CHAPTER 1
INTRODUCTION

1. INTRODUCTION

“Even though women constitute nearby half of the population, they have all the characteristics of a minority viz. inequality of class (economic situation), status (social position) and political power.”¹

Simone de Beauvoir’s seminal work, The Second Sex,² which was published in 1949, forms a foundation for much sought feminist analysis. This work also focuses on different approaches to the question of gender justice and its significance. The subject matter of this work is that of women being treated as the ‘other’ (sex). By this ‘other’, de Beauvoir means that the structure of society, language, thought, religion and family all rest on the assumptions that the world is male. It is men who control the meaning given to society; man is the standard against which all is judged. Women on the other hand are excluded from these constructions; woman is the ‘other’. Thus being a woman i.e. the other – is reflected in law’s construction also.

Law is male; the subjects of law are male. In her words:

“She is defined and differentiated with reference to man and not he with reference to her: she is the incidental, the inessential as opposed to the essential. He is the subject, he is the absolute – she is the other.”

Thus, according to de Beauvoir, in all the societies there exist the essential and the inessential; the self and the other, and all the societies reflect this duality. From this perspective, woman is socially constructed in relation to male and considered as inferior to the superior male. The man from his infant age has been cherished to assume an unquestioned superiority. Later on his superiority defines woman’s role, creates and maintains a mythology of woman based on her feminism, weakness and subordination to his power.³

Considering this phenomenon in relation to law, it can be seen that traditionally law also had been a male construct and that the subject of law was male. Women, being the ‘other’ have been for long at worst oppressed and at best ignored by the law. Yatindra Singh, J., very rightly mentioned that the hunt for gender justice

³ See, on this, op. cit. de Beauvoir, fn 8, particularly Book II, Part IV chapter 1.
in law Courts started about one hundred and fifty years ago with ‘person’ clause cases and it took 75 years to settle. Up till the middle of 19th century, majority of the statutes used the phrase ‘any person who is or has… is entitled to vote or to take admission or to practise.’ But women were neither permitted to vote nor to take admissions. And soon a question was raised, “does the word ‘person’ include women?” It was consistently answered against them.4

The House of Lords in Nairn v. Scottish University5 expressly held that women did not fall within the meaning of the term ‘person’. Similarly, the U.S. Supreme Court had already held in Bradwell v. Illinois6 and in Minor v. Happier Sett7. A court in South Africa had held otherwise but it did not last long. In an appeal against it, the appellate court in Incorporated Law Society v. Wookey8 overruled it. Thus, it was the established law that women were not included in the term ‘person’.

In India earlier the Full Benches of Calcutta High Court in Re Regina Guha9 and the Patna High Court in Re Sudhansu Bala Hazara10 also rejected the application of women for enrolment under ‘person’ clause in the Legal Practitioner Act. But in Indian context, fortunately Allahabad High Court is the first Court to recognise a woman under the ‘person’ clause when Cornella Sorabji was allowed by Allahabad High Court to enrol herself as an advocate under the Legal Practitioners Act 1879 on August 27, 1921. Though this was done on administrative side, but this was the first step took by Allahabad High Court to recognise a female having her own separate identity. In the rest of the world the controversy relating to the ‘person’ clause was set at rest after eight years from the decision of Allahabad High Court. This was done in 1929, when the Privy Council overruling the unanimous decision of the Supreme Court of Canada observed that the word ‘person’ may include members of both sexes and to those who ask why the word should include females, the obvious answer is ‘why not’.11

5 (1909) AC 147, 100 LT 96.
6 183 US 130 (1873).
7 88 US 162 (1875).
8 1912.
10 A.I.R., 1922, Pat. 269.
11 Edwards v. Attorney General Canada, 1929 All ER 571.
2. STATUS AND POSITION OF WOMEN: INTERNATIONAL SCENARIO

This was the position and status of women during eighteenth century. At that time, even the educated strata of the society was hesitated to treat women as persons. Thus, the concept of women was explained in the traditional and continuing stereotyping framework which regarded the women as the bearers and nurturers of the children, the homemakers and thus confined the role of women with the four walls of the house. The result of this restrictive role of women further perpetuate the low expectations for women and the lesser involvement of them in other areas, whether these areas are social, economic or political.

Though, during the eighteenth, nineteenth and early twentieth century, various feminist campaigns emerged, these raise their voice for the elimination of discriminatory laws against the female. But the era of mid eighteenth century noticed the origin of contemporary feminist thought. The early struggle for admission to higher educational institutions and professions, battle for the voting rights, represented significantly important and ultimately largely successful movements on the basis of which subsequent movements towards the full liberation of women in society was founded.12

If we analyse the historical development regarding the status of women in international context, the American and British women’s rights movements presented a useful historical context for developing relevant prepositions.

2.1 American Movement: The American movement can be divided into four historical stages. The first stage begins from the period of 1820 to 1869. During this first stage, there were no permanent organisations which devoted themselves especially to women’s rights. But after 1848 various Women’s Rights Conventions were held. These conventions took up the issues which deal with various controversial matters relating to women like women’s rights in marriage, divorce, property, employment as well as suffrage. During the second stage which begins from 1860 to 1890 various permanent organisations came to be formed. Out of these organisations, two rival organisations emerged namely National Women Suffrage Association (NWSA) and American Women Suffrage Association (AWSA). But these organisations did nothing in the name of progress regarding the women’s rights and thus this period was considered as stagnant period. The third stage from 1890 to 1920

was considered as important because during this period women for the first time achieve right to vote. In 1890, the two rival groups merged together and form National American Women Suffrage Association (NWASA). During this time period a new generation of women’s movement leaders supposed to take the control. With the emergence of these progressive movements and the participation of political leaders, the women’s movement gained important achievements. The fourth stage from 1920 to 1930 was marked by an attempt to gain public support on other issues which was to some extent successful. Some women organisations came together in 1920 to utilize the newly obtained franchise to get social legislations passed to improve the position of women. Initially, though some measures were also passed but due to the various reasons, the other proposed legislations were failed. The reasons for this failure were difference of opinions over policies to be adopted to improve the status of women. A majority of these organisations demanded protective legislation for women while others opposed protective and supported the equal rights amendment.

2.2 British Movement: During the same time in Britain also, women’s movement started take their birth. The women’s movement in Britain can also be divided into four historical stages. From the period of 1840 to 1870 i.e. the first stage women’s organisations were formed and adopted various types of issues in their agenda. During the second stage i.e. from 1870 to 1905 the main thrust area of these organisations was to gain the right to vote and for this purpose various society and organisation were found. These organisations were divided into two types; first the democratic and decentralised in nature like National Union of Women’s Suffrage Societies (NUWSS), second were centralised, autocratic and militant in nature like Women Social and Political Union (WSPU). But the militancy of the WSPU ceased abruptly with the outbreak of World War I in 1914 when it worked whole-heartedly in support of Britain war effort. The constitutional section of the women’s movement also focussed on war relief activities. After the war was ceased in 1918, the British Parliament provided suffrage rights to the women above the age of 30 years. The purpose behind limiting franchise right to women above the age of 30 years was to ensure that male voters outnumbered female voters because there were more adult women than men in Britain after the war. The fourth stage of British women’s movement i.e. from 1919 to 1930, was again dominated by woman’s democratic organisation like National Union of Society for Equal Citizenship (NUSEC) as
militant organisations like WPSU was banned during the war period. These
democratic organisations emphasized on equality of sex and put their demands for
various types of legislative relief for women. On the whole, the British women’s
organisations were made successful attempts in achieving their legislative goals than
their in American counterparts. With the efforts of these organisations, British
Parliament in 1928 further extended women’s franchise to include all women above
the age of 21 years.\textsuperscript{13}

The major reasons for the participation of middle class women’s in public
activities of 19\textsuperscript{th} century America and Britain was due to the impact of industrial
capitalism on women. The early involvement of middle class women in United States
and Great Britain was to achieve the following objectives (a) to improve the legal
status of women (b) participation of women in social reform activities. (c) to improve
conditions in occupation open to middle class women and to expand employment
opportunities, by involving themselves in gaining these objectives, women’s tried to
restrict their domestic roles and thus wanted to liberate themselves by improving their
wage earning potentials. Thus, with the creation of these new roles, it led to expansion
of their social influence also.

