CHAPTER 2

NON- REACTIVE HISTORICAL PERSPECTIVE OF
RIGHT TO PROPERTY OF HINDU WOMEN AS
DOCTRINAL MEASURE

“A woman is not entitled to independence in any period of her life; her father shall protect her when she is maiden, her husband when she is married, her son when she is old; and in their absence kinsmen shall protect her”

-Manu IX,3

Lifelong subjection was the condition of women, according to ancient legal system\(^1\). It happens because of physical weakness and the impulsive nature of the fair sex, as well as two peculiar institutions common to most systems of archaic jurisprudence, namely patria potestas\(^2\) and slavery.

Patria Potestas is the father’s absolute and unlimited power over his children, in exercise of which he could sell, give, abandon or even kill his own child\(^3\). The reason behind was considered as the father and mother are the cause of creation and the existence of a child, so they are entitled to full authority over their children, they can control and dispose of the child in any

\(^1\) G.L. Sastri, A treaties on Hindu Law, Eastern Law House, Calcutta, Fifth edition, p. 581,
\(^2\) ibid.
\(^3\) ibid
manner whatever they likes. Though this natural reason is equally applicable
to the mother, but she is unable to do this because of her own personal
disability being a woman, as she herself is under the will and control of the
person who owns her.

The dominating role played by the man from the ancient period in the
patriarchal society of Hindu people is rooted with the joint family system,
which has sprung up from the ancient period and can be considered as the
earliest unit of human society. The Patriarchal family has been defined as ‘a
group of natural or adoptive descendants, held together by subjection to the
eldest living ascendant, father, grandfather or great grandfather’\(^4\). Whatever be
the formal prescription of law, the head of such group i.e. father is the object
of respect either of affection or under fear. In the writings of smritikars we
have found that Hindu father was the backbone of the family, and hence
wives, slaves and cattles were considered as his property. But such a despotic
position of Hindu father in patriarchy reduced to the representative of the
family in the form of Joint Family System, which improve the condition of
individual right. In Joint Family System, Karta was the head of the family,
where the autocratic power of father could be shifted to other male members
of the family, although such system excludes the managership of Karta by
woman. A woman was not allowed to be a Karta, however in absence of major

\(^4\) Werner F. Menski, Hindu Law, Oxford University Press, edition (2009), Delhi
male member in the family the mother could discharge the function of the Karta on behalf of the minor male until he attained majority.

2.1 Hindu Joint Family:

A Hindu Joint Family always consists of male members descended lineally from a common male ancestor, together with their mothers, wives or widows and unmarried daughters bound together by the fundamental principle of sapindaship or family relationship which is the essence and distinguishing feature of such institutions. This body is purely a creature of law and cannot be created by act of parties, except in so far that by adoption or marriage a stranger may be affiliated as a member thereof. In a Joint Hindu Family ordinarily, the normal condition is that Hindu society is ordinarily joint not only in estate but also in food and worship. The members of a joint family may have separate personal properties and also may have common properties of the entire joint family. In such family all the members may not possess equal rights or status even though the property of the family is called joint family property. Some may have the right to alienate or divide the property who are called as coparceners, whereas some members have only the right to receive maintenance. For example, the female members of the family like the daughters have no share in the property. On her marriage she gets the
membership of her husband’s family and is deprived of the membership of the family of her birth. And the sisters, though they were entitled to a share in the property, have lost that right and are entitled only for maintenance until their marriage and for marriage expenses.

Hon’ble Justice Bhashyam Ayyangar has stated the legal position, in Sudarshanam Maistry vs Narasimbulu Maistry,5

“The Mitakshara doctrine of joint family property is founded upon the existence of an undivided family, as a corporate body and the possession of the property by such corporate body. The first requisite, therefore, is a family unit and the possession by it of property is the second requisite. For the present purpose, the family members of the family may be left out of consideration and the conception of a Hindu family is a common male ancestor with his lineal descendants in the male line and so long as that family is in its normal condition, viz., the undivided state- it forms a corporate body. Such corporate body, with its heritage, is purely a creature of law and cannot be created by act of parties, save in so far, that, by adoption, a stranger may be affiliated as a member of that corporate family……As regards the property of such family, the unobstructed heritage devolving on such family, with its accretions, is owned by the family, as a corporate body and one or more branches of that family, each forming a corporate body within a larger

5. ILR (1902) 25 MAD 149
corporate body, may possess separate unobstructed heritage, which, with its accretions, may be exclusively owned by such branch as a corporate body”.

The Hindu Law of the joint family property is yet to be Codified. Though there are a few scattered piecemeal legislation in this subject. But it needs more attention of codification rather than piecemeal legislation. The law relating to this matter is in the Smriti, more than that in the commentaries or digest, and still more in the judicial decision.

2.2 Coparcenery:

Coparcenery is a narrower body within a joint family and consists of only those persons who have taken an interest in the property of holder by birth. It is a blank check to masculine gender. It commences, with a common ancestor and includes a holder of joint property and only those males in his male line who are not removed from him by more than three degrees. Thus, a son, a grandson, or a great grandson is a coparcener with the holder of the property i.e. only male can be coparceners, and all females were excluded from the Coparcenary, because the test of coparcenership is the right to enforce a partition and no female has that right though females like wives and mothers

6. R.K.Mishra, A spotlight on Mitakshara School, the Law House, 1st edition, Bhubaneswar, p. 44
may be allotted shares when a partition takes place. The divorced wife loses the membership of the joint family of her husband because her link with the family was only through her husband. A widow remains a member of the joint family of the husband till she remarries\(^7\). So women were subject to male dominion under both family be it Joint Hindu Family and Coparcenary family.

The Supreme Court has summarized the law of the Mitaksahara coparcenry as follows (State Bank of India vs. Ghamandi Ram (dead) by Lrs)\(^8\)

“According to the Mitakshara school of Hindu law, all the properties of a Hindu joint family is held in collective ownership by all the coparceners in a quasi-corporate capacity. The textual authority of the Mitakshara lays down in express terms that the joint family property held in trust for the joint family the members then living and thereafter to be born. The incidents of coparcenership in Mitakshara law are:

First, the lineal male decendants of a person up to the third generation, acquire on birth ownership in the ancestral properties of such person;

Secondly, such descendants can at any time work out their rights by asking for partition;

\(^7\) Supra, note 6
\(^8\) AIR 1969 SC 1330
Thirdly, that till partition each member has got ownership extending over the entire property conjointly with the rest.

Fourthly, that as a result of such co-ownership, the possession and enjoyment of the properties is common;

Fifthly, that no alienation of the property is possible unless, it be for necessity, with the concurrence of the coparceners; and

Sixthly, that the interest of a deceased member lapses on his death to the survivors.

The Coparcenary under the Mitakshara School is a creature of law and cannot arise by act of the parties except in so far that on adoption, the adopted son becomes a coparcener with his adoptive father as regards the ancestral properties of the latter. 

These principles of Mitakshara Law have undergone radical changes and are clearly on the way out and the system is sure to abolish by sheer efflux of time in view of amended section 6 of Hindu Succession (Amendment) Act, 2005.

9. Supra, note 7
2.3 Obstructed and Unobstructed Heritage:

Due to the nature of interest in the property a distinction arises, in which a person acquires right by birth and that in which he does not get such right is called as ‘daya’ or ‘heritage’. The Mitakshara system has classified it into two, i.e., Apratibandha or unobstructed heritage and Sapratibandha or Obstructed heritage. In obstructed heritage the nearer excludes the more remote and in unobstructed heritage the doctrine of representation excludes the rule of preference. The wealth of the father or of the paternal grandfather becomes the property of his son or of his son’s sons in the right of their being his sons or grandsons, that inheritance is not liable to obstruction, so they take the property as unobstructed heritage. It means unobstructed heritage is property where a person gets a right by birth. But property that a Hindu gets by inheritance from any relation other than his father or grandfather or great grandfather is called the obstructed heritage. It is because the accrual right in it is obstructed by the existence of the owner. The heir who gets this property on the death of the owner had no interest in it by birth. Hence the property inherited from one’s brother, son, uncle, nephew, mother, grandmother or from paternal ancestor beyond the fourth degree of ascent is obstructed.

