



# INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary  
Peer Reviewed Edition :

[www.ijlra.com](http://www.ijlra.com)

## **DISCLAIMER**

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of IJLRA. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of IJLRA.

Though every effort has been made to ensure that the information in Volume 2 Issue 7 is accurate and appropriately cited/referenced, neither the Editorial Board nor IJLRA shall be held liable or responsible in any manner whatsoever for any consequences for any action taken by anyone on the basis of information in the Journal.

Copyright © International Journal for Legal Research & Analysis

IJLRA

## **EDITORIAL TEAM**

### **EDITORS**



### **Megha Middha**

*Megha Middha, Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar*

*Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society*

### **Dr. Samrat Datta**

*Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board*



## **Dr. Namita Jain**



*Head & Associate Professor*

*School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC -NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce.*

*Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India. India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrisht Bharat Foundation, New Delhi.(2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020). Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on March 14th, 2019*

## **Mrs.S.Kalpana**

*Assistant professor of Law*

*Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8 Articles in various reputed Law Journals. Conducted 1 Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.*



## **Avinash Kumar**



*Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and*

*learning.*

## **ABOUT US**

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS

ISSN

2582-6433 is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

# **SUCCESSION AND INHERITANCE RIGHTS OF WOMEN IN INDIA: A CRITICAL ANALYSIS**

AUTHORED BY – URVASHI

The Constitution of India lays down the fundamental rights of the citizens of our country. One of the most important fundamental right provided is the “*Right to Equality*”<sup>1</sup>. This right states that every citizen is equal in front of the law, has equal rights and will be treated equally in the court of law<sup>2</sup>. Right to Equality also entails equality amongst genders. It essentially says that all individuals will be treated equally irrespective of their genders. However, it is abundantly clear that this law has not fared well in practical life. There is a clear gap between the law on paper and law in reality due to existence of laws, which are discriminatory against women.

The Indian Government has played a huge role in attempting to create a society that is non discriminatory to individuals on the basis of their genders. However, the Indian society has largely been governed by the principles and values of patriarchy, where women are oppressed and their participation in the public sphere is restricted. Hence, when India achieved independence, the leaders of the nation deemed it essential to enact laws guaranteeing gender equality to all citizens. The Lawmakers also deemed it necessary to take affirmative action in order to make up for the years of oppression and under-representation of women in Indian society. One such enactment can be seen under Article 15(3) of the Indian Constitution, which states, “*Nothing in this article shall prevent the State from making any special provision for women and children*”<sup>3</sup>. While the Constitution makers took positive steps to ensure gender equality, the government’s reluctance to interfere in the private sphere of the citizens such as family and religion, has proven to be an obstacle towards achieving equality in its true sense.

A large portion of women in India still have to struggle to be independent from their families and this is a result of their inability to access basic rights such as right to education and equal opportunities in terms of employment. Although the inherent gender bias in the Indian society helps perpetuate a paternal structure in the society, it is also pertinent to analyze the existing

---

<sup>1</sup> Article 14, Constitution of India

<sup>2</sup> Ibid

<sup>3</sup> Article 15(3), Constitution of India

government policies and certain laws enacted by the State that further legitimize gender based discrimination.

While a lot has been written on how the criminal law fails to provide women safety in their own country and how the failure of due process has led to women resorting to social media and other avenues to achieve justice, the area of civil law remains largely under researched. Hence in this Research Paper, I propose to analyze civil law; especially the large number of acts and customs pertaining to inheritance and property laws that still discriminate against women and the need to amend these laws and bring about a reform at the earliest.

### **Hindu Women: Inheritance and Property Rights**

Historically, the Hindu women's right to inheritance and property were minimal. Hindu women were excluded from getting a share in family property; in fact it was rare for a Hindu woman to hold any property independently in her own name. The Hindu laws relating to inheritance were not exhaustively codified till the mid 1900's; hence the rules for inheritance were governed by sacred religious texts and customs.

These texts did not recognize the genders to be equal and preached that women were inferior beings who needed support and protection. An excerpt from Manusmriti, a sacred text of Hindus says, "*Her father protects her in childhood, her husband protects her in youth and her sons protect her in old age; a woman is never fit for independence.*"<sup>4</sup> This ideology and patriarchal values also governed the customs relating to inheritance of property by women.

The two main schools of thoughts followed by Hindus were Mitakshara and Dayabhaga. Under the Mitakshara school an heir was called a coparcener and earned a right in the family property by the virtue of his birth. It is pertinent to note that female heirs were never considered coparceners and could not claim a share in the family property. The Dayabhaga School provided certain limited rights to women to be exercised in situations of necessity but these rights were still far from being considered gender-equal.<sup>5</sup>

---

<sup>4</sup> Halder, D. and Jaishankar, K. (2008). Property Rights of Hindu Women: A Feminist Review of Succession Laws of Ancient, Medieval, and Modern India. *Journal of Law and Religion*, 24(2), pp.663-687.

