

# PROPERTY RIGHTS OF INDIAN WOMEN

By  
Shruti Pandey<sup>1</sup>

## Introduction

Much like those of women of any other country, property rights of Indian women have evolved out a continuing struggle between the status quoist and the progressive forces. And pretty much like the property rights of women elsewhere, property rights of Indian women too are unequal and unfair: while they have come a long way ahead in the last century, Indian women still continue to get less rights in property than the men, both in terms of quality and quantity.

What may be slightly different about the property rights of Indian women is that, alongwith many other personal rights, in the matter of property rights too the Indian women are highly divided within themselves. Home to diverse religions, till date, India has failed to bring in a uniform civil code. Therefore every religious community continues to be governed by its respective personal laws in several matters – property rights are one of them. Infact even within the different religious groups, there are sub-groups and local customs and norms with their respective property rights. Thus Hindus, Sikhs, Buddhists and Jains are governed by one code of property rights codified only as recently as the year 1956, while Christians are governed by another code and the Muslims have not codified their property rights, neither the Shias nor the Sunnis. Also, the tribal women of various religions and states continue to be governed for their property rights by the customs and norms of their tribes. To complicate it further, under the Indian Constitution, both the central and the state governments are competent to enact laws on matters of succession and hence the states can, and some have, enacted their own variations of property laws within each personal law.

There is therefore no single body of property rights of Indian women. The property rights of the Indian woman get determined depending on which religion and religious school she follows, if she is married or unmarried, which part of the country she comes from, if she is a tribal or non-tribal and so on.

Ironically, what unifies them is the fact that cutting across all those divisions, the property rights of the Indian women are immune from Constitutional protection; the various property rights could be, as they indeed are in several ways, discriminatory and arbitrary, notwithstanding the Constitutional guarantee of equality and fairness. For by and large, with a few exceptions, the Indian courts have refused to test the personal laws on the touchstone of Constitution to strike down those that are clearly unconstitutional and have left it to the wisdom of legislature to choose the time to frame the uniform civil code as per the mandate of a Directive Principle in Article 44 of the Constitution.

Following is an attempt to chart this interesting interplay of socio-legal forces leading to the property rights of Indian women as they stand today, and the challenges ahead.

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<sup>1</sup> Shruti Pandey is a lawyer practising in New Delhi, in the Supreme Court of India and other Delhi courts, on various human rights issues. She is the National Director of the Women's Justice Initiative of Human Rights Law Network, India. She is also actively involved in out of court advocacy work through capacity building and writing.

## **Indian Constitution: Framework of Equality, formal and substantive, through affirmative action, positive discrimination**

Indian Constitution has a substantially elaborate framework to ensure equality amongst its citizens. It not only guarantees equality to all persons, under Article 14 as a fundamental right, but also expands on this in the subsequent Articles, to make room for affirmative action and positive discrimination.

Article 14 of the Constitution of India states that: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." In practice this guarantee has been read to infer 'substantial' equality as opposed to 'formal' equality, as judicially explained and elaborated upon in several judgments of the Supreme Court of India as well as the Indian High Courts. The latter dictates that only equals must be treated as equals and that unequal may not be treated as equals. This broad paradigm itself permits the creation of affirmative action by way of special laws creating rights and positive discrimination by way of reservations in favour of weaker classes of society.

This view is strengthened by Article 15 of the Constitution, which goes on to specifically lay down prohibition of discrimination on any arbitrary ground, including the ground of sex, as also the parameters of affirmative action and positive discrimination:

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

- (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
- (2) No citizen shall on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to:
  - a) access to shops, public restaurants, hotels and places of entertainment; or
  - b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of state funds or dedicated to the use of general public.
- (4) Nothing in this Article shall prevent the state from making any special provision for women and children.
- (5) Nothing in this Article or in clause (2) of Article 29 shall prevent the state from making any special provision for advancement of any socially or educationally backward classes of citizens or for Scheduled Castes and Scheduled Tribes."

