



Gender, Law and Inheritance Rights: A Comparative Study of Women's Rights in India

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Abstract

Inheritance rights and gender - both of these have always been significant and contentious issues in discussions about women's rights in India. Since women are considered second-class citizens, the discussion of their inheritance rights is seen to be divided into two groups: the first being the conservative group, which obstructs women's empowerment, and the second being the progressive forces that fight for women's liberation. Despite their significant contributions in various fields of life, they have to silently suffer and are considered a disadvantaged class due to social barriers. Preventing women's access to inheritance rights is a blatant violation of rights guaranteed under the Indian Constitution and legal framework. It is noteworthy that the absence of a Uniform Civil Code in India has led to the division of inheritance rights through the religious system. Different religious communities have adopted their traditional practices regarding inheritance, which has made the matter even more complex. This research paper attempts to provide an analytical discussion on various factors influencing women's inheritance rights in the Indian social system.

Keywords: inheritance rights, women, India, uniform civil code.

Introduction:

The issue of women's inheritance rights is always a critical as well as controversial issue in India. Being mostly considered as the second citizens, women's inheritance rights have evolved as a continuing struggle between the status quoists who oppose women's empowerment and the progressive forces that demand women's emancipation. In spite of their contribution in different spheres of life, they have to suffer in silence and belong to the disadvantaged section on account of different social barriers and impediments. Most importantly, women always get fewer opportunities to enjoy property rights in comparison to the male section. Here, it is also to be mentioned that without a uniform civil code, women's inheritance rights are divided in India on the basis of religion the religious communities have evolved their traditional practices to maintain their customs and norms regarding the inheritance rights. The Indian Constitution, while maintaining equality between men and women, tries to guarantee women's inheritance rights, but the traditional practices prevent India from achieving this goal. Therefore, this paper is an attempt to show the interplay of the social factor of women's inheritance and the challenges faced by women in this regard.¹

Objectives:

The objectives behind the study are:

- To identify the conceptual framework and historical development of the inheritance rights of women in India.
- To assess the problems associated with women's rights of inheritance in society.
- To present a descriptive and analytical frame through which the inference can be drawn about the role of the government schemes in ensuring women's rights in the inheritance of property.

Methodology:

The paper is an attempt to focus on the status of women's inheritance rights in India and the problems faced by women in India to ensure their rights to inherit property. The methodology chosen for the study is the secondary data collection method, depending upon different books, articles, journals and government schemes and laws regarding women's inheritance rights in India.

Hypotheses:

¹ Gerald James Larson, *Religion and Personal Law in Secular India: A Call to Judgment* (Indiana University Press 2001).

The hypotheses formulated for the study are:

- The legal measures adopted to ensure and to recognise the inheritance rights of women in India are not sufficient in this regard.
- The social and religious forces play an important role in determining women's inheritance rights among different communities in India.

Findings of the Study:

Women are an important element of our society. The more active and progressive role played by women in society results in social change and development. Women in India during the early Vedic period used to enjoy equal status with men in all aspects of life. They used to enjoy equal opportunity with men in education, including the study of the Vedas and also to participate in religious discussion with them. However, the social status of women in India began to deteriorate during the medieval period. Different social customs and traditions among different communities restricted the freedom of women previously enjoyed by women in society. This ultimately resulted in the general negligence towards women in society. Women's right to equality was denied by the social customs and traditions. Along with this, a critical right of women, which was completely denied, is the right of women to inherit property of parents and of husband as well. After independence, the framers of the Indian Constitution adopted different safeguard measures to ensure equal rights of women. Again, the legal framework of the country tried to implement women's right to inherit property. However, all these measures fall short to ensure inheritance rights of women in India.

Constitutional Framework:

During the post-independent period, the Indian Constitution adopted elaborate framework to provide legal recognition to the equal status of women in society along with the men. Article 14 of the Constitution which comes under the category of Fundamental Rights guarantees "Equality before Law" and mentions "The State shall not deny to any person equality before law and equal protection of the laws within the territory of India". Again, Article 15 (1)² prohibits discrimination on the grounds of religion, race, caste, sex or place of birth" and Article 15 (3) empowers the State to positively discriminate in favour of women and children. Article 16 guarantees "Equality of Opportunity in matter of public employment". It clarifies, "No citizens shall on the grounds only of religion, race, cast, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect, any employment or office under the

² Constitution of India 1950, art 15(1)–(3).

state.” Along with the Fundamental Rights, Directive Principles of State Policy also seek to promote welfare of women. Article 39³ mentions that “The State shall, in particular, direct its policy towards securing---

- a) That the citizen, men and women equally, have the right to an adequate means of livelihood;
- b) That there is equal pay for equal work for men and women;
- c) That the health and strength of workers, men and women, and the tender age of children are not abused and citizens are forced by economic necessity to enter avocations unsuited to their age or strength.”