After this, with the adoption of United Nations Charter of 1945, it further
strengthen the development of women’s movement by providing prohibition against
sex discrimination which was later reiterated in the Universal Declaration of Human
Rights of 1948. Since then, virtually all human rights instruments have reinforced and
extended protection against discrimination. The International Covenant on Civil and
Political Rights adopted in 1966 guarantees equal protection of the law to both sexes.
In 1966, The International Covenant on Economic, Social and Cultural Rights
adopted which also promises equality of status. The Fourth World Conference on
Women was held in Beijing brought further forward by reaffirming gender equality as
a fundamental pre-requisite for social justice.

Possibly the most important conceptual advance in the international law of
women’s rights is the Convention on the Elimination of all Forms of Discrimination
Against Women (CEDAW) 1981, which provides that women be given rights equal to
those of men on equal terms. The preamble of CEDAW maintains that “full and
complete development of each country, the welfare of the world and the cause of

\textsuperscript{13} Jana Matson Everett, \textit{Women and Social Change in India}, Heritage Publishers, New Delhi (1979),
pp. 5-8.
peace require the maximum participation of women on equal terms with men in all fields.”

But even at the dawn of 21st century when the whole world is awakening to the call of enlightened feminism, certain important issues pertaining to the status and position of women are still hanging on as it is. Women consisting half of human population still have been treated as weaker sex in all the societies of the world. Though inequality is a common feature among human beings but the gender inequality is totally artificial, man-made only to put unnecessary restrictions on the freedom of females.

3. STATUS AND POSITION OF WOMEN: INDIAN SCENARIO

Coming to the national context, the symbol of women in the Indian society has been multifaceted, some time women enjoyed glorious position in ancient times on the other side having low legal status, virtual disrespect for being a women. Thus, within the Indian subcontinent there has been infinite variation on the status of women diverging according to religious and cultural background, class, caste, family structures, property rights and morals. Accordingly the role, status and position of women have been far from static ranging from what is thought to have been a position of considerable subservience.

Particularly after independence the democratic framework, various constitutional provisions, different state legislations, the awakening on the part of certain sections of women, the influence of feminist movements in the West, all these aspects supported to initiate the women’s liberation movements in India. But despite the constitutional guarantees of equality, if we see the Indian social realities, there is not so much change or improvement in the status of women. All theoretical indicators of equal rights and high social status such as policy declaration, constitutional guarantees and prohibitive protective measures exist only on papers and the life of average Indian women is still governed by customs, habit, prejudices and unwritten code of conduct. Thus, the combination of legal complexities and social realities create the life of average Indian women insecure and miserable.

3.1 Status and Position of Women in Pre-Independence Period: Here, if we analyse the historical perspective, this existing low profile of feminine status in India is mainly due to the position of the females that was mentioned in all Hindu religious texts i.e. the Vedas and the Samritis, established customs and good conscience. The Vedas which perhaps 3,000 years old were the religious hymns and the Samritis were the collection of rules of conduct and descriptive principles based on Vedas. These Samritis especially Manu Samriti provide restrictive rights to the females which 20th century educated Indian women would required. Manu’s maxim meant that Hindu women could never divorce her husband under any circumstances and that she was devoid of any legal capacity to inherit and own property. She was only entitled to maintenance that to if she lives with her husband. These dictums combined with the right of Hindu man to unrestricted polygamy and denial to the wife of the right to get the marriages dissolved makes the position of the women deplorable. Further, if she left her husband’s place, she would forfeit her right of maintenance, deprived of inheritance rights over her own property which was consisted of her Stridhan, i.e. the wealth which she was given by her family at the time of her marriage. These prevailing aspects would give her little freedom whether economic, social or otherwise. Thus most of the Hindu religious texts treated women as dependents, requiring protection throughout her lifetime and considering them incapable of exercising independent authority.

The concept of Manusamriti on woman contributes indirectly towards the development of the Indian women’s movement. These established social practices of early marriage, ban on widow remarriage and callous treatment of the widows inspired some 19th century influential educated Indians to spotlight their reform activities on women. Though, these social reformers were not successful in getting widespread support for these reforms. But their efforts established various prerequisite conditions necessary for the development of the Indian women’s movement16.

At this point scholars as well as social reformers found that in the Vedic period, there were the traditions that women had gained religious equality with men; women were educated, participated in public affairs, child marriages were unknown. Thus, these two aspects of Hinduism i.e. religious dualism and equality of men and

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women in Vedic period were emphasised by the Hindu revival movements of the late 19th century and various social movements like the Arya Samaj movement called for a return to Vedic practices, the Ramakrishna Mission emphasised the female aspect of Hinduism. Thus, the Hindu revivalist movement placed women in a position of great honour, articulated their concern for the better position of women and widened the definition of religious activities, so as to include social service and reform activities within its framework.\textsuperscript{17}

But at the same time these social reformers had come across much opposition in trying to change these social practices which were firmly rooted in the society because these social practices had become the customs and habits of people. The social practices affected the status of Indian women in different ways whether she belongs to Muslim religion or high caste Hindu women or belong to low caste Hindu women. Purdah system, polygamy and easy access to divorce on the part of Muslim males contributed to an inferior status of the Muslim women. For high caste Hindu women, Brahaminical Hindu law made them economically dependent and restricted their rights in marriage and property. Usually low caste Hindu women were not affected by Brahaminical Hindu Law and could be economically independent, can easily obtain divorces and may remarry. But their low economic status and the rigid caste system left them illiterate, with little opportunity to join themselves with high caste Hindu women and demand reforms. Thus, the use of religious ideals i.e. the Vedic practices by the social reformers to attack the rigid practices of Hindu Law, Islamic Law or the Caste System (each of which were significant obstacles in improving the status of Indian women) were proved futile.\textsuperscript{18}

Further, as we know that Hindu society is mainly a patriarchal society and has patriarchal approach towards the role and value of women in society. In this patrilineal Hindu joint family the main features are common rights over ancestral property and a joint household in which male relatives and their wives lived. Female members are always considered as dependent upon these males, so Hindu law gives them right to maintenance only and no right of inheritance. Hindu law on joint family was designed in such a way that it prevents the fragmentation of property which was inherited from ancestors and thus this property devolves only through male line. So in

\textsuperscript{17} Jana Matson Everett, \textit{Women and Social Change in India} (1979), p. 39.
\textsuperscript{18} Ibid., p. 67.
this set up of Hindu joint family, joint ownership is the advantage of male members only. Females are not joint proprietors.

It was the position of patrilineal societies but even in southern states like Kerela which are primarily matrilineal societies, the men was considered as the official head of the household, all economic deeds and decisions were controlled by the eldest male head. As per these features, women are either presumed to be dependent on men or are ignored altogether. These widespread structures of patriarchy continue the women to remain in secondary position.

In this type of social scenario, in the 18th century when the British established its control in India, they brought with them western concepts and practices in administration of justice. During their regime, India became politically and socially integrated but the British officials adopted the policy not to interfere with the personal laws of various communities living in India. Later on the British administration of Hindu law had put its far reaching implications on Indian society like Lord Warren Hastings in 1772 nominated Hindu texts as the exclusive basis of the Hindu law. Article 27 of the Plan of 1772 directed the Diwani Adalat to decide all the cases according to the laws of Koran with regard to Mohammadans and the laws of Shastars with respect to Hindus. Though by dong this, he gave due respect to Indian local laws and customs, but by doing so he unintentionally imposed the dharmasastra on low caste Hindus also who were not previously governed by it. After 1864, the concept of judicial precedents also took its birth as the practice of consulting Hindu pundits on question of personal matter ceased and judges started deciding personal matter of the party on the basis of available texts and the developing case laws. Before this the idea of the precedents had not existed in the adjudication of Hindu law.