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

The Indian courts have also taken an immensely expansive definition of fundamental right to life under Article 21 of the Constitution as an umbrella provision and have included within it right to everything which would make life meaningful and which prevent it from making it a mere existence, including the right to food, clean air, water, roads, health, and importantly the right to shelter/ housing<sup>2</sup>.

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<sup>2</sup> For instance in *Shantistar Builders v. Narayan Khimalal Tortame*: (1990) 1 SCC 520), *P.G. Gupta v. State of Gujarat* ((1995) Supp 2 SCC 182), *Chameli Singh v. State of U.P.*: (1996) 2 SCC 549, *Nawab Khan's case (Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan & Ors.*: (1997) 11 SCC 121)), right to education ( *Bandhua Mukti Morcha v. Union of India* (1984 3 SCC 161), *Mohini Jain v. State of Karnataka* (1992) 3 SCC 666) and *Unnikrishnan J.P. & Ors. v. State of*

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

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

### **The Present Position Of Property Rights Of Indian Women:**

#### **Hindu women's property rights:**

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

Prior to the Hindu Succession Act, 1956 'Shastric' (Hindu Canonical) and customary laws that varied from region to region governed the Hindus. Consequently in matters of succession also, there were different schools, like Dayabhaga in Bengal in eastern India and the adjoining areas; Mayukha in Bombay, Konkan and Gujarat in the western part and Marumakkattayam or Nambudri in Kerala in far south and Mitakshara in other parts of India, with slight variations.

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

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Andhra Pradesh & Ors. Union of India (1993) 1 SCC 645), right to health (C.E.S.C. Ltd. v. Subhash Chandra Bose (1992) 1 SCC 441, Consumer Education & Research Centre & Ors. v. Union of India & Ors.: (1995) 3 SCC 42), right to food (People's Union for Civil Liberties v. Union of India & Ors.: Writ Petition No. 196 of 2001), right to clean water (Attakoya Thangal Vs. Union of India [1990(1) KLT 580]

Thus the concept of a birthright, at which a person acquires rights on his birth even if the ancestor is still alive, is fundamental to an understanding of the coparcenary. In fact, the birth of a male child diminishes the right of the ancestor instantly, as each coparcener has an equal share in the undivided whole. As contrasted with this, inheritance, whether testamentary or intestate, is a right that accrues on the death of a person. Inheritance can only be in that property which a man leaves on his death. Until then, a person has an unrestricted right to enjoy the property or alienate it.

The Hindu Succession Act enacted in 1956 was the first law to provide a comprehensive and uniform system of inheritance among Hindus and to address gender inequalities in the area of inheritance – it was therefore a process of codification as well as a reform at the same time. Prior to this; the Hindu Women's Rights to Property Act, 1937 was in operation and though this enactment was itself radical as it conferred rights of succession to the Hindu widow for the first time, it also gave rise to lacunae which were later filled by the Hindu Succession Act (HSA). HSA was the first post-independence enactment of property rights among Hindus – it applies to both the Mitakshara and the Dayabhaga systems, as also to persons in certain parts of South India previously governed by certain matriarchal systems of Hindu Law such as the Marumakkatayam, Aliyasantana and Nambudri systems.

The main scheme of the Act is:

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

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

In the case of *V. Tulasamma & Ors. versus V. Sessa Reddi*<sup>3</sup> the Supreme Court of India clearly laid down the scope and ambit of Sections 14(1) and (2) of the HSA, in which a fine distinction was made by the court recognizing the woman's right to property through her pre-existing right to be maintained.

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<sup>3</sup> (1977) 3 SCC 99

The Court applied the exception only for the cases where an instrument created an independent and new title in favour of females for the first time and ruled it out where the instrument concerned merely confirmed, endorsed, declared or recognized pre-existing rights, like the right to maintenance.