<sup>5</sup> Ibid

Over the time, these customs were codified and the Act that now governs inheritance and property rights of Hindus is “The Hindu Succession Act, 1956”. The Hindu Succession Act brought about various positive changes related to property and inheritance rights of Hindu Women. For example, the Act allowed women to be absolute owners of their properties over which they could exercise any rights such as the right to alienation on their own free will.

Though the Hindu Succession Act brought about a sweeping change in the position of women as property right holders, it still does not guarantee complete equality for women as envisioned by our lawmakers.

One such case that highlights the shortcoming of the Hindu Succession Act is that of *Omprakash & Ors. v. Radhacharan*<sup>6</sup>. This particular case related to the self-acquired property of Narayani Devi. Narayani was married for three months before her husband passed away and on account of his death, she was driven out of her matrimonial home by her in laws and husband’s relatives. She thus returned back to her parents’ house who paid for her education that resulted in her being well employed and accumulating a large sum of money in her bank account. However she too passed away after some time, without making a will. Her parents assumed that the wealth that was acquired by Narayani would pass on to them however that was not the case. The court ruled that as per the Hindu Succession Act, when a Hindu female dies intestate, her property should go to the heirs of her pre-deceased husband.<sup>7</sup> Hence, the hard earned money acquired by Naraynai was awarded to the husband’s heirs who provided her no support whatsoever, who treated her horribly and drove her out of her home, while her parents who provided for her education were left with nothing.

The court stated “*it is now a well settled principle of law that sentiment or sympathy alone would not be a guiding factor in determining the rights of the parties which are otherwise clear and unambiguous*”<sup>8</sup>. However, this is not what is being asked from the court. Women do not require the courts to make decisions based on sentiments or sympathy. What they want is to reform the laws, which the courts can clearly see are discriminatory in nature and need to be struck down. Section 15 of the Hindu Succession Act, 1956 provides that in the case of a Hindu Woman dying intestate, her property will devolve in the order of:

---

<sup>6</sup> (2009) 15 SCC 66

<sup>7</sup> Ibid

<sup>8</sup> Ibid

*“(a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband;*

*(b) secondly, upon the heirs of the husband ;*

*(c) thirdly, upon the mother and father ;*

*(d) fourthly, upon the heirs of the father; and (c) lastly, upon the heirs of the mother”<sup>9</sup>*

Thus, the heirs of a woman’s husband are given a priority irrespective of whether the woman ever had any relations with them. This case reinforces the idea of Indian women being considered as property in our society. Once a woman is married, she is considered to be the property of her husband and fully belongs to the husband’s family. This situation is not the same for men, however for women it is the harsh reality. This reality is reflected by the Section mentioned above which assumes that the husband’s heirs have a priority when it comes to a woman’s property, be it inherited, or self-acquired.

The case of Om Prakash was widely criticized for failing to provide justice to women and giving legitimacy to a discriminatory law. This issue was also taken up by the Law Commission of India in its 174th Report titled *“Property Rights of Women: Proposed Reforms under the Hindu Law”*. The report noted that the Section *“depict that property continues to be inherited through the male line from which it came either back to her father's family or back to her husband's family.”<sup>10</sup>* Thus, such sections that legitimize patriarchy must be reformed. Section 15 of the HSA must be reformed to ensure that a woman’s self-acquired property must devolve equally upon the heirs of the husband and to her natal family. However, there has been no step taken by the State to bring about such a reform as of 2019.

Over the years the State has worked towards repealing such discriminatory sections. One example of that is Section 23 of the Hindu Succession Act, 1956 that has now been repealed by the Hindu Succession (Amendment) Act, 2005. Previously this section disentitled a female heir to *“ask for partition in respect of a dwelling house wholly occupied by a joint family until the male heirs choose to divide their respective shares therein.”<sup>11</sup>* This Section has now been repealed for the reason that it discriminated heirs in a family on the basis of gender and acted as a drawback when it came to rights of a female member to demand partition. The female heirs were expected to seek

---

<sup>9</sup> Section 15 (1), Hindu Succession Act, 1956

<sup>10</sup> Property Rights of Women: Proposed Reforms under the Hindu Law, 174th Report, Law Commission of India

<sup>11</sup> Section 23, Hindu Succession Act, 1956

permission of the male heirs and obtain their consent in order to demand a partition of the family dwelling house whereas no such restriction was placed on the male heirs.

Another major improvement brought about by the Hindu Succession Amendment Act (2005) was the introduction of Section 6. Section 6 of the amended Hindu Succession Act provides that the daughter of a coparcener in a “*Hindu Undivided Family*” would also acquire the status of a coparcener from birth, which is the same as the status of a son in a Hindu Undivided Family. The Section states that “*in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall, —*

*(a) by birth become a coparcener in her own right the same manner as the son;*

*(b) have the same rights in the coparcenary property as she would have had if she had been a son;*

*(c) be subject to the same liabilities in respect of the said coparcenary property as that of a son.<sup>12</sup>”*

It also clarifies that the share of such a daughter will be equal to that of a son, thus bringing about complete equality between male and female heirs in Mitakshara Coparcenary Laws. Though this amendment has been lauded as a transformative step taken in a positive direction, this amendment too suffers from one drawback i.e. the said amendment applies prospectively and no retrospective application of this law is allowed under the statute to allow women to exercise their rights under the amendment.

