines for devolving the rights of the share-cropper upon his death. In practice, the rights usually devolve on the next male kin. There was not a single woman registered as share-cropper.

The Kerala land reform experience shows that despite the progressive nature of the Kerala Land Reform Amendment, 1969,²⁰ the legislation addressed class concern and conveniently ignored the need to mediate gender specific constraints. The legislation chose not to intervene in the intra-family relations and thus, families had the important role to decide whose land was to be surrendered when excess was registered.²¹ In this state, where redistribution of ceiling surplus land was the least effective of the provisions and the bulk of the reform activity has long ceased, the government has barely taken notice of the central government's directives.²² And though mainstream development scholarship has emphasized on the role of the land reforms in

²⁰ The Kerala Land Reform Amendment Act of 1969 amended .The Kerala Land Reforms Act of 1964. It abolished tenancy by enabling tenants to purchase ownership rights over leased-out land and cultivators were given ownership right over their homestead sites. A ceiling of 10 standard acres was fixed for a family for five, which include a cultivator his or her spouse and unmarried minor children. In addition every adult member male or female was allowed to hold 7 acres of land. Unmarried adult daughters were recognized as separate units.

²¹ P. Kodoth, 'Gender, Family and Property Rights: Questions from Kerala's Land Reforms', *Indian Journal of Gender Studies*, Vol.8, January- June, 2001.

²² Rules under The Kerala Land Assignment Act, 1960, pertaining to the assignment of land in municipal and corporation areas were amended in 1997 to make joint pattas mandatory for married people applying for assignment of land.

Kerala's 'achievements', feminist insights have gone unnoticed. Sardamoni had warned in the early 1980s that women were a major casualty in the land reforms.²³ In the six villages in the district of Palakkad, she found that the women owned much of the land that was either transferred either due to absentee landlordism or the ceilings provision. In three of these villages, more than one-fourth of those who lost land were widows. Female agricultural labour grew at a much higher pace than male agricultural labour between 1965 and 1975, including the period immediately following the land reform period. This implied that while male agricultural labour grew at the same rate as rural households, female agricultural labour grew at twice the rate and thus, there was greater negative impact on women.

There is a vast gender disparity in ownership and control over landholding in Kerala. A household survey in selected localities in Thiruvananthapuram revealed that only 21 percent of women owned land, though 30 percent owned a house.²⁴ Statewide data from the agricultural census for 1995-96 showed a sharp disparity in the number and area of operational holding of land with men and women.²⁵ Women hold less than a third of the number and area of operational holdings held by men, but also that as the size of holdings increase, women's share of the number of holdings and area decline. Disparity in women's landholding is more pronounced when we turn the area of holdings. In the above 10 hectares category, women hold less than 10 percent of the total operational and less than 5 percent of the area of operational holdings.²⁶

²³ K. Sardamoni, 'Changing Land Relation and Women: A Case Study of Palghat District, Kerala', in V.Majumdar (ed.), *Women and Rural Transformation: Two Studies*, Concept, New Delhi, 1983, pp.173.

²⁴ P.K. Panda, 'Rights-Based Strategies for Prevention of Domestic Violence', Working Paper, *Centre for Development Studies*, Thiruvananthapuram, 2003.

²⁵ However, the Agricultural Census takes the household, that is, a commensal unit, as the unit of enumeration. As members of a single household are not recognized as joint holders, individual holdings stand in for household. Further operational holdings do not refer to title or ownership as they include, owned and tenanted holdings

²⁶ P.Kodoth, 'Gender, Property Rights and Responsibility for Farming in Kerala', *Economic and Political Weekly*, Vol.39 (19), 2004, pp.1911-20.

Another aspect of land transfers from the state relate to resettlement schemes to compensate those who have been displaced due to the implementation of some government's developmental project. The resettlement schemes have also been characterized by privileged male entitlement to land. Bina Agarwal argues that the resettlement packages like that of Sardar Sarovar Project (across Gujarat, Madhya Pradesh and Maharashtra); the Tehri Project (Uttarakhand); the Upper Krishna Project (Karnataka) and the Upper Iravati Project (Orissa) - has been typically male biased.²⁷ In male-headed households, all land transfers are to men alone. In five of the six states, except Karnataka there is no provision for widows. Another five of the six have special provision for adult sons but the only two have such provision for adult unmarried daughters, in one of which the daughter has to be 35 years in age.

Land distribution programmes and their implementation experience started a debate in the academic circles on whether women should be given 'independent' or 'joint' rights in land. The case for independent land rights for women in this discourse is built on the basis of several arguments, particularly issues such as welfare (security against property); efficiency (access to credit, technology and institutional support which increase productivity) and equality and empowerment (enabling challenges to male oppression). Gender equality and women's empowerment in this discourse are explicitly valued as an end in itself. That land rights can improve the treatment of women from other family members by strengthening their bargaining power becomes evident if the examples of two peasant struggles-Bodhgaya Movement in Bihar catalysed by the ChatraYuva Sangharsh Vahini in 1978 and the Shetkari Sangathan's Movement for farmers rights launched in Maharashtra in 1980- are considered. In both these instances of grassroot interventions, the question of women's claims to land was raised with some success in transferring land to women. To elucidate, in the Bodhgaya movement in Bihar in the late 1970s in which women and men of landless households jointly participate in the extended struggle for ownership rights in the land they

²⁷ B. Agarwal, *A Field of One's Own: Gender and Land Rights in South Asia.*, Cambridge University Press, Cambridge, 1994.

cultivated, which was under the illegal possession of a local 'math'. During the struggle, women demanded independent land rights which would serve as an economic security. Further, they feared that if land titles went only to husbands, wives would be rendered even more powerless and vulnerable to domestic violence. In fact, land rights would indeed impinge upon their marital relations. It was found that where only men got titles, there was an increase in drunkenness, wife-beating and threats: "get out of the house, the land is mine now".²⁸ In the two villages where women received titles in land they responded: "Now that we have the land we have the strength to speak and walk".²⁹ The experience of peasant struggles in some areas has been that "by raising the question of land rights of women, rather than the peasant movement being divided, what is observed is its strengthening"³⁰, consequent upon the greater democratization within the peasant movement as it attacks feudal landlordism. Nathan concludes that equal property rights for women including the right to land, "are essential for women to become full participants in the movement in their own right and to prevent the strengthening of patriarchy that would inevitably follow a successful distribution of land solely to men".³¹

Bina Agarwal argues for the 'independent' rights: rights independent of male ownership or control. She says that the conferment of independent rights would make it easier to gain control of the land in case of dispute, that women's land-use priorities are different from men's. While theoretically, these arguments are powerful, the practical aspect is a different question altogether. Even Agarwal notes that about 86 per cent of arable land in India is already in private hands and the question of where the land to be distributed to women is to come from has to be addressed directly. On the other hand, Indu Agnihotri argues for 'joint titles' to agricultural land. She raises a practical

²⁸ Manimala, 'Zameen Kenkar? Jote Onkar! Women's Participation in the Bodhgaya Land Struggle', *Manushi*, 14, January-February, 1983, pp 2-16.

²⁹ Ibid. pp.15.

³⁰ D.Nathan, 'Agricultural Labour and the Poor Peasant Movement in Bihar', in T.V.Sathyamurthy (ed.), *Class Formation and Political Transformation in Post-Colonial India*, Oxford University Press, Delhi, 1996.

³¹ Ibid.

what is the difference between Agarwal's approach and that of Agnihotri?

question: " If land reform per se has ceased to be on the agenda for most political parties except those on the Left.....where would the land that women should be in control of be made available from?".³² "According to mid-1996 figures of the Government of India the area declared surplus to date, all India came to only 3million hectares or 1.6 per cent of the arable land and only 0.2 per cent is still available for distribution".³³ It is that even if all the land is allotted independently to women only a minute fraction of the female population would benefit.

this debate needs to be more informed

this does not follow what follows is low availability of land most the present laws

From the debate it follows that joint titles present problems: it makes it difficult for women to gain control over the produce to bequeath the land as they want and to claim their share incase of marital conflict. Individual titles provide women with more flexibility in pursuing their own agendas. However, given some of the problems that resource-strained women small holders with individual titles might confront- for example, their lack of investible funds, and difficulties of investment in capital equipment if the farm is small- for Agarwal, the optimum institutional arrangement would be some collective form of investment and cultivation that would bring women smallholders together, thereby cutting across households. Individual titles for women thus, need to be pursued in tandem with institutional innovations to forge new form of collective investment and cultivation that reduce the risk of individual enterprise for women and yet provide mechanism for their greater independence and autonomy from male dominated households. Such institutional innovations are premised on the prior existence of active and well-funded non-governmental organizations that can act as facilitators.

It is clear from the above discussion that the question about the joint or individual titles is in fact not as straightforward as it appears. Implicitly, it is a question about the conceptualization of conjugal relations and the forces that bind agrarian

³² I.Agnihotri, 'Bringing Land Rights Centre-Stage', *Economic and Political Weekly*, 31(9), March 2, 1996.

³³ B.Agarwal, 'Disinherited Peasants, Disadvantaged Workers: A Gender Perspective on Land and Livelihood', *Economic and Political Weekly*, 33(13), March 26, 1998.

household together. The two positions, by Agarwal and Indu Agnihotri in fact bring to the forefront some of the tensions within the current, second generation feminist conceptualizations of the household, where the first generation feminist critique has established in both theoretical and empirical terms, serious flaws in the previously dominant unified paradigm. While most feminists would agree that households are sites of struggle and inequality there is certainly less agreement as to how the given inequalities and tensions as well as common interest and cooperative behaviour should be understood and conceptualised. Do conflictual and bargaining models sufficiently capture the common interests that all household members have in the overall economic success of their household? What makes women stay inside the patriarchal household even though they are allocated fewer resources? Is it really pure despotism on the part of the male household head and 'false consciousness' on the part of the junior household members that binds the household together?³⁴

These are not questions to which any definitive answer can be provided. However, the gender biases in land transfers from the state can indeed be removed if one takes into consideration the positive implications of land access to women for gender relations. This would entail the recognition of the structures and practices of families as crucial in determining gender differentiated patterns of access to land. In fact, a gender perspective which challenges the conventional economic analysis underlying the rationale of land distribution programmes can be useful to push for alternative needed to reduce existing biases in women's access to land.