On the other hand in some areas of Hindu law the British officials purposefully amended them by passing various regulations and acts. Though, these were mainly the pieces of permissive legilsations and did not affect the majority of Hindus. Hindu reformers with the support British officials recommended some of these modifications which provide benefit to the women also like the passing of Prohibition of Infanticide in 1795, Abolition of Sati in 1829, and Legalising Widow Re-marriage in 1856.19

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19 Ibid., p. 144.
Gradually, legislative assembly became a new arena for the social reforms. With the efforts of small group of liberals who were first led by H.S Gour and H.B. Sarda and then by Dr. G.V. Deshmukh, they were able to raise the issues relating to the legal rights of Hindu women. In 1928, H.S Gour introduced a bill providing grounds for Hindu women to seek dissolution of marriage. He withdrew it after much opposition was expressed but reintroduced it several times in between 1931 and 1933. In 1932, another controversial bill was introduced by H.B. Sarda, which tried to give Hindu widows a share in their husband’s property, but it was again defeated.\(^{20}\) In order to get the bills passed in the legislative assembly the support of the government was necessary. G.V. Deshmukh obtained this support in 1937 after he agreed to confine a bill he was sponsoring on Hindu women inheritance rights to widows. This became the Hindu Women’s Right to Property Act, 1937 which gave all Hindu widows a limited estate in separate and joint property in Mitakshara law.\(^{21}\)

The Act of 1937 facilitated the widows to succeed along with the son and to take equal share as that of the son. But still the widow did not become coparcener even though she possessed the right similar to coparcenary interest in the property and was also a member of the joint family. The widow was only allowed the limited estate in the property of the deceased along with the right to claim partition. By the Act of 1937 the widows were given a share to the limited extent but this Act did not provide any benefit to the daughter in the matter of inheritance. So despite these features that the enactments having brought important changes in the law of succession by conferring new rights of succession to certain females, these were still found to be incoherent and defective in many respects and gave rise to irregularities and left untouched the basic features of discrimination against women.

### 3.2 Status and Position of Women after Independence period

After independence, the framers of Indian Constitution took note of this unfavourable and discriminatory position of women in society and take special care to ensure that state took positive steps to give her equal status. In this direction, our Constitution is rightly considered as significant touchstone for determining the scope of women’s rights. The preamble of paramount law speaks of securing to all citizens of India equality of status and opportunity as well as justice – social, economic and political. There are various provisions in the Constitution which are especially enacted to protect women and

\(^{20}\) *Indian Annual Register* (1932), Vol. 1, p. 137.
uphold their honour. For instance, the Constitution of India solemnly enjoins on each citizen the obligation “to renounce practice derogatory to the dignity of women.” It also guarantees certain right for the protection and welfare of women for example:

1. The state shall not deny person equality before the law or the equal protection of the law within the territory of India.\(^{22}\)

2. The state shall not discriminate against any citizen on the ground only of sex.\(^{23}\)

3. No citizen shall on the ground only of sex be subjected to any disability, liability, restriction or condition with regard to: (a) access to shops, public restaurants, hotels and places of public entertainments; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of state funds dedicated to the use of the general public.\(^{24}\)

4. Nothing in this article shall prevent the state from making any special provision for women and children.\(^{25}\)

5. There shall be equality of opportunities for all citizens in matters relating to employment or appointment to any office under the state.\(^{26}\)

6. No citizen shall on the ground only of sex be ineligible for or discriminated against in respect of any employment or office under the state.\(^{27}\)

7. The state shall in particular direct its policies towards securing equal pay for equal work for both men and women.\(^{28}\)

8. The state shall make provisions for securing just and human conditions of work and for maternity relief.\(^{29}\)

Thus, it is clear from the aforesaid provisions that not only the perfect equality but also special protection have also been guaranteed to women under the Constitution.

In order to realise the high ideals of these provisions the Central and State Governments have also enacted several legislations. For instance, Maternity Relief

\(^{22}\) Article 14.
\(^{23}\) Article 15(1).
\(^{24}\) Article 15(2) (a) & (b).
\(^{25}\) Article 15(3).
\(^{26}\) Article 16(1)
\(^{27}\) Article 16(2).
\(^{28}\) Article 39.
\(^{29}\) Article 42.
Act 1961, Factories Act 1948, Tamil Nadu Catering Establishments Act 1958, Plantation Labour Act 1961, Beedi and Cigar Workers Act 1966, Mines Act 1952, Contract Labour Act 1970 etc. provide relief to the women working in different occupations. The Equal Remuneration Act, 1976 has been passed to implement Directive Principles and Fundamental Rights enshrined in the Constitution. The Act provides for the payment of equal remuneration to men and women workers and for the prevention of indiscrimination on the ground of sex against women in the matter of employment and for the matters connected herewith or incidental thereto. The Hindu Marriage Act, 1955 gives equal rights to husband and wife to obtain divorce on the same grounds. The Suppression of Immoral Traffic in Women and Girls Act, 1956 is intended to suppress immoral traffic in women and girls. In order to eradicate the evil of dowry, the Dowry Prohibition Act, 1961 was passed making, giving and taking the dowry punishable with imprisonment which shall not be less than six months.

But so far as the right of inheritance, the right to hold property and the right to deal with one’s property concerned we do not have any uniform code of law in India. The rights of inheritance depend upon the personal law which applied to a particular woman. The Hindu Succession Act 1956 applies to Hindus, The Indian Succession Act 1925 applies to Christians and Muslims are governed by the law deduced from the text of Holy Quran.

Thus, though various legislations have been passed to safeguard the interests of women but in reality there is a big gap between the theory and practice, so far as the implementations of these laws were concerned. Any legislation will be meaningful, only if society receives it in its true spirit. It is therefore, the change of attitude is required which will make laws more effective and the condition of women more humane.

4. STATUS OF INDIAN WOMEN VIS-À-VIS LAW OF SUCCESSION

In India the succession matters are governed by the personal laws of the parties. In these personal law the most important and controversial issue is regarding women’s rights under succession laws. In India there is multiplicity of personal laws, as we do not have any uniform code of law in this area. The reason being, that in India several communities lived together and profess their own religion and practices. After independence our Constitution guarantees right to religious freedom and cultural
rights as fundamental rights, which means that these communities are totally free to preserve their traditional practices. This preservation resulted in the protection of those social practices also that placed the women in a subordinate position in the matters relating to marriage, family and particularly in succession and property matters.

Gender inequality is most prominent in personal laws. In Constitutional law, Article 13 does not make any distinction between personal law and any other law. Personal laws are also subject to Part III of the Constitution. There are many provisions of personal law which violate Article 14 and 15 of the Constitution and thus they should be declared unconstitutional. But the decisions regarding these personal laws disclose that the courts are hesitant to interfere in this regard or to declare them ultra vires of the Constitution. In this field, the women do not enjoy complete legal equality with men. In spite of the enactment of egalitarian constitution which contains comprehensive environment for empowering women, it has failed to interpret the constitutional mandate into the reality. Even after 59 years of independence, women have neither achieved de facto equality nor there an end to discrimination in personal laws.

In these personal matters, the most important and controversial issue is regarding women’s rights under succession laws. Since, personal laws of the parties governed their succession matters and due to diversity of personal laws, succession laws are also diverse in their nature owing to their varied origins. In India, the succession laws can be generally classified into two groups. The first sets of laws are ancient in time and based on religion. These laws have either their roots in their respective religion or deeply influenced by them. The other set, of laws are made by human agencies i.e. which were passed by various legislative bodies. The former category comprises of Muslim law, Parsi law and Hindu law as it stood before the involvement of legislation while later refers to Indian Succession Act, 1925 and Hindu succession Act, 1956 i.e. laws passed by legislation.

The prominent difference between these two groups of laws was that the former group of laws were agreed in relegating women to the backdrop with respect
to inheritance and other rights, where as in the latter group reputable position is credited to women along with their male counterparts.30

In the light of social justice women should be treated equally both in all the spheres. But the study of the legal systems of the world whether ancient or modern, it disclose one thing in common that the females have been denied their proprietary status under all male dominated legal system which resulted in deteriorating their social status and reducing them into the other class, definitely of inferior human beings.

4.1 Historical Aspect: Here if we analyse the historical background of Hindu law regarding law of succession and inheritance with respect to women’s position, then this problem cannot be understood without reference to the law of joint family. Joint and undivided Hindu family is the normal condition of Hindu society. Joint ownership can be treated in its developing form in the Vedic times but at that time it was the privilege of male members only. Females are not joint proprietors. Further prior to the year 1956, Hindus were governed by Shastric and Customary Laws, which were diverse from region to region and sometimes it varied in the same region on the basis of caste. As the country is vast and communications and social interactions in the past were difficult, it led to diversity in the law relating to joint family system and succession laws.