This case arose from the facts where, under a compromise in a suit for maintenance filed by the appellant Tulasamma, against her deceased husband's brother, who was in a state of jointness in the ownership of properties with her husband at the time of husband's death, Tulasamma was allotted certain properties, but as per the written terms, she was to enjoy only a limited interest in it with no power of alienation at all. According to the terms of the compromise the properties were to revert to the brother after the death of Tulasamma. Subsequently Tulasamma continued to remain in possession of the properties even after coming into force of the HAS and after the HSA was enacted Tulasamma alienated her shares to some one else. The alienation was challenged by the husband's brother on the ground that she had got a restricted estate only under the terms of the compromise and her interest could not be enlarged into an absolute interest by the provisions of the HSA in view of exception to Section 14 of the Act.

In declining the challenge by the brother, the Supreme Court upheld the absolute right of Tulasamma. Infact the relevant observations in the judgment deserve to be extracted in extenso (sub para (1) of in para 62):

“The Hindu female's right to maintenance is not an empty formality or an illusory claim being conceded as a matter of grace and generosity, but is a tangible right against property which flows from the spiritual relationship between the husband and the wife and is recognized and enjoined by pure Shastric Hindu Law and has been strongly stressed even by the earlier Hindu jurists starting from Yajnavalkya to Manu. Such a right may not be a right to property but it is a right against property and the husband has a personal obligation to maintain his wife and if he or the family has property, the female has the legal right to be maintained therefrom. If a charge is created for the maintenance of a female. The said right becomes a legally enforceable one. At any rate, even without a charge the claim for maintenance is doubtless a pre-existing right so that any transfer declaring or recognizing such a right does not confer any new title but merely endorses or confirms the pre-existing rights.”

This principle has subsequently been reiterated and expanded in several later decisions.

The second important change has been brought about by Section 6 of the HSA by virtue of which on the death of a member of a coparcenary, the property devolves upon his mother, widow and daughter, alongwith his son, by testamentary or intestate succession, as the case may be, and not by survivorship. This rule confers on the women an equal right with the male member of the coparcenary. However, when the proviso to Section 6 applies, there is no disruption of joint family status – the proviso creates a fiction so that persons who are to inherit are identified.

While the Hindu Succession Act may be said to have revolutionized the previously held concepts on rules of inheritance, it has its own flaws while dealing with property rights of women since it still does not give the right to the daughter of a coparcener in a Hindu joint family to be coparcener by birth in her own right in the same manner as the son or to have right of claim by birth.

Also, there is a provision in Section 23 which states that “when the coparcenary property includes a dwelling house, the rights of a daughter to claim partition of the dwelling house shall not arise until the

male coparceners choose to divide their respective shares and the daughter shall be entitled to a right of residence therein". This fails to take into account that the right to claim partition of dwelling houses is one of the basic incidents of ownership by women. Under this provision in its present form a daughter has to wait till the male members seek a partition.

Though an amendment by the Central Government, to address these anomalies, is on the anvil and is likely to be introduced in the Parliament in this session, in five southern States in India namely, Kerala, Andhra Pradesh, Tamil Nadu, Maharashtra and Karnataka necessary amendments have been made. As per the law of four of these states, except 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 has abolished the right to claim any interest in any property of an ancestor during his or her lifetime founded on the mere fact that he or she was born in the family. In fact, the Kerala Act is the only law that has abolished the Joint Hindu family system altogether in the state including the Mitakshara, Marumakkattayam, Aliyasantana and Nambudri systems. The approach of the Andhra Pradesh, Tamil Nadu, Maharashtra and Karnataka state legislatures is different from that of Kerala and these states have not abolished the coparcenary and the right by birth, while broadly removing the gender discrimination inherent in Mitakshara coparcenary.

The broad features of the legislations in the four states are more or less couched in the same language:

- (a) The daughter of a coparcener in a Joint Hindu Family governed by Mitakshara law, shall become a coparcener by birth in her own right in the same manner as the son and have similar rights in the coparcenary property and be subject to similar liabilities and disabilities;
- (b) On partition of a joint Hindu family of the coparcenary property, the daughter 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 predeceased daughter, if alive at the time of the partition.
- (c) This property shall be held by the woman with the incidents of coparcenary ownership and shall be regarded as property capable of being disposed of by her by will or other testamentary disposition.

In Kerala Section 4 (i) of the Kerala Joint Family System (Abolition) Act, lays down that all the members of a 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.