Conventional policy discourse neglects gender differences in several ways. An analysis of the gendered perspective will enable to build strong arguments for the case of land rights to women. The gender perspective challenges the assumption of a unitary household model which treats the household as an undifferentiated unit in which the

³⁴ A. Whitehead, and N. Kabeer, 'Living with Uncertainty: Gender, Livelihoods and Pro-poor Growth in Rural Sub-Saharan Africa', IDS Working Paper 134, *Institute of Development Studies*, Brighton, 2001.

governing principle is common preferences and interests. It highlights the role of harmony and cooperation rather than unequal power relations and conflict. Consequently economic resources have been distributed in favour of male household heads as the inherent assumption of these development policies has been that resources will be shared equitably among all members. These inequalities have taken the form of unequal allocation of productive resources as well as gendered division of labour.

The gender perspective challenges the failure of conventional economic analysis to recognize gender differences in expenditure patterns and resource use. There are a number of links between women's well-being, agency and resources on one hand and a variety of demographic and welfare outcomes on the other. There is evidence to suggest that women may use resources at their disposal differently than men.³⁵ In fact, attempts to explain these findings have varied between those who emphasise gender differentiated preferences and those who suggest they may reflect gender differentiated interests. The former tend to emphasise socialization processes by which women acquire a more 'connected' sense of the self and pursue more altruistic forms of behaviour while men define themselves in more 'separative' terms and display more self interested forms of behaviour. This interpretation is supported by findings from a wide range of contexts that men are likely to retain a greater percentage of their income on collective welfare. On the other hand it has also been pointed out women's fortunes are more closely bound up with the fortune of their families and children. The ideology of maternal altruism may thus merely disguise self -interested forms of behaviour (investments in family as a form of 'social capital') or distract attention from non-altruistic forms of discrimination against daughters. Alternatively, of course, both explanations may be true. Inequalities in access to independent resources would mean that women have a greater stake in nurturing their family networks and thus discriminating in ways that are likely to secure their status in the family.

Finally, a gender view challenges the assumption that women's class can be derived simply from their family's property status and class position. There is some

³⁵ N.Kabeer, *Gender Mainstreaming in Poverty Eradication and the Millennium Development Goals*, Commonwealth Secretariat, London, 2003.

truth in the fact that the living standards of women are affected by their father's or husband's class positions. But to the extent that women, even from the propertied households, do not own property themselves, their class positions remain vicarious: a well placed marriage can raise it, divorce or widowhood can lower it. Even women who are married into rich households find themselves in economically vulnerable positions when there is a breakdown of marital relationships.³⁶

It is within this broader understanding of households and their positioning within the social economy that the 'women and land' question needs to be placed. In some contexts and for some groups of women, mechanism that secure and extend women's rights to household land can provide appropriate form of access and entitlement, yet without having to venture down the risky path of individual rights where rural power relations are less menacing. In other contexts, where rural class structures and power relations are less menacing, it may be more feasible to experiment with alternative institutional arrangements that require and enhance women's greater autonomy from male dominated households.

X The skewed distribution of property rights in land has left little room for dispute that the agrarian reforms have reinforced a patrilineal framework of family relations. By constructing family created programmes where power rested male heads of households, the state seems likely to erode even further the rights which women had secured through peasant struggles. Thus, it becomes clear that in India gender relations were never fundamentally changed to enable women to have effective access to land and other productive resources. However, one needs to acknowledge that land rights are undoubtedly very important for women but at the same time with the increasing land scarcity, combined with diversified livelihood systems, conscious attempts to open opportunities and shift macro-policies to support women's work in rural economy and consequently the gendered valuations of work and worth is the need of the day.

³⁶ G. Omvedt, 'Effects of Agricultural Development on the Status of Women', Paper prepared for the International Labour Office Tripartite Asian Regional Seminar on Rural Development and Women, Mahabaleshwar, April 6-11, 1981.

X Skewed distribution in which context?

Chapter IV

GENDER AND LAW: INTERFACE WITH THE JUDICIARY

Gender is a powerful principle for social life. It is a multilevel system of social practices that produce distinctions between men and women and organizes inequality on the basis of those distinctions. It operates at the individual, interactional and institutional levels. Gender inequality is reproduced through two inter-related processes- the forces of institutionalization and legitimation. Institutionalization refers to the processes through which social relationships take on the qualities of an institution. Legitimation is defined as the processes through which inequalities are justified- that is, they are understood in the ways that make them 'fair' and 'reasonable'. As gender inequality gets institutionalized, it is built into social structures and everyday routines to sustain them. Gender inequality is legitimated through ideological accounts that emphasise women's and men's differences, but downplay the ways those differences generate inequalities. In this context, law becomes an instrument to legitimise the institutionalized relationships, which are interpreted through gendered lens.

(need
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Within the broad framework of understanding the Hindu property laws, in this chapter the focus is on law as an instrument of the state to mitigate the pervasive gender discrimination faced by Hindu women. The basic questions addressed are- How do cultural factors affect the outcome of laws intended to bring about social reform? Can social change be precipitated by legal reform? To understand these queries, one needs to decipher the very meaning and authority of law, in the over determination of law as an ideological apparatus. As Rosen observes, there is a 'paradox' inherent in the foundation of the legal system. The 'paradox' is that the legal system "seems central to the imposition of decisive pronouncements aimed the very structure of social relationships" while being "dependent on forces beyond its direct control for acceptance and implementation of these structures".¹

? Check

¹ L. Rosen, 'Law and Social Change in the New Nations', *Comparative Studies in Society and History*, 20(1), 1978, pp 3-28.

The fundamental problem lies in the over-reliance of law for bringing about change. Within the feminist movement itself the question of legal equality for women has posed theoretical and practical dilemmas. The Indian feminist movement continues to seek legal remedies for social practices that specifically discriminate against women such as widow immolation, dowry, while demanding equality in other spheres like work and education. Some Anglo-American legal theorists have however suggested that "the rhetoric of rights has become exhausted and may even be detrimental" to the cause of women's equality.² The "rhetoric of (equal) rights is inadequate", says Carol Smart, "in a situation where women have been demanding for rights for which there has been no masculine equivalent in the past"³ Equally pragmatic is the observation of Martha Fineman who says that "the unequal and inequitable position of women can only be remedied through pervasive legal accommodation of difference.... there has been a move away from inequality as one of the organizing principles of legal thought".⁴ Indeed, she argues that a theory of "difference", rather than the discourse of "equality", may be a more rewarding strategy for legal feminists to pursue.

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Other feminist legal theorists such as Catherine Mackinnon argue that both the "sameness" and the "difference" approaches are subtended by the belief that man is the ultimate measure of women. Mackinnon says, "Under the sameness rubric, women are measured according to the correspondence with man, their womanhood judged by the distance from his measure".⁵ She calls instead move towards substantive equality that recognizes women's realities. In short, Mackinnon's critique of liberal legalism of which the sameness/ difference binary is fully a part, stops short of a critique of the legal form itself, arguing instead that the barriers to equality are often legal. In India, the dilemmas of the sameness/ difference rubric are manifested particularly in the contestation of personal laws. The theorizing of 'difference' has become critical in multicultural societies where the 'neutrality' of institutions has only perpetuated historical and cultural

² C.Smart, *Feminism and the Power of Law*, Routledge, London, 1989.

³ Ibid, pp 67-69.

⁴ C.MacKinnon, *Towards a Feminist Theory of the State*, Harvard University Press, Cambridge, 1989.

⁵ M.Fineman, 'Feminist Theory in Law: The Difference it Makes', *Columbia Journal of Gender and Law*, 2.1, 1992 pp 1-23.

disadvantages. The colonial interregnum in India produced institutionalized 'differences', which resonate in plural and unequal personal laws, legally ensuring that women occupy unequal subordinate positions. In India thus, rethinking the rhetoric of equality necessarily follows a distinct path, which may not parallel the Anglo-American scholars.

In many studies it has been suggested that new laws are most effective when they legitimize changes that are endorsed by societal norms and practices and legal transformation reflects rather than initiates political economic or political change. Consequently, it follows from this argument that laws enacted for greater redistributive justice are likely to be unsuccessful. Again, as feminist theorists have pointed out that many times there may be resistance to radical social change to ameliorate status of women from within the legal transformation itself. This results in the incorporation of cosmetic, superficial changes that in turn reinforce hegemony of patriarchy. Carol Smart argues that law can "be understood as a mode of reproduction of existing patriarchal order, minimizing social change but avoiding the problems of overt conflict".⁶ Others like Srimati Basu contend that law is one of the primary cultural spaces where gender identity is constituted, a crucial site where notions of gender are created and reinforced through judgements relating to subjects such as family law or sexual violence.⁷

Law is not a unitary category, which serves the interests of men alone. Infact, the legal apparatus has multiple locations within the social system and serves heterogeneous interests. The legal cases are examined to enable the construction of gendered issues emergent in property laws. They show that the judgements do not simply resonate the laws but are mediated by the cultural perceptions of the judges and lawyers, by-acts of legal translation that revise and recreate gender and can profoundly affect the intent of legislation.

⁶ C.Mackinnon, op. cit., pp. 45-49.

⁷ S. Basu, *She Comes to Take Her Rights, Kali for Women*, New Delhi., 2001.

Judicial Approaches to Gender Rights in India

Indian women's lives continue to be characterized by a formidable amount of pervasive discrimination and substantive inequalities. Despite guarantees of formal equality being enshrined in the Indian law, there is sex discrimination. Broadly, we find that the judicial approach to the question of both equality and gender difference has been problematic. There are two competing models of equality- formal equality and substantive equality models-which have informed constitutional law. In fact, in the recent times there has been a perceptible shift in the approach from formal equality model to substantive equality model but the latter continues to be thwarted by the deeply embedded assumptions regarding equality as formal equality.⁸ Subsequently, the question of the relevance of gender difference can be examined through three competing approaches- protectionist, sameness and corrective. These debates form the context of the Supreme Court and the High Court cases in the next section of the chapter which seeks to examine and illustrate how the legal system itself contributes to the gap between the formal guarantees of gender equality and substantive inequality that plagues women's lives.

The formal equality discourse has been the cornerstone of any traditional understanding of equality. It has been the theme of Western thought since the times of Aristotle. Equality has been interpreted as "treating like alike" and its constitutional manifestation is evident in the expression of equal protection doctrine, the principle here is that all persons are to be treated alike except where circumstances require different treatment. Equality is thus, equated with sameness. The entitlement to equality is based on sameness and discrimination is defined as any difference in treatment between similarly situated individuals.⁹ This 'similarly situated' test requires the Court to begin by providing a definition of the relevant groups and classes for comparison.¹⁰

⁸ R.Kapur and B.Cossman, 'On Women, Equality and the Constitution- Through the Looking Glass of Feminism', *National Law School Journal*, 1993.

