Chapter II

Hindu Succession Act

The constitutional debates on the Hindu Code which resulted in the formulation of the Hindu Succession Act, 1956, unravels the forms, manifestations and effects of both continuities and disjunctures in the exercise of state power between colonial and post-colonial eras in India. The legal regulation of property rights in post-colonial India is an important pointer to the status of women in India. Law is constitutive of the modern state and defines how it exercises power. In the context of Hindu Succession Act, 1956 and 2005, this chapter explores the interface of law and state in mitigating the property rights to Hindu women. It interrogates the way cultural factors affect the outcome of laws and the extent to which social change and empowerment is precipitated by legal reform. The link between agency and social change is sought to be understood through judicial decisions on Hindu property laws.

The framework of rights is important for women's equality and empowerment. Rights may be understood to reflect agreed political claims or they may be understood as emanating from and grounded within law. For most purposes, the framework of law is important to ground rights claims, to provide an effective structure which further legitimizes such claims and to promote their implementation. The basis of rights as legitimate claims has important consequences for their ability to bring about change. The legitimacy of claims presumptively conferred within a legal framework must be interrogated in the light of legal, historical, political and cultural contexts. Such a contextual and critical analysis is crucial for effective protection of rights claims through law.

At the conceptual level, the first section of the chapter deals with the formal aspects of law, that is, Hindu Succession Act of 1956 and Hindu Succession (Amendment) Act, 2005. The necessity in analyzing both the laws is to contextualize the issue of property rights of Hindu women in India. The Hindu Succession Act of 1956, which governed the laws relating to property rights of Hindu women, was hailed to have constituted a substantial move towards gender equality. The Act gave equal rights to males and females to succeed intestate property. It sought to unify the Dayabhaga and
Mitakshara systems and purported to lay down a law of succession whereby sons and daughters would enjoy equal inheritance rights, as would brothers and sisters. The Hindu Succession Act was a watershed as for the first time a legal category of a "woman" was created to include daughters, wives and widows. It is particularly important for the analysis because it is not only relevant for legal precedents but also because the judgments on the new Amendment are still under way. The study of judicial decisions demonstrates the way the legal provisions of the Act fall short of assuring women substantive gender equality. The second part of this chapter deals with the myriad ways in which the Hindu Succession Act, 1956 and 2004 constructs gendered identities of women. Its focus is on judicial decisions at the Supreme Court and the High Courts of India to present the construction of gendered issues emergent in property laws. The judgments do not simply resonate the laws but are mediated by the cultural perceptions of the judges and lawyers, by acts of legal translation that revise and recreate gender and can profoundly affect the intent of legislation. The main argument is that the legal subject is posited not as the abstract, un-gendered creature but as an ideological construct, endowed with attributes that vary according to context and compel particular perceptions of a social world. While some judgments often powerfully reinstate patriarchal and sexist normative behaviour and institutionalize the legitimation processes of appropriate codes of female behaviour, others create important spaces for negotiation of new rights and social change.

Debates on Gender in Law

As such feminist understanding of law typically addresses and explores the significance of gender in law. It engages with a wide range of diverse perspectives and traditions to highlight and explore the gendered content of law. They challenge traditional understanding of social, legal, cultural and epistemological order by placing women, their individual and shared experiences at the centre of their scholarship. The impact and implications of law in women's disadvantage with a view to bringing about transformative and social change is also another concern.

There have been many debates about gender in law in feminist scholarship. A feminist perspective brings a gendered perception about legal and social arrangements to
bear upon a largely gender neutral understanding of them. Gendered assumptions embedded in such arrangements are almost rendered invisible. Feminism presupposes that 'gender' has a much greater structural and discursive significance than is commonly assumed. The relative invisibility only retains its significance for its practical and to a lesser extent ideological constructs. Law therefore, is not just a reform mechanism or part of capitalist and patriarchal oppression but also a body of knowledge which can be explored and subject to critical scrutiny.