In the case of *Prakash v. Phulvati*<sup>13</sup>, the Supreme Court clarified that the petitioner could not claim the status “*daughter of a coparcener*” under Section 6 as amended on 2005 as her father had passed away in 1988 i.e. before the amendment came into effect. The Court stated that the Statute clearly stated that the amendment applies “*On and from the commencement of the Hindu Succession (Amendment) Act, 2005*”<sup>14</sup>. The court applied the plain meaning rule to interpret the statute to hold that “*there is no scope for a different interpretation than the one suggested by the text of the amendment*<sup>15</sup>” i.e. the section applied prospectively and not retrospectively.

The Court failed to discuss the important object behind this amendment i.e. the purpose of

---

<sup>12</sup> Section 6, Hindu Succession Act, 1956

<sup>13</sup> 2 SCC 36 (2016)

<sup>14</sup> Ibid

<sup>15</sup> Ibid

introducing the said amendment was to fight back and strike down laws that discriminated against women. The object of the amendment was to return to the daughters in Hindu Undivided Family their rightful shares in the coparcenary property. However instead of applying the method of purposive interpretation to interpret the amendment and give effect to the object of the amendment, the court applied the plain meaning or literal interpretation rule thus taking away the rights of a majority of women due to prospective application.

An argument against retrospective application would be that it would lead to re- opening of a vast number of cases decided before the amendment came into effect and increasing the burden on the Courts. However, these are merely institutional and administrative problems to be dealt with, in fact this would not be the first instance where a provision, law or statute is applied retrospectively to give effect to justice. This judgment is a clear instance of a situation where the Indian judicial system failed to reinforce the principle of equality and grant a decision in favor of women who have historically been exploited and stripped away of their rights on account of their gender.

### **Muslim Law**

Unlike the Hindus, the Muslim community in India is still largely governed by customary laws when it comes to marriage, divorce and inheritance of property. Although various acts such as the Shariat Act 1937 have been enacted, the majority of the Muslim Personal Law still remains uncodified.

The personal laws are vast and are largely controlled and influenced by the All India Muslim Personal Law Board. This Board is largely under the control of male members who do little to bring about reforms in the personal laws. Muslim women argue that though Quran guarantees every individual equal rights, the inequality still exists due to the patriarchal figures called Ulamas controlling the board. They argue that these Ulamas resort to a patriarchal reading of religious texts to deprive women of their rights in both family and property matters.<sup>16</sup>

The Muslims in India can be divided into two schools i.e. Sunni and Shia, which have their own set of customary laws relating to inheritance of property.

---

<sup>16</sup> VATUK, S. (2008). Islamic Feminism in India: Indian Muslim Women Activists and the Reform of Muslim Personal Law. *Modern Asian Studies*, 42(2-3), pp.489-518.

## Sunni Law

Under Sunni law no heirs can claim any vested right on another's property. It is only upon the death of an individual that the heirs take a vested interest in the property of the deceased. The shares of all heirs are pre decided as per the customary law. The heirs can only inherit that fixed share as prescribed by the uncodified personal laws. These are called "*Quaranic heirs*". Apart from sharers, there is another category of heirs, which are called the residuaries, or "*agnatic heirs*". The residuaries can demand a share in the heritable property only once the shares of all the Quaranic heirs are satisfied and some property is left as residue.<sup>17</sup>

Under these personal laws the share that can be demanded by a daughter is not independent, rather it depends on the presence of a son in the family. When there is a living male heir i.e. a son in the family, the status of the daughter is reduced to an agnatic heir i.e. a residuary.

The son is always considered a residuary but the rules are formulated in a manner that despite the son acting as a residuary he will always inherit property while granting of shares. The fixed share of the son as a residuary is  $\frac{2}{3}$ <sup>rd</sup> of the divisible property which is double the share granted to daughter i.e.  $\frac{1}{3}$ <sup>rd</sup> share of the property. In case there is no living daughter at the point of distribution of shares, the entire residue passes on to the son. This is a blatant violation of the principle of equality and reinforces the patriarchal values of discriminating between children and their rights based on gender.

These rules also discriminate between the shares of parents i.e. the mother and the father in certain circumstances wherein in cases of no living lineal descendants, the mother gets a fixed share of  $\frac{1}{3}$ <sup>rd</sup> the property whereas the father acting as a residuary obtains  $\frac{2}{3}$ <sup>rd</sup> of the heritable property. A similar discrimination is seen between a husband and wife. In case of death of a wife, the husband i.e. the widower is entitled to  $\frac{1}{2}$  of the wife's property in case there is no child or son's child and  $\frac{1}{4}$ <sup>th</sup> of the property in case of a living child. This share given to the husband is double of what a widow is entitled to on her husband's death. On the death of the husband, the wife is only entitled to  $\frac{1}{4}$ <sup>th</sup> of the husband's share of property in case there is no child or son's child and  $\frac{1}{8}$ <sup>th</sup> in case there is a child or son's child.