A lingering anomaly is that although the Hindu Succession (State Amendment) Acts have conferred upon the daughter of a coparcener status but there is still a reluctance to making her a Karta (manager of the joint family) because of the general male view that she is incapable of managing the properties or running the business.

Recently the Central Government has proposed certain amendments in the HSA as The Hindu Succession (Amendment) Bill 2004, that are likely to be tabled in the Indian Parliament soon. The proposed amendments are on the lines of those carried out by the four southern states. Most importantly, they give independent right by birth to the daughter like the son. Also they aim to do away

with the restriction on the daughter in asking for partition. However, these proposed amendments, if enacted, will leave several critical sources of gender inequality intact, and also disadvantage particular categories of women.

The provision for daughter's right by birth will enhance the share of daughters by making daughters coparceners on the same basis as sons in the Mitakshara coparcenary. 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. These inequalities would remain unless the entire coparcenary system is abolished totally since it has folds within folds of inequalities which cannot be dealt with in a piecemeal manner. However the central Government seems reluctant to do so right away.

The proposed 2004 Bill also leaves untouched a person's unrestricted testamentary rights over his/her property. In principle this right is gender-neutral since both sexes enjoy it, but in practice (given male bias in our society) the provision can be used to disinherit female heirs. In fact, the man can will away not only his separate property but also his "notional" share in the coparcenary. This could totally disinherit the widow in states where she gets no share on partition.

Another continuing area of discrimination is that Section 4(2) of the HSA exempts significant interests in agricultural land from the purview of the Act and the agricultural lands continue to be covered by the existing laws providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings. Hence, interests in tenancy land devolve according to the order of devolution specified in the tenurial laws, which vary by state. Broadly, the states fall into three categories. (i) In the southern and most of the central and eastern states, the tenurial laws are silent on devolution, so inheritance can be assumed to follow the 'personal law', which for Hindus is the HSA. (ii) In a few states, the tenurial laws explicitly note that the HSA or the 'personal law' will apply. But (iii) in the northwestern states of Haryana, Punjab, Himachal Pradesh, Delhi, Uttar Pradesh, and Jammu & Kashmir the tenurial laws *do* specify the order of devolution, and one that is highly gender-unequal. Here (retaining vestiges of the old Mitakshara system) primacy is given to male lineal descendents in the male line of descent and women come very low in the order of heirs. Also, a woman gets only a limited estate, and loses the land if she remarries (as a widow) or fails to cultivate it for a year or two. Moreover, in Uttar Pradesh and Delhi, a 'tenant' is defined so broadly that this unequal order of devolution effectively covers all agricultural land. Agricultural land is the most important form of rural property in India; and ensuring gender-equal rights in it is important not only for gender justice but also for economic and social advancement. Gender equality in agricultural land can reduce not just a woman's but her whole family's risk of poverty, increase her livelihood options, enhance prospects of child survival, education and health, reduce domestic violence, and empower women.

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

### **Rights of tribal women:**

It is also pertinent to mention here that as far as property rights of the tribal women are concerned, they continue to be ruled by even more archaic system of customary law under which they totally lack rights of succession or partition. Infact the tribal women do not even have any right in agricultural lands. What is ironical is that reform to making the property rights gender just are being resisted in the name of preservation of tribal culture!

In *Madhu Kishwar & others v. State of Bihar & others*<sup>4</sup> there was a public interest petition filed by a leading women's rights activist challenging the customary law operating in the Bihar State and other parts of the country excluding tribal women from inheritance of land or property belonging to father, husband, mother and conferment of right to inheritance to the male heirs or lineal descendants being founded solely on sex is discriminatory. The contention of the Petitioner was there is no recognition of the fact that the tribal women toil, share with men equally the daily sweat, troubles and tribulations in agricultural operations and family management. It was alleged that even usufructuary rights conferred on a widow or an unmarried daughter become illusory due to diverse pressures brought to bear brunt at the behest of lineal descendants or their extermination. Even married or unmarried daughters are excluded from inheritance, when they are subjected to adultery by non-tribals; they are denuded of the right to enjoy the property of her father or deceased husband for life. The widow on remarriage is denied inherited property of her former husband. They elaborated further by narrating several incidents in which the women either were forced to give up their life interest or became target of violent attacks or murdered. Therefore the discrimination based on the customary law of inheritance was challenged as being unconstitutional, unjust, unfair and illegal.