Article 42 of the Constitution incorporates a very important provision for the women as it directs the State to make provisions for securing just conditions of work and for maternity and humane relief. Again, Article 44 directs the State to secure for citizens a Uniform Civil Code applicable throughout the territory of India. Its particular objective is to achieve the goal of gender justice in matters of marriage, succession, adoption, divorce, maintenance etc.

Likewise, Article 51A⁴ which is a Fundamental Duty states that “It shall be the duty of every citizen of India to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religion, linguistic, regional, or sectional diversities; to renounce practices derogatory to the dignity of women.”

In this way, the Constitution of India tries to maintain and to accord social status of women equal to men. However, in spite of the regular and repetitive efforts made by the Constitution, the social constraints undermine the importance of women and deny the facilities to be given to women. Along with other facilities, right of inheritance has also been denied to women. The right of property inheritance of women in India is generally administered by the communities according to their customs and traditions. But even today, property inheritance by women is far from being gender-just and bears the example of inequality. Here, are some of the religion-based inheritance rights used by women in India:

Present Position of inheritance Rights of Women in India:

The inheritance rights of the Hindu women in India are different from each other on the basis of several factors like religion and the geographical region. It also varies depending on the status of the woman in the family and her marital status. It also depends on the kind of property one is looking at: whether the property is hereditary or ancestral or self-acquired, land or dwelling

³ Constitution of India 1950, art 39.

⁴ Constitution of India 1950, art 51A.

house or matrimonial property. Even from ancient period, Hindu Jurists like Yajnavalkya, Katyayana and Narada promoted the concept of women's right to property. The Smritikars created a unique type of property to women, the stridhana. Jimutavahana went to the extent of stating that woman has absolute control over her property even after marriage⁷. The ornaments, the wealth she receives at the time of marriage from her father and relatives constitute her share. The gifts from her own and husband's family would also be added to her own.

Before the enactment of Hindu Inheritance Laws, certain customary laws existed in different regions of India which varied from each other. There were certain customs in southern part of India among the Dravidians to give a piece of land to the bride. The daughter can take this income and use it for her own daily needs. This constituted her stridhanam and it was passed on to the daughter by the mother. The land was named as 'Manjalkani'. Similarly, a custom of handing over 1/3rd of the property by the husband existed when he remarries. It was called Patnibhagam. In coastal Andhra Pradesh also a custom of giving land to the daughter at the time of marriage also existed. It was termed as the Sudra women from the Dharwar region also enjoyed property rights. In spite of all these women's right to property her freedom was restricted by way of non-participation in decision-making especially in financial matters and that it is a patriarchal concept. 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 the far south and Mitakshara in other parts of India, with slight variations.⁵

Under the Juridical system, the Hindu Succession Act, enacted in 1937, was the first law to provide a uniform system of inheritance among Hindus and to address gender inequalities in the area of inheritance. The main scheme of the Act is:

- a) The hitherto limited estate given to women was converted to an absolute one.
- b) Female heirs other than the widow were recognised while the widow's position was strengthened.
- c) The principle of simultaneous succession of heirs of a certain class was introduced.
- d) 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 not to exclude her.
- e) Remarriage, conversion and unchastity are no longer held as grounds for disability to inherit.

⁵ Archana Parashar, *Women and Family Reform in India* (Sage Publications 1992).

- f) Even the unborn child, son or daughter, has a right if she or he was in the womb at the time of death of the intestate, if born subsequently.

Women's right to property has been substantially improved by the Hindu Succession Act 1956. The concept of women being entitled to a limited estate when they acquire property by inheritance is abolished and women are entitled to an absolute estate like men when they inherit any property. Again, the daughter of a predeceased son and the daughter of a predeceased daughter are raised to a higher rank. They became Class – I heirs and get a share along with the son, and other Class – I heirs. The daughters are included in the Class – I in order to remove the discrimination on the basis of sex. Similarly, succession to a women's property or stridhanam of whatever nature is made uniform irrespective of the nature of stridhanam. In the same way the distinction between male and female heirs in the case of succession has been taken away and now they are treated on equal basis if they belong to the same degree of relationship. Women will no longer be disinherited on the ground of unchastely. Under Section 14 of The Hindu Succession Act 1956, the limited interest of a Hindu female is converted into absolute rights. If she gets property from her husband, she can sell it and the purchaser gets absolute right in the property.⁶

Meanwhile some States took the progressive step to confer birth right to Hindu women in the joint Family property. The Constitution permits Central and State Governments to enact laws on matters of succession and hence the States can enact their own variations of property laws within each Personal law. It is worth mentioning the land mark amendments made by five southern States in India, namely Kerala, Andhra Pradesh, Tamil Nadu, Maharashtra and Karnataka. As per the law of these States except Kerala, in a joint 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 son. The Andhra Pradesh Hindu Succession (Amendment) Act 1986 thus raised the status of a daughter to that of a coparcener in a Mitakshara Coparcenary. This has been eloquently reflected in its Preamble itself where it is stated that the Constitution of India has proclaimed equality before law as a fundamental right. Same model was followed by Tamil Nadu, Maharashtra and Karnataka by amending Hindu Succession Act of 1956.