The debate in the feminist movement on law is intertwined legal rights and gender quality. Within the feminist movement itself the question of legal equality for women has posed theoretical and practical dilemmas. Some Anglo-American legal theorists have however suggested that “the rhetoric of rights has become exhausted and may even be detrimental” to the cause of women’s equality. The “rhetoric of (equal) rights is inadequate”, says Carol Smart, “in a situation where women have been demanding for rights for which there has been no masculine equivalent in the past”. Equally pragmatic is the observation of Martha Fineman who says that “the unequal and inequitable position of women can only remedied through pervasive legal accommodation of difference.... there has been a move away from inequality as one of the organizing the principles of legal thought”. Indeed, she argues that a theory of “difference”, rather than the discourse of “equality”, may be a more rewarding strategy for legal feminists to pursue. Other feminist legal theorists such as Catherine Mackinnon argue that both the “sameness” and the “difference” approaches are subtended by the belief that man is the ultimate measure of women. Mackinnon says, “Under the sameness rubric, women are measured according to the correspondence with man, their womanhood judged by the distance from his measure”. She calls instead move towards substantive equality that recognizes women’s realities. In short, Mackinnon’s critique of liberal legalism of which the sameness/ difference binary is fully a part, stops short of a critique of the legal form itself, arguing instead that the barriers to equality are often legal.

The women's movement in India has been critical of the legal reform project in the recent times. The early phase of the women's movement was engaged in the struggle for democratic rights of women like the right to education, employment, right to own property, the right to vote. They fought for legal reform for a legally equal position in society. These struggles were beyond the home and the family. The fundamental problem was the over-reliance on legal reform to bring about change. In the present conjuncture, feminists have gone beyond legal reforms and are directed towards emancipation of women. Feminism now includes the struggle against women's subordination to the male within the home, against her exploitation within the family, against their low status at work, against their double burden in production and reproduction.

In India, the dilemmas of the sameness/difference rubric are manifested particularly in the contestation of personal laws. The theorizing of 'difference' has become critical in multicultural societies where the 'neutrality' of institutions has only perpetuated historical and cultural disadvantages. The colonial interregnum in India produced institutionalized 'differences', which resonate in plural and unequal personal laws, legally ensuring that women occupy unequal subordinate positions. In India thus, rethinking the rhetoric of equality necessarily follows a distinct path, which may not parallel the Anglo-American scholars. In many studies it has been suggested that new laws are most effective when they legitimize changes that are endorsed by societal norms and practices and legal transformation reflects rather than initiates political, economic or political change. Consequently, it follows from this argument that laws enacted for greater redistributive justice are likely to be unsuccessful. Feminist theorists have pointed out that many times there may be resistance to radical social change to ameliorate status of women from within the legal transformation itself. This results in the incorporation of cosmetic, superficial changes that in turn reinforce hegemony of patriarchy. Carol Smart argues that law can "be understood as a mode of reproduction of existing patriarchal order, minimizing social change but avoiding the problems of overt conflict".20 Others like Srimati Basu contend that law is one of the primary cultural spaces where gender identity is constituted, a crucial site where notions of gender are created and reinforced through judgments relating to subjects such as family law or sexual violence.21

20 C.Mackinnon, op. cit., pp. 45-49.
21 S. Basu, She Comes to Take Her Rights, Kali for Women, New Delhi, 2001.
The Indian women's movement is fragmented on the issue of seeking support of the state in achieving emancipation of women through the institution of law. Feminist legal discourse in India has addressed the question of whether law has the capacity to pursue justice. Feminists who favour the intrinsic value of that legal reform brings with it, consider it to be an important site for negotiation for rights of women. Archana Parashar, Benda Cossman and Ratna Kapur are some feminists who recognize the emancipatory potential of law. Parashar calls for a re-conceptualisation of categories of law so that it does not dismiss or marginalize the interests of women.22 The inclusiveness and contextuality of any law is important for its agency for social change. But her contention that feminist critiques of law can emanate from societies where women have achieved legal equality is a contested issue. Gandhi and Shah argue that legal reform strategies are fundamentally a part of a larger struggle and not an end in itself.23 It is at the most a broad strategy to create public awareness and short term redress. Similarly, Haksar argues that struggles to transform social values are fundamental to the women's movement in India and as such law reform cannot be separated from it.