⁹ H.Reddy, 'Equality Doctrine and Indian Constitution', *Andhra Law Times*, 45, 1982, pp 57-58.

¹⁰ R.Kapur and B.Cossman, op. cit., pp7.

Selene

The philosophy underlying the sameness/difference approach applies liberalism to women. Sex is a natural difference, a division, a distinction, beneath which use a stratum of human commonality, sameness. The emphasis of the sameness principle is that it conforms normative rules to empirical reality by granting women access to what men have: to the extent are no different from men, women deserve what men have. The difference branch, which is generally regarded as patronizing and unprincipled but necessary to avoid absurdity, exist to value or compensate women for what they are or have become distinctively as women- by which is meant unlike men, or to leave women as "different" as equality law finds them.¹¹ It continues to insist that the only way for women to achieve legal recognition of their equal status to men is to deny the legal relevance of their difference to the degrees that it exists: Women should be recognized as gender-neutral legal persons.

The legal mandate of equal treatment- both as systemic norm and a specific legal doctrine- becomes a matter of treating like alike and unlikes unlike, while the sexes are socially defined as such by their mutual unlikeness. That is, gender is socially constructed as difference epistemologically and sex discrimination law bounds gender equality by difference doctrinally. The same /difference doctrine ignores an important aspect- how to get a woman access to everything women are or have been allowed to become or have developed as consequence of their struggle either not to be excluded from most of life's pursuits or to be taken seriously under the terms that have been permitted to be women's terms. The sameness approach cannot distinguish between 'differential treatment that disadvantages and differential treatment that advantage', as Kapur and Cossman put it.

The substantive equality model of equality is critical of the formal equality and its emphasis on sameness. It recognises the fact that equality sometimes requires that individuals be treated differently. The problematic linkage between equality and sameness has been elaborated by Martha Minnow: "The problem with this concept of equality is that it makes the recognition of difference a threat to the premise behind

¹¹ C.Mackinnon, op. cit., pp 102-114.

equality. If to be equal you must be the same, then to be different is to be unequal".¹² The substantive equality approach emphasizes on the actual impact of the law rather than focusing on the equal treatment under the law. Its main aim is to eliminate substantive inequality in the form of individual, institutional and systemic discrimination against the marginalized and disadvantaged groups in society. It seeks to enable such groups to engage in full and equal social, economic and cultural participation in society.¹³ This is attempt to make law more sensitive to a more complex notion of equality which takes into account the comparative disadvantages of persons under existing unequal conditions.

The argument further gains currency when the paradigm of equality analysis shifts from sameness and difference to disadvantage. The substantive equality model views differences not to preclude an entitlement to equality. It is embraced within the concept of equality. Differential treatment may be required but "not to perpetuate the existing inequalities; to achieve and maintain a real state of effective equality".¹⁴ The substantive equality approach is illustrative of the problematic nature of the discourse of legal rights. The inherent assumption is that of independence and separateness of the judiciary and the legal system from the institutions of the state and the economic and cultural practices which constitute the present condition of inequality. "It seems to suggest that all that is required is for judges to be sensitized to the notion of substantive equality and social conditions will be gradually transformed by law".¹⁵ The apparent objection to this is that if the morality underlying the notion of substantive equality were so self-evident and unthreatening to the dominant social order there would no need for law to bring about social justice. On the whole, in Frug's words, "Sameness feminists

¹² M. Minnow, 'Learning to Live with the Dilemma of Difference- Bilingual and Special Education', *Law and Contemporary Problems*, 1985, pp. 157-207.

¹³ The main argument of this line of thinking is that Courts must adopt an approach which considers the effect of the rule or practice being challenged to determine whether it contributed to the actual inequality of women and whether changing the rule will actually produce an improvement in the specific material condition of the women affected.

¹⁴ R. K. Gupta, 'Justice: Unequal but Inseparate', *Journal of Indian Law Institute*, 1969, pp 57-76.

¹⁵ N. Menon, *Gender and Politics in India*, Oxford University Press, 1999.

have been thwarted by the repeated recognition of difference; difference feminists by the devaluing of women's differences".¹⁶ (penline)

Again—there has evolved different approaches to understand the question of relevance of gender differences within the judiciary. The discrimination law is fundamentally undercut by its concept of sex, inequality and law. It reflects more or less the same arguments of the judicial approaches to the interpretation of equality rights. The formal model of equality largely informs the sex discrimination law. Its focus on sameness led to the question of relevance of gender difference. There are three distinct judicial approaches – protectionist, sameness and corrective. Each of them has conceded to the assumptions of formal equality and indeed represents a problematic approach to gender difference.

The Protectionist Approach: The construction of women as weak, marginalized and subordinate justifies the need for protection to them. Differential treatment is accorded as this is precisely the Court's understanding of women's difference. This 'essentialisation' of difference- to take the existence of difference as the natural and inevitable point of departure is deemed to be preferential treatment. Unfortunately, in the name of protecting women, this approach endorses and reinforces the ideology of male domination and subordination of women.

The Sameness Approach: Sex discrimination law sees equality and gender as issues of sameness and difference. Equality is an equivalence and not a distinction and gender is a distinction, not an equivalence. Gender difference is considered as irrelevant and women ought to be treated exactly the same as men.¹⁷

Corrective Approach: In this perspective, special treatment for women is justified on the ground of past discrimination. Gender difference is held to be relevant and also considered to require recognition in law. Gender differences have to be recognized to

¹⁶ M. J. Frug, *Post- Modern Legal Feminism*, Routledge, New York, 1992.

¹⁷ S. Jahwari, 'Women and Constitutional Safeguards in India', *Andhra Law Times Journal*, 40, 1979, pp11. He observes: " The true meaning of the principle of equality between men and women is to be treated as normally is irrelevant in law and that consequently is not to be treated as constituting in itself a sufficient justification for unequal treatment".

avoid the reinforcement and perpetuation of the difference and the inequalities underlying it. Gender difference is not essentialised. The simple gender neutrality in law based on male standards and values. Thus, as long as women conform to these male standards, they qualify for equality. The corrective approach is critical of such assumptions and argues that substantive equality for women necessarily must account for gender difference in its analysis of women's experiences. Gender difference is contextualised in terms of the historical disadvantages and discrimination. Though it has often been conceded that the corrective approach is most promising and balanced but such straightjacket conclusions cannot be drawn. In fact, the question of relevance of gender difference is contextual. In a particular context, treating women differently may further enhance their chance of disadvantage and thus conclude that women ought to be treated the same. In some contexts the substantive approach may require a sameness approach while in other context it will require a corrective approach.¹⁸

Marc Galanter's work attempts to introduce into the law, a conception of 'identity', which is constituted by interacting and negotiating with other elements of society. This understanding of identity requires the Courts to be informed by an 'empirical' approach which stands in contrast to a 'formal' approach.¹⁹ The latter views the individual to have single membership status of one group only and thus, have rights which that group is entitled to. Contrastingly, the empirical approach accepts multiple group membership of individuals. It addresses cases according to its contexts. Galanter is aware that this approach may lead to a gap between judicial formulation and actual administration. He hopes that Courts will make reasonable distinctions, which has to be translated into workable rules.

could have
been developed

¹⁸ One can explain this with the help of an example, like, right to vote is a political right. Here, gender is considered as irrelevant in pursuit of equality. Any recognition of gender would only reinforce or contribute to women's subordination. In contrast, with regard to employment rights, a substantive approach may require a recognition of women's reproductive differences in so far as the pursuit of equality will require that women are proved with maternity leave and benefits.

¹⁹ M.Galanter, *Competing Equalities, Law and Backward Classes in India*, Oxford University Press, Delhi, 1984.

All these different approaches to the understanding of gender equality become operational when judges decide on different succession cases relating to property rights. Infact, the question of dispensing property cases dealing with the seclusion of women is indeed a complex matter. The study of these cases shows that there is an oscillating tendency between the protectionist and the corrective approaches. Often extra-legal ideologies are also invoked in legal decision making which either favour or not favour gender discrimination.

Family law is a crucial site for the examination of the intricate dynamics of the working of "heteropatriarchy" and for studying what Patricia Oberoi calls, "judicial ethnosexology", the ways in which "a set of widely shared cultural assumptions" inform the substance of legal decisions²⁰. Ratna Kapur and Brenda Cossman have extensively analysed women and law in post- Independence India. According to them, "the legal regulation of women is informed by and serves to reinscribe family ideology", where "family ideology" stands for "a set of norms , values and assumptions about the way, family life is and should be organized; a set of ideas that have been so naturalised and universalized that have come to dominate common-sense thinking about the family".²¹

Constitutional challenge to family laws on the ground of sex discrimination have met with mixed results. In some cases, the Courts have held that laws which treat women differently than men, are discriminatory and thus, in violation of the equality guarantees. Indeed, some cases recognize that the discriminatory treatment based on sexist attitudes and practices which reinforce women's subordination. The approach adopted by those courts is one of formal equality and sameness. However, other cases have rejected the challenges to family laws. These are cases, though also adopting a formal equality, emphasise the differences between men and women, and thus, preclude interrogation of substantive inequalities.

²⁰ P. Oberoi, 'Hindu Marriage Law and the Judicial Construction of Sexuality', in R. Kapur (ed.) *Feminist Terrains in Legal Domains*, Kali For Women, New Delhi, 1996, pp 184-209.

²¹ R. Kapur, and B. Cossman , *Subversive Sites: Feminist Engagements with Law in India*, Sage Publications, New Delhi, 1996.

Challenges made to the laws of succession on the ground that it discriminated on the basis of sex, brought overwhelming by men have been rejected by the Court. For example, in *Kaur Singh vs. Jaggar Singh*,²² section 14 of the Hindu Succession Act, which provides a female Hindu with the right of absolute ownership over her property, was challenged as discriminatory.²³ While the Court acknowledged that the Hindu Succession Act did create an apparent anomaly in the power of alienation of property it held that removal of such remained the prerogative of the legislature, not the Courts. The court held that “ it may well be that in view of the inferior status enjoyed by the females, the legislature thought fit to put the females on a higher pedestal”, which was within the purview of Article 15 (3) of the Constitution²³. It further held that women as a class were different from men as a class and the legislature had merely removed the disability attaching to the women. (What was his case?)