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11. Ibid
12. Ibid
13. Ibid
14. Id at p.269
heritage\textsuperscript{15}. Inheritor had no interest in the obstructed property before the death of the owner\textsuperscript{16}. This doctrine applies equally to coparcenary property and to the separate property of the father. In a coparcenary joint family, the interest of a coparcener, on his demise, passed as unobstructed heritage in the hands of his son, grandson and great-grandson. If he died without having male issue, passed by way of survivorship to the other coparceners. So a son enjoys unobstructible right by his birth in the family, but a daughter was deprived of the same right to be unobstructible. Such deformities has been removed by the Hindu Succession (Amendment) Act, 2005.

In Dayabhaga Law there is only obstructed heritage either the property as ancestral or self-acquired. The property is obstructed both for son and daughter till the death of the father. It becomes unobstructible only after the death of the intestate, in the hands of his child.

The position of Hindu woman in the society during ancient period could be found in the writings of Smritikars of Smriti period. Smriti is considered as an ancient source of Hindu law. During Smriti period, considerable changes regarding the position of women in home as well as in the society was reflected in the writings of Manu, Yajnavalkya, Brihaspati, Narada and other Smriti writers. Among all the authority of Manu is paramount.

\begin{itemize}
\item \textsuperscript{15} supra, note 14
\item \textsuperscript{16} ibid
\end{itemize}
2.4 Opinion of Smriti Writers on the position of women:

Manu who was considered as the supreme authority of Hindu law among Smritikars showed double view towards women. Manu Smriti mandates that the highest respect and the regard must be extended and full protection should be given to women throughout their life. Some of his relevant verses are given below:

“Women must be honoured and adorned, by their fathers, brothers, husbands and brother-in-law, who seek their own welfare.”17

“In a house where women are honoured, there Gods are pleased. But where they are not honoured, and are insulted, nothing done in that house yields good results.”18

“In a house where womenfolk live in grief, the whole family perishes. In a house where womenfolk are happy, that house prospers.”19

17. MANU- III 55
18. MANU-III56
19. MANU-III57
“In a house where female members are not duly honoured and are made to suffer, and consequently they pronounce curse, such family perishes completely as if destroyed by magic.”  

“Men who seek their own welfare, should always respect women and give presents to them in particular during holidays, and festivals with ornaments and dainty food.”

“In that family in which the husband is pleased with his wife and the wife is pleased with her husband, happiness will be everlasting.

The house in which womenfolk are decorated with dress and jewellery, shines, otherwise the house is sure to suffer.”

“Recently married daughters, as well as daughters-in-law, young girls as also pregnant women should be served with meals even before the meals are served to the guests.”

All the above verses indicate the utmost consideration given to women in Manu Smriti. The normal usage of family is to feed guests first and only there after the owner of the house, his wife and other members of the family have to have food. But the above provision shows an another picture that a young

20. MANU-III58
21. MANU- III-59
22. MANU- III-60
23. MANU III-62-114
daughter who had been recently married and a young daughter-in-law as also young girls and pregnant women were given such an important and priority in that they were to be served with meals even earlier than the guests. This indicated the highest concern shown to women in view of their great importance to the happiness of family.

But on the other Manu can rarely be said to be more tender to women than he was to the shudra. He started with a low opinion of women. Manu proclaimed:

“It is the nature of women to seduce men in this (world); for that reason the wise are never unguarded in (the company) of females”.24

“For women are able to lead astray in (this) world not only a fool, but even a learned man, and (to make) him a slave of desire and anger.”25

“Though their passion for men, through their mutable temper, through their natural heartlessness, they become disloyal towards their husbands, however, carefully they may be guarded in this (world).”26

24. MANU II 213
25. MANU II 214
26. MANU IX 15
“(when creating them) Manu allotted to women (a love of their) bed, (of their) seat and (of) ornament, impure desires, wrath, dishonesty, malice, and bad conduct”.  

The laws of Manu against women were of poisonous nature. Women should not be free under any circumstances as we find in the opinion of Manu:

“Day and night women must be kept in dependence by the males (of their families), and, if they attach themselves to the sexual enjoyments, they must be kept under one’s control.”

“By a girl, by a young woman, or even by an aged one, nothing must be done independently, even in her own house”.

“Considering that the highest duty of all caste, even weak husbands (must) strive to guard their wives”.

Manu was not taking a liberal view in inheriting the property by a woman. He had almost disqualified the woman in deriving title over property.

27. MANU IX 17
28. MANU IX 2
29. MANU IV 2147
30. MANU IX 6
By him a woman was reduced to the level of a slave in the matter of property.\(^{31}\)

Narada observed that: “it is through independence that women go to ruin, though born in a noble family. Therefore the Lord of Creatures has assigned a dependent condition to them.”\(^{32}\)

It may be observed from the aforesaid text that the conditions of women during the period of the Smritis was one of dependence. The main purpose of the aforementioned texts may have been to preserve the morals of females as they lacked capacity to differentiate between right and wrong.

Dr. Altekar observes as, ‘the fact, however, was that the doctrine of perpetual dependence of women was never seriously subscribed to by Hindu society, though some of its jurists had solemnly initiated it. Proprietary rights of women went on developing in spite of the doctrine. The only result of material consequence which it produced was to circumscribe women’s power to dispose of immovable property. It has to be noted, however, that the rights of males also were by no means unrestricted in this matter’\(^{33}\)

\(\text{32. NARADA XIII}\)
2.5 Proprietary Right of females under old Hindu law:

A female had to perform manifold roles in her entire life in the form of daughter, sister, wife, mother, widow etc. in every performance she was entitled for different share in the family property. The various nature of women’s share in the property of Hindu Joint Family is discussed below.

2.5.1 Share of the daughter and unmarried sister:

Hindu society from the ancient period has preferred the birth of a son to a daughter. The birth of a female child did not cause much rejoicing, and was put aside as the male child was received by the parents with much happiness and joy assuming that he would continue the family line, offered ‘pinda’ to the ancestors for the spiritual benefits, was a support to the parents when they will attain the age of seniority and helplessness and added luster and glory to the good name of the family by his noble and brilliant achievements. In this connection the observation in a decision of a Division Bench of the Patna high Court in Nalini Ranjan vs. State of Bihar\(^3\), can be referred, where some of the reasons justifying the exclusion of the daughter by the sons have been stated as under:

\(^1\) (AIR 1968 PAT 442)
“Some of such factors are the offering of oblations after the death of the father, the pious obligation attaching to a son to discharge his father’s debts, the changing of gotra of a daughter when she is married from one of her father to that of her husband and well-nigh severing in many vital respects her connections with the father’s family and joining that of her husband so that a daughter on marriage ceases to be a member of her husband’s family: these, inter alia, do afford sufficient rationale to sanction the discrimination between a son and daughter.”

As for the daughter, she was considered more a liability than an asset. They are declared as source of misery, while the son is the savior of the family; again daughters are the source of trouble but the sons are the only hope for the family. After her marriage there was a change in her gotra after her marriage. As because upon marriage she migrated to another family and therefore ceased to have any direct spiritual benefit of her parents. None the less it was required for the father to maintain and educate his daughters, and to give them in marriage before they attained puberty to suitable bridegrooms. On the death of the father, the duty devolves upon the brother or the Karta of the family. She remained as a burden as substantial wealth had to be spent on the occasion of her marriage. According to Hindu family system, the daughter becomes a part of her husband’s family after marriage, and inherits her husband’s or son’s property. However, Dharmasastras have tried to create some security for the
unmarried daughter (and a married daughter in distress). The unmarried
daughter had the right to be maintained by her father and brothers, and also the
right to be married off for which the father or the brother may draw from the
ancestral corpus. After the death of the father, property devolves upon the
brothers, and they are under the obligation to look after the unmarried sister.
The unmarried one had to be provided for with the apportionment of a share in
the family property and also had to be guarded from going astray. They also
have the pious duty to arrange her wedding.

It had been laid down by Manu that each brother must give one fourth of
the share to his unmarried sisters\(^\text{35}\). In this form the rule is absolute and
unconditional. Yajnavalkya prescribed that the ‘married’ brothers must give one
fourth of their share ‘for the wedding of the unmarried sisters\(^\text{36}\). This rule is
conditional and prescribes that only married brothers shall give one fourth
share, and that the share is to be given for the marriage of the unmarried sisters.