The role of the state in regulating legislations and also finding an ally in the state is a suspect among many feminists. Flavia Agnes makes the point: “If oppression could be tackled by passing laws, then the decade of the 1980s would be adjudged a golden period for Indian women, when protective laws were offered on a platter. Almost every single campaign against violence on women resulted in new legislation. The successive enactments would seem to provide a positive picture of achievement. But the crime statistics reveals a different story....The deterrent value of the enactments was apparently nil. Some of the enactments were apparently only on paper. Why were the laws ineffective in tackling the problem?”24 Though progressive laws are necessary conditions for women’s minimal well being and status, it may also become a conduit for state control. The tokenist value of legal reform is also elaborated by Omvedt who is critical of such strategies for not being able to challenge the social and systemic structures that increase atrocities against women. Abdication law is not a viable option since the only

22 A. Parashar, Women and Family Law Reform in India, Sage Publications, New Delhi, 1992
permissible identities in modern identities are the ones that are put in place by law.\textsuperscript{25} Creative engagement with the legal project could be negotiating space around prescribed identities.

Gender equality definitely demands more than gender specific laws. The need is to carefully strategise to do away with universalizing tendencies of metanarratives and reorient legal theory to become more contextual and inclusive. It is equally important to explore the limits and possibilities of any law that directs itself towards emancipation of women. The paradox may be in "demanding that law both privilege women's difference and overlook in different contexts according to the ends of real and substantive justice".\textsuperscript{26}

**THE HINDU SUCCESSION ACT: A WATERSHED IN GENDER RELATIONS**

The Hindu Succession Act, 1956 dealing with intestate succession among Hindus came into force on 19 June, 1956. This Act brought about changes in the law of succession and gave rights which were hitherto unknown, in relation to women's property. It was applicable to all states other than Jammu and Kashmir and covered about 86 percent of the Indian population.\textsuperscript{27} The Act lays down a uniform and comprehensive system of inheritance persons governed by Mitakshara and Dayabhaga schools as also to those in certain parts of Southern Indian, who were previously governed by Murumakkattayam, Aliyasanta and Nambudri system.\textsuperscript{28} The Act applies to any person who is a 'Hindu' by religion is any of its forms or developments including a Virashiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj; or to any person who is Buddhist, Jain or Sikh by religion; to any other person who is not a Muslim, Christian, Parsi or Jew by religious as per Section 2.

The Hindu Succession Act of 1956 is often considered to have constituted a substantial move towards gender equality in many ways. It gave equal rights to males and females to succeed intestate property. It sought the unity of the Mitakshara and


\textsuperscript{27} In Jammu and Kashmir, the Hindu Succession Act, of 1956 with some modification applies.

\textsuperscript{28} There are however special provisions in the Act, for Hindu Matrilineal communities customarily governed by the Murumakkattayam and Aliyasanta system.
Dayabhaga systems and sought to lay down a law of succession whereby sons and daughters would enjoy equal inheritance rights, as would brothers and sisters.

Under the Act, in the case of a Hindu male dying intestate all his separate or self-acquired property, in the first instance, devolves equally upon his sons, daughter, widow, and mother. In addition (and simultaneously with the mentioned four categories of heirs), if there is a predeceased son, his children and widow get the share he would have received if alive: and the children and widow of predeceased son similarly inherit a share as representatives of the deceased son similarly inherit a share as representatives of the deceased in question. All these are the primary or class I heirs under the Act. In the absence of Class I heirs, the property devolves on class II heirs and in their absence first and agnates and then on cognates. For joint family property, if the deceased male was earlier governed by the Dayabhaga system, the same rules of succession as relate to other types of property apply to this as well.