As a result Hindu law is basically classified into two branches i.e. Mitakshara which prevailed over the whole of India except Bengal and Assam where Dayabhaga was applicable. Besides these two main schools, Maukhya in Bombay, Konkan in Gujarat and Marumakkattayam or Nimbudri laws in Kerela were also prevalent. The division of these branches was because of two different interpretations given to a single word ‘sapinda’. Generally, it was accepted under the old Hindu law that when a man dies, his property will go to his nearest sapinda. The question therefore, arises as to the meaning of the word ‘sapinda’. To understand the meaning of the word sapinda, it is essential to know the meaning of the word ‘pinda’. According to Dayabhaga school ‘pinda’ means rice balls which are offered in Sharaddha ceremony to one’s deceased ancestors. According to Mitakshara School the word ‘pinda’ does not mean rice balls but it means the particles of the same body of the deceased. Vijnaneshwara

discarded the theory of connection through rice ball offerings and accepted the theory of transmission to constituent particles. Under the Mitakshara law, the law of succession is intimately connected with the special incidence of coparcenary property. In coparcenary property (before the Amendment of 2005), a son, son’s son and a son’s son’s son acquire the right by birth. Thus, according to Mitakshara only male members can be coparceners. An important source of coparcenary or joint family property is the property obtained from father, father’s father and father’s father’s father. The prominent feature of a Mitakshara coparcenary is the existence of community of interest, unity of possession and right of survivorship among the coparceners. So long as the family is undivided, no individual coparcener can predict his specific share in joint family property. His share is liable to increase by deaths and decrease by births. The shares are ascertained only by a partition. The properties are managed by the Karta (manager) who is usually the eldest male among the coparceners. The Karta of joint family under Hindu law has substantial powers. He may spend more on one branch than on the other according to his discretion and his discretion cannot be questioned. But his power of alienation i.e. power to dispose off the joint family property is restricted. He can alienate the joint family properties only in case of ‘legal necessity’ or for the ‘benefit of the estate’.

In the Mitakshara joint family the property devolved on the male coparceners according to the rule of survivorship. For example under the Mitakshara law, if coparcenary consist of father F and his two sons S1 and S2. Now if S1 died leaving no issue but only a widow, his undivided interest devolved on F and S2 i.e. the surviving coparceners by the principle of survivorship to the total exclusion of widow in the matter of succession.

On the other side, the Dayabhaga schools plead to the doctrine of religious efficacy in respect of inheritance matters. At every stage, Dayabhaga checks the claim of rival heirs on the basis of their number and the nature of their respective offerings. Doctrine of religious efficacy is associated with Shraddha ceremony i.e. one who offers rice balls to departed ancestors have right to inherit the property of deceased also. Under the old Hindu law the person who offer these rice balls are up to 7 degrees from father side and up to 5 degrees on the mother side. After the passing Hindu Succession Act, 1956, now these degrees are 5 degrees from father side and 3 degrees

from mother side. In the list of persons who offer these rice balls, the first one is the son. At the second number, son’s son is mentioned. The general rule is that if a person at a higher position is available, then one cannot go down the list and the list terminates there. For instance if one son is alive, then son’s son (i.e. grandson of the deceased) has no right to perform the Sharaddha because grandson is at serial number 2 whereas the son is at serial number 1. Probably, it is for this reason that there is no inheritance right of the son at the time of his birth in Dayabhaga, when the farther is alive. The succession for the first time opens only after the death of the father because sons perform Sharaddha ceremony only after the death of their father. This was in sharp contrast to Miktakshara in which the son inherits a share in the ancestral property at the time of birth itself (after the Amendment of 2005, now the daughters also have the same right).

So though these two schools adopt two different modes in respect of inheritance (one adopts the rule of propinquity i.e. particles of same body theory and the other adopts religious efficacy theory, i.e. offering of pindas to departed ancestors), but one thing was common that in both of these schools females have been devoid of inheritance rights. Even in Mitakshara Schools which is said to be secular in its approach, daughters had always been excluded from inheritance rights, whereas if we follow the Mitakshara School, daughters also have same particles of the body as the son has but it was the unique aspect of Mitakshara coparcenary that only sons have birth rights in property and daughters do not possess such type of rights. Under Dayabhaga schools also which follows religious efficacy theory only the male members in the family have right to perform Sharaddha ceremony. Daughters are again excluded.

But still out of these two schools, Vijnaneshwara’s observations and definitions seem to be more realistic and innovative in its application. In the matter of succession, Vijnaneshwara discarded the theory of connection through the rice balls offerings and accepted the theory of transmission of constituent particles.\(^\text{32}\) In the British Indian legal history, earlier the Privy Council also preferred the Dayabhaga’s rule of religious efficacy, thus limiting the proprietary independence of Hindu females and Vijnaneshwara’s view was thwarted to emerge and develop into a rule of law. The Hindu female’s absolute right to property advocated by Vijnaneshwara was also

\(^{32}\) Ibid., p. 217-218.
judicially curtailed by the Privy Council in 1866 in *Mussumat Thakoor Deyhee v. Rai Baluk Ram.* In this Privy Council held that a widow may have power of disposing off moveable property inherited from her husband but she had no such right in respect of immoveable property. This case was from the Benaras Hindu Law. The view of Vijnaneshwara was noted by Privy Council in *Balasubrahmany v. Subbaya* also. The Privy Council held that the claims of rival heirs are determined primarily by the test of degrees of propinquity and not religious efficacy. Even a person who bestowed no religious benefits to the deceased is admitted as heirs on the basis of affinity. Vijnaneshwara forcefully states that ‘sapinda’ relationship does not depend upon the offering of the ‘pinda’ to the departed soul and irrespective of the fact whether he is getting it or not, but it depends upon having the same particles of one’s body. Vijnaneshwara’s definition of law was therefore revolutionary. It dissociate the word ‘sapinda’ from its religious meaning which was in keeping with the new dimensions which he gave to the Civil law (Vyavahara) by treating the property and inheritance as purely secular matters. According to Vijnaneshwara, the origin of the concept of property is having a popular acceptance and hence the basis of inheritance and succession must be secular in nature i.e. it must be based on relationship by blood.

While Jimutvahana based his principles of inheritance on the text of Manu and Manu emphasises on the spiritual aspect. Vijnaneshwara mainly relies on the texts of Yajnavalika Samriti because it prefers the practical and secular aspects. Furthermore, the Dayabhaga prefers the father to the mother because he offers two oblations in which the deceased son participates, while the mother offers none. On the other hand Vijnaneshwara takes the opposite view on the ground that mother’s propinquity is the greatest as compared to the father. This view of Vijnaneshwara is reflected in Hindu Succession Act, 1956 also because mother of a deceased Hindu is a class I heir and is hence automatically entitled to the share in the property of her deceased son whereas the father is only a class II heir and will only get the property if there is no class I heir.

Similarly, the right of daughter to inherit was opposed by Jimutvahana because of the funeral obligations, which may be hoped from the son only. On the same basis the widow or barren or sonless daughters, was also excluded from inheritance. But the Mitakshara follows Brihaspati in basing its claims upon simple consanguinity. As a son, so do the daughters of a man also proceed from his several

33 (1866) XI MIA, 139.
34 A.I.R., 1938, P.C. 34
limbs. Then how can any other person take her father’s property? Similarly Mitakshara does not exclude widowed or the barren daughter, but prefers one to another. Accordingly whether the daughter is married or unmarried, poor or rich, she has provided with the natural claim on her father’s property.

Besides this, the Mitakshara School as propounded by Vijnaneshwara liberalised the law with regard to women in other perspectives also like he provided maintenance not only to the chaste wife but also the unchaste wife and unchaste widow. Also while earlier writers circumscribed women’s property within narrow limits prescribed by Manu, Vijnaneshwara included all properties however acquired within the definition. In this connection his liberal views evoked protests from conservative scholars.

Under the Bengal School, a Hindu widow is restricted to dispose off both kinds of property moveable and immovable but in Benaras School; she was free to dispose off moveable property inherited from her husband. In 1867, the judicial committee of the Privy Council also tried to restrict the right of Hindu women to dispose off movable property inherited from her husband. In Bhugwandas Doobey v. Mynabee35, Privy Council held that under the Hindu Law prevailing in Benaras, the part of the husband’s estate whether moveable or immovable forms portion of his widow’s stridhan and thus she had no power to alienate the estate which she inherited from her husband to the prejudice of her husband heirs that after her death devolves on them.