Since the States brought about amendments to the Act of 1956 conferring birth right to women in the joint family property, Law Commission of India took the initiative and submitted its 174th Report in the year 2000 pointing out that in the matter of property rights of Hindu women, inequality and discrimination still exist in the 1956 Act. The Commission hence made a

⁶ Gill K, *Hindu Women's Right to Property in India* (Deep and Deep Publications 1986).

recommendation for the amendment of the Hindu Succession Act 1956 in order to provide Hindu women equal inheritance right in the ancestral property. In the Mitakshara coparcenary only the male members get property by survivorship. So, the Mitakshara system perpetuated patriarchal regime in which property descends only through the male line. Since women were not coparceners, they were not entitled to any share in the ancestral property by birth. Thus, the law excluded women from participating in ownership only on the grounds of sex. This is nothing but an outright negation of her fundamental right.

The Hindu Succession (Amendment) Act of 2005 crushed the exclusive citadel of male coparcenary to give effect to the principle of equality enshrined in Part III of the Indian Constitution. The gender discrimination in the Mitakshara coparcenary has been completely wiped off by raising the status of female members of the Hindu joint family equal to that of the male coparceners. Another notable achievement of the 2005 Act is the inclusion of all daughters, especially married daughters, as coparceners in the Joint Family Property. Section 6 of the 2005 Act removed the discrimination between married and unmarried daughters.

Unlike the Hindu women, **Muslim** Women also enjoy inheritance rights. Indian Muslims broadly belong to two schools of thought in Islamic Law: the Sunnite and the Shiite. Under which is the preponderant school in India, there are four sub-categories, i.e Hanafis, Shafis, Malikis and Hanbalis under the Sunnite School. 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. The usual practice in this sub-continent is to use the terms 'Sunni' 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. Till 1937, Muslims in India were governed by customary law, which was highly unjust. After the Shariat Act of 1937, Muslims in India came to be governed in their 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 to 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.

The Mohammedan law is not similar to the Hindu 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 recognised under the Law. Again, there is no difference between movable property and immovable property. The Hanafi Law divides heirs into seven categories: three principal and four subsidiaries. The three 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.⁷

The following 12 heirs constitute the Koranic Heirs: Heirs by Affinity - Husband and Wife, 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

⁷ *Shayara Bano v Union of India* (2017) 9 SCC 1.

mother, father, and two sisters: the two sisters are excluded by the father; and yet they reduce the mother's share to 1/6th.

The classification of Agnatic heir 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 Uterine heir is constituted mainly by the female agnates and cognates. Group descendants 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 descendants 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.

The Indian **Christian** widow's right is not exclusive and gets curtailed as the other heir's 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 the 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.

According to **Parsi** Law, a 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, gets 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.

Judiciary and Women's Inheritance Rights:

Women's inheritance rights in India differ from community to community who develop their customary laws. However, these fail to provide equal status to women. Similarly, the right to property inheritance for women is still far from equal and just. Here, the Supreme Court plays a pivotal role in recognising women's rights. The Supreme Court of India 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 violate fundamental rights, especially those guaranteed under Articles 14, 15 and 21 of the Constitution of India. In some other cases, the Supreme Court has tested personal laws on the grounds of fundamental rights and interpreted such practices to make them consistent with fundamental rights. Though in these decisions the personal laws under challenge may not have been struck down, So, it can be said that without a uniform civil code in the country, the Supreme Court scrutinizes personal laws and challenges them as being violative of the fundamental rights of women under Articles 14 and 15 and struck them off.⁸

Conclusion:

Despite the legal enforcement and judicial pronouncement, women's inheritance rights in India are still not guaranteed. Indian women are still fighting for inheritance rights: both marital property and father's property. In India, the issue of women's inheritance rights is not socially accepted. Here, women are mostly considered as inferior and their rights are generally neglected. While many women with educational development try to ensure equal status, the majority are still lagging. What we need in this matter is the social thinking about women. Women should first be considered as equals and they should be provided with all the facilities. Social acceptance of women's rights can greatly influence their life. In this way, their right to property inheritance can also be ensured.

⁸ *C. Masilamani Mudaliar v Idol of Sri Swaminathaswami Thirukoil* (1996) 8 SCC 525.

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