However, for those previously governed by Mitakshara law, the concept of Mitakshara coparcenary property devolving by survivorship continues to the recognized with some qualifications: in the case of a male who has in interests in Mitakshara coparcenary at the time of his death and who leaves behind class I female heirs, his interest devolves not according to the Mitakshara principle of survivorship but according to the 1956 Act and his share in the Mitakshara principle of survivorship but according to the 1956 Act and his share in the joint property and hence the shares of his heirs are ascertained under the assumption of a 'notional' partition (that is, as if the partition had taken place just prior to his death). If the deceased does not leave behind Class I female heirs or male heirs claiming through female heirs, the devolution is according to the Mitakshara rules. Either way this does not affect the direct interest in the coparcenary held by male members of virtue of birth it affect only the interest the may hold in the share of the deceased.

29 Class I heirs' consists of son, daughter; widow; mother; son of a pre-deceased son daughter of a pre-deceased son; son of a pre-deceased daughter; daughter of a pre-deceased daughter son of a pre-deceased son; daughter of a predeceased son of a pre-deceased son; widow of a pre-deceased son of pre-deceased son.
Hindu Property Laws and Gender Equality

The Hindu Succession Act has improved the position in favour of the widow and other owners by abolition of 'widow estate' or 'limited estate' and their conversion into absolute ones. The Act confers full heritable capacity on the female heir and recognizes her states as independent and absolute owner. This provision is embodied under Section 14 of the Hindu Succession Act, which enacts as:

(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act shall be held by the by her as full owner there of and not as a limited owner.

In this sub-Section “property” include both movable and immovable property acquired by a female Hindu by inheritance or device, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act.

(2) Nothing contained in sub-Section (1), shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil Court or under an award where the terms of the gift, will or other instrument or the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property.

Thus, Section 14(1) of the Act makes the female Hindu as full owner or absolute owner. Absolute ownership means and connotes that the owner has certain unqualified rights over the property such as:-

(a) The right to its possession,
(b) The right to its management,
(c) The right to its exclusive enjoyment,
(d) The right of disposal by an intervivos or will at pleasure, and
(e) On the death of the owner intestate the property should devolve by succession on the owner's own heirs.

Where any of these essentials of the content of absolute ownership is lacking the owner cannot be regarded as an absolute owner. The object of this Section is to do away
with the estate called 'limited estate' or 'widow estate' in Hindu law and to make a Hindu woman, who under old law would have been only a limited owner, a full owner of the property with all powers of disposition and to make the estate heritable by her own and not revertible to the heirs of the last male holder. However, it does not in any way confer a title on the female Hindu where she did not in fact possess any vestige of title.  

The Act propounds a definite and uniform scheme of succession to the property of a female Hindu who dies intestate after the commencement of the Act. Section 15 of the Act lays down general rules of succession in case of female Hindu and Section 15(1) provides that her property shall devolve-

(a) Upon the sons and daughter (including the children of any pre­deceased son or daughter) and husband;
(b) Upon the heirs of the husband;
(c) Upon the mother and father;
(d) Upon the heirs of the father, and
(e) Upon the heirs of the mother.

Section 15(2) embodies two exceptions within it and provides that notwithstanding contained in sub-Section (1) -

(a) Any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre­deceased son or daughter) or upon the other heirs referred to sub-Section (1) in the order specified therein but upon the heirs of the father; and
(b) Any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre­deceased son or daughter) not upon the other heirs referred to in sub-Section(1) in the order specified therein, but upon the heirs of the husband.

Hence after coming into force of this Act of 1956 the female becomes the full owner and after the death her property shall devolve upon the own heirs mentioned in Section 15(1).