The abovementioned case was decided by the judicial committee in order to settle the then existing contradictory interpretations given to the texts of Dharamsastras and concept of Stridhan. The judicial committee of the Privy Council finally accepted the text of Yajnavalika which gave restricted interpretation to the concept of Stridhan text of Yajnavalika and thus is born the concept of woman’s limited estate or limited ownership rights36.

The movement to further strengthen the position of women in society again started from the second half of the nineteenth century. The earliest attempts may be traced back to 1865, with the passing of The Indian Succession Act 1865 (Act X of 1865) which was the first step towards conferring economic security upon Indian

35 (1867), XI MIA, 487.
women. The Indian Succession Act 1865, laid down that ‘no person shall, by marriage, acquire any interest in the property of the person whom he or she marries nor become incapable of doing any act in respect of his or her own property which he or she could have done if not married to that person’.  

After this the Married Women’s Property Bill, 1874 was introduced as a natural consequence of the Act of 1865. The Council of the Governor-General of India met at Government House on 24th February 1874 to consider the Bill. The Bill was passed into Act III of 1874, which was the first law that extending the scope of stridhan. It stated that the wages and earnings of any married woman, any property acquired by her through the employment of her art and skill, and all her savings and investments shall be her separate property. It also provided that a married woman can file a suit in her own name in respect of her own property. The Act, though having far-reaching effects, did not create any stir in Hindu society because until 1923, the Act applied only to Indian Christian women. Married women belonging to Hindu, Mohammedan, Sikh and Jain communities remained outside the purview of the Act.

The Married Women’s Property Act of 1874 was amended in 1923, so as to bring Hindu women and others within its jurisdiction. On the motion of Kamath, on 15th February 1923, the Select Committee’s Report on the Bill was presented which provides to further amend the Married Women’s Property Act of 1874. Kamath’s Bill sought to provide a policy of insurance which would be for the benefit of the wife, or the wife and children of the insurer. The Bill was finally passed into law in March 1923.

The year 1923 constitutes a landmark in itself. This was the year when for the first time that the Hindu woman’s independent right to property was recognised although to a limited extent. No doubt, section 4 of the Widow Remarriage Act 1856 entitled the childless widow to get a share of her husband’s property; this right was limited in scope. So the attempt made in 1923 may be regarded as the first step to honour the women’s economic rights.

The Married Women’s Property Act of 1874, was further amended in 1927. Its aim was to safeguard the interests of husbands. James Crerar, the Home Member

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37 Act X of 1865, Section 4.
39 Section I of Act III of 1874.
40 The Indian Annual Register, Vol. II (1923).
41 Proceedings of the Council of the Governor-General of India (1874), pp. 69, 77.
moved the Bill, a part of which was meant to limit the liability of a husband when his wife had obtained a probate or letter of administration and was a trustee, executrix or administratix either before or after marriage. The motion was adopted.\(^{42}\)

Apart from safeguarding the interest of wives and husbands by the Acts of 1923 and 1927 respectively, another Act was passed in 1929, which aimed at giving preference to some nearer degrees of female heirs over certain remoter degrees of male heirs. The seeds of this Act were sown on 15\(^{th}\) February 1923, when along with Kamath, T.V. Seshagiri Ayyar, also moved a Bill in the Legislative Assembly to change the order of inheritance in the Hindu family. This Bill aimed at to give priority to certain female members.\(^{43}\) What was sought to be done in this Bill was that in matters of inheritance, after the father’s father and before the father’s brother, the son’s daughter, daughter’s daughter, sister and sister’s son to be given preference over the father’s brother. This Bill sought to ensure that the inheritance rights of female heirs were between those of the father’s father and the uncle.

Seshagiri argued that the principle of Hindu Law on Property was based on three elements of bandhus (atmabandhus) i.e., one’s own descendant, pitribandhus, that is, the father’s descendants and matribandhus, that is, the mother’s descendants. The second principle of Hindu Law was that the classes of bandhus should not go beyond three degrees, which meant that the grandson’s daughter, who was more than three degrees and were within one’s atmabandhus, and so they must be given preference over the sister, who was a pitribandhu. That was the principle upon which the order of succession of the Bill was based.\(^{44}\) When put to vote, Seshgiri’s motion for re-circulation of the Bill was lost by a margin of eleven votes, and on 19th July 1923, when the Bill came up before the Council of States, it was postponed. Thus Seshagiri’s Bill on the Hindu Law of Inheritance remained pending.\(^{45}\) Though Seshagiri’s Bill was kept in abeyance, the legislators continued their endeavour. It was again moved in the legislative Assembly by Sir Shanmukham Chetty on 12th February 1929.\(^{46}\) The Bill now laid down that if a person died leaving property not held in coparcenary and not disposed of by will, and if the last persons surviving were the father’s brother and a son’s daughter, the son’s daughter, being the nearer relative,

\(^{42}\) Act XVIII 1927, Section 10. Legislative Assembly Debates, (14\(^{th}\) September 1927), p. 4352.
\(^{43}\) The Indian Annual Register, Vol. II (1923).
\(^{44}\) Legislative Assembly Debates, (2-7 September 1923), p. 4041.
\(^{45}\) The Indian Annual Register, Vol. II (1923).
\(^{46}\) Legislative Assembly Debates, (12\(^{th}\) February 1929), p. 7080.
should have preference over the father’s brother. That is, a son’s daughter, a
daughter’s daughter, sister and sister’s son should in the order specified, be entitled to
rank in order of succession, next after a father’s father and before a father’s brother.
Various scholars, legislators and orthodox leaders opposed this Bill. The view points
of these persons were that laying down new rules of succession meant hurting that
sentiment and faith of those dying intestate, while our age old tradition was based
upon the duties of the living to the dead. Others believed that this tradition would be
in jeopardy, if Chetty’s motion was carried through. So, if the amendment was
accepted it would tantamount to striking at the very root of the Hindu people’s faith in
their achaars.47

Seshagiri’s Bill received the assent of the Governor-General on the 21
February 1929, and became a law under the name of the Hindu Law of Inheritance
(Amendment) Act 1929 (Act II of 1929). The provision of the Act introducing the
female heirs reads as follows:

A son’s daughter, daughter’s daughter, sister and sister’s son shall, in the order
so specified be entitled to rank in the order of succession next after a father’s father
and before a father’s brother provided that a sister’s son shall not be included, if
adopted after the sister’s death.48

This Act was very limited in its scope and did not make any fundamental
change in Hindu law in favour of women, because under this Act neither the
daughters nor the widows were provided with the rights of inheritance. The Act only
emphasised that certain nearer degrees of female heirs should be preferred over the
remoter male heirs. So the provisions of the Act were not particularly sweeping in
support of property rights of female.

In addition to this, Act of 1929 was limited in the sense because it regulated
succession only in the case of the separate property of a Hindu male who dies
intestate. Its aim was not to change the law in respect of the female’s property, but
only to ensure that when a husband succeeded to his wife’s stridhan property, it
descended in the same way as if it had belonged to the husband himself, after her
death. If at such time, Act of 1929 was in force, it was that Act which governed
succession, and the property could not be deemed to be the property of a female.49

48 The Hindu Law of Inheritance (Amendment) Act, 1929, Section 2.
Thus, the legal position of women, according to Act of 1929, was far from satisfactory. Realising this, the legislators continued to fight for greater inheritance rights for women.

Raisaheb Harbilas Sarda on 26th September 1929 introduced the Hindu Widow’s Rights of Inheritance Bill to secure a share for Hindu widows in their husband’s property, but to no effect. The same Bill was again introduced by Sarda on 21st January 1930. This time it was widely discussed.\(^{50}\) The principal clause of the Bill was: where the husband of a widow was at the time of his death a member of a joint Hindu family, the widow shall be entitled to such share of the joint family property as her husband would have been. This share would become her absolute property: Under the Hindu law, a widow did not get any share in her husband’s property as a son did. A widow’s right of inheritance was very limited and this right was often interpreted in courts of law in a narrow sense and entitled her only to maintenance and residence in her deceased husband’s house.