---

<sup>17</sup> Ashok, J. (1998). Family Law. New Delhi: Ascent Publications.

It is also pertinent to note that majority of these rules depend on the presence of heirs of the son of the deceased i.e. presence of son's children, grandchildren or wife. However, there is rarely any mention of shares assigned to heirs of the daughter. Apart from sharers and residuaries, there is another class of heirs called "*Distant Kindred*". This class consists of daughter's children, children of son's daughters, full brothers daughter etc. These female heirs are at the bottom of the priority list when it comes to inheriting property and can claim a share in the deceased's property only in the absence of any sharer or residuary.<sup>18</sup>

This further highlights the patriarchal nature of these laws. Thus although the rules governing inheritance acknowledge the right of female heirs to property, they are still not considered to be on the same pedestal as male heirs in every circumstance.

### Shia law

Under Shia law too the sharers are divided into categories namely sharers and residuaries. Unlike Sunni law, there is no category for distant kindred. An individual becomes a sharer as a consanguine heir or relation by marriage. Consanguine heirs are heirs that are related to the deceased by blood and are further divided into three groups in order of priority.

Group 1 - Parents and Children

Group 2 - All Grandparents and Brothers & Sisters (including their descendant) Group 3 - Paternal and Maternal Uncles and their Grandparents<sup>19</sup>

Similar to Sunni law, even under the rules of Shia law a widowed husband is entitled to 1/2 of his deceased wife's property in the absence of lineal descendants and 1/4<sup>th</sup> in the presence of lineal descendants. The share assigned to a widow however is cut in half in case of her husband's death. A widow is entitled to only 1/8<sup>th</sup> share of her deceased husband's property in case of lineal descendants and 1/4<sup>th</sup> otherwise.

The rules governing the shares of a daughter are also similar to Sunni law, wherein a son gets double the share of the deceased's daughter. Further, the son is entitled to the entire residue of property in the absence of a daughter whereas the daughter is only entitled to 1/2 of the property as a sharer in case there is no son of the deceased. In case there are two daughters, they are

---

<sup>18</sup> Ibid, pp-306

<sup>19</sup> Ibid, pp-310

collectively entitled to 2/3rd of the share. Hence, the rules under Shia law discriminate between children on the basis of gender and the notion behind this is that daughters have “*lesser responsibilities and obligations in comparison to males*”<sup>20</sup>.

Such notions reinforce the idea that females are not capable of handling responsibilities similar to men. In fact, the work done by women at homes for the family is disregarded and not recognized as actual labor or “work”. Females in India are often discouraged from working outside the home and even the families that do allow this often restrict their freedom to choose profession. The male heirs and sons are seen as the representative of the families who are responsible to take care of financial situations and even control the conduct and behavior of female members of the household.

The fact that male heirs, especially sons are given an elevated status in the house can be seen by another principle followed under Shia law called the “*Principle of Primogeniture*”. As per this custom, when an individual passes away his eldest “son” is entitled to inherit his father’s “*garments, sword, ring, and the copy of Quran.*”<sup>21</sup> If a deceased father has a daughter who is the eldest amongst all living siblings she will not have a right to inherit the articles listed above, it is only the eldest son of all siblings who can claim this right.

## Reforms in Muslim Personal Law

In 2017, the Supreme Court of India held that, the custom of triple talaq practiced by Muslims in India, wherein a husband was allowed to legally divorce his wife by uttering the word “*talaq*” three times, was unconstitutional<sup>22</sup>. Justice Nariman in his judgment stated that the practice of triple talaq flows from the Shariat Act and hence its validity can be determined by testing it against the principles laid by the Constitution of India. He went on to state that Article 14 does not allow for discrimination on the grounds of “*religion, race, caste, sex or place of birth*”<sup>23</sup>. The only situation where there can be a differentiation is in cases of reasonable classification i.e. the differential treatment must be justifiable.

The Supreme Court held that in the case of *triple talaq* there was no justifiable object that was

---

<sup>20</sup> Ibid, pp-308

<sup>21</sup> Ibid, pp-313

<sup>22</sup> Shayara Bano v. Union of India, 2017 SCC OnLine SC 963

<sup>23</sup> Article 14, Constitution of India

being achieved by giving husbands the power to exercise arbitrary powers and divorce their wives without a proper procedure or mechanism being followed. The court found the practice to be arbitrary and hence unconstitutional as it violated the rights of women under Article 14 of the Indian Constitution. Justice Nariman's reasoning and judgment striking down the practice as unconstitutional has been lauded as a progressive step taken by the Indian judiciary to bring about necessary reforms in personal laws instead of sticking to the behavior of non-interference. Further, the reasoning of his judgment reinforced the principle that no personal laws should be allowed to operate while in contradiction to the fundamental rights guaranteed by the Constitution of India.