Jimutavahana says very categorically that the smriti rules prescribing one
fourth share for the unmarried sister do not confer upon her any vested right to
get that share, and that the spirit of the law is that the brothers are under the

\(\text{35. MS IX 118}\)

\(\text{36. YS II. 124}\)
obligation to arrange her wedding. Hence, if the estate is large, they may not spend one fourth but only such amount as is necessary. The Mitakshara showed some innovation in interpreting the rule of one fourth and suggested that the expression one fourth did not mean one fourth of each brother’s share but only one fourth of the share the daughter would have received if she were a son.

The Manu smriti gave an equal share to the son and the daughter in the mother’s property but Yajnavalkya made the daughter the first heir to the mother’s estate.

Under the Hindu Succession Act, 1956, the position of sister is akin to that of the brother and a sister may be a natural sister, a step sister or a uterine sister. ‘Sister means only the natural sister and sister related by half blood i.e., step sister. A uterine sister will not be a sister within the meaning of this entry in view of the explanation of the schedule. Under the Act the sister inherits simultaneously with the brother and other heirs mentioned in this Entry and take an absolute estate. The full-sister is preferred to the half-sister. Uterine sister is not entitled to succeed as per the Explanation to the Schedule. In C. S. Muniappa vs. Pillayya, the deceased died leaving behind no heirs specified in Class I. The petitioners claimed succession under the 4th entry in Class II. It was found that another sister of the deceased belonging to the 2nd entry in Class I

37. DBIII 38
38. Mitakshara on YS II 124
39. 2009 (84) A.I.C. 791 (Knt.)
was alive. The property of the deceased devolved on her as the only surviving sister.

**2.5.2 Illegitimate Daughter:**

The position of illegitimate daughter to inherit the property of her father is nowhere found to be mentioned under any text of Hindu law. An illegitimate Daughter cannot inherit her father’s property, though he happens to be sudra\(^{40}\). The test of giving the right of succession to the illegitimate son was relied upon to show that the daughter was also entitled to succeed, the argument was that “son” the word was comprehensive to include a daughter, but the argument was repelled as unsound on the ground that the texts which do not generally favour the claims of females must not be built to indicate them in absence of a clear cut expression to that effect, and therefore the claims of only such of those females as are mentioned expressly should be allowed for inheritance.

The rule of inheritance is almost based upon marriage and a legitimate descent. The illegitimate son of a Sudra is the exception to this rule that too his rights are also limited. But an illegitimate son of a Sudra does not inherit collaterally to a legitimate son by the same father. The reason behind is that there can be no sapindaship relationship between a legitimate and an

\(^{40}\) AIR 1915 Mad 63
illegitimate collaterals. But due to lack of expressed text in terms of the right of illegitimate daughter over the property of her prostitute mother, the son excludes the daughter. In Menakshi vs. Murugan\textsuperscript{41}, it has been observed that a daughter includes an illegitimate daughter and so a legitimate son cannot exclude her in the case of Stidhana property of a prostitute. An illegitimate daughter can succeed to her mother’s property but not the property of her father even in the absence of the nearer heirs. So illegitimate daughter is not getting her due in the property of her father and forefathers.

\textbf{2.5.3 Wife’s right to property:}

The construction of the daughter, as a liability and with whom the parents’ relation was to a great extent defined by their burdensome responsibility to give her in marriage, is the precursor of her role as a wife. On becoming a wife, a female is considered to assume her ideal role, where she may fulfill her duties towards her husband, his family and the society, and consequently live a virtuous life.

The chastity of the wife was of paramount importance, for according to Manusmriti, ‘One must guard the wife against sensual contact, as the ruin of the wife involves the ruin of the family, ruin of the family involves the ruin of

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41. 2006 (38)A.I.C. 425
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the line, the ruin of offerings involve the ruin of the soul, and ruin of the soul means the ruin of all things.‘

It is an important requirement that chastity has to be guarded by the Husband;

‘Women must particularly be guarded against evil inclinations, however trifling they may appear to be; for if they are not guarded, they will bring sorrow to both the families. Considering it the highest duty of all castes, even weak husband must strive to guard their wives…. He who carefully guards his wife preserves the purity of his offspring, virtuous conduct, his family, himself and his means of acquiring merit.’

But such guarding is not done by force. It is not possible on part of the husband to guard their wives by force.

The Manusmriti suggest three ways of doing this. Firstly, the importance of chastity must enthuse/infuse in their mind so that they might themselves be their own guards. Secondly, they should be kept away from drinking, associating with wicked people, tendency to keep away from the husband rambling, sleeping and residing at other people’s houses, because these things help to corrupt the mind of women and they develop to lose all fear of their

42. Reena Patel , Hindu Women’s Property Rights in Rural India , Ashgate (2007)p.79

43. ibid
father-in-law and others as also the regard for public opinion. Thirdly, the husband should keep her engaged in the management of the household work so that she does not get the time and opportunity to think and engage in any undesirable and evil acts\textsuperscript{44}.

Chastity plays a significant role in any analysis of the position of a Hindu wife in the family. While it is the prime right of the wife to be maintained by her husband persists notwithstanding her unchastity, the pervasiveness of the religious prescriptions as normative and binding principles to be taken into account by law is evident from the implications of unchastity in contemporary law. Under Hindu Succession Act, 1956 chastity was a condition for entitlement of Husband’s property. Again the Hindu Adoptions and Maintenance Act, 1956 nullifies the right of a Hindu wife to claim maintenance if she is unchaste, even if she may be living apart from her husband under any of the grounds recognized by the Act.

Dharmasastra shows several stages of evolution of law on the wife’s right to property, particularly her husband’s property- both self acquired and ancestral. Some earlier sutras prescribed that the wife was the other half of her husband, and that the bond of marriage between the two invested them with joint ownership of property. Apastambha said that husband and wife had a

\textsuperscript{44} Supra, note42, p80
joint interest in the acquisition and disposal of wealth. On the basis of Apastamba’s principle it was further held that after the death of the owner, the other held the property, and therefore after the death of the husband the wife was allowed to succeed to the whole of the deceased husband’s estate without allowing even the son to take a share\textsuperscript{45}. The Dayabhaga of Jimutavahana follows this principle, and lays down that after the death of the father the sons have no independent power to partition father’s estate throughout the life of the mother, yet the sons are given a position of eminence and the widow’s seemingly absolute right in the husband’s property is circumscribed by the rights of the son, and it is said that though the sons acquire ownership in father’s property immediately upon his death, the actual partition is postponed to a later date\textsuperscript{46}. It is however, laid down that the sons may divide with the mother’s consent.

Jimutavahana further lays down that where a person leaves behind more than one widow, each having an equal number of sons, the widows may partition the property among themselves, and though he says that this partition is as per the widows and not sons, yet it is submitted that the reference to equal number of sons signifies that the mother’s right to partition is limited by

\textsuperscript{45.} \textsuperscript{DB III. 1.1}
\textsuperscript{46.} \textsuperscript{DB III. 1.13}
the sons, and that each widow is allowed to take an equal share only as a stop gap arrangement till the sons can succeed (upon her death).47

The Mitakshara has a very different scheme of a woman’s right to property and the son’s interest in the ancestral estate. It has made the son a co-owner with the father of all the ancestral property and vested him (the son) with an interest since birth in it. The wife loses her position of equality and her status as the joint owner with the husband. Consequently, it came to be held that the sons could have a partition during the life time of their mother whose consent became irrelevant. Vijnaneswara has, following Yajnavalkya, provided that where a man divides his estate during his life time he should give an equal share to his wife, and where sons divide after the father’s death they should give an equal share to their mother.

Though Yajnavalkya made adequate provision for the wife of the person dividing his wealth during his lifetime, he provided that the wife of the person dividing his property shall be given a share equal to that of the sons provided that she has not received her stridhana. Such provision to the rule leads to several possibilities about the woman who has received her stridhana (i) that she does not get any share in the husband’s property, or (ii) that she gets an amount equal to her stridhana, (iii) where she has received a part of her stridhana she gets the difference between her stridhan and the amount

47. YS II. 115
already received, or (iv) that she gets the difference between the amount received and the one’s share\textsuperscript{48}.