The Bill was supported by women all over India who demanded the right of inheritance in Women’s Conferences held in different parts of the country. During the successive annual meetings of the All India Women’s Conference at Poona in 1927 under the Presidentship of Her Highness, the Maharani of Baroda, at Delhi in 1928 under the Presidentship of Her Highness, the Begum of Bhopal, in 1929 at Patna with the Dowager Rani of Mandi as the President and at Bombay in 1930 under the Presidentship of Sarojini Naidu and at various other provincial level conferences of women, the right of inheritance was being demanded repeatedly.

On 17th February 1931, Harbilas Sarda tried again to introduce the Bill in the Assembly after it had been circulated. But due to some opposition, it could make no headway. On 26th January 1932, the discussion on the Bill was held.\(^{51}\) It was further considered on 4th February 1932.\(^{52}\) The Bill was vehemently criticised by a number of members, particularly those from Bengal. At the same time, other members supported it. Rai Bahadur Lala Brij Kishore, a member admitted that the condition of Hindu widows was truly deplorable. They had no legal position and were at the mercy of the male members of the family. Thousands of them were humiliated, disgraced and even driven away from their homes; hence, it was necessary to improve their

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\(^{50}\) Legislative Assembly Debates (21 January 1930), pp. 162-168.

\(^{51}\) Legislative Assembly debates, Vol. I (26th January 1932), pp. 73-104.

\(^{52}\) Ibid., Vol. I (4th February 1932), pp. 442-448.
A. Das, another member supporting the Bill, said that most of the objections raised during the debates were vague and pointless, and that the legislation was overdue.

Sir Hari Singh Gour vehemently criticised the attitude of the government, which only paid lip service to the Bill. He said that a question of such vital importance should not be decided by counting heads but by its righteousness and truth. Addressing the claims of his orthodox opponents, he said that the Bill was only trying to reform laws made by men and that ancient Hindu laws were not sacred or divine. He argued for the urgency needed for such a piece of legislation and that if there were any defect in the Bill, the Select Committee would make suitable amendments in view of changing times. The question whether the Bill should be referred to a select committee was put to vote. The House was divided and the Bill was rejected by fifty-five votes against twenty-six.

Undaunted by earlier failures, Harbilas Sarda moved another Bill entitled ‘The Hindu Widows’ Right of Maintenance Bill’ in the Assembly on 29 August 1933. He said that Hindu law gave widows the right of maintenance, but since there was no definite standard to guide judges in fixing the amount of maintenance, this Bill aimed at providing that measuring rod to the judges.

But again due to its opposition, the Bill never came up and, therefore, Sarda’s Bill for the Hindu Widow’s Right for Maintenance met the fate of its predecessor. But his efforts did not go unrewarded, for his idea caught the imagination of the reformers and a few years later an Act was passed in 1937, which eventually recognised the rights of Hindu widows. The Bill to amend the Hindu law, governing Hindu women’s right to property was circulated for the purpose of eliciting public opinion on 17th April 1936. It was referred to a select committee on 15th October 1936 and on 4th February 1937 the Bill, as amended by the select committee was taken up for consideration.

Replying to the arguments advanced by the orthodox Hindus that women could not have the right to property, because they were dependent during their whole life, Dr. G.V. Deshmukh said that extending the argument to India as a whole, it might as well be contended that because Indians for a thousand years had been

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54 The Indian Annual Register, Vol. II (1932).
dependent, no Indian had the right to hold property. The Bill, as it emerged from the select committee, might not perhaps mean material gain to a Hindu widow, but it certainly represented moral gain in as much as it recognised her right of partition.\textsuperscript{57}

The House passed the Bill amidst cheers. The main provisions of this newly formed law were as under:

When a Hindu governed by the Dayabhaga School or by any other school of Hindu Law died intestate leaving separate property, it would devolve upon his widow along with his lineal descendants, if any, in the same manner as it devolved upon a son.

Provided, that the widow of a predeceased son would inherit in like manner as a son, provided further, that the same provision should apply mutatis mutandis to a widow of a predeceased son of a predeceased son.

When a Hindu governed by any school of Hindu Law, other than the Dayabhaga School died intestate having at the time of his death an interest in a Hindu joint family property, his widow would have in the property the same interest as he himself had. Any interest devolving on a Hindu widow would be limited interest known as ‘Hindu Women’s Estate’ provided, however, that she would have the same right of claiming partition as a male owner.\textsuperscript{58}

Act of 1929 was the first to amend the Hindu law of inheritance and Act XVIII of 1937 was the second. The Act of 1929 made no provision for helpless widows, for whom the legislature had to make better provisions by the Act of 1937. But this Act of 1937 was criticised on several grounds. Rishindra Nath Sarkar, an advocate of Calcutta High Court, wrote an open letter to the Law Member, N.N. Sircar, pointing out some of its defects. First, according to this law, when a Hindu died intestate, his property would devolve upon his widow along with his lineal descendants, if any, in like manner, as it devolved upon a son. Now the term lineal descendants’ was a comprehensive term which meant direct descendants like son, daughters, grandsons and granddaughters by sons and daughters, and so forth. Consequently, the property of a Hindu dying intestate would be liable to be divided into an infinite number of shares. As such, the interest a widow would get could never be deemed to be better than what perhaps the Act intended it to be, as she would

\textsuperscript{57} Ibid., pp. 486-92.
\textsuperscript{58} The Hindu Women’s Right to Property Act, 1937 (Act No. XVIII of 1937).
merely get a share equal to that of each of the numerous lineal descendants, instead of a share equal to that of a son.⁵⁹

Therefore, a Bill was subsequently introduced in 1938 for the amendment of the Act of 1937. The Law Member, Sir N.N. Sircar, in his speech pointed out the defects of the Act 1937.⁶⁰ According to him by ‘lineal descendants’, the legislators did not mean to provide rights to numerous inheritors of the man dying intestate but it means providing inheritance rights only to three types of widows: (a) his own widow, (b) the widow of his deceased son and (c) the widow of his deceased’s son’s deceased son. But the language used in the Act was ambiguous and needed to be corrected. He also clarified another controversial point in the Act, that is, whether a daughter in law’s right depended upon the fact that whether her mother-in-law was alive or not? According to him, it was not the intention of the Act that the woman’s right should be influenced by the existence or otherwise of a widowed mother-in-law. He also corrected another ambiguous point of the Act and made it perfectly clear that if there were more than one widow, say two widows, both would jointly get the share equal to that of a son.

The second defect of this Act was that it gave undue rights to a predeceased son’s widow, who got more concrete rights than those of the widow of the deceased owner. Whereas the interest conferred upon the deceased person’s own widow was expressly subject to the provision of sub-section (3) which meant that the interest would be known as ‘Hindu Woman’s Estate’, there was no such limitation in respect of the interest conferred on the predeceased son’s widow.⁶¹ Besides, under Section 2 of the Widow Remarriage Act 1856, the widow of a deceased Hindu would forfeit the property on remarriage, but it could not be concluded that widows other than the widow of the predeceased owner would also be divested of the property vested in her on remarriage. The Act of 1937 was not specific as to what would happen if a man died leaving a son and a predeceased son’s widow and her son. Would she inherit one-third and the son and the grandson get one-third each? Or would the son get half and the widowed daughter-in-law and her son inherit one-fourth each?

The third defect of the Act was that it affected the daughters. The Hindu law-givers expressly laid down that the maiden daughter’s maintenance till her marriage,

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⁶¹ The Hindu Women’s Right to Property Act, 1937.
and her marriage expenses were to be paid out of her father’s estate. By the Act of 1937 and its amendment, a predeceased son’s widow was placed before the daughter in the order of succession but she was not liable to pay any amount to anybody out of the estate which devolved on her. Consequently, the maiden daughter could not enforce her claim to maintenance or her marriage expenses from the predeceased son’s widow.\(^{62}\) In fact, there was no justification in placing predeceased son’s widow and the widow of a predeceased son of the predeceased son before the maiden daughter. Any of these widows might turn the daughter out in to the street, since her rights were not protected in the Act or its amendments.\(^{63}\) In view of the above shortcomings of the Act, various private Bills came up for consideration such as bill presented by A.N. Chattopadhyay, by N.V. Gadgil and by G.V. Deshmukh.