In *Pratap Singh vs. Union of India*,²⁴ section 14 (1) of the Hindu Succession Act was again challenged as violating Article 14 and 15(1) of the Constitution. The Court found that Section 14(1) was enacted to address the problem faced by the Hindu women who were unable to claim absolute interest in property inherited from their husbands, but rather, who could only enjoy these properties with the restrictions attached to widow's estates under the Hindu law. As a special provision intended to benefit and protect women who have traditionally been discriminated against in terms of access to property, it was not open to Hindu males to challenge the provision as hostile discrimination. Rather, the Court concluded that the provision was protected by Article 15(3), which in its view, “over reads clause 15(1)”,²⁵ while the Court thus upheld the provision, the approach to equality and to gender on which it did so remains unclear.

²² *Kaur Singh, Gajjan Singh vs. Jaggar Singh, Kehar Singh*, AIR 1961, Punjab 489, *All India Reporter*.

²³ The plaintiffs argued that the effect of Section 14 was discrimination in the powers of alienation of property between women and men. While women had by virtue of Section 14 absolute ownership and thus, absolute right of alienation, men who were still governed by the Punjab Customary law were not free to dispose off ancestral immovable property by will.

²³ *Ibid*, 493, Para 13.

²⁴ *Pratap Singh vs. Union of India*, AIR 1985 S.C. 1695.

²⁵ *Ibid*, 1697, Para 6.

The decision could be informed by either a protective approach or a corrective approach. The Court's reference to the traditional problem that women faced in property ownership is suggestive of the latter.

In *Sonubhai Yeshwant Jabhar vs. Bala Govinda Yadav and Others*,²⁶ section 15(2) of the Hindu Succession Act was challenged as discriminating on the basis of sex and thus, being in violation of Articles 14 and 15. section 15(2)(b) provides that the property inherited from a husband of a female Hindu dying intestate will devolve upon the heirs of the husband, whereas section 8, dealing with the property of the male Hindu dying intestate does not make any such provision regarding property inherited from his wife. In rejecting the challenge the Court held that the rules were enacted with the clear intention of ensuring the continuity of the property within the husband's line. The assumption that property should be passed down through the male line is so deeply held that the Court does not question the gender bias of the assumption. The historic discrimination against women in inheritance has created a norm - that property passed through the male line- and it is against this norm which any challenges to the practice are measured, and ultimately rejected.

Cases relating to Land Entitlements:

The different levels and spheres where women's rights as equal citizens of the nation have been denied have resulted in many contradictory provisions through which women have to establish their equal rights as individuals. Since land ownership is an important source of power- social, cultural as well as political- often disputes have emerged on this question. Over the years some of the ceiling acts which have been elaborately discussed-in Chapter III of the study, have been challenged in the Court of law. However, though they have been largely unsuccessful, the grounds for challenging them have often been sex discrimination against women.²⁷ However, the First Amendment to the Constitution of India, enacted in 1951 had introduced a device for the protection of validity of land reform legislation. Under Article 31b of the Constitution, it

²⁶ *Sonubhai Yeshwant Jabhar vs. Bala Govinda Yadav and Others*, AIR 1983 Bombay 156.

²⁷ Article 14 of the Constitution of India promises equality before the law and Article 15 prohibits discrimination on the basis of sex, etc. Both constitute part of Fundamental Rights.

provided that none of the Acts mentioned in the Ninth Schedule of the Constitution could be deemed to be void on the ground that they infringed on the Fundamental Rights. This provision provides the basis for dismissing pleas challenging the ceiling laws on various grounds, including grounds of gender discrimination.

The Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 was challenged in 1980. Among the grounds for challenging it were that it discriminated against the major unmarried daughters by not providing extra land to the fathers as it did for the adult sons and also that it discriminated against women in the fixation of ceilings, by regarding the husband as the tenure holder even when the wife was the owner. Justice Krishna Iyer stated: "No submission to destroy this measure can be permitted using sex discrimination as a means to sabotage what is socially desirable".²⁸ While admitting that the advantage granted to major sons and not daughters was discriminatory, he nevertheless justified the rule on the ground that in effective terms the entire land goes to the father as the tenure holder (not to the son) "for feeding this extra mouth". The question that arises then don't adult daughters need to be fed? The explanation for the exclusion of women as tenure holders was provided as: "When all is said and done, married women in our villages do need their husbands' services and speak through them in public places".²⁹ Underlying these justifications was clearly the prioritization of class interests at the expense of gender concerns. "Large land holders cannot be allowed to outwit socially imperative land distribution by putting female discrimination as a mask".³⁰ The success of land reform programmes in redistributing land between households is but a contested issue.

The assessment of ceiling surplus land has been yet another issue which has been a cause of dispute and has required judicial intervention. The dispute stems from the fact that often in deciding the amount of land to be declared as surplus and consequently forfeited, consultation with the female owner of the land is avoided. This

²⁸ Ambika Prasad Mishra vs The State of U.P. and Others , *Supreme Court Cases*, 1980, 719, 3 , pp 719-34.

²⁹ Ibid, pp 729.

³⁰ Ibid.

leads the wife's land being forfeited without her having any say in the matter. Cases in which the wife has been able to establish her claim has been rare. In the *Kunjalata Purohit vs. Tahsildar, Sambalpur and Others*,³¹ the government revenue officer in making an assessment of the ceiling surplus land, aggregated the land of both spouse as 'family land', including, land separately registered in the wife's name and inherited from her father. But he gave notice only to the husband as the 'person interested'. The two men settled the matter between them and the wife's land was declared surplus. The wife appealed to the High Court asking that her separate land be excluded from the ceiling surplus, on the ground that since the land concerned was her separate property, she was the 'person interested' to whom prior notice should have been given. This, she argued would have given her a chance to ask the revenue officer to let her retain her land and instead declare part of her husband's land as surplus. The Court under the constitutional principle of 'natural justice' accepted her appeal.

The tension between post-colonial legal change and the persistence of privileges become evident in the issue of inheritance and succession within family law. It is found that within the spaces of law and legal decision-making in India gender entitlements to both male and female heirs are culturally reconstructed and reinvented through the judicial pronouncements on property cases. The division of property is determined by a range of factors like "extra-judicial ideas of family responsibility (who does elder care? Who support the family?), resources distribution (what really constitutes dowry and how does it measure against the total family resources?) and meanings of access to property (what does it mean for women to have affinal family property?)".³² Thus, it becomes important to analyse the construction of gendered subjects, the post-colonial state, and legal entitlements and responsibilities, which are highlighted in the legal cases studied.

The legal cases, which are dealt with herein, reveal how in many of these cases the judges invoke the essentialist depictions of "woman" in the form of moral righteousness, helplessness, and weakness as deserving grounds for judicial support to

³¹ *Kunjalata Purohit vs Tahsildar, Sambalpur and Others*, AIR 1986a, Orissa 115.

³² S. Basu, op.cit .

women. In *Joti Dadu Navale vs. Monikabai Kashinath Mohite*,³³ the judge rebuked a brother's attempt to disinherit his sister from their parental property. The manipulative intention of the brother was condemned as it was observed: "The defendant has not succeeded in painting a very glorious picture of himself before the Court. On his own showing, he is a grabber. He has no regard for the right of his own sister; that she wants only a quarter share but he was not inclined to give even that pittance." The underlying meaning to the judgement becomes prominent when it is contextualized. The very language of the judgement reveals that the sister's claim for a share less than what she is actually entitled to is glorified. Thus, here the "subject" (sister) has been constructed to be "passive" and thus, the "Indianness" depicted by the women are upheld through law.

The Court invoked sympathy for age and lack of legal knowledge as the basis of the protectionist approach to decide some cases related to property entitlement ~~top~~ widows. In *A. Venkappa Bhatta vs. Gangamma*,³⁴ the widow wanted a share from the joint family property, which was under the control of the brother-in-law. The vulnerability of the widow was taken into account when the judgement pronounced the verdict as: "an old lady in the late sixties and literate, not well versed in the ways of the world....leading a sheltered life of a widow in an orthodox family.... very much under the influence of the first defendant, kartha³⁵ of the family and brother of the late husband. She had no sons of support to look to". The justification for a favorable verdict to the widow was indeed based on the patrilineal assumption that sons are invariably responsible for the financial and social support of parents. The fact that she did not have sons was emphasized, while ignoring that she was the mother of two daughters. Here, again it becomes evident that the Court assumes that the role of daughters was passive as daughters often retained no interest in property or rather, were socialized to be "good sisters" and thus, the conclusion was drawn that the widow had no support to sustain her.

³³ *Jote Dadu Navale vs. Monikabai Kashinath Mohite*, AIR 1988 Bombay 348.

³⁴ *A. Venkappa Bhatta vs. Gangamma*, AIR 1988 Kerala 133.

³⁵ 'Kartha' is defined as the titular head, usually senior male member of the Hindu joint family and manager of the coparcenary property with discretion to sell or acquire property in the family's best interest. Women cannot be karthas in accordance with the texts of Hindu law.

In both these cases it is found that the ideology underlying the judgements becomes clear. Women's perceived helplessness and weakness are taken to be strong and valid grounds for judicial support to them. The judiciary, in the name of delivering gender justice, appreciated the conformity to a hegemonic favourable image of 'woman'.

Yet another reason, which the Court took into consideration while deciding property cases, was the question of "eldercare". However, the decision of the Court in this regard has oscillated between the validation of strong inequities in Hindu property laws on one hand, and an understanding of inheritance as a reward for care giving on the other. In *Sushila Bala Saha vs. Saraswati Mondal*,³⁶ the judge declared the validity of the will where the mother who had two daughters and a son, left her property to one of the daughters. This was because this daughter had resided with the mother and "looked after her comforts", whereas the son had not only failed in his "bounded duty" to maintain his mother but had also stolen from her, tried to defraud her and forced her to leave her home in fear of her life. The judge ignored gendered rights but favoured "eldercare" as the basis of property division. Son's right to deserve property share was legitimized on the ground that son's duties to maintain the parent was fulfilled. Again, in *Ram Piari vs. Bhagwant*,³⁷ the Court favoured "eldercare" when a will was contested by one of the two daughters and only the sons of one the daughters were the heirs.

In other cases, like *Paramma vs. Chikarangappa*,³⁸ inheritance rights of male were protected. Often the legal notion of "joint family" to which only males could become coparceners restricted parents' from rewarding daughters a share in that property. The father made a gift of one acre of land to the daughter he was residing with. He called the son lazy and vagabond. Since the land was a part of joint family property the daughter was not directly entitled to inherit it. The only way to enable the daughter a share in it was to claim that the land was a gift for pious purpose. The sons claimed that they were deprived of livelihood as the land that was gifted to their sister was the most productive in the joint family estate. The Court focused on the jointness of property and held that the gift was too large and thus, unjustifiable. Despite the attempts to overcome gender

³⁶ *Sushila Bala Saha vs. Saraswati Mondal*, AIR 1991 Calcutta 166.