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

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

Another passage in this judgment that deserves to be quoted, wherein the desirability of flexible and adaptable laws, even customary law, to changing times, was emphasized, is:

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

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

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<sup>4</sup> (1996) 5 SCC 125)



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

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

In a substantially concurring but separately written judgment another judge of the Bench supplemented another significant principle to strengthen the tribal women’s right to property by reading the right to property into the tribal women’s right to livelihood. The judge reasoned that since agriculture is not a singular vocation, it is more often than not, a joint venture, mainly, of the tiller’s family members; everybody, young or old, male or female, has chores allotted to perform. However in the traditional system the agricultural family is identified by the male head and because of this, on his death, his dependent family females, such as his mother, widow, daughter, daughter-in-law, grand-daughter, and others joint with him have to make way to a male relative within and outside the family of the deceased entitled thereunder, disconnecting them from the land and their means of livelihood. Their right to livelihood in that instance gets affected, a right constitutionally recognized, a right which the female enjoyed in common with the last male holder of the tenancy. It was thus held:

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

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

### **Muslim women’s property rights:**

Indian Muslims broadly belong to two schools of thought in Islamic Law: the Sunnite and the Shiite. Under the Sunnite School which is the preponderant school in India, there are four sub categories; Hanafis, Shafis, Malikis and Hanbalis. The vast majority of Muslims in India, Pakistan, Afghanistan, and Turkey are Hanafis. The Shiites are divided into a large number of sub schools, the two most important of which, so far as India is concerned are the Ismailis and the Ithna Asharis, but they form a smaller section of the Indian Muslim population. The usual practice in this sub-continent is to use the terms ‘Sunnī’ law or ‘Shia’ law. Strictly speaking, this is inexact; by the former is meant the Hanafi Law and by the latter, the Ithna Ashari school.

Broad principles of inheritance in Muslim law: Till 1937 Muslims in India were governed by customary law which were highly unjust. After the Shariat Act of 1937 Muslims in India came to be governed in their personal matters, including property rights, by Muslim personal law as it “restored” personal law in

preference to custom. However this did not mean either “reform” or “codification” of Muslim law and till date both these have been resisted by the patriarchal forces in the garb of religion.

Broadly the Islamic scheme of inheritance discloses three features, which are markedly different from the Hindu law of inheritance: (i) the Koran gives specific shares to certain individuals (ii) the residue goes to the agnatic heirs and failing them to uterine heirs and (iii) bequests are limited to one-third of the estate, i.e., maximum one-third share in the property can be willed away by the owner.

The main principles of Islamic inheritance law which mark an advance vis-à-vis the pre-Islamic law of inheritance, which have significant bearing on the property rights of women, are: (i) the husband or wife was made an heir (ii) females and cognates were made competent to inherit (iii) parents and ascendants were given the right to inherit even when there were male descendants and (iv) as a general rule, a female was given one half the share of a male.

The newly created heirs were mostly females; but where a female is equal to the customary heir in proximity to the deceased, the Islamic law gives her half the share of a male. For example, if a daughter co-exists with the son, or a sister with a brother, the female gets one share and the male two shares.

The doctrine of survivorship followed in Hindu law is not known to Mohammedan law; the share of each Muslim heir is definite and known before actual partition. Rights of inheritance arise only on the death of a certain person. Hence the question of the devolution of inheritance rests entirely upon the exact point of time when the person through whom the heir claims dies, the order of deaths being the sole guide. The relinquishment of a contingent right of inheritance by a Muslim heir is generally void in Mohammedan law, but if it is supported by good consideration and forms part of a valid family settlement, it is perfectly valid. The rule of representation is not recognized, for example, if A dies leaving a son B and a predeceased son's son C, the rule is that the nearer excludes the more remote and, there being no representation, C is entirely excluded by B. There is however no difference between movable property and immovable property.