Faced with such a storm of private Bills, the government appointed a small Hindu Law Committee known as Rau Committee with B.N. Rau, a judge of the Calcutta High Court as its chairman and three other lawyers as its members.\(^{64}\) They were D.N. Mitter, Ex-Judge of Calcutta High Court; Gharpure, Principal, Law College of Poona; and Rajratna Vasudev Vinayak Joshi, a lawyer of Baroda. The Committee advocated a Hindu Code which was considered as a blend of the finest elements of various schools of Hindu law. On the basis of the various private Bills on property, the Committee evolved a common law of intestate succession for all Hindus in British India. The Code recognised the equality of the status of men and women before law with appropriate obligations as well as rights.\(^{65}\) The Rau Committee reported in June 1941 that the Hindu Code Bill should be taken up by compartments:\(^{66}\) (1) Hindu Marriage, (2) Hindu Succession, (3) Hindu Minority and Guardianship, (4) Hindu Adoption and Maintenance. It was essential to reduce the law relating to each part to a statutory form, and then consolidate the various Acts into a single code.\(^{67}\)

Though Hindu Code Bill deals with various aspects of Hindu Law but Hindu Code Bill relating to intestate succession came up before the assembly for discussion

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\(^{62}\) Ibid.

\(^{63}\) Calcutta Weekly Notes, Xc IX


\(^{65}\) Rau Committee Report, 1941, p. 24 Para 38.

\(^{66}\) Ibid., 1941, p. 23.

\(^{67}\) Ibid.
on 24th March 1943.\(^68\) The salient features of the Bill were that (i) it suggested a common law of intestate succession for all Hindus in British India (ii) it remove the disqualification based on sex by which the Hindu women in general had been barred from inheriting property (iii) it also abolished the Hindu woman’s limited estate and converted it into an absolute estate.

On the submission of the report by the Joint Committee, the Government of India issued a notification on 21 January 1944, reviving the Hindu Law Committee again with B.N. Rau as Chairman to complete the codification of other parts of the Hindu Code Bill.\(^69\) On the occasion of the debates on the Bill, Dr. Ambedkar said that the Bill was ‘no revolutionary measure, not even a radical measure.’ He did not appreciate the criticism that shares to daughters meant disruption of the joint family property. According to him ‘If we want to stop fragmentation we would have to do something else, not by law of inheritance but by some other law’.

The Bill as recommended by the Rau Committee was referred to a select committee on 9 April 1948.\(^70\) It came up for discussion in the Legislative Assembly on 24 February 1949. The Hindu Code relating to succession had its repercussions in different parts of India. A letter published in the Statesman stated that the Hindu Code was a measure which interfered with the religious and socio-religious life of Hindus and protested that when there was no code for Muslims, Christians and other communities, there was no reason why Hindu society should be made an exception, especially in opposition to the vast majority of Hindus. This violated all principles of secularism and democracy which were the two guiding principles of our national government. The letter went to say that women who opposed the Code were accused of a slavish mentality and a fondness for their chains. However, if obedience to religious, social and family rules was slavery, obedience to political and legal rules should also be considered as such. According to this view, then, savages and vagabonds were the only free people in this world.\(^71\)

'The Hindu' vehemently attacked the Bill on the basis that the national leaders of this country and their advice were behind it. 'The Hindu' commented that Dr. Ambedkar seemed to regard the Hindu Code Bill as a practical joke, He described himself as a ‘progressive conservative’ and his job was that of ‘repairing those parts

\(^{68}\) Legislative Assembly Debates, Vol. II (24th March 1943), p. 1406.

\(^{69}\) Amrita Bazaar Patrika, 22 January 1944.

\(^{70}\) The Statesman, 10th April 1948.

\(^{71}\) The Statesman, 25th February 1948.
of the Hindu system which had almost become dilapidated’. Further ‘The Hindu' mentioned that far from its having become dilapidated and unsafe, the Hindu society rested so strongly on its foundation that Dr. Ambedkar had confessed to a news agency that the orthodox section of the population did not want the proposed Hindu Code and such people were in a vast majority. By what right then, did a microscopic minority seek to impose its own view on the vast body of Hindus in a matter of such fundamental importance to the future of Hindu society and culture? The government could claim no popular mandate for such a measure.

**4.2 Status under Hindu Succession Act, 1956:** Leaving behind the criticism, the Hindu Code relating to succession received the assent of the President and became the law of the land on 17<sup>th</sup> June 1956. The law was named The Hindu Succession Act 1956 (Act No. XXX of 1956).<sup>72</sup> It was considered as a landmark at that time because it for the first time provide a share to a female even in property owned by a Mitakshara Hindu joint family. This Act also gave a solution to strong divergent views regarding a Hindu woman’s position in the order of succession without disrupting the Hindu Mitakshara coparcenary.<sup>73</sup>

Thus, Hindu Succession Act, 1956 (herein after referred to as Act) is also regarded as one of those measures which try to improve the proprietary status of Hindu females. The Act brought some radical and fundamental changes that considerably enhance the women’s succession and property rights. The fundamental features of the Act are that the old rules of intestacy prevailing under the existing Mitakshara and Dayabhaga Schools (i.e. rules of consanguinity under Mitakshara and religious efficacy under Dayabhaga) have been considerably altered and entirely new scheme has been adopted based on relationship of love and affection. The Act introduces daughter as simultaneous heir along with son, widow etc. and the share of the daughter in the property of the father is made equal to that of son, married and unmarried daughters are placed on the same footing, share was allotted to daughter in Mitakshara coparcenary by virtue of section 6 of the Act.

But even after about more than five decades of the passing of the Act, the females are still unable to reap the benefits provided under the enactment. The reason is being that, there is a great difference between idealised concept under the Act and

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<sup>72</sup> Ananda Bazaar Patrika, 19<sup>th</sup> June 1956.

in the reality. One of the serious omissions under the Act is the absence of any provisions which could invalidate the devices intended to defeat or reduce the right of female heirs. On the contrary, the Act itself confers unrestrained testamentary powers under section 30. Therefore disinheritance by execution of Will can be availed by all Hindus under the Act whether they are governed by Mitakshara, Dayabhaga or Marumakattayam Law.

The second aspect under the Act, which enhances the gender discrimination, was under section 4(2) of the Act. It provided that the state can pass rules “providing for the fragmentation of agricultural holding or for fixation of ceiling or for the devolution of tenancy rights in respect of such holdings”. A serious objection to it was that the beneficial effect of the Act can be denied by a resort to this provision because these laws contain features which were more discriminatory than the existing laws.

Third aspect under the Act that again provided this discrimination was that at the time of passing of this Act the Mitakshara coparcenary was retained with son’s birth right in the family property. According to Mitakshara School, a son, grandson and a great grandson constitute a class of coparceners. No female was member of Mitakshara coparcenary. The Act by virtue of section 6 recognises inheritance by succession but only to the property separately owned by an individual. It provides that if the male Hindu governed by Mitakshara Law dies, leaving his undivided interest in coparcenary property, his undivided interest will devolve according to the rules of survivorship and not according to the Act. The proviso to section 6 lays down that if the deceased had left behind him any female relative specified in class I of the Schedule or male relative claiming through such female relatives, the interest of the deceased devolve not by survivorship but by testamentary or intestate succession as provided under the Act. To determine the share of deceased person at the time of his death, explanation to section 6 resorts to the simple, expedient, undoubtedly a fictional or national partition that the interest of the Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted if the partition of that property had taken place immediately before his death. So to know the share of deceased coparcener one has to resort to old rules of partition and the net result is unequal distribution among brothers and sisters because the son by virtue of being coparcener was entitled to have greater share, one as a coparcener with the father and other as a class I heirs whereas the daughter was again given only one share in the separated share of the deceased father. Thus, even the projected image of
section 6 gives the implication that daughters have been given the right in Mitakshara coparcenary but the real picture is that ancestral property continues to be governed by a wholly patriarchal regime and thus responsible for gender discrimination.

Along with this aspect, the right of coparcener to renounce his interest in coparcenary also defeat the right of female to inherit. In order to do this, no particular formality was required except the expression of clear intention and the result of renunciation was that on the death of the person who had renounced the share, will have no interest in the joint family property which could be distributed among the class I heirs. The similar characteristic to reduce the right of female heir was conversion of self-acquired property into coparcenary property. This conversion was frequently resorted to reduce the burden of income tax. Again, no formalities are necessary in order to bring this about and the only question was one of intention on the part of the owner of separate property to abandon his separate rights and invest it with the character of joint family property. So the availability of these mechanisms in favour of male descendents was the major point of discrimination that enhances discrimination.