³⁷ *Ram Piari vs. Bhagwant*, AIR 1990 Supreme Court 1742.

³⁸ *Paramma vs. Chikarangappa*, AIR 1989 Karnataka .

roles which rationalise their disentanglement, women face persistent obstacles in getting family property. *what did the courts do?*

There are times when the Court has invoked extra-legal ideologies about family roles and property which has indeed made legal reform appear superficial and illusory. In *Chandania vs Cyan Chand*,³⁹ a man had left a will which disposed the property to his nephew and left only maintenance rights to his wife. The Court had to decide the question of the validity of the will. The judge argued: "He appears to have decided to keep the property within his family.....There ~~was~~ apprehension in the mind of the testator that after his death his brother-in-law usurps the immovable property". The contention that was accepted was that among the Hindus it is uncommon that if the owner of the property has no children he wills his immovable property in favour of some member of his family in whom he has implicit confidence so that the property is prevented from being transferred from the widow to her natal family. The judge implicitly accepted the predominance of the customary rules in deciding the legality of property transmission and ignoring the fact the Hindu customs were overridden by the new legislation. The contradiction that was apparent here was that the property in question was "self-acquired" and there could have been a scope to entitle the widow a share in it as it was also the result of her lifelong contribution through labour and savings. The ideology that was reinforced was that women after marriage had no responsibility towards their natal families. They could at best be thankful recipients rather than co-sharers of marital property. *were*

Again in several other cases of property dispensation was considered to be "natural" when daughters were disentitled and were justified as adherence to customs. In the *Khushbir Singh vs. The State*,⁴⁰ the court claimed that a man's will made out to the son and excluding a daughter of a second marriage was quite rational because the " may well have wanted to solemnize his daughter's marriage during his lifetime and that may have led him to disinherit her." The Court in this judgement lent legitimacy that dowry or marriage expenses can be regarded as equivalent to property share. In other words dowry was considered to be legitimate ground for disinheritance. It cannot be denied

³⁹ *Chandania vs. Cyan Chand*, AIR 1989 Allahabad 75.

⁴⁰ *Khushbir Singh vs. The State*, AIR 1990 Delhi 59.

that dowry is undoubtedly a much smaller share than what a woman can actually inherit.

From the above legal cases on sex discrimination relating to women's inheritance rights in both movable and immovable property, it becomes evident that mostly, the formal model of equality has informed the judgements. Women's complex inscription within the legal system in contemporary India has been paradoxical. While largely women's legal claims were not entirely discarded, there have been cases where the judges have felt squeamish about the entry of question of law into the holy precincts of the family. For instance, in the *Harvinder Singh vs. Harminder Singh*⁴¹ case, the Court did not accept the fundamental concept of equal rights of women in the family. Srimati Basu has pointed out that women fare quite well within the legal process- especially women who have sufficient financial assets to take on court battles.⁴² However, the ideological motives and metaphors invoked with the legal regime of power to dispense sympathetic judgement in favour of women's property entitlement are problematic. Carol Smart evaluates the value of law when she comments, "law is never a stable ally, indeed it is hardly an ally at all....We should recognize that law is more a part of the problem (in the way it genders, sexes and sexualizes the male and the female body) than part of the solution".⁴³

However a wholesale rejection of the legal-juridical framework would be only counter-productive in the long run. Law is an arena of power, of potential change and a site for negotiation of dominant ideologies. Its importance as one of the spaces in which "discursive struggle to displace ideas of women's role and identities",⁴⁴ continues and cannot be denied. At the same time women's rights should not be collapsed entirely into the question of law and legislation on the assumption that the legal system is secular or gender neutral. The legal system itself establishes the equation between gender justice and law (arrogating to itself the role of social reformer) to legitimize the domination of

⁴¹ *Harvinder Singh vs. Harminder Singh*, AIR 1984 Delhi 66.

⁴² S. Basu, *op. cit.*, pp. 47-54.

⁴³ C. Smart, *op. cit.*, pp. 52.

⁴⁴ R. Kapur and B. Cossman, *op. cit.*, pp. 38.

the judiciary.⁴⁵ Apart from this, the role of the judges per se, in interpreting the legal cases is of utmost importance. It has been quite rightly commented by Justice M. Hidayatullah that "Judges have been swayed unconsciously by their own notions of equality and equal protection of law, by their reaction to the social structure of society, by their conception of protection of certain basic rights and even, by their respect ~~for~~ ^{for} legislature. To some the written word has a meaning which they do fit into their scheme of thinking while others read their own notions and theories into the law itself, some others look at law with blinkers on".⁴⁶

Formal laws do play an important part as they allow arbiters to use them to steer through the myriad issues involved in dispute. The role ~~that~~ ^{that} law can play and its limitations have been rightly observed in a perceptive analysis of justice, gender and justice that "without a fundamental reordering of cultural values, women cannot hope to secure true equality in employment opportunities, economic security and social status. In that constructive enterprise, law can play a modest but more effective role".⁴⁷

Greater transparency and fewer ambiguities in the law help to bridge the gap between the law, the judiciary and the changing social reality. Discrimination against women can be direct or indirect. Indirect discrimination requires particular scrutiny by the judiciary, there is a need to ensure not only formal but also substantive equality for women and for that purpose affirmative action may be adopted if necessary. Legal solutions to pervasive gender discrimination must take into account the ways in which such discrimination receives meaning in and through other structures of Indian society. However, law alone cannot effect changes in cultural practices without widespread state intervention.

⁴⁵ M.Mukhopadhyay, *Legally dispossessed: Gender, Identity and the Process of Law*, Stree, Calcutta, 1998.

⁴⁶ Justice M. Hidayatullah, *Judicial Methods*, New Delhi Institute of Constitutional and Parliamentary Studies, 1970, pp.25.

⁴⁷ D. Rhode, 'Justice, gender and the justice', in L. Lawra and H. Winifred (eds.) *Women, The Courts and Equality*, Oxford University Press, Delhi, 1987.

CONCLUSION

The primary identity of an Indian male or female is defined by his or her citizenship. This offers a promise of equality and justice within the nation's democratic constitutional framework. Repeatedly, however, this promise is undermined by the masculinity of the nationalist ideology, the fiction of citizenship and the malleability of law. Instead, of offering an alternative space, the nation often simply functions as an extension of family, caste and community structures and defines woman as belonging in the same way as their structures. The state indeed plays a pivotal role in upholding and sustaining patriarchal institutions and instruments, both by commission and omission. The dual and paradoxical attitude of the state towards the 'women's question' often was reflected in the legal and judicial dilution of women's rights.

The colonial period was considered as a watershed in gender relations. During this period modernity was set into motion through colonial and indigenous initiative. The battle of debates between the traditionalists and the modernists in redefining tradition and therefore, "Indianness" treated women 'neither as the subjects nor the objects' of the discourse but merely the 'site' on which the debates were conducted. And even as this recast tradition came to occupy the core of modern Indian identity, gender as the exemplary site became and remained central to political and cultural processes of identity formation. 'Woman' has become the arena in which community, caste and class battles are fought. In such a discursive space, the unity of nation requires the subordination of women. Legal reforms have been at the center of the agenda for strategizing gender justice in India. Legislation, it was felt can 'act directly as a norm setter, or indirectly, providing institutions which accelerate social change by making it more acceptable'.¹ Building a gender just society was perceived as part of the task of nation-building, of development and social reconstruction. The role of law in the whole process was perceived as 'non-ambivalent, well defined and positive'.² It is in this

¹ Government of India, 'Towards Equality: Report of the Committee on the Status of Women in India', 1975, pp.102.

² S. Mukhopadhyay, *In the Name of Justice- Women and Law in Society*, Manohar Publishers, New Delhi, 1998.

historical context that Hindu law was attempted to be reconstructed and reformed. The underlying motive was consolidation of the powers of the state and building an integrated nation. This crucial objective was achieved only by diluting women's rights, to arrive at a minimum level of consensus so that the agenda of reform could be effected without much opposition.

The new codified personal laws were the bedrock of new patriarchy. Personal laws and a flexible approach to customary law were used as a tool to legally buttress familial authority. The question of personal law in the newly independent nation was sought to be resolved through a comprehensive Hindu Code. Infact, the longest and most bitter debates were over women's property rights and these rights were the most compromised in the legislation that was passed. Though some of the most glaring discrepancies in the legal position of Hindu women were reformed it was a reform process in which the input of women themselves was marginalized and in which the rights of women were subordinated to the modernizing impulse of the Indian state.

The resultant Hindu Succession Act of 1956, which governed the laws relating to property rights of Hindu women, was hailed to have constituted a substantial move towards gender equality. The Act gave equal rights to males and females to succeed intestate property. It sought to unify the Dayabhaga and Mitakshara systems and purported to lay down a law of succession whereby sons and daughters would enjoy equal inheritance rights, as would brothers and sisters. However, a critical evaluation of it brought to the forefront that "without disrupting the coparcenary unit and without actually partitioning the coparcenary property, the Act intervenes to give some rights of inheritance to the female relations of coparceners at his death".³ Significant gender inequalities persist in the Hindu Succession Act of 1956. These include the retention of the system of Mitakshara coparcenaries, the right to will away property and denial of right to residence to daughters. These shortcomings indeed, endorse the patrilineal assumptions of a male ideology that informs this piece of legal reform.

³ L. Curroll, 'Daughter's Right of Inheritance in India: A Perspective on the Problem of Dowry', *Modern Asian Studies*, 1991, pp.798.

The attempt to remove gender discrimination in the Hindu Succession Act led to making of amendments to it in Kerala, Andhra Pradesh, Tamil Nadu, Maharashtra and Karnataka. Despite including many progressive features like abolition of coparcenary (as in the Kerala Model) and equal rights to daughter in coparcenary property (as in the Andhra Model), anomalies underlying the Kerala and Andhra Models of Succession reveals that women's right should not be collapsed entirely into the question of law and legislation on the assumption that the legal system is secular or gender-neutral. Infact, in view of limited assertion of equal rights of property by women, it becomes necessary to understand that unless there exists awareness and societal approval of majority of the people equal inheritance rights cannot be realized by a section of women socialized in the tradition of inequality. What is required is enabling factors to enhance women's agency to make choice about their property entitlements. The present debates about the UPA government's proposed amendment to the Hindu Succession Act, indeed proposes to take into account all such sources of gender inequalities to ensure gender-just regime of laws.