Some of the features of the Hanafi school are being pointed out here to get a glimpse into the broad structure of the property rights of Muslim women in India.

The Hanafi jurists divide heirs into seven categories; three principal and four subsidiaries. The 3 principal heirs are Koranic heirs, Agnatic heirs (through male lineage) and Uterine heirs. The 4 subsidiaries are the successor by contract, the acknowledged relative, the sole legatee and the state by escheat.

The following 12 heirs constitute Class I heirs (Koranic Heirs):

- (a) Heirs by Affinity - Husband and Wife
- (b) Blood Relations - Father, True Grandfather (howsoever high), Mother, True Grandmother (howsoever high), Daughter, Son's Daughter (howsoever low), Full sister, consanguine sister, uterine brother, and uterine sister.

Rules of Exclusion: The husband and wife are primary heirs and cannot be excluded by anyone, but they also don't exclude anyone either. Law fixes the share of the spouses; if they exist they reduce the residue which may be taken by the Agnatic or Uterine heirs, but they do not exclude either wholly or partly any heir.

The father does not affect the share of any Koranic heir except the sisters (full, consanguine or uterine) all of whom he excludes.

The mother excludes the grandmother, and the nearer grandmother excludes the more remote. The mother's share is affected by the presence of children or two or more brothers or sisters. Her share is also greatly affected by the existence of the husband or wife and the father. In the case of a daughter she is the primary heir. She partially excludes lower son's daughters, but one daughter or son's daughter does not entirely exclude a lower son's daughter. As far as the sisters are concerned, one full sister does not exclude the consanguine sister, two full sisters however exclude the consanguine sister. The uterine brother or sister is not excluded by the full or consanguine brother or sister.

Another rule that requires consideration is that, 'a person though excluded himself, may exclude others.' For example, in a case where the survivors are the mother, father, and two sisters: the two sisters are excluded by the father; and yet they reduce the mother's share to 1/6<sup>th</sup>.

Class II heir (Agnatic heir): Their classification is done as follows; Males (Group I)- the agnate in his own right, Group II (females)-the agnate in the right of another, Group III – the agnate with another.

The first group comprises all male agnates; it includes the son, the son's son, the father, the brother, the paternal uncle and his son and so forth. These in pre-Islamic law were the most important heirs; to a large extent they retain, in Hanafi law, their primacy, influence and power.

The second group contains four specified female agnates, when they co-exist with male relatives of the same degree, namely, daughter (with son), and son's daughter howsoever low with equal son's son howsoever low, full sister with full brother and consanguine sister with consanguine brother.

The third group comprises the case of the full sister and consanguine sister. For example if there are two daughters and two sisters, here the daughter is preferred as a descendant to the sister who is a collateral; thus the daughter would be placed in Class I and she would be allotted the Koranic share and the residue would be given to the sister as a member of Class II.

Under this system the rule that is followed is first the descendants, then the ascendants and finally the collaterals. The agnatic heirs come into picture when there are no Koranic heirs or some residue is left after having dealt with the Koranic heirs.

Class III (Uterine heir):

This class is constituted mainly by the female agnates and cognates. Classification is group I- descendants, which are daughter's children and their descendants and children of son's daughters howsoever low and their descendants, Group II-ascendants, which are false grandfathers howsoever high and false grandmothers howsoever high, Group III- collaterals, which are descendants of parents and descendents of grandparents true as well as false.

Members of this class succeed only in the absence of members of Class I and Class II. They also succeed if the only surviving heir of Class I is the husband or the widow of the deceased.

Property rights through marriage: The Supreme Court of India has laid down in *Kapore Chand v Kadar Unnissa*<sup>5</sup>, that the mahr (dower) ranks as a debt and the widow is entitled, along with the other creditors of her deceased husband, to have it satisfied out of his estate. Her right, however, is the right of an unsecured creditor; she is not entitled to a charge on the husband's property unless there be an agreement. The Supreme Court has laid down that the widow has no priority over other creditors, but that mahr as debt has priority over the other heir's claims. This right is known as the widow's right of retention.