Of these possibilities the Mitakshara ruled in favour of giving to the wife the difference between the son’s share, and what she has received as stridhana. Jimutavahana prescribes that when a person divides his property in his lifetime he must give his wife a share equal to that of the son provided that if the wife has received her stridhana she would get only half the share of the son. He added another condition that only the sonless wife is entitled to a share equal to that of the son, whereas woman with a son shall get only half of the share.

2.5.4 Widow’s right to inherit:

It is quite clear, after having traced the position of the female as a daughter and wife, she occupies a totally dependent position, first to her parents, and thereafter to her husband and his family.

Apastambha recognized husband and the wife as co-owners of wealth. Therefore the wife succeeded to the estate upon the husband’s death. A verse in the Yajnavalkya smriti, prescribes that sonless the father, and the grandfather

48. Mayne’s, Hindu Law & Usage, Bharat Law House, 16\textsuperscript{th} edition, New Delhi, p.976
are also entitled to equal shares with sons and grandsons. However, this verse limits the right to sonless women and the wives who have sons get excluded.

The Mitakshara reflect two contradictory trends with regard to the widow’s right to a share in her deceased husband’s estate at the time of partition by her sons 49, On the one hand they argue very strongly in favour of giving an equal share to her with the sons but on the other hand they introduce several restrictions on her right . Under the Mitakshara School, the widow’s chastity plays a key role in inheriting property of her husband. A married woman living in adultery at the time of her husband’s death is disqualified by reason of her unchasity 50. The widow under the school must be chaste not only when the inheritance of her deceased husband opens but also thereafter.

The Dayabhaga has a very different system where, though sons acquire an interest in father’s estate since birth, the entire property of a deceased male devolves upon the widow, and the sons cannot divide it till the mother is alive except with her consent.

49. Supra.note 48
50. MS IX 146
2.5.5 Rights of Sonless Widows:

The sonless widow’s right to succeed to her husband’s estate has been a big area of dispute in different phases of Hindu law. Classical smriti works show that the opinion on this subject was divided. Manu said that the widow had no right in her husband’s property in the absence of a male child, for her interest in property was through the son, and if she submitted to niyoga, and gave birth to a son the latter would take all the wealth of his deceased father\(^\text{51}\). Yajnavalkya, on the other hand, was very liberal and allowed full right to the sonless widow to succeed to her husband’s estate\(^\text{52}\).

While laying down the order of succession to a man who died without a male progeny, he placed the wife at the first place. A verse ascribed to Prajapati clearly bars the father, brothers, and other relatives from succeeding to the wealth of a male who died without a son if his wife is living. A rule in the Narada smriti specially laid down that if a man died without a son, his property would go to his brothers, and they would be under the obligation to maintain his widow, i.e. the widow was entitled only to maintenance\(^\text{53}\).

In face of such conflicting authorities it must have been difficult for commentators and authors of digest to come to any definite conclusion but this

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51. Mitakshara on YSII. 135
52. YS II.135
53. Narada II
difficulty itself affords a deep insight into the minds of Hindu thinkers and shows how Hindu law adapted itself of new situations and new thought. Both the Mitakshara and the Dayabhaga schools exhibit concern for the plight of the sonless widow, and seek to grant her some interest in her deceased husband’s estate, but both also seek to protect the interests of the father and brothers, and the heirs in the male line of the deceased who in their view inherit the deceased’s property after the demise of the childless widow.

The Mitakshara distinguishes between self acquired property and ancestral property on the one hand, and divided and undivided property on the other. It allows the sonless widow to inherit the separate estate of the husband, i.e. his self acquired property and his share in the ancestral estate if separated from the family. However, she gets no share in the husband’s ancestral property if he was undivided or had rejoined the joint family. The husband’s family is under obligation to maintain her decently.

Women’s right over property shows several stages of evolution. Different writers gave their opinion differently. There were lack of uniform rule which govern the woman’s right over property.

When she becomes a widow, Manu allows her maintenance, if her husband was joint, and a widow’s estate in the property of her husband, if he was separate from his family. But Manu never allowed her to have any dominion
over property. Manu had limited the proprietary right of women. They were not entitled to any kind of share in the property of father and husband. Though the widow can ask partition of the property in the husband’s family, but she was entitled for a limited interest over such property, which she got in lieu of maintenance. Manu cut a sorry figure of women’s right over property.

It is considered as a pre-existing right of female to receive maintenance. Mayne in his “Treatise on Hindu Law & Usage”, has visited the history and origin of the right of maintenance of a Hindu woman which according to him arises from the theory of an undivided family where the head of the family is bound to maintain the members including their wives and their children. Thus he observes as, ‘the maintenance and extent of the right of maintenance necessarily arises from the theory of undivided family. The head of such a family is bound to maintain its members, their wives and their children, to perform their ceremonies and to defray the expenses of their marriages.’

But gradually women’s incapacity to hold property has been reduced with the introduction of few reforms in the then society. We can find two kinds of property mentioned in the writings of various commentators, i.e. stridhana and women’s estate.

54. MS IX 104
55. 11th Edition, p. 813
2.5.6. Step Mother:

The position of step mother is not good under the Hindu Law. Her position is never at par with the mother. She is always treated as the father’s wife. Acharya Shuklendra has raised its queries regarding inclusion of Father’s widow in entry No VI of the Hindu Succession Act, 1956, as

“It is not at all understandable as to why the Legislature incorporated this Entry separately whereas “mother” has already been specified in Class I of the Schedule. Does father’s widow mean something different from Mother?”

Father’s widow means and includes the mother and stepmother. The context in which this expression is used in Entry VI of Class II, it relates only to the step mother, for, if the mother had been alive, she would have taken the entire estate as Class I heir. The expression “father’s widow” has a special significance and has been preferred to the expression “stepmother” for a specific reason. Where a woman marries the father of the propositus, she becomes his step mother forever. A widow is one who survives her husband as his wife; if she had been divorced by her husband she cannot be his widow. She will only be his divorced wife, but continue to be the stepmother. The legislature has conferred the right of inheritance on the stepmother who was the widow of his father and not on the stepmother who had been divorced by his

father. But remarriage of the father’s widow does not constitute a bar to her right to succeed under this Entry. Under section 24 of the parent Act, the brother’s widow was disentitled to inherit if she had remarried on the date when succession opened. Section 25 has now been omitted by section 5 of the Hindu Succession (Amendment) Act, 2005 with effect from 9.9.2005 and the disqualification is taken away.

A step son has not statutory obligation to maintain his step mother unless any portion or share of his father is allotted or devolved or taken by him. Where a wife obtained a decree for maintenance with a charge on joint family property, it is binding on her step son subsequent to partition of the joint family property.

2.6 Stridhana:

“What was given before the nuptial fire, what was presented in the bridal procession, what has been conferred on the wife through affection, and what has been received by her from her brother, her mother, or her father, are ordained the six fold stridhanam or woman’s property” 57

The term Stridhana is derived from the word ‘Stri’ which means woman and ‘dhana’ means wealth. So stridhana means woman’s property. It is mainly

57. Manu IX 194
gifts obtained by a woman from her relations, her ornaments and her apparel which constitute her stridhana.

It would not be easy to show any prevailing practice of any Hindu caste or community gave women rights of acquiring, enjoying, and disposing of the property equal to those by their male counterpart, who enjoyed without question. However, the concept of stridhana has advocated the women’s independent ownership.