Though the triple talaq judgment is a step towards progress, in order to bring about complete gender equality, it is important for the Indian judiciary to adopt the same attitude towards Muslim personal laws that govern matters of inheritance and succession. The rules and customs governing such matters are founded on ideas of patriarchy, they justify the discrimination between men and women on account of men being seen as the responsible member of the family who are obligated to provide for female members.

Although this scenario might have been true in earlier times, the same is not true for the modern days. The number of women who are working and financially independent is growing every year; rather these patriarchal customs and rules act as a hindrance when it comes to women achieving independence from their families. The State must recognize that these customs are nothing but patriarchal notions in disguise, wherein the Ulamas interpret religious texts in a manner that aims to oppress women.

The women of the Muslim community have tried to bring about reforms from within the community by interpreting the religious texts and principles in a gender neutral way, however their efforts have always been overpowered by the strong influential power of the Ulamas who control how personal laws are governed within the Muslim community. The policy of non-interference by the State and the judiciary will only result in continuing violation of fundamental rights of women over the years.

## Tribal Laws of India

The laws and Acts pertaining to inheritance and property rights of women belonging to religions such as Hindu, Muslim etc. despite having their drawbacks, have shown positive development and reforms over the years. However, there are certain groups of women in India that have seen no improvements in their inheritance and property rights, rather some of the customs and rules regulating these women's right to property are as patriarchal in nature as the ones practiced in ancient times. These customs do not allow tribal women to demand any share or inherit any property in the event of death of the head of the family owning the property or land.

An example of that would be the Chota Nagpur Tenancy Act, 1908 which is an Act governing the law of "*Landlord and Tenant*" amongst the tribal population in the areas extending to "*North Chotanagpur, the South Chotanagpur and Palamau Divisions*"<sup>24</sup>. Section 7 and 8 of the said Act provide that it is only the male heirs and descendants that have the right to inherit property. The presence of the phrase "male descendants" automatically excluded female descendants in the tribal communities from exercising any rights in terms of the family property<sup>25</sup>.

The matter relating to the enactment and execution of these discriminatory laws were brought to the attention of Supreme Court in 1986. The argument of the petitioners was simple, Section 7 and 8 of the Chota Nagpur Tenancy Act, 1908 were unconstitutional and hence needed to be struck down. The provisions in question discriminated between the heirs in a community based solely on their gender and hence infringed upon the female heirs' right to equality by excluding them from taking a share inland or property. Hence the provisions were in clear violation of Article 14 of the India Constitution, which guarantees equality to all individuals irrespective of their gender.<sup>26</sup>

Although the government enacting and enforcing these laws has largely refrained from interfering into customary and personal laws, the petition submitted before the Supreme Court to strike down these discriminatory sections was an excellent opportunity for the judiciary to reinforce the principle of gender equality in the society. However, the Supreme Court failed to provide justice to these tribal women by holding that Section 7 and 8 of the said Act which excluded women

---

<sup>24</sup> Section 1, Chota Nagpur Tenancy Act, 1908

<sup>25</sup> Section 7, Chota Nagpur Tenancy Act, 1908

<sup>26</sup> Madhu Kishwar vs State of Bihar, (1996) 5 SCC 125

from inheriting land could not be struck down and were in fact constitutionally valid.

The Court stated its inability to interfere with the working of legislature in the present case, which is in complete contradiction with the activist reputation that the Supreme Court of India enjoys. The Supreme Court has in the past has not shied away from taking similar stances and passing orders repealing sections of Acts which were unconstitutional in nature. The argument provided by the Court was that even though different Acts such as Hindu Succession Act and the Indian Succession Act provided for female heirs to inherit family property, it wasn't necessary for all Acts dealing with the same matter to be uniform. However, the petitioners argue was not to apply the provisions of the Hindu Succession Act or the Indian Succession Act to the tribal community. The petitioners simply wanted to borrow the principles of "*justice, equity and fair play*"<sup>27</sup> which could be found in the scheme of HSA and ISA and apply the same to the Acts governing the tribal communities of India.

The Court further stated, "*Rules of succession are indeed susceptible of providing differential treatment, not necessarily equal. Non uniformities would not in all events violate Article 14.*"<sup>28</sup> This statement given by the Court is indeed correct however not in the present situation. The non uniformity in the present case is the fact that on one side there is enactment of Acts which provide male and female heirs with the right to inherit and on one hand the Chota Nagpur Tenancy Act which excluded female heirs from exercising any property rights. This amounts to discrimination based solely on gender and is a violation of the principle of inequality on the face of it, thus violating Article 14 of the Indian Constitution. Differential treatment is allowed under Article 14 as long as there is a bonafide object behind it, which can be justified. The provisions of the Chota Nagpur Tenancy Act do not pass this test of reasonable classification.