Will: There is a provision against destitution of the family members in the Islamic law in that it is clearly provided that a Muslim cannot bequeath more than one third of his property. However if he registers his existing marriage under the provisions of the Special Marriage Act, 1954 he has all the powers of a testator under the Indian Succession Act, 1925.

### **Property rights of Christian, Parsi (Zoroastrians) women:**

The laws of succession for Christians and Parsis are laid down in the Indian Succession Act, 1925 (ISA). Sections 31 to 49 deal with Christian Succession and Sections 50 to 56 deal with Succession for Parsis.

### **Christian women's property rights:**

The Indian Christian widow's right is not an exclusive right and gets curtailed as the other heirs step in. Only if the intestate has left none who are of kindred to him, the whole of his property would belong to his widow. Where the intestate has left a widow and any lineal descendants, one third of his property devolves to his widow and the remaining two thirds go to his lineal descendants. If he has left no lineal descendants but has left persons who are kindred to him, one half of his property devolves to his widow and the remaining half goes to those who are of kindred to him.

Another anomaly is a peculiar feature that the widow of a pre-deceased son gets no share, but the children whether born or in the womb at the time of the death would be entitled to equal shares.

Where there are no lineal descendants, after having deducted the widow's share, the remaining property devolves to the father of the intestate in the first instance. Only in case the father of the intestate is dead but mother and brothers and sisters are alive, they all would share equally. If the intestate's father has died, but his mother is living and there are no surviving brothers, sisters, nieces, or nephews, then, the entire property would belong to the mother.

A celebrated litigation and judgment around the Christian women's property rights is *Mary Roy v. State of Kerala & others*<sup>6</sup> in which provisions of the Travancore Christian Succession Act, 1092 were challenged as they severely restricted the property rights of women belonging to the Indian Christian community in a part of south India formerly called Travancore. The said law laid down that for succession to the immovable property of the intestate is concerned, a widow or mother shall have only life interest terminable at death or on remarriage and that a daughter will be entitled to one-fourth the value of the share of the son or Rs 5000 whichever is less and even to this amount she will not be entitled on intestacy, if streedhan (woman's property given to her at the time of her marriage) was provided or promised to her by the intestate or in the lifetime of the intestate, either by his wife or husband or after the death of such wife or husband, by his or her heirs. These provisions were

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<sup>5</sup> (1950) SCR 747

challenged as unconstitutional and void on account of discrimination and being violative of right to equality under Article 14 of the Constitution.

The Writ Petition was allowed by the Supreme Court and the curtailment of the property rights of Christian women in former Travancore was held to be invalid on the ground that the said state Act stood repealed by the subsequent Indian Succession Act of 1925 which governs all Indian Christians. However, the provisions were not struck down as unconstitutional since the Court felt that it was unnecessary to go into the constitutionality issue of the provisions as they are in any case inoperable due to the overriding effect of the ISA.

### **Parsi women's right to property:**

Prima facie the property rights of the Parsis are quite gender just. Basically, a Parsi widow and all her children, both sons and daughters, irrespective of their marital status, get equal shares in the property of the intestate while each parent, both father and mother, get half of the share of each child. However, on a closer look there are anomalies: for example, a widow of a predeceased son who died issueless, gets no share at all.

### **The Response of the Judiciary:**

It is clear from the foregoing that though the property rights of Indian women have grown better with advance of time, they are far from totally equal and fair. There is much that remains in Indian women's property rights, that can be struck down as unconstitutional.