The word "possessed" is used Section 14 in a broad sense and in its widest connotation. It means the state of owning or having in one's hand or power. It need not

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be actual physical possession or personal occupation of the property by the female but may be possession in law. It may be either actual or constructive or in any form recognized by law. This for instance the possession of a license, lessee or a mortgagee from the female owner would be her possession for the purpose of this Section. The Section can have no application where a female Hindu never acquired any property at all or where having acquired it she happens to have lost her title there to by alienation, surrender or otherwise and of which she was not or could not be in judicial possession at the commencement of the Act. 31

Sub-Section (2) of Section 14 must be read as a proviso or exception to sub-Section (1) of Section 14 of the Act. It is intended to make it clear that any such restricted estate created prior to the commencement of the Act will not be enlarged into full ownership by operation of sub-Section (1) if the gift, will, other instrument, decree, order or award had prescribed a restricted estate. Its operation must be confined to cases where property is acquired for the first time as a grant without any pre-existing right under a gift, will, instrument, decree, order or aware, the terms of which prescribed a restricted estate in the property.

INHERITANCE RIGHTS OF HINDU WOMEN: CRITICAL ISSUES

While the Hindu Succession Act of 1956 codified the multiplicity of laws concerning the property rights of women and considerably broadened them, it cannot be denied that several major gender inequalities have remained. Equity by gender in Hindu property law lies within a very narrow compass. Janaki Nair rightly comments that the Succession Act “codified a power structure which continued to exclude women from having a direct control over assets”. 32

In the Hindu system, ancestral property has traditionally been held by a joint Hindu family consisting of male coparceners. Coparcenary is a narrower body of persons within a joint family and consists of father, son, son’s son and son’s son’s son. Again a coparcenary can also be of a grandfather and a grandson or of mothers, or an uncle and

32 J.Nair, Women and Law in Colonial India, Kali for Women, New Delhi, 1996
nephew and so on. Thus, ancestral property continues to be governed by a patrilineal regime wherein property descends only through the male line as only the male members of a joint Hindu family have an interest by birth in the joint or coparcenary property. A female cannot become a coparcener. She has no coparcenary rights. Sons’ have a right to succeed to the deceased father’s share of coparcenary if the father dies intestate in addition to the share he has on birth.

The retention of the Mitakshara coparcenary has indeed abrogated all safeguards for the protection of women’s rights. If a joint family gets divided, each male coparcener takes his share and the female gets nothing. Only when one of the coparceners dies, a female gets a share of his share as an heir to the deceased. Thus, the law excludes daughter’s participation in coparcenary ownership merely by nature of the sex. This has not only contributed to an inequity against females but has led to oppression and negation of their right to equality. It appears to be a mockery of the Fundamental Rights guaranteed by the Constitution of India.

Another related aspect of this gender discrimination apparent in the Hindu Succession Act is the clause that a coparcener can renounce his rights in the coparcenary property. This has also weakened the position of the female members. In such cases his sons would continue to maintain their independent rights to the coparcenary but daughters and other class I female heirs would lose the possibility of benefiting from such property. Likewise, after partition, the father can make a gift of his share of the coparcenary property to his sons thereby defeating the rights of the female heirs.

The daughter had equal rights only in the separate or self-acquired property of their father. But daughters could be denied a share even in this separate property by throwing the property back into the common stock, using the doctrine of blending or by forming new coparcenars. In other words, a man can convert his separate and self-acquired property to coparcenary property in which case his daughters, widow and neither who would otherwise have engaged equal shares with his sons in such separate

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and self acquired property, lose out. An incentive for such a move was provided by the state by conferring tax reliefs for coparcenaries, under the Income Tax Act. 34

The Hindu Succession Act at best is a half-hearted measure to improve the position of women. Apart from the inherent discrimination against daughters arising out of the retention of the *Mitakshara* coparcenary, there are ways by which the purpose of the Act stands defeated. The patrilineal assumptions of a dominant male ideology are clearly reflected in the laws governing a Hindu female who dies interstate. The law in her case is different from those governing the Hindu males. Section 15 (1) of the Act makes it clear that the property of a female Hindu shall devolve first to her children and husband; secondly, to her husband’s heirs; thirdly, to her father’s heirs and lastly to her mothers heirs. In case of a male Hindu, the mother is also a class I heir and inherits equally with the children and wife of the deceased son. But the mother of a daughter stands excluded by the children and husband of the deceased daughter.