There is another major gender inequality found in the Hindu Succession Act of 1956 stemming from land legislation and land reform laws. The disjunction between women's legal rights in property in general and their rights in agricultural land is a crucial aspect of women's inheritance rights. The legal rights in agricultural land has to be understood under two broad parameters- (i) Devolution of agricultural land under tenancy; (ii) Fixation of ceilings and the assessment of surplus land. Both these aspects are fore grounded in the framework of understanding women's relationship to land. Women as a category are missing from most studies on agrarian society in India. As subject in their own right with agency or as significant contributor in agrarian production, women's invisibility remains a characteristic feature of Indian land legislation.

Why should women have rights to land? As a conclusion to the enquiry rural women's access to and control over land is seen not only as the single most empowering strategy in achieving gender parity but redressing existing power imbalance but also in encouraging women's autonomy and decision making while promoting economic independence, particularly where the very survival of females is dependent on women's

roles and contributions. A commitment to participatory democracy must necessarily involve a protection of the rights of livelihood and the right to life, itself of the landless victims of development. Here, democracy is defined as “the process by which individuals exercise control over the condition which affect their lives”.⁴ Hence, a just development policy would have to be one, which has provision for women’s access to productive resources and for their management of property.⁵ Furthermore, one needs to acknowledge that land rights are undoubtedly very important for women but at the same time with the increasing land scarcity, combined with diversified livelihood systems, conscious attempts to open opportunities and shift macro-policies to support women’s work in rural economy and consequently the gendered valuations of work and worth is the need of the day.

Property, whether movable or immovable, thus emerges as the corner stone as women’s self-empowerment to challenge numerous structures of oppression: the state, landlords, husbands and parents. The question of whether law initiates or reflects social change is very important in this context. The different legal cases that have been cited in the study reveals the ideological mechanisms that underlie the judicial verdicts relating to women’s property entitlements. Law indeed becomes a discursive site for struggle for women’s rights and also a space, which constructs myths about gendered identities. While the state should not be seen as the prime “protector”, it should not be demonized. It represents itself as at once the protector of religious freedom and the reformer of injustices based on religion. Women can infact use these paradoxes in the rhetoric of the state purposively as subversively. This is because the state is the guarantor of rights and moreover, the history of state intervention is itself partly a history of struggles against patriarchal struggles institutionalized by the state. The potential of law to liberate and emancipate women from oppressive social structures has to be explored relentlessly despite impediments imposed by the limitations of the legal system. There is a need to define and explore the feminist identity and strategies of feminism in the legal context in India at the current juncture. A feminist jurisprudence needs to be evolved through a

⁴ N. Chandhoke, ‘Why People should Have Rights’, *Economic and Political Weekly*, October 8, 1994.

⁵ E.G. Thukral, ‘Development, Displacement and Rehabilitation: Locating Gender’, *Economic and Political Weekly*, June 15, 1995.

reinterpretation of the concept of equality, protection and status. An independent mechanism to ensure accountability has to be evolved to check inadequacies in the letter of the law as well as in the delivery of justice. However, effective agency on the part of women can be realized only when women have greater ability to question, analyse and act on the structures of patriarchal constraints in their lives. On the whole, the socially embedded nature of property (inheritance) with kinship and marriage systems, its strong association with cultural identities and symbolism that makes it different from other aspects of gender inequality as violence, sexual harassment or health status. The arena of property rights becomes more ambiguous and yet more significant.

APPENDIX I

**ORAL AND WRITTEN OPINIONS OF THE DRAFT HINDU CODE RECEIVED
BY THE SECOND RAU COMMITTEE, 1945**

	Draft Hindu code		Absolute Estate for Windows		Monogamy		Divorce*	
	No	%	No	%	No	%	No	%
Totals for against	224	37	49	31	75	43	108	36
	375	63	107	69	99	57	195	64
Women** for Against	32	71	10	59	21	68		
	13	29	7	41	10	32		
Men** for against	192	35	39	28	54	38		
	362	65	100	72	89	62		

Note:

* On this clause the data from most regions were not disaggregated by sex.

**Includes both initial women and women's organizations

*** Includes both individual men and organisation other than women's organizations.

Source: GOI (1947): Report o the Hindu Law Committee.

APPENDIX II

PARTY AFFILIATION OF HINDU CODE BILL SPEAKERS SEPTEMBER 1951

Party	Supported HCB	Opposed HCB
Congress	7	14
Scheduled Castes Fed.	1	-
Hindu Mahasabha	-	1
Akali Dal	-	1
Independent	1	1
Don't know	1	2
Total	10	19

APPENDIX III

Devolution of Agricultural Tenancies in Land Enactments, By State

State	Agricultural Tenancies: First Order Heirs	Relevant Act
<i>Northwest India</i> Delhi	Male lineal descendants in the male line of descent	The Delhi Land Reforms Act, 1954 (Act No 8 of 1954)
Haryana	Male lineal descendants in male line of descent	The Punjab Tenancy Act 1887 (Act No 16 Of 1887), Amended Up To 1969; And The Pepsu Tenancy And Agricultural Land Act 1955 (Pepsu Act 13 of 1955)
Himachal Pradesh	Male lineal descendants in male line of descent	The Himachal Pradesh Tenancy and Land Reform Act 1972 (Act No 8 of 1974)
Jammu & Kashmir	Male lineal descendants in male line of descent	The Jammu & Kashmir Tenancy Act 1980 (Act No 2 of 1980)
Punjab	Male lineal descendants in male line of descent	The Punjab Tenancy Act 1887 (Act No 16 of 1887), amended up to 1969; and the Pepsu Tenancy and Agricultural Land Act 1955 (Pepsu Act 13 of 1955)
Rajasthan	Personal law applies	The Rajasthan Tenancy Act 1955 (Act No 3 of 1955)
Uttar Pradesh	Male lineal descendants in male line of descent	The Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (UP Act No1 of 1951), amended up to 1987

<i>East, west and central India</i>		
Bihar	No specification of the order of devolution; but the tenancy laws state that the devolutions of occupancy rights shall be in the same manner as other immovable property, unless custom to the contrary is established	The Bihar Tenancy Act 1885 (Act No 8 of 1885) amended up to 1987; and The Chota Nagpar Tenancy Act 1908 (Bengal Act No 6 of 1908)
Gujarat	No specification of the order of devolution; can be presumed that the personal law applies	The Bombay Tenancy and Agricultural Lands Act, 1948 (Act No 67 to 1948)
Madhya Pradesh	Personal law applies	The Madhya Pradesh Land Revenue Code, 1959 (Act No 20 of 1959), as amended in 1961
State	Agricultural Tenancies: First Order Heirs	Relevant Act
Maharashtra		
- Vidarbha region	Can be presumed that the personal law applies; see explanatory note	The Bombay Tenancy and Agricultural Lands (Vidarbha region) Act, 1958 (Bombay Act no 99 of 1958) as amended up to 1981
Bombay region	No specification of the order of devolution; can be presumed that the personal law applies	The Bombay Tenancy and Agricultural Lands Act, 1948 (Act No 67 of 1948)
-Marathawada region (earlier in former Hyderabad state)	Can be presumed that the personal law applies: see explanatory note	The Hyderabad Tenancy and Agricultural Lands (Amendment) Act, 1957 (Bombay Act No 32 of 1958)

Orissa	No specification of the order of devolutions; but the tenancy laws specify that devolution of occupancy rights shall be in the same manner as other immovable property, unless custom to the contrary is established	Orissa Tenancy Act 1913 (B and O Act no 2 of 1913)
West Bengal	No specification of the order of devolution; can be presumed that the personal law applies	The Bengal Tenancy Act 1885 (Act No 8 of 1885) and West Bengal Land Reforms Act 1955 (Act No 10 of 1956)
<i>South India</i>		
Andhra Pradesh	Andhra area: no specification of the order of devolution; can be presumed that the personal law applies Telangana area for Hindus the HAS applies.	The Andhra Pradesh (Andhra area) Tenancy Act 1956 (Act, No 8 of 1956) The Andhra Pradesh (Telangana area) Tenancy and Agricultural Lands Act 1950 (Act No 21 of 1950)
Karnataka	No specification of the order no devolution; can he presumed that the personal law applies	The Karnataka Land Reforms Act 1961 (Act No 10 of 1962), amended upto March 1980
Kerala	No specification of the order of devolution; can be presumed that the personal law applies	Kerala Land Reforms Act 1963 (Act No 1 of 1964)
Tamil Nadu	No specification of the order of devolution; can be presumed that the law applies	The Tamil Nadu Tenants and Ryots Protection Act 1949) Act No 24 of 1949); The Tamil Nadu Cultivating Tenants (Protection) Act 1955

Note:

1. The definition of land under tenancy in these states is very broad and effectively covers all agricultural land (see discussion in text).

2. When initially passed, the Madhya Pradesh Land Revenue Code of 1959 specified an order of devolution wherein the Class I heirs (for both owned and tenancy land) were as follows: son; widow (or widower); predeceased son's son and widow; son and widow of predeceased son's predeceased son; and widow of predeceased son's predeceased son's predeceased son. Since the 1961 amendment, however, devolution is according to personal law for the lands of both tenure holders and occupancy tenants.

Section 54 of the Bombay tenancy and Agricultural Lands (Vidarbha region) Act, 1958, specifies that if the deceased tenant was a member of an undivided Hindu family the tenancy would devolve on the surviving members of that family; otherwise it would pass to "his heirs". In the case of an occupancy tenant the holding would be inherited in accordance with his personal law.

Since the Hindu Succession Act had already been passed in 1956, that is prior to this Tenancy Act, I am taking the view that even for Hindu tenants who are not occupancy tenants, the HAS would apply (with the relevant provisions with respect to survivorship applying if the tenant was a member of an undivided Hindu family).

Similarly under the Hyderabad tenancy and agricultural Lands Act 1950, as amended by the Hyderabad tenancy and Agricultural lands (Amendment) Act, 1957, Section 40 specifies that if the deceased tenant was a member of an undivided Hindu family the tenancy would devolve on the surviving members of that family; otherwise it would pass to "his heirs". This 1957 Act does not contain a separate specification for an occupancy tenant. But here also, since the Hindu Succession Act had already been passed, I am taking the view that if the tenant was a member of an undivided Hindu family the relevant provisions in the Hindu Succession Act respect to survivorship would apply.