When the Code of Manu was drawn up, the female sex had fallen to a distinctly lower position. A woman was not allowed ever to seek independence, no religious rite was allowed to her apart from her husband, she must oblige him as a God. According to Manu and Katyayana, “a woman’s earnings were absolutely at the disposal; of the man to whom she belonged. Still certain kinds of property were recognized as belonging to the wife:”\textsuperscript{58}

1. What was given before the nuptial fire (Adhyagni),

2. What was given on the bridal procession (Adhyavahanika)

3. What was given in token of love (Dattam Pritikarmani),

4. And what was received from a brother, mother or father were considered as the six- fold property of a married woman.

\textsuperscript{58} Manu and Katayana, D.B.iv,1,4
At first six descriptions of property were recognized as woman’s property, and these consisted of gifts received by a woman from four relations, namely, the father, the mother, the brother, and the husband, as well as of gifts received at the time of marriage when the ceremony was actually being performed before the nuptial fire, and of gifts received when the bride was taken to her father-in-law’s house. Upon a consideration of all the items described as stridhana, it appears that women’s property under the codes consisted only of gifts or grants made by her relations, and some of them are separately enumerated either to remove the doubts, or to make the occasions of the gift. The gifts made by strangers only before nuptial fire and those made at the bridal procession are part of stridhana. 59

The most striking feature of stridhana is that a maiden and a widow, provided they are not minors, have absolute powers of disposition over their Stridhana properties and can dispose of them by gift or will. But the rights of a married woman during coverture vary according as the Stridhana property is Saudayika or Non-saudayika. 60

Saudayika means the gift of affectionate kindered, includes both Yautaka or gifts received at the time of marriage as well as its negative Ayautaka. In respect of such property, whether given by gift or will, she is the absolute owner

59. Infra,note 57 at p.47
60. Mayne’s, Hindu Law&Usage, Bharat Law House, 16th edition, New Delhi, p.1077
and can deal with it in any manner she likes. On the other hand in case of non-
saudayika property i.e. in the words of Katayana “the wealth which is earned by
mechanical arts, or which is received through affection from other (but the
Kindered), is always subject to the husband’s control”\(^61\). Hence in the case of
property which is non-saudayika, the husband’s consent is a condition precedent
to her power of disposal, and he is entitled to use it for his own purposes even in
the absence of any compelling necessity. But after his death, her power of
disposition becomes unfettered. Even during the lifetime of the husband, the
wife does not cease to be its owner, though the husband has the right above
referred to.

Therefore there are some general guiding principle which govern the
succession to Stridhana as given below-

1. The religious element is not a factor that enters into the question of preference
among the claimants. Thus neither unchastity nor illegitimacy operates as a
barrier against inheritance. This however does not mean that when a woman
leaves both legitimate and illegitimate issue, they are entitled to succeed
together. In such a situation, the legitimate issue excludes the illegitimate issue,
whatever be the sex of the rival claimant.

2. Female issues are preferred to male issue. Thus a son is excluded by a daughter
and the daughter’s son is excluded by the daughters’ daughter.

\(^61\) supra, note 60
3. Stridhana heirs take as tenants-in-common and not as joint tenants with right of survivorship, even though the heirs are the sons of the deceased woman.

4. Heirs like daughter’s daughters, daughter’s sons and son’s sons take per stripes

5. Female Stridhana heirs take limited estate except female heirs, governed by the Bombay School but male heirs take absolutely.

In Sheo Shankar Lal vs. Debi Sahai62, their Lordships of the Privy Council draw the difference between the two as follows:

‘The Bengal School of lawyers have always limited the use of the term narrowly, applying it exclusively, or nearly exclusively to the kinds of woman’s property enumerated in the primitive sacred tests. The author of the Mitakshara and some other authors (that is, of the Viramitrodaya and the Mayukha) seem to apply the terms broadly to every kind of property which a woman can possess from whatever source it may be derived.’

2.7 Women’s estate:

When a woman inherited property from a male or female, it was treated as her non-stridhana property over which she had no power of disposition in any

62. (1903) 25 All 468: 30 IA 302
manner like by sale, mortgage, lease, gift or will. Such property inherited by woman was known as woman estate or limited estate wherein she had no interest beyond her life time. On her heavenly abode the property passes not to her heirs, but went to the next heir of the last full owner, who was regarded as ‘Reversioner’. The word ‘limited estate’ is used in contradiction to ‘stridhana’ or ‘absolute estate’. The position of limited owner is not a tenant for life but she is the owner of the property subject to restrictions on alienation and subject to its devolving upon the next heir of the last full owner of her death. The entire estate for the time being is vested in her. She is the owner having limited power. During her life time no one has any vested interest in the succession. Being the owner of the property she can manage it like a prudent owner. At no time she is allowed to commit waste or do any work which is injurious to the reversioners. She is entitled for the whole income and she can spend the entire income. She can sell her life-estate in the property or mortgage it or make a gift of it to any one she likes. If she is dispossessed of the ‘limited estate’ by a third person she can sue to recover it, but if she fails to sue it and allows the adverse possession the reversioners are not affected by it. The widow holds the property as the legal representative of the husband. The owner of the limited estate has no power of alienation of the estate inherited by her from the deceased male owner except the following grounds:

63. Mayne’s, Hindu Law & Usage, Bharat Law House, 16th edition, New Delhi, p.1100
64. Id., p.1117
(a) Religious purpose:

The Hindu widow was entitled to cause expenditure for religious purpose from the estate of her limited estate for the following:

(i) Performance of the funeral and sraddha ceremony of the deceased.
(ii) Performance of the sraddha ceremony of the husband’s mother.
(iii) Other religious acts which are conducive to the spiritual welfare of her husband.

(b) Legal necessities:

In case of legal necessity arise the limited estate owner can alienate the property for the following:

(i) Cost of taking probate of letters of administration or succession certificate in respect of the estate of the deceased owner.
(ii) Payment of arrears of Government revenue and the decrees for rent accrued due after death of the deceased owner provided she had no funds to pay them.

When a widow inherits the property with a limited interest over it is called widow’s estate\(^{65}\). Such property is either property inherited by a woman or property which she has been allotted to her in a partition in her husband’s family. The distinctive feature of the estate is that at her death it reverts to the

\(^{65}\) supra, note 63 at p.50
heirs of the last male owner. The Hindu people worship Goddess Durga, Laxmi, Saraswati etc. as a symbol of power, wealth, knowledge respectively, who are women, but in practice from the time immemorial women are deserted and deprived of giving any right over property. Though women are considered as an ‘ardhangini’ of men, but they were not getting equal rights over property. Some texture expressly providing their rights but by imposing various conditions they made it quite difficult for enjoyment by the same. This made them quite handicapped and hence they are always subject to the control of male, which deteriorated women position in the society in large scale.

From the above discussion we can chalk out the status of women in holding proprietary rights under Hindu society during earlier period in summary-

1. They were dominated by male counterpart under patriarchy.

2. They were disqualified to be the Karta of the family.

3. They could not own property, though they own they could not dispose it in any manner she liked, conditions were imposed on them. Exception was stridhana.

4. Again holding of property depends on the chastity of woman. An unchaste wife was disqualified in inheriting property.

5. An issueless widow’s property reverts back to the relatives of husband.
2.8 Rights of women under the different customary practices in India:

In relation to the rights of women there are numerous prevailing practices under the different custom in the nook and corner of the country. However a brief attempt has been made hereunder of such practices.

In the Presidency of Madras a custom of handing over a piece of land to the daughter at the time of her marriage was prevailed. The income from this land was meant for the woman’s exclusive use. This was her stridhana and devolved on the female heirs and passed from mother to daughter. Perhaps the land was given with an intent to provide an independent income to the daughter which would be sufficient to provide for her personal expenses like manjal (turmeric) and kumkum (vermillion) while in her husband house, this is known as “manjal Kani.”

The similar type of custom of providing a piece of land for the daughter’s personal expenses also prevailed in the Maratha region of Bombay Presidency by the nomenclature of ‘bangdi choli’, which literally means bangles and blouse. In between certain lower castes of Madras Presidency, the women’s

right to one-third of the property upon her husband remarriage was also recognized which is known as ‘patnibhagam.’

Among the Virasaiva women from Karnataka region, it was viewed that twelve percent women inherited property in the form of land from their mother and this property passed on only to the daughters as per custom of the region, even when boys did not inherit from their fathers.

As per Carol Upadhyaya, in her study of the coastal Andhra region has recorded a practice of giving land to the daughter at the time of her marriage which was known as Katnam. According to her observation, this land owned by the woman was very distinct from the land owned by the husband’s family and also distinct from the present day north Indian practice of dowry. Even after marriage, as per their tradition, women continued to exercise control over this land. Among the Lingayat women of Dharwar region also had rights of divorce, remarriage and property ownership.