The response of the judiciary has been ambivalent. On one hand, the Supreme Court of India has in a number of cases held that personal laws of parties are not susceptible to fundamental rights under the Constitution and therefore they cannot be challenged on the ground that they are in violation of fundamental rights especially those guaranteed under Articles 14, 15 and 21 of the Constitution of India<sup>7</sup>. On the other hand, in a number of other cases the Supreme Court has tested personal laws on the touchstone of fundamental rights and read down the laws or interpreted them so as to make them consistent with fundamental rights. Though in these decisions the personal laws under challenge may not have been struck down, but the fact that the decisions were on merits go to show that though enactment of a uniform civil code may require legislative intervention but the discriminatory aspects of personal laws can definitely be challenged as being violative of the fundamental rights of women under Articles 14 and 15 and can be struck down.<sup>8</sup> Infact in one case the Supreme Court has held that that personal laws, to the extent that they are in violation of the fundamental rights, are void<sup>9</sup>. In some judgments the Supreme Court has expressly recommended to the State to carry out its obligation

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<sup>6</sup> (AIR 1986 SC 1011: (1986) 2 SCC 209)

<sup>7</sup> Krishna Singh Vs. Mathura Ahir (AIR 1980 SC 707), Maharshi Avdhesh Vs. Union of India (1994 Supp (1) SCC 713), Ahmedabad Women Action Group & Ors. Vs. Union of India (1997 3 SCC 573), Pannalal Pitti Vs. State of A.P. (1996 2 SCC 498)

<sup>8</sup> Anil Kumar Mhasi Vs. Union of India (1994 5 SCC 704), Madhu Kishwar Vs. State of Bihar (1996 5 SCC 125), Githa Hariharan Vs. Reserve Bank of India (1999 2 SCC 228), Daniel Latifi Vs. Union of India (2001 7 SCC 740), N. Adithyan Vs. Travancore Devaswom Board & Ors. (2002 8 SCC 106), John Vallamattom Vs. Union of India (2003 6 SCC 611).

<sup>9</sup> Masilamani Mudaliar Vs. Idol of Sri Swaminathaswami Thirukoil (1996 8 SCC 525)

under Article 44 of the Constitution and formulate a uniform civil code<sup>10</sup>. There is a definite swing is towards a uniform civil code and one can see that the courts are going to play a significant role to usher it in.

Another heartening trend is that the Indian courts are increasingly relying on international standards, derived from various international declarations and conventions<sup>11</sup>. Specifically CEDAW has been referred to and relied upon by the Supreme Court of India in some judgments<sup>12</sup>. These line of judgments give a firm basis for the women of India to demand gender justice and equal rights on par with international standards.

**Road ahead:**

Apart from the ongoing struggle for a uniform civil code in accordance with the Constitutional framework, today the India women are fighting for rights in marital property, denied uniformly to them across all religious boundaries. There is also a significant movement in some of the hill states, towards community ownership of land by women by creating group titles and promoting group production and management of land and natural resources by landless women for joint cultivation or related farm activity. Land rights would be linked directly to residence and working on land under this approach being lobbied for under the Beijing Platform for Action.

However, the challenges are many: social acceptance of women's rights in property leads them. In a country where women continue to be property themselves the road ahead promises to be long and bumpy.

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<sup>10</sup> National Textile Mazdur Union Vs. P.R.Ramkrishnan (1983 1 SCC 224), Mohd. Ahmed Khan Vs. Shah Bano Begum (1985 2 SCC 556), Jordam Diengdeh Vs. S.S. Chopra (1985 3 SCC 62), Sarla Mudgal Vs. Union of India (1995 3 SCC 635), Lily Thomas Vs. Union of India (2000 6 SCC 224), John Vellamatham Vs. Union of India (2003 6 SCC 611)

<sup>11</sup> For instance: Jolly George Verghese & Anr. v. State Bank of India: AIR 1980 SC 470, Gramophone company of India Ltd. v. Birendra Bahadur Pandey & Ors.: AIR 1984 SC 667, People's Union for Civil Liberties v. Union of India & Anr.: (1997) 3 SCC 433,

<sup>12</sup> Vishaka & Ors. v. State of Rajasthan & Ors.: AIR 1997 SC 3011, Gita Hariharan v. Reserve Bank of India: AIR 1999 SC 1149, C. Masilamani Mudaliar & Ors. v. The Idol of Sri Swaminathaswami: 1996 8 SCC 525