3. See not 34 in the text.

APPENDIX IV

Definition of Family and Treatment of Adult Sons in Land Ceiling Laws

State	Definition of family	Treatment of Adult sons	Relevant Act
<i>Northwest India</i> Delhi	Cultivator, spouse, minor sons, unmarried minor daughters	Family gets additional land	The Delhi Land Holdings (Ceiling) Act 1960 (Act No. 24 of 1960)
Haryana	Cultivator, spouse, minor sons, unmarried minor daughter	Family gets additional land if son is living with parents; son counts as separate unit if living separately	Haryana Ceiling on Holding Act 1972 (Haryana No. 26 of 1972), as amended up to 1976.
Himachal Pradesh	Cultivator, spouse, minor children	Separate unit (If son is dead, his widow and children receive the same consideration)	Himachal Pradesh Ceiling on Land Holding act (Act No. 17 of 1976)
Jammu & Kashmir	Cultivator, spouse, minor sons, unmarried daughters, some major sons ¹	---	Jammu & Kashmir Agrarian reforms Act 1976 (Act No. 17 of 1976)
Punjab	Cultivator, spouse, minor sons, unmarried minor daughters	Family gets additional land	The Punjab Land reforms Act 1972, (Punjab Act No. 10 of 1973)
Rajasthan	Cultivator, spouse, minor sons, unmarried minor daughters	Separate unit (if son is dead his widow and children receive the same consideration)	Rajasthan Imposition of ceiling on Agricultural Holdings Act 1973 (Rajasthan Act No. 11 of 1973)

Uttar Pradesh	Cultivator, spouse, minor sons, unmarried minor daughters	Family given additional land; and if the son is dead his minor sons or unmarried minor daughters (who are not tenure holders, themselves or who hold < 2 ha irrigated land) receive the same consideration	The Uttar Pradesh (Imposition of Ceiling on Land Holdings) Act 1960 (Uttar Pradesh Act No. 1 of 1960 as amended up to 1976.
<i>East, West and central India</i>			
Bihar	Cultivator, spouse, minor children	Separate unit	Bihar Land reforms (Fixation of Ceiling and Acquisition of Surplus Land) Act 1961 (Bihar act of 1962)
Gujarat	Cultivator, Spouse, minor sons, unmarried minor daughters; widow of predeceased son. Orphaned minor grandson and unmarried granddaughter in the male line	Separate unit	The Gujarat Agricultural Lands Ceiling Act 1960 (Gujarat Act no 27 of 1961), as amended up to 19
Madhya Pradesh	Cultivator, Spouse, Minor children	Separate Unit	Madhya Pradesh Ceiling on Agricultural Holding Act 1960 (Act No. 20 of 1960), as amended upto 1961.
Maharashtra	1) Cultivator, spouse, minor sons, Unmarried minor daughters; or (2) Hindu undivided family	Separate Unit HUF estate each person who is entitled to a share on partition is taken as holding land separately as if the estate is divided	The Maharashtra Agricultural lands (Ceiling on Holdings) Act 1961 (Act no. 27 of 1961) as amend up to 1975.

Orissa	Cultivator, spouse, children except major married sons separated before September 26, 1970. In relation to mother, family includes married daughters	---	The Orissa Land Reforms Act 1960 (Orissa Act No 1 of 1960)
West Bengal	Cultivator, spouse, minor sons unmarried daughters and some adult sons and their families ²	--	The West Bengal Land reforms Act 1955 (West Bengal Act no. 10 of 1956), as amended up to 1986
<i>South India</i>			
Andhra Pradesh	Cultivator, spouse, minor sons, unmarried minor daughters	Separate unit	Andhra Pradesh Land reform (Ceiling on Agriculture Holdings) Act 1973 (Act No. 1 of 1973).
Karnataka	Cultivator, spouse, minor sons, unmarried daughters	--	Karnataka land reforms Act 1961 (Act No 10 of k1962), as amended up to 1980
Kerala	Cultivator, spouse, unmarried minor children	Unmarried adult sons, and unmarried adult daughters counted as separate units	Kerala Land Reforms Act 1963 (Act No. 1 of 1964)
Tamil Nadu	Cultivator, Spouse, Minor sons, unmarried daughters; and orphaned minor grandsons and orphaned unmarried granddaughters in the male line	Separate unit	The Tamil Nadu Land Reforms (Fixation of Ceiling on Land Holdings) Act 1971 (Act No. 58 of 1961).

Note:

1. It excludes major sons separated from the father on or before September 1, 1971 and holding land separately in their own names.
2. In West Bengal, the family unit is defined as including the following categories of adult sons and their families: (1) unmarried adult son who does not hold land as a raiyat; (2) married adult son where neither he nor his wife or minor son or unmarried daughter hold land as raiyats; (3) the widow of a son where neither the widow nor her minor son or unmarried daughter hold land as raiyats; and (4) minor son or unmarried daughter of a deceased son and his deceased wife, where the parents did not hold land as raiyats and the children too do not hold land as raiyats. Also an adult unmarried man or woman who has been divorced and has not remarried counts as a separate unit, provided such person is the guardian of a minor son or a unmarried daughter, or both.

BIBLIOGRAPHY

PRIMARY SOURCES

GOVERNMENT DOCUMENTS

AIR (1961): 'Kaur Singh, Gajjan Singh vs. Jaggar Singh, Kehar Singh', Punjab 489, *All India Reporter*.

AIR (1983): 'Sonubhai Yeshwant Jabhar vs. Bala Govinda Yadav and Others', Bombay 156, *All India Reporter*.

AIR (1984): 'Harvinder Singh vs. Harminder Singh', Delhi 66, *All India Reporter*.

AIR (1985): 'Pratap Singh vs. Union of India', S.C. 1695, *All India Reporter*.

AIR (1986a): 'Kunjalata Purohit vs Tahsildar, Sambalpur and Others', Orissa 115, *All India Reporter*.

AIR (1988): 'A. Venkappa Bhatta vs. Gangamma', Kerala 133, *All India Reporter*.

AIR (1988): 'Jote Dadu Navale vs. Monikabai Kashinath Mohite', Bombay 348, *All India Reporter*.

AIR (1989): 'Chandania vs. Cyan Chand', Allahabad 75, *All India Reporter*.

AIR (1989): 'Paramma vs. Chikarangappa', Karnataka 63, *All India Reporter*.

AIR (1990): 'Khushbir Singh vs. The State', Delhi 59, *All India Reporter*.

AIR (1990): 'Ram Piari vs. Bhawant', Supreme Court 1742, *All India Reporter*.

AIR (1991): 'Sushila Bala Saha vs. Saraswati Mondal', Calcutta 166, *All India Reporter*.

AIR (1996): 'Narshimhamurthy vs. Sushilabilla', SC 1826, *All India Reporter*.

AIR (1996): 'Savita Samvedi vs. Union of India', 680, *All India Reporter*.

Government of India (1941): *Report of the Hindu Law Committee, 1941*, Government of India Press, Simla.

Government of India (1947): *Report of the Hindu Law Committee, 1947*, Government of India, New Delhi.

Government of India (1951): *Parliamentary Debates, VII, Part 2, Debate on Hindu Code*, February 5-March 2.

Government of India (1974): *Towards Equality: Report of the Committee on the Status of Women in India*, Department of Social Welfare, Ministry of Education and Social Welfare, December.

Government of India (1976): *Report of the National Commission on Agriculture, 1976, 15, Agrarian Reforms*, Ministry of Agriculture and Irrigation, New Delhi.

Government of India (2004): *The Constitution of India*, P .M. Bakshi (ed.), Universal Book Traders, Delhi.

Government of India, (1941): *Report of the Hindu Law Committee*, Government of India Press, Simla.

Government of India, (1949): *Constituent Assembly of India (Legislative) Debates II, Part 2, Debates on Hindu Code Bill*, March 1.

Law Commission of India (2000): *Property Rights of Women: Proposed Reform under the Hindu Law*, 174th Report, No.6 (3) (59) / 99 LC (LS), May 5.

Supreme Court Cases (SCC) (1980): 'Ambika Prasad Mishra vs The State of U.P. and Others', *Supreme Court Cases*, 719, 3, pp 719-34.

SECONDARY SOURCES**BOOKS**

Agarwal, B. (1994): *A Field of One's Own: Gender and Land Rights in South Asia*, Cambridge University Press, Cambridge.

Agnes, F. (1999): *Law and Gender Inequality: The Politics of Women's Rights in India*, Oxford University Press, Delhi.

Basu, S. (2001): *She Comes to Take Her Rights*, Kali for Women, New Delhi.

Bhattacharjee, A.N. (1994): *Hindu Law and the Constitution*, Eastern Law House, Calcutta, pp-17.

Carr, M., M. Chen and R. Jhabvala (ed.) (1996): *Speaking Out- Women's Economic Empowerment in South Asia*, IT Publications, U.K.

Chakraborti, A.K., A.K. Mukhopadhyay and D. Roy (2003): *Beneficiaries of Land Reforms: The West Bengal Scenario*, State Institute of Panchayats and Rural Development, Kalyani, Spandan, Calcutta.

Chaudhury, R.L. (1961): *Hindu Women's Right to Property: Past and Present*, Firma K.L Mukhopadhyay, Calcutta.

Chen, M. (2000): *Perpetual Mourning: Widowhood in Rural India*, Oxford University Press, New Delhi.

Chen, M. (ed.) (1998): *Widows in India: Social Neglect and Public Action*, Sage Publications, New Delhi.

D.A. Low (ed.) (1988): *The Indian National Congress: Centenary Hindsight*, Oxford Publishing Press, Delhi.

Derrett, J.D.M. (1968): *Religion, Law and State in India*, Faber and Faber, London.

Desai, S.T. (ed), (1994): *Mulla's Principles of Hindu Law*, Asia Publishing House, Bombay.

Everett, J.M. (1978): *Women and Social Change in India*, Heritage Publishers, Delhi.

Frug, M. J. (1992): *Post- Modern Legal Feminism*, Routledge, New York.