Among various caste and tribes, along the Malabar coast, there were female-headed joint family household and matrilineal inheritance patterns. Of

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67. Yadeorao Jogeshwar vs. Vithal Shamaji AIR 1952 Nag 55
69. Carol Upadhyaya, Dowry and women’s property in coastal Andhra Pradesh, Sage Publication, New Delhi, 1990
these the Marumakkathayam and Aliyasantha received judicial recognition during the British period\textsuperscript{70}. The female – headed joint families were called Tarwad and Tavazi and the line of descents was traced through the female line. These systems were in existence until recently and were brought to an end through specific state intervention in the form of legislations in the post-independence period\textsuperscript{71}. In this system, the women contracted loose marriage alliances which were called ‘sambandham’, which could be easily terminated with the consent of both the parties. Since the property devolved along the female line, there was no premium on the sexual purity of these women.

The Brahminical -Aryan customs followed by the upper castes of north India exercised a strict control over women and their sexuality and the status of women among them was low, as compared to women from the lower castes and the Dravidian regions. Brahminical norms such as pre-puberty marriage, restraint on widow remarriage and divorce, the ceremony of ‘kanyadan’, the theory of ‘kshetra and beeja’ (means soil and seed symbolizing that the woman was a mere carrier of the children who actually belonged to the man), are an indication of the lower status of women among the north Indian higher castes\textsuperscript{72}.

The main purpose of such rituals was to maintain the caste purity through a

\textsuperscript{70} Mayne’s ,Hindu Law&Usage, Bharat Law House, 16\textsuperscript{th} edition, New Delhi, p.1209

\textsuperscript{71} The Kerala Joint Hindu Family system (Abolition) Act, 1975,

\textsuperscript{72} M.N. Srinivas, Caste in Modern India and Other Essays, Media Promoters & Publishers, Bombay, (1986)
very strict control over women and their sexuality. However women from lower caste were relatively free from these strict rules. The women from lower caste worked and contributed to the household and hence were not totally dependent upon their men.

As far as the property was concerned, the law of the land was binding. Laws and customs applied to people locally, regionally and along family, tribe (or caste) and trade divisions. Therefore it is not surprising that there was greater similarity between customs and usages (as well as language and tradition) of people from a region irrespective of their religious faiths and affiliations, rather than between followers of a region living in far flung regions, for example the Malabar region and the north-eastern tribal belts. On the Malabar coast, not only the Nairs, but also the predominantly Muslim population of the Lakshadeep Island of around 99 percent, follow the matrilineal system of Marumakkathayam. The Khasi, Jaintia and Garo tribes of north-east region who converted to Christianity continue to follow the matrilineal inheritance. The Khojas, Cutchi Memons, the Bohras and the Halai Memons, who were converts from the trading communities of Gujrat, followed the Hindu custom of joint property, based on male coparcenary.

73. L.Dube., Conflict and Compromise Devolution and Disposal of Property in Matrilineal Muslim Society, Economic and Political Weekly (1994) XXIX/21
74. K.Alladi., Mayne’s, Treatise on Hindu Law and Usage, Bharat law House, New Delhi, 16th edition, p.63
2.9. The role of British Administrator in codification of Hindu Law:

The codification and reformation of Hindu personal law was a matter of great concern. British Imperialism brought substantial change in the existing legal framework, though initially they were reluctant to interfere between the personal laws of various religions, but situation impelled them to made reformation.

The British introduced the system of dividing the communities on the basis of their religion and applying to them their own ‘divine law’ disregarding their caste, tribe and race of differences. They had tried to introduce a concept of institutionalized religion with clear affiliation along the lines of Christian church fellowship and subordinated the institution of property to it. Since there were sharp differences in the customs and practices of Aryans and non-Aryan communities, the decision of deciding cases on the basis of a ‘divine and ancient Hindu law’ caused a lot of confusion and hardship. During this period social reform movements raised the issue of advancement of the women’s position in the society. It was a bold step to ameliorate the position of women by the British by way of codification of Hindu law despite of much opposition from the Hindu conservatives. The opposition to the codification was based mainly on religious grounds and rooted with the sentiments of male chauvinist. This slackened the process of
codification. Even then the earliest legislation brings females into the scheme of inheritance is the Hindu Law of Inheritance Act, 1929. This Act, conferred right of inheritance on three female heirs, i.e. son’s daughter, daughter’s daughter and sister (thereby creating a limited restriction on the rule of survivorship). Another landmark legislation conferring ownership rights on woman was the Hindu Women’s Right to Property Act, 1937. This act has brought about revolutionary changes in the Hindu Law of all schools, and brought changes not only in the law of Coparcenary but also in the law of partition, alienation of property, inheritance and adoption.

2.10 Property rights of women under the International Laws:

In support of property rights of women there are copious of International Conventions and Declarations. In its pledge to protect the women’s right to property the United Nations Organization (UNO) stands at the Supreme position worldwide. The woman is not discriminated only in the sphere of property rights, but discrimination has been creeping in other faces also in the globe.

While considering that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights, in the dignity and worth of the human persona and in the equal rights of men and women and
considering that the Universal Declaration of Human Rights asserts the principle of non-discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedom set forth therein without distinction of any kind, including any distinction as to sex, the United Nations has solemnly proclaimed by General Assembly resolution 2263 (XXII) of 7 November, 1967 as follows: (the relevant Provisions)

(1) Discrimination against women, denying or limiting as it does their equality of rights with men, is fundamentally unjust and constitutes an offence against human dignity.

(2) All appropriate measures shall be taken to abolish existing laws, customs, regulations and practices which are discriminatory against women, and to establish adequate legal protection for equal rights of men and women, in particular by embodied in the constitution or otherwise guaranteed by law, the international instruments of the united Nations and the law specialized agencies relating to the elimination of discrimination against women shall be ratified or acceded to and fully implemented as soon as practicable.

(3) All appropriate measures shall be taken to educated public opinion and to direct national aspirations towards the eradication of prejudice and the abolition of customary and all other practices which are based on the idea of the inferiority of women.
(6) without prejudice to the safeguarding of the unity and the harmony of the family, which remains the basic unit of any society, all appropriate measures, particularly legislative measures, shall be taken to ensure to women, married or unmarried, equal rights with men in the field of civil law, and in particular:

(a) The right to acquire, administer, enjoy, dispose of and inherit property, including property acquired during marriage;

(b) The right to equality in legal capacity and the exercise thereof;

(10) The principle of equality of rights of men and women demands implementation in all states in accordance with the principles of the Charter of the United Nations and of the Universal Declaration of Human Rights.

Amongst all the Conventions and Declarations and Resolutions on discrimination over women, the United Nation Convention on Elimination of All Forms of Discrimination against Women, 1979 is the major one which is dealing with the women’s right specifically.

The preamble of the Convention of 1979 among other things declares:\n
“Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural

75. Adopted on 18\textsuperscript{th} December 1979 and came into force in 1981
life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity”.

Article 1 of this convention says that, “for the purposes of the present Convention, the term ‘discrimination against women shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in political, economic, social, cultural, civil or any other field.’”

Article 3 says that states take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Article 8 states that state parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.

Article 16 of the Convention states that the state parties shall take all
appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure on a basis of equality of men and women the same rights to enter into marriage and the same rights of both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property whether free of charge or for a valuable consideration.

Being a signatory of this Convention, India in respect of its article 15(1) and 16(2) has declared that it shall be abided by and it shall ensure these provisions in conformity with its policy of non-interference in the personal affairs of any community without their initiative and consent.

Besides above the Vienna Declaration and Programme of Action, 1993 particularly in its chapter 3, from article 36 to 44 deals with equal status and human right of women.

For the first time this convention recognized the gender based violence against women in public and private life as a human rights concern and condemned all forms of sexual harassment and exploitation. The Conference concluded that;

“The human rights of women and of the girl child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life at the national, regional and international levels and the eradication of all forms of
discrimination on grounds of sex are priority objectives of the international community.”

All these Conventions, Resolutions and Declarations try to protect the interest of female and to remove the disparity and gender bias including the women’s right to marry, status in the family and right over property. But due to non-availability of binding force of the member countries and implementing agency to enforce these international laws in the domestic fields, the rights made for women’s become futile. However the International Laws are successful in infusing the awareness in the mind of the member countries to make the laws in guaranteeing the rights to women. Such International laws inspired the Government of India to bring the reformation in the sphere of providing property rights to women.

The rights of women and International treaties were noticed and observed by the Supreme Court in a large number of Judgements.