The Court did not deprive the female heirs of all their rights, however the rights granted are so limited and restricted that they serve no good to the tribal women of India. The court held that if women were not given any rights over the land of the deceased this would lead to widows and daughters being destitute, thus violating their right to livelihood under Article 21 of the Indian Constitution. Hence "*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*

---

<sup>27</sup> Ibid

<sup>28</sup> Ibid

*earning their livelihood, for otherwise it would render them destitute. In other words, the exclusive right of male succession conceived of in Section 7 and 8 has to remain suspended animation so long as the right of livelihood of the female descendant's of the last male holder remains valid and in vogue.<sup>29</sup>*

This right is exceedingly discriminatory towards the female descendants when compared to rights of male descendants under the Act. In today's day and time, the Courts cannot assume that male members are the head of families and solely capable of taking care of agricultural lands. The conditional right awarded to women to have control over the land as long as they remain dependent on it, is colored with patriarchal overtones. This rule aims to restrict the alienation of lands from tribes at the expense of the rights of female descendants. Further it restricts the movement of women, as they will lose any right they had over the land if they move away.

This rule is blatantly discriminatory in nature and a clear violation of the Right to Equality. If the male descendants have been awarded exclusive rights over agricultural lands, including the right to alienate such land, the same treatment must be awarded to female descendants too. There is no justifiable object that can be said to have been achieved by awarding female descendants limited and restricted rights over the tribal lands especially with the increasing number of women participating in the agricultural sector work force.

The correct approach that should have been taken by the Supreme Court is that of the dissenting opinion in the case of *Madhu Kishwar v. State of Bihar*<sup>30</sup>. Justice Ramaswamy in his dissent opined that the laws governing the tribal population in India and the customs followed by this community of people cannot be prioritized over the fundamental rights enshrined in the Constitution. He held that the said provisions of the Chota Nagpur Tenancy Act were gender-discriminatory and thus unconstitutional for violating Article 14 of the Constitution of India.

Another practice that governs the tribal population of India is Wazib-ul-arz, which came into effect in 1926. This customary practice governs the tribal population in the state of Himachal Pradesh and similar to the Chota Nagpur Tenancy Act, this practice does not allow female descendants to inherit ancestral property on the death of the owner.<sup>31</sup> The object behind this

---

<sup>29</sup> Ibid

<sup>30</sup> (1996) 5 SCC 125

<sup>31</sup> Gulati, Vishal. "HP: Tribal women fight for inheritance rights; petition SC for justice" National Herald, 26th September 2018. Web. 30th March 2019.

practice is similar to that of the laws in Chota Nagpur, wherein it is feared that women will be unable to maintain tribal lands and might alienate the property when they move away from marriage.

Such presumptions have no basis in the legal system and are only a sham to cover the true patriarchal structure of these tribal populations, which consider men to be the head of the house and women incapable of taking such responsibilities. These practices only aim to restrict the rights of women, as there is no guarantee that male descendants who inherit tribal land would not exercise their right to alienate such lands.

However, unlike the case of Chota Nagpur Tenancy Act, the practice of Wazib-ul-arz has been abolished by a reformative and progressive judgment by the High Court of Himachal Pradesh. Justice Rajiv Sharma, in the case of *Bahadur v. Bratiya and Ors* held that, “*daughters in the tribal areas in the State of Himachal Pradesh shall inherit the property in accordance with the Hindu Succession Act, 1956 and not as per customs and usages in order to prevent the women from social injustice and prevention of all forms of exploitation*”<sup>32</sup>. The Court further went on to state that even if the laws enacted in earlier times are patriarchal in nature, these gender discriminatory laws must not be allowed to be enforced even in the present society. As the society progresses so must the laws and the customs to ensure equality amongst all citizens and fair administration of justice to every citizen.

### **Christian Women: The Indian Succession Act**

The property and inheritance rights of Christian Women in India are governed by the Indian Succession Act, 1925. Though the Act does not provide an exhaustive list of groups of communities or religions governed by it, Section 4 does state that it does not apply to “*Hindu, Muhammadan, Buddhist, Sikh or Jains*”<sup>33</sup>.

Section 42 of the Indian Succession Act talks about the circumstance in which the intestate (deceased) passes away without leaving any lineal descendants. In such scenarios “If the intestate’s father is living, he shall succeed to the property.”<sup>34</sup> Thus, the presence of a living father automatically results in the whole of the intestate’s property devolving upon the father excluding

---

<sup>32</sup> Bahadur v. Bratiya and Ors, AIR 2016 H.P. 58

<sup>33</sup> Section 4, Indian Succession Act, 1925

<sup>34</sup> Section 42, Indian Succession Act, 1925

the share of the widow if one has left a widow. This section puts the parents of the intestate on unequal grounds on the basis of their gender. The mother is excluded from inheriting the property of the deceased son in case the father of the deceased is living.

Not only is this a clear case of gender discrimination but also it can lead to gross injustice in certain circumstances. Section 42 when using the term “*father*” and granting him exclusive rights over the intestate’s property in case of no lineal descendants does not provide for any requirement for succeeding the intestate’s property apart from him being the father.<sup>35</sup> This would mean that in cases of re- marriage, even if it were the mother who takes the sole responsibility of raising the child, contributing to the child’s education and development as an adult, she would not succeed to any of the child’s property if the father of the child were still living.<sup>36</sup>

The law does not require the father to contribute financially or in any other way to the upbringing of the child, for him to obtain the property of the child in case of intestate succession. The father of the intestate is put at a much higher pedestal than the mother, in fact the only case where the mother can succeed to the whole property of the intestate who dies without a widow and lineal descendants is where the intestate’s father is dead and there are no “*brother, sister, nephew or niece.*”<sup>37</sup> In case the siblings of the deceased are living, the mother has to divide her share with the brother, sister and their children.