- Galanter, M. (1984): *Competing Equalities, Law and Backward Classes in India*, Oxford University Press, Delhi.
- Gandhi, N and N. Shah (1991): *The Issues at Stake-Theory and Practice in Contemporary India*, Kali for Women, New Delhi.
- Goody, J. and S.J. Tambiah (1973): *Bridewealth and Dowry*, Cambridge University Press, Cambridge.
- Jassal, S.T. (2001): *Daughters of Earth: Women and Land in Uttar Pradesh*, Manohar, New Delhi. Oakley, A. (1972): *Sex, Gender and Society*, Temple Smith, London.
- Kabeer, N. (2003): *Gender Mainstreaming in Poverty Eradication and the Millennium Development Goals*, Commonwealth Secretariat, London.
- Kane, P.V. (1946): *History of Dharmashastras*, Asia Publishing House, Bombay.
- Kapur R. (1996) (ed.) *Feminist Terrains in Legal Domains*, Kali For Women, New Delhi, pp 184-209.
- Kapur, R. and B.Cossman (1996): *Subversive Sites: Feminist Engagements with Law in India*, Sage Publications, New Delhi.
- Kishwar, M. (1999): *Off the beaten Track: Rethinking Gender Justice for Indian Women*, Oxford University Press, New Delhi.
- MacKinnon, C. (1989): *Towards a Feminist Theory of the State*, Harvard University Press, Cambridge.
- Menon, N. (1999): *Gender and Politics in India*, Oxford University Press, Delhi.
- Minault, G. (1981): *The Extended Family: Women and Political Participation in India and Pakistan*, South Asia Books, Missouri.
- Mukhopadhyay, M. (1998): *sLegally dispossessed: Gender, Identity and the Process of Law*, Stree, Calcutta.
- Mukhopadhyay, S. (1998): *In the Name of Justice-Women and Law in Society*, Manohar Publishers, sNew Delhi.

- Mulla, D.F. (1982): *Principles of Hindu Law*, 15th Edition by S.T.Desai, N.Tripathi, Bombay, pp.980.
- Nair, J. (1996): *Women and Law in Colonial India*, Kali for Women, New Delhi.
- Sivaramayya, B. (1973): *Women's Rights of Inheritance In India: A Comparative Study of Equality and Protection*, Madras Law Journal Office, Madras.
- Oakley, A. (1972): *Sex, Gender and Society*, Temple Smith, London.
- Parashar, A. (1992): *Women and Family Law Reform in India*, Sage Publications, Delhi.
- Rao ,N. and L. Rurup (eds.), *A Just Right: Women's Ownership and Natural Resources and Livelihood Security*, Friderich Ebert Stiftung, New Delhi, pp135-69.
- Rao,N., L. Rarup and R. Sudarshan (ed).(1996): *Sites of Change- The Structural Context for Empowering Women in India*, FES and UNDP, New Delhi.
- Sarkar, L. and B. Sivaramayya (ed.) (1996): *Women and Law- Contemporary Problems*, Vikas Publishing House, New Delhi.
- Sarkar, S. (1993): *A Treatise on Hindu Law*, Banerjee and Co., Calcutta, pp-12.
- Sathymurthy, T.V. (ed.) (1996): *Class Formation and Political Transformation in Post-Colonial India*, Oxford University Press, Delhi.
- Shahra, R. (2000): *Gendered Poverty and Well- Being*, Blackwell Publishers, Oxford.
- Sharma, U. (1980): *Women, Work and Property in North-West India*, Tavistock Publication, London and New York.
- Smart, C. (1989): *Feminism and the Power of Law*, Routledge, London.
- Tanwar, R. (ed.) (1998): *Women- Human Rights, Religion and Violence*, Nirmal Book Agency, Kurukshetra.
- Thorner A. and M. Krishnaraj (2000): *Ideals, Images and Real Lives*, Orient Longman, Mumbai.
- Thorner, D. and A. Thorner (1962): *Land and Labour in India*, Asia Publishing House, Bombay

V.Majumdar (ed.), *Women and Rural Transformation: Two Studies*, Concept, New Delhi, pp.173.

Wharton, A.S. (2005): *The Sociology of Gender*, Blackwell Publishers, Oxford.

Winifred, H. and L. Lawra (ed.)(1987): *Women, The Courts and Equality*, Oxford University Press, Delhi.

ARTICLES

Agarwal , B. (1995): 'Women's Legal Rights in Agricultural Land in India', *Economic and Political Weekly, Review of Agriculture*, March 25.

Agarwal, B. (1994): 'Gender and Command over Property- An Economic analysis of South Asia', *World Development*, Vol. 22.

Agarwal, B. (1998): 'Disinherited Peasants, Disadvantaged Workers: A Gender Perspective on Land and Livelihood', *Economic and Political Weekly*, 33(13), March 26.

Agarwal, B. (1998): 'Widows versus Daughters or Widows as Daughters: Property , Land and Economic Security in Rural India', *Modern Asian Studies*, Vol. 1 (Part 1), pp. 48.

Agnihotri, I. (1996): 'Bringing Land Rights Centre-Stage', *Economic and Political Weekly*, 31(9), March 2.

Alaka and Chetna (1987): 'When Women Get Land- A Report from Bodhgaya', *Manushi*, No.40, pp.25-26.

Bardhan, K. (1985): 'Women's Work, Welfare Tradition and Change in India', *Economic and Political Weekly*, December 24-28.

Brown, J. and S. Das Chowdhury (2002): ' Women's Land Rights in West Bengal: A Field Study', *RDI Report on Foreign Aid and Development*, No. 116, Rural Development Institute, Washington.

Chandhoke N. (1994): 'Why People should have Rights', *Economic and Political Weekly*, October, 8.

- Chowdhury, P. (1993): 'Conjugality, Law and State: Inheritance Right as the Pivot of Control in Northern India', *National Law School Journal*, Special issue.
- Chowdhury, P. (1997): 'Enforcing Cultural Codes: Gender and Violence in Northern India', *Economic and Political Weekly*, May 10.
- Curroll, L.(1991): 'Daughter's Right of Inheritance In India: A Perspective on the Problem of Dowry', *Modern Asian Studies*, pp.798
- D.N. (1990): 'Land Struggle in Basuhari Continues', *Economic and Political Weekly*, August 25.
- Delphy, C. (1993): 'Rethinking Gender', *Women's Studies International Forum*, Vol.16, No.1.
- Fineman, M. (1992): 'Feminist Theory in Law: The Difference it Makes', *Columbia Journal of Gender and Law*, 2,1, pp 1-23.
- Gupta, J. (1993): Land, Dowry and Labour: Women in the Changing Economy of Midnapur', *Social Scientist*, 21, pp. 74-90.
- Gupta, J. (2002): 'Women Second in Land Agenda', *Economic and Political Weekly*, May 4.
- Gupta, R. K. (1969): 'Justice: Unequal but Inseparate', *Journal of Indian Law Institute*, pp 57-76.
- Jahwari, S. (1979): 'Women and Constitutional Safeguards in India', *Andhra Law Times Journal*, 40, pp11.
- Jaising, I. (2004): 'Unequal Reforms', *Communalism Combat*, Vol. No. 14, January.
- Kapur, R. and B.Cossman (1993): 'On Women, Equality and the Constitution- Through the Looking Glass of Feminism', *National Law School Journal*, Special Issue.
- Katzenstein, M. F. (1978): 'Towards Equality? Cause and Consequence of the Political Prominence of Women in India', *Asian Survey*, May 5.
- Kishwar, M. and R. Vanita (1990): 'Inheritance Rights of Women : A Response to Some Commonly Expressed Fears', *Manushi*, Vol. 57.

- Kishwar. M. (1987): 'Toiling Without Rights- Ho Women of Singhbhum', *Economic and Political Weekly*, January 31.
- Kodoth, P. (2001): 'Gender, Family and Property Rights: Questions from Kerala's Land Reforms', *Indian Journal of Gender Studies*, Vol.8, January- June.
- Kodoth, P. (2005): 'Fostering Insecure Livelihoods: Dowry and Female seclusion in Left Developmental Contexts in West Bengal and Kerala', *Economic and Political Weekly*, June 8.
- Kodoth., P.(2004): 'Gender, Property Rights and Responsibility for Farming in Kerala', *Economic and Political Weekly*, Vol.39 (19), pp.1911-20.
- Manimala (1983): 'The Story of Women's Participation in the Bodhgaya Movement', *Manushi*, Vol.3.
- Manimala (1983): 'Zameen Kenkar? Jote Onkar! Women's Participation in the Bodhgaya Land Struggle', *Manushi*, 14, January-February, pp 2-16.
- Mearns , R. (1999) : 'Access to Land in Rural India - Policy Issues and Options', *World Bank Policy Research Working Paper* 212, World Bank, Washington D.C.
- Minnow, M. (1985): 'Learning to Live with the Dilemma of Difference- Bilingual and Special Education', *Law and Contemporary Problems*, pp 157-207.
- Omvedt, G. (1981): 'Effects of Agricultural Development on the Status of Women', Paper prepared for the *International Labour Office Tripartite Asian Regional Seminar on Rural Development and Women*, Mahabaleshwar, April 6-11.
- Omvedt, G. (1986): 'Patriarchy: The Analysis of Women's Oppression', *The Insurgent Sociologist*, No. 13, Spring, pp 38.
- Panda, P.K. (2003): 'Rights-Based Strategies for Prevention of Domestic Violence', Working Paper, *Centre for Development Studies*, Thiruvananthapuram.
- Plumwood, V. (1989): 'Do We Need a Sex Gender Distinction?', *Radical Philosophy*, Vol.51, Spring.
- Prasad, P.H. and G.B. Rodgers (1987): 'Class, Caste and Landholding in the Analysis of Rural Economy', *International Labour Organisation*, Working Paper, Geneva.

Rao, N. (2005): 'Gender Equality, Land Rights and Household Food Security', *Economic and Political Weekly*, June 18.

Reddy, H. (1982): 'Equality Doctrine and Indian Constitution', *Andhra Law Times*, 45, pp 57-58.

Rosen, L. (1978): 'Law and Social Change in the New Nations', *Comparative Studies in Society and History*, 20(1), pp 3-28

Sen, G. (1999): 'Engendering Poverty Alleviation- Challenges and Opportunities', *Development and Change*, 30(3): 695-692.

Sen, G. and C. Sen (1985): 'Women's Domestic Work and Economic Activity: Results from the National Sample Survey', *Economic and Political Weekly*, 20 (17), *Review of Women's Studies*, April 27, pp. WS-49-WS-56.

Sivaramayya, B. (1997): 'Of daughter, Sons and Widows Dissimilation in Inheritance Laws', *Manushi*, May-June.

Sivaramayya, B. (1997): 'Coparcenary Rights to Daughter-Constitutional and Interpretational issues', 3 SCC (J), pp 25.

Thukral, E.G. (1995): 'Development, Displacement and Rehabilitation: Locating Gender', *Economic and Political Weekly*, June 15.

Whitehead, A. and N. Kabeer (2001): 'Living with Uncertainty: Gender, Livelihoods and Pro-poor Growth in Rural Sub-Saharan Africa', IDS Working Paper 134, *Institute of Development Studies*, Brighton.