The Supreme Court has faced section 6(a) of Hindu Minority and Guardianship Act, 1956 and section 19(b) of Guardian and Wards Act, 1890 as violative of the concept of equality under the Constitution, in as much as the mother of the minor is relegated to an inferior position on ground of sex alone since her right, as a natural guardian of the minor, is made cognizable only ‘after’ the father. The Court relied upon the Convention on the Elimination of
all Forms of Discrimination against Women, 1979 (CEDAW) and the Beijing Declaration, which directs all State parties to take appropriate measures to prevent discrimination of all forms against women quite clear. It was held by the Court that the domestic courts are under an obligation to give due regard to International Conventions and Norms for construing domestic laws when there is no inconsistency between them.

In another case a challenge was made to certain provisions of Chotanagpur Tenancy Act, 1908 providing succession to property in the male line in favour of the male on the premise that the provisions are discriminatory and unfair against women and therefore, ultra vires the equality clause in the constitution76. The Court while upholding the fundamental right of the Tribal women to the right to livelihood held that the State was under an obligation to enforce the provisions of CEDAW which provided that discrimination against women violated the principles of equality of rights and respect for human dignity.

In cases involving violation of human rights, the courts must for ever remain alive to the International Instruments and Conventions and apply the same to a given case when there is no inconsistency between the international norms and the domestic law occupying the field. The courts are under an obligation to give due regard to International Convention and Norms for construing domestic laws more so when there is no inconsistency between them.

76. Article 14 of the Constitution of India
and there is a void in domestic law.

The Supreme Court has in numerous cases emphasized that while discussing constitutional requirements, court and counsel must never forget the core principle embodied in the International Conventions and Instruments and as far as possible give effect to the principles contained in those international instruments.

The Constitution of India has reflected the two principle of gender equality and non-discrimination which are the basic human rights under the Universal Declaration of human Rights 1948. Equality before the law, equal protection of laws, gender equality and right to non-discrimination on the ground of religion were all enshrined in the Constitution as people’s Fundamental Right. (Articles 14-16).

2.11 Constitutional Provisions:

The framers of the Constitution took note of the adverse and discriminatory position of women in society and took special care to ensure that the State took positive steps to give her equal status. The law of the land safeguards woman’s right by putting her at par with man socially, politically and economically. Equality of gender is reflected in the Constitution in its Preamble, Fundamental Rights, Directive Principles of State Policy and
Fundamental Duties. There is still a very wide gap between the goals enunciated in the Constitution and the situational practicality and reality of the status of woman in India, though the constitution of India provides guarantee for elimination of discrimination on the basis of gender by its different relevant Articles:

Article 14. Equality before the Law – The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Article 15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth –

(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 public entertainment; or

(b) the use of well, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of general public.
(3) Nothing in this article shall prevent the State from making any special provision for women and children.

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

(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the state from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the state, other than the minority educational institutions referred to in clause (1) of article 30.

The two Judge Bench of the Supreme Court in Krishna Singh vs. Mathura Ahir\textsuperscript{77}, has held that “Part III of the Constitution does not touch upon the personal law of the parties” and “in applying the personal laws of the parties”, the Judge “could not have introduced his own concepts of the modern times, but should have enforced the law as derived from recognized and authoritative sources of Hindu Law, i.e. Smritis and Commentaries referred to,

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\textsuperscript{77.} AIR 1980 SC 707
as interpreted in the judgments of various High Courts, except where such law is altered by any usage or custom, or is modified or abrogated by statute”.

In declaring the personal laws to be untouched by the provisions of Part III of the Constitution, the Apex Court has not given any reason for such decision.

The Constitution of India itself has recognized the Hindu law and other personal law as laws in force immediately before the commencement of the Constitution under Entry No. 5 of the Concurrent List and provided that “marriage and divorce, infants and minors; adoption; wills intestacy and succession; joint family and partition; all matters of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law” are matters on which both Parliament and the State Legislature can make laws under Art. 246 (2).

The Court in Ramdas (Smt) vs. Gurudev Singh78 has held that the Hindu Succession Act, 1956 regulates succession to properties of all Hindus and as such has been validly enacted by Parliament under the entry 5 of list III (concurrent list) of the Constitution. The Act applies to agricultural lands also. It has no retrospective operation.

The Directive Principles of State Policy contained in Part IV of the

78. AIR 1960 Punjab 462
Constitution incorporate many directives to the State to elevate the status of women and for their protection.

Article 39 (a) directs the state to direct its policy towards securing that the citizen, men and women, equally have the right to an adequate means of livelihood.

Article 39(d) directs the State to secure equal pay for equal work for both men and women. The State has enacted The Equal Remuneration Act, 1976 to give effect of this Directive Principle.

Article 39(e) specifically directs the State not to abuse the health and strength of workers, men and women.

Article 42 of the Constitution incorporates a very important provision for the benefit of women. It directs the State to make provisions for securing just and humane conditions of work and for maternity relief. The state has tried to implement this directive by enacting the Maternity Benefits Act, 1961.

Apart from these specific provisions all the other provisions of the Constitution are equally applicable to the men and women. This clearly establishes the intention of the framers of the Constitution to improve the social, economic, educational and political status of the women so that they can be treated with men on equal terms.
In M. Kishwar vs. State of Bihar\(^7\), the Supreme Court has dealt with the validity of the Chotangpur Tenancy Act, 1908 of Bihar which denied the right to succession to Schedule tribes woman as violative of right to livelihood under Article 21 of the constitution. The majority judgement upheld the validity of the legislation on the ground that such enactment was in accordance with the custom of inheritance of the Schedule Tribes. However the dissenting judgement was delivered by Justice K. Rama Swamy who felt that the law made a gender- based discrimination and that it violated Articles 15,16 and 21 of the Constitution of India. The majority Judgement does not appear to be in consonance with the right to equality enshrined in the Constitution. During the course of his dissenting opinion justice K. Rama Swamy had an occasion to refer to various International Declarations and Conventions along with the relevant provisions of the Indian Constitution as regards the gender discrimination in India. The Learned Judge observed:

“Legislative and executive actions must be comfortable to, and for effectuation of the fundamental rights guaranteed in Part III and the directive principles enshrined in Part IV and the preamble of the Constitution which constitute the conscience of the Constitution. Covenants of the United Nations and impetus and urgency to eliminate gender-based obstacles and discrimination. Legislative action should be devised suitably to constitute

\[^7\] (1996) 5 SCC 125
economic empowerment of women in socio-economic restructure for establishing egalitarian social order. Law is an instrument of social change as well as the defender of social change. Article 2(e) of CEDAW (The Vienna Convention on the Elimination of all forms of Discrimination Against Women which was ratified by the UNO on 18-12-1979 and which was ratified by the Government of India on 19-6-1993) enjoins this Court to breathe life into the dry bones of the Constitution, international conventions and the Protection of Human Rights Act, to prevent gender-based discrimination and to effectuate right to life including empowerment of economic, social and cultural rights”.

These remarks made by the learned judge highlight the plight of the Indian Women and also the necessity of the State action that should be taken to rectify the historical inequity that discriminated against the women.

The Apex Court has highlighted the right of the women in India to eliminate gender based discrimination particularly in respect of property so as to attain economic empowerment. In the case of C. M. Mudaliar vs. Idol of Sri S. Swaminathaswami Thirukoi, the Supreme Court has elaborately discussed the principles of equality of rights and respect of women dignity. The necessary implication of the observations of the Supreme Court in this case dealt with the right of Hindu females to execute a will in respect of the

80. AIR 1953 SC 495
property acquired or possessed by her, under Section 14 of the Hindu Succession act, 1956 is that the right of women to eliminate all kinds of gender based discrimination particularly in respect of property is an implicitly right forming part of Articles 14, 15, and 21 of the Constitution of India.

2.12 The National Commission for Women Act, 1990:

The Parliament of India has realized the significance of a monitoring institution to examine and investigate all the matters relating to the protection provided for woman under the Constitution and other existing laws. This realization has led to the enactment of the National Commissions for Women Act, 1990 which came into force with effect from 31-1-1992. It is the supreme national level organization of India with the mandate of protecting and promoting the interest of women.