The provisions of section 15 of Hindu Succession Act is indicative again of the bias towards the male as it provides that in the absence of children the order of succession in case of Hindu female would vary depending upon the source through which the property was acquired. Any property that she inherited from her parents would devolve not upon her own heirs but upon her father’s heirs. Similarly, if the property were inherited from her husband or father-in-law, it would devolve upon her husband’s heir. However, in case of a Hindu male’s property, devolution does not depend upon the source of acquisition. These provisions highlight how property continues to be inherited by the male line from which it comes back either to her father’s family or back to her husband’s family. It also seems to perpetuate the concept that a woman is entitled only to limited ownership of her property and her dependence on males continues. This strikes a considerable blow to her economic independence.

Another anomaly in the Hindu Succession Act as per Section 23 is the provision denying a married daughter the right to residence in the ancestral home. And while daughters who are unmarried, separated, divorced, deserted or widowed have residence rights, they cannot demand partition if males do not choose to partition. This right

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34 Under Section 10.2 of the Income Tax Act an exemption is granted to income from the Hindu Undivided Family (HUF). Under SS.20 and 20A of the Wealth Tax Act, certain tax concessions are granted to members of HUF at the time of partition.
however is not denied to a son. The Supreme Court in its recent judgment in *Narshimhamurthy v. Sushilabilla* held that the female heirs right to claim partition of the dwelling house of a Hindu dying intestate under section 23 of the Hindu Succession Act will be deferred or kept in abeyance during the lifetime of even a sole surviving male heirs of the deceased until he chooses to separate his share or ceases to occupy it or lets it out.  

The idea of this section, being to prevent the fragmentation and disintegration of the dwelling house at the instance of the female heirs to the detriment of the male heirs in occupation of the house and thus, rendering the male heirs homeless/shelterless. The main object of the section is said to be the primacy of the rights of the family against that of an individual by imposing a restriction on partition. Why is it that this right of primacy of family is considered only in the case of a female member of the family?  

If we take this argument further then, the serious implications of this clause become even more evident. In fact this clause has facilitated the capitalist and consumerist forces to transform the ancient system of *Stridhana* into a modern distortion called dowry. Under its modern guise, daughters lost control upon their property, which was presumably given on her behalf, to secure her happiness in her matrimonial home. In fact the subsequent years, the demand for dowry became an instrument of violence and subjugation of the newly married bride.  

The right to will away property has also restricted women's inheritance rights under the Hindu Succession Act. A man has full testamentary power over all his property including his interest in the coparcenary. This freedom of testation, a legacy of English law in India, is an anomaly according to standards of comparative jurisprudence. In fact, the English concept of alienation through testamentary succession was incorporated into Hindu Succession Act but the protection granted to the family members under the English law did not find mention here. So, individual men could will away both their share in the joint family property as well as the whole of their separate property with

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38 The English Statute, *Inheritance Act of 1958* (subsequently re-enacted as *Matrimonial Causes Act, 1965*) placed a divorced wife in a superior position vulture to the surviving spouse. A further statute was enacted entitled as *inheritance (provision for family and d dependent) Act, 1975* through which the surviving spouse could claim not only maintenance but also share in the capital.
absolute abandonment. In practice this was used to disinherit females. In fact, it led to a diminution in the status of a wife/widow.

Section 24 of