Apart from the Indian Succession Act, the Christian Women in India were governed by different laws depending on their community, for example Christians belonging to Travancore were governed by the Travancore Christian Succession Act 1092, whereas Christian communities belonging to Cochin were governed by the Cochin Christian Succession Act, 1921. These local Acts were an example of gender-discriminatory laws where female heirs were not considered equals of the male heirs.

One such provision under the Travancore Christian Succession Act, 1092 provided that “*widow or mother shall have only life interest terminable at death or on remarriage*”<sup>38</sup> and that a daughter

---

<sup>35</sup> Section 42, Indian Succession Act, 1925

<sup>36</sup> Pandey, Shruti. 2005. Property Rights of Indian women.

<<https://www.womenslinkworldwide.org/en/files/1290/property-rights-of-indian-women.pdf>> (accessed on 7th April 2019)

<sup>37</sup> Section 46, Indian Succession Act, 1925

<sup>38</sup> Section 16, Travancore Christian Succession Act, 1092

was not allowed to demand a share in the intestate property if she had been granted stridhan by the family. Further in case the stridhan was not provided to the daughter she was not entitled to have the “*same share as the son but that she will be entitled to one-fourth the value of the share of the son or Rs. 5,000 whichever is less.*”<sup>39</sup>

These problematic provisions were brought into question before the Supreme Court of India through a writ petition filed under Article 32 of the Indian Constitution in the case of *Mary Roy v. State of Kerala & Ors*<sup>40</sup>. It was argued that certain provisions of the Travancore Christian Succession Act as illustrated above were in violation of Article 14 of the Indian Constitution as they were discriminatory towards the daughters and provided limited rights to widows and mothers. Therefore a petition was filed to strike down the provisions in question on grounds of constitutional invalidity.

The Supreme Court held that since the enactment of Part B of State (Laws) Act, 1951, the provisions of the Travancore Christian Succession Act, 1092 were no longer applicable to Travancore Christians. Section 6 of the State Law Act provided that “*If immediately before the appointed day, there is in force in any Part State any law corresponding to any of the Acts or Ordinances now extended to that State, that law shall, save as otherwise expressly provided in the Act, stand repealed.*”<sup>41</sup>

The court thus held that the Christians in Travancore were to be governed by the Indian Succession Act and the shares of the female heirs i.e. the daughter; mother and the widow were to be calculated as per the provisions provided in the Indian Succession Act. The Travancore Christians Succession Act stood repealed and was no more in function.

Although the Court in this case repealed the Statute that discriminated against female heirs it is important to analyze the judgment in light of the case of *Madhu Kishwar v. State of Bihar* as illustrated above. Both these cases are similar to the extent that whereas in the case of *Madhu Kishwar*, the Supreme Court refused to hold laws that discriminated between male and female heirs as unconstitutional under Article 14 of the Indian Constitution, the Supreme Court in the case of *Mary Roy* avoided addressing the issue of constitutional validity of discriminatory provisions in the Travancore Christian Succession Act altogether.

---

<sup>39</sup> Ibid

<sup>40</sup> 1986 AIR 1011

<sup>41</sup> Ibid

These instances highlight the fact that even though the Supreme Court has held that there is no law, including personal laws that are superior to the fundamental rights guaranteed under the Indian Constitution, the courts continue to deflect the question of constitutional validity of personal laws that discriminate between genders. An important step towards reform would be acknowledgment on part of the courts that these laws are inherently discriminatory in nature and violate the fundamental right of equality guaranteed by the Indian Constitution. Such decisions will henceforth encourage the legislature to amend such laws or introduce new laws that take into account the interest of women in these matters.

### **Uniform Civil Code**

There has been a huge debate in the Indian society about the need of introducing a Uniform Civil Code. As illustrated by the above discussions, India is a diverse country and there are a diverse number of laws governing the personal laws of these individuals. It has often been argued that uncodified personal laws such as a major portion of Muslim laws that are enforced in India are regressive and based on the principles of patriarchy. However the discussion of various Acts such as the Hindu Succession Act and the Indian Succession Act shows that these uncodified customary laws are not the only problem. All acts and customs regulating the Succession and Inheritance rights of women fail to pass the test of gender-equality and non- discrimination.

It is to be noted that the State has essentially divided the laws governing the citizens into two categories i.e. laws relating to the public sphere and secondly laws relating to the private sphere. When it comes to laws pertaining to the public sphere for example tax laws, the laws do not differ for individuals on the basis of their religion or community. However issues of marriage, divorce, inheritance etc. are considered to be part of the personal sphere. The laws pertaining to the personal sphere are not uniform and vary according to difference in religions, communities and gender of an individual. These laws see little interference from the State due to the Government's reluctance to interfere with a particular communities religions and customary rules even though some of these rules may be inherently discriminatory as illustrated by the discussion above.