The Commission shall perform all or any of the following functions, namely

(a) Investigate and examine all matters relating to the safeguards provided for women under the Constitution and other law;

(b) Present to the Central government, annually and at such other times as the Commission may deem fit, reports upon the working of those safeguards;

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(c) Make in such reports recommendations for the effective implementation of those safeguards for improving the conditions of women by the Union or any state;

(d) Review, from time to time, the existing Provisions of the constitution and other laws affecting women and recommend amendments thereto so as to suggest remedial legislative measures to meet any lacunae, inadequacies or shortcomings in such legislations;

(e) Take up the cases of violation of the provisions of the constitution and of other laws relating to women with the appropriate authorities;

(f) Look into complaints and take suo moto notice of matters relating to –

(i) Deprivation of women’s rights;

(ii) Non-implementation of laws enacted to provide protection to women and also to achieve the objective of equality and development;

(iii) Non-compliance of policy decisions, guidelines or instructions aimed at mitigating hardships and ensuring welfare and providing relief to women,

And take up the issue arising out of such matters with appropriate authorities;

(g) Call for special studies or investigations into specific problems or situations arising out of discrimination and atrocities against women and identify the constraints so as to recommend strategies for their removal;
(h) Undertake promotional and educational research so as to suggest ways of ensuring due representation of women in all spheres and identify factors responsible for impeding their advancement, such as, lack of access to housing and basic services, inadequate support services and technologies for reducing drudgery and occupational health hazard and for increasing their productivity;

(i) Participate and advise on the planning process of socio-economic development of women;

(j) Evaluate the progress of the development of women under the Union and any State;

(k) Inspect or cause to be inspected a jail, remand home women's institution or other place of custody where women are kept as prisoners or otherwise, and take up with the concerned authorities for remedial action, if found necessary;

(l) Fund litigation involving issue affecting a large body of women;

(m) Make periodical reports to the government on any matter pertaining to women and in particular various difficulties under which women toil;

(n) Any other matter which may be referred to it by the Central Government.

(2) the Central Government shall cause all the reports referred to in clause (b) of sub-section (1) to be laid before each House of Parliament along
with a memorandum explaining the action taken or proposed to be taken on the recommendations relating to the Union and the reasons for the non-acceptance, if any, of any of such recommendations.

(3) Where any such report or any part thereof relate to any matter with which any State Government is concerned, the Commission shall forward a copy of such report or part to such State Government who shall cause it to be laid before the legislature of the State along with a memorandum explaining the action taken or proposed to be taken on the recommendations relating to the State and the reasons for the non-acceptance, if any, of any of such recommendations.

(4) The Commission shall, while investigating any matter referred to in clause(a) or sub-clause(f) of sub-section (1), have all the powers of a Civil Court trying a suit and, in particular, in respect of the following matters, namely;

(a) summoning and enforcing the attendance of any person from any part of India and examining him on oath;

(b) requiring the discovery and production of any document;

(c) receiving evidence on affidavits;

(d) requisitioning any public record or copy thereof from any Court or office;
(e) issuing commissions for the examination of witnesses and documents;

and

(f) Any other matter which may be prescribed.

Summarily, the Commission has been entrusted with the task of presenting to the Central Government the problems of women, deprivation of womens’ rights, and the reports of the progress of the development of woman under the Union and any State, it has not been given a Constitutional Status. However this body has been burdened with the laborious efficacy and effective implementation of the safeguards for improving the conditions of woman by the Government as to the efficacy and effective implementation of the safeguards for improving the conditions of woman by the Government, and for monitoring the socio-economic development of woman in all spheres of their life. Unfortunately, the Commission can make any recommendations and send the same to the respective authority for action. It has no judicial Powers for making it an effective instrument for providing relief to woman in distress. Justice V.R. Krishna Iyer, observed that a National Commission for Women has “hardly any teeth or nail”. It is peakt ime that the Commission has been given the Judicial Powers.
2.13 Role of law Commission:

The Law Commission has assumed an important role in our current day society. The Central Government constitutes Law commission to examine and propose reforms in the prevailing laws, to propose new sets of rules and regulations for situation which already are available or likely to arise in respect of which there is no law. As like the State Government may also appoint Law Commissions for the matters within their States. The Commission examines the law either suo moto or at the direction of the Government and submits its report to the concerned authority.

In view of the prevailing discrimination against women in relation to laws governing the inheritance vis-a-vis succession of property amongst the members of a joint Hindu family, the law commission of India has taken up the matter as its own and provided some recommendation on the removal of ambiguities in the property rights of Hindu women.

The exclusion of daughters to be member of Coparcenery and from its property, by reason of fair sex is not justified. To make better the status of women in society by giving economic rights in the form of providing equal rights by birth in the family property is a long felt social need. It was the need of the time to provide equal distribution of property under Mitakshara Coparcenery, not only with respect to self acquired property but also of the ancestral property in the house of husband and father.
The Commission also speaks on the right of widow to reside in dwelling house. It recommends that without the consent of the widow the family dwelling house should not be alienated. Hence in order to make the proprietary right of women a full-fledged one the Commission has recommended to make daughter a coparcener.

Hence to improve the development of women the law commission on its own took the responsibility to draft the Hindu Succession (Amendment) Bill of 2004 and for the inclusion of recommendation made by the law Commission to be applied by the Government.

In its 174\textsuperscript{th} Report, the Commission has studied and remedied the various inequities emerging from section 6 of the Hindu Succession Act 1956. The law Commission was intending to recommend for the adoption of the Kerala Model in totality. As because the same model had abolished the right by birth of males in the Mitakshara Coparcenary and brought an end to the Joint Family. The Commision was of view that first to make daughters coparceners like sons so that they would be entitled to and get their respective shares on partition or death of the male coparcener and hold after that as tenants in common.

In peeping the history of women’s status under the Hindu law, it can be observed that the position was quite abhorrent. Unequal treatment were imparted to the women. The so called man chauvinism had discriminated
women by not giving their due rights in the property. They were deprived even at their own home. The following can be briefed out after going through the historical background of women’s right over property.

1. Women were not getting proper treatment in the texts penned by Smritikars.

2. Manu who was regarded as the main law giver in the field of Hindu legal system underestimated the role and status of women in home as well as in the society. He viewed that women should not be given the opportunity to be independent throughout her life. Instead she needs care and protection from the male members of her house. He opined that women is not allowed to have any property, whatever she have would be of her master. Of course he is in favour of allowing maintenance to the women.

3. Lack of specific text on assertion of women’s right over property.

4. Custom practices also were placing women at distress. There is no uniformity of custom among the different sections of Hindu people.

5. Mitakshara and Dayabhaga system plays a pivotal role in shaping the rights of women within the family.

6. Besides the schools of Hindu law, Mitakshara and Dayabhaga, Joint family and Coparcenary family both are Patriarch dominant have almost denied the right of women over property. They have given limited rights to the women.

7. The concept of stridhana and women estate were imparting ambiguous rights over property. The law makers were not unanimous in classifying
what property constitutes stridhana and over what the women would have absolute ownership right.

8. International covenants is playing important role which compel the member state to work on women empowerment by providing equal rights like men.

9. Constitution of India no doubt remains forward in providing equality before law to each and everyone without any discrimination in its preamble which the basic structure of the Constitution.

10. The contribution of Law Commission indeed is providing fuel to the reform pertaining to women’s right over property. It suggests to remove all kinds of discrimination against women by providing reformatory suggestions.

11. Last but not the least the National Commission for Women is proof itself as a protecting wing towards securing the dignity and rights of women in the society.
Summary:

The researcher in this chapter has tried to evaluate the position of women in the writings of smritikars. The historical development of Hindu women’s right to property is considered under the chapter. The role of joint family and coparcenery which are the backbone of Hindu family plays a key role in determining the position of Hindu women. In the ancient period two kinds of women’s property viz., stridhana and women’s estate were in vogue. Women enjoyed restricted right over the property given to her. In the chapter the role of National Women Commission, Law Commission and international instruments are analysed in consideration of women’s right to property. Besides the position of different female like mother, sister, wife, daughter etc., are considered under this chapter.

The legislative enactments which have provided a helping hand to enhance the position of women and keep the sanctity of the ancient custom and practices of Hindu people simultaneously, are discussed in the next chapter.