Fifthly, the patrilineal assumption of a dominant male ideology is clearly reflected in laws governing a Hindu female who dies intestate. Section 15 of the Act, deals with succession of Hindu female property. This Section makes a distinction between the property inherited by her from her parents and from her husband and father-in-law. The former devolves on the heirs of the father and the latter devolves on the heir of her husband provided she died issueless. This provision is indicative again of a tilt towards the male as it provides that the 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. Further section 15 does not specifically mention about the properties earned by a female out of her own exertion or gains of learning. Thus, where a widow dies issueless, her property will devolve on the heirs of her husband and not on her blood relations. In view of practical reality, this provision is not consistent with equity and fairness. Usually, a widow does not find her deceased husband’s house as a fit place to live in and she quite often turns to her parent’s place for help. This fact has been recognised even by legislature as section 23 of the Act conferred on a widowed daughter the right of residence in the dwelling house of a

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deceased father. The irony is that because of section 15(1) whatever little income she had, passed on her death to a distant relations of her husband’s side and not to her blood relations i.e. parents, brothers and sisters, etc.75

Sixthly, the provision under section 23 relating to the right of inheritance to a dwelling house was again discriminatory one. It provided that where a Hindu dies intestate and his property includes a dwelling house wholly occupied by the members of the family, then the female heirs were not entitled to claim partition of it unless male members choose to divide their share in the dwelling house. Female heirs were entitled to the right of residence only. Even there was discrimination as this right of residence was restricted only to unmarried and widowed daughters or those separated or deserted by their husbands. Married daughters do not enjoy the right of residence.

So while analysing the above-mentioned aspects, it is concluded that apparently Hindu Succession Act may give the impression that daughters are treated at par with son but the reality presents totally a different scene in which every effort has been made to deny the rightful share to females. Thus Hindu Succession Act, 1956 has been unable to play a successful role in diluting the gap of gender discrimination.

To achieve the full equality is the matter of succession. The Hindu Succession Act was again amended on the basis of proposals made in the 174th Report of Joint Committee, Law Commission of India. Though this report was submitted in May 2000, but amendment was made in September 2005 after a lot of hue and cry for these amendments.

5. SIGNIFICANCE OF THE STUDY

No doubt, the amendment, that is, The Hindu Succession (Amendment) Act, 2005 in one stroke makes ‘the daughter of a coparcener’ by birth a coparcener in her own right in the same manner as the son and introduced certain other changes in the principal Act. As a result of the amendment the position and the status of women is enhanced to a considerable extent. But practically if we see the reality, the practicability and the implications of new amendment, there are still very important drawbacks or loopholes in this amending Act which have been left out either

incidentally or deliberately by the makers of new Act. The reason is that in spite of 
these egalitarian enactments certain types of social and economic disabilities prevent 
the women from exercising their human rights and freedom in society. As a result of 
this, the women do not enjoy complete legal equality with men in Indian society 
especially in the area of succession or inheritance or proprietary rights.

So even though the period of 1955-56 was considered as the dawn of new era 
in improving the status and position of Hindu women but so far as the codification of 
these laws or the latest amendments of these laws was concerned, its purpose would 
be defeated if the legal loopholes and social attitude was allowed to continue. All this 
prompted me to take the present topic for my research purposes under this topic.

Here I would like to mention that when I presented my synopsis, at that time 
amendment in the Principal Act had not taken place. This amendment was made in 
September 2005. Now, the present study, without throwing light on the amendment, 
would be totally irrational. So the study of Hindu Succession (Amendment) Act, 2005 
in the present work would help in analysing the provisions of Hindu Succession Act 
in altogether new framework which would in turn help in reducing the gap of gender 
discrimination and in transforming the constitutional mandates into reality.

6. OBJECTIVES OF THE STUDY
The objectives of the present study are as under:

1. To examine the various types of proprietary rights, given to the women under the 
   Hindu Succession Act, 1956.
2. To review the changes that has taken place by way of the Hindu Succession 
   (Amendment) Act, 2005.
3. To study the extent to which the females are allowed to exercise their proprietary 
   rights.
4. To make a comparative study of the proprietary rights available to the Hindu 
   women vis-à-vis their counter part of Muslim, Christian and Parsi communities.
5. To examine the role of judiciary in interpreting, the provisions of the Hindu 
   Succession Act, 1956.
7. ORGANISATION OF THE STUDY

The present study has been divided six chapters. Chapter I, that is the present chapter, deals with the general introduction to the topic which explains how the Constitution and Legislature take steps after independence, in improving the condition of Hindu females and how the Hindu Succession Act is passed as one the measures in this direction. Alongwith this it also explains the universe of the study, sample and sample design, distribution of the sample of the respondents, procedure of the data collection, research instrument used and the statistical techniques used for the analysis of data.

Chapter II throws light on the historical survey regarding the rights of women in the past that what types of inheritance rights were given to females from time to time.

Chapter III deals with women’s rights under Hindu Succession Act, 1956 with special reference to Sections 4, 6, 8, 14, 15, 23, 24 and 30 of the Act. The chapter also contains the implications of the new amendment made in the Principal Act in September 2005.

Chapter IV makes a comparative study of Hindu Women’s Rights vis-à-vis their counterparts of Muslim, Christian and Parsi communities.

Chapter V deals with the empirical study regarding the women's property rights and through a questionnaire tries to analyse the level of awareness of the respondents regarding the socio-legal scenario and other issues pertaining to the rights of women.

Chapter VI deals with the Conclusions of the study and Suggestions to reform the Hindu Succession Act, so that the Constitutional mandate of equality of status and opportunity would be transformed into reality.

8. RESEARCH DESIGN

The research design helps us to carry out the various research operations very smoothly, thereby making research as efficient as possible by giving maximum information by minimising the time, energy and cost. It covers the aspects relating to data sources, universe of study, research approach, research instruments, sampling plan and data collection techniques.
9. RESEARCH QUESTION

In order to develop sound theoretical framework for this research work a comprehensive review of literature was undertaken. The literature revealed that much work has not been done on the present topic after the latest amendment of 2005. The basic research question was: What types of proprietary rights have been given to the Hindu women under the Hindu Succession Act, 1956? What is the impact of the new amendment on the rights of women? To what extent the females are allowed to exercise their proprietary rights? Besides, an attempt was also made to make a comparative study of the proprietary rights available to the Hindu women vis-à-vis their counter part of Muslim, Christian and Parsi communities. The last research question was that what role the judiciary plays while interpreting the provisions of the Hindu Succession Act, 1956?

10. UNIVERSE OF STUDY

The universe of the study comprised of educated individuals who were residing in Punjab and belonging to different gender, age, income and occupations.

11. SAMPLE AND SAMPLE DESIGN

A total of 100 respondents were taken from the two cities of Punjab i.e. Amritsar, Gurdaspur and Union Territory of Chandigarh. The respondents were personally contacted for the purpose of data collection. The sample comprised of various individuals belonging to different gender, age, income categories and professions. Since, the present study was exploratory in nature, non-probabilistic judgement sampling technique was used. The following tables show the distribution of the respondents.
12. DATA COLLECTION

The present study consisted of two types of data sources, i.e. primary and secondary sources. The primary data was collected from the survey with the help of a non-disguised structured questionnaire. On the other hand, secondary data was collected through various books, articles published in journals, newspapers and magazines. Apart from this, various legal reports of Law Commissions were also referred to for the purpose of the study. The case laws decided by various Courts were also included in the study.

13. DATA ANALYSIS

The tabulation of data was done to have a comprehensive picture of the analysis commensurate with the different objectives of the study.

14. LIMITATIONS OF STUDY

1. The accuracy and reliability of the data depends upon its source.
2. Less availability of relevant sources made the study more tedious.
3. The paucity of time and other resources confined the study to a less number of judgements given by the various courts.
4. Since, the scope of the study was limited to the precision of the study, so all the related topics and sub-topics could not be studied.

5. The present study was confined to The Hindu Succession Act, 1956 and various provisions relating to succession in Muslim, Christian and Parsi Succession.