Some suggest that instead of trying to bring reforms within each of these enactments and customs, it is necessary for the government to move away from its act of non interference in the personal laws and introduce a Uniform Civil Code which will guarantee equality across all religious communities for all individuals irrespective of their gender. The enactment of a Uniform Civil

Code is supported by the principles laid down in our Indian Constitution, mainly the right to be treated irrespective of an individual's religion or gender.

An opposition to the Uniform Civil Code is that it threatens the religious identity of various groups, particularly minority religions that believe their interests and cultural values will not be taken into account or paid heed to over the interest of religious majorities such as the Hindus. Hence, the enactment and formation of laws related to the Uniform Civil Code must be after careful consideration of interest of all religions and communities. This is a complex task but an important exercise to ensure there is no discrimination between different religions and communities. Further, enactment of a Uniform Civil Code is important to ensure that the very religious identity that seems to be threatened, does not impose personal laws on women in India that are discriminatory in nature. Nevertheless, it is important for the state to balance the right to equality and the right to religion of citizens of the country.<sup>42</sup>

The Indian Government has already enacted uniform laws related to women issues such as the Domestic Violence Act and these laws have proven to be great step towards protecting interests of women across all religions and communities. Though a complex task, enactment of a Uniform Civil Code could bring about uniformity in laws across the country. The enactment of a new code that would apply to all citizens would further make it simpler to ensure that there are no provisions in the Code that are gender-discriminatory and that the reforms are brought about keeping into account the interest of women.

### **Conclusion**

This is just one example of how civil law does not do justice to women in India and the archaic thoughts present behind the enactment of such laws. The family laws of India governing succession and inheritance of property have divided women according to their religions and enacted discriminatory laws in these acts, which leave the women of India fighting for equal rights in marriage and property.

It is true that no right is absolute and the State is bound to restrict the rights of citizens to achieve certain objects and goals, however it cannot be forgotten that certain rights are primary and others

---

<sup>42</sup> Menon, N. (2014). A Uniform Civil Code in India: The State of the Debate in 2014. Feminist Studies, Inc, 40(2).

subordinate. While it is important to protect the interests of religious communities and respect their customs and practices, these cannot be used as an excuse to oppress and restrict the rights of women in India. Women's right to be treated equally and be entitled to the same rights as their male counterparts is primary and this right cannot be violated based on interpretations of religious texts written thousands of years ago or customs & practices formulated in ancient times.

The State is obligated to interfere in personal laws of the communities when such laws are oppressive towards a certain class of citizens. Women have rallied for reforms over decades however complete reformation of personal laws is not possible without state intervention and the state's willingness to participate in the journey towards enactment of gender-neutral laws. The State must realize that the Indian society is still run by the notions of patriarchy and these personal laws are a way to enable such patriarchy and restrict the role and rights of women in our society. India is also a party to treaties such as Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), which shows that our Government has expressed willingness to align the standards of equality and justice exercised in our country to the international standards and ensure that they align to the universal human rights system. Article 5 of the CEDAW requires States Parties to *"take all appropriate measures to modify social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."*<sup>43</sup> This will also include an obligation to ensure that the succession and inheritance rights are equal for men and women. This equality can be brought about any means, be it the introduction of a Uniform Civil Code or bringing individual reforms in all the Acts and customs governing different religious groups or communities.

In ensuring that the State does not overlook the interest of any religious or regional community, it is important that when bringing about major reforms the State must encourage public debate and discussion. Women especially should be given a chance to voice their concerns. This is because the aim of these reforms is not only impose certain laws on the citizens but to ensure that these laws have been enacted after taking into account the interest of all.

Apart from the State Legislature and the Executive's responsibility to enact and amend laws,

---

<sup>43</sup> Article 5, Convention on the Elimination of all Forms of Discrimination Against Women

there is also a responsibility on the Indian Judiciary to ensure that the laws on paper do not differ from the ground reality. Justice Chandrachud, a Supreme Court judge has talked about how it is time for judges to use the principles of feminism while deciding cases. The judge says that the principle is simple, equality amongst the genders. Equality amongst genders is already a principle and an important fundamental right provided by the Constitution. It is time for the judges to make decisions, which support gender equality, and for the legislature to finally make the required amendments in the current acts governing civil law.

A just law does not always lead to justice; rather it is the obligation of the State, judiciary and the society as a whole to ensure justice is granted to all. This includes constantly reforming and redeveloping our laws and as a society to meet the needs of modern times. Women are guaranteed equality in all spheres of life, and this equality can be translated as a ground reality only when the laws of the country are amended in a manner that they see women to be equally capable of men, where men are not considered a priority not only when it comes to inheritance and succession matters but all spheres of life. Only then can we truly bridge the gap between the constitutional ideals and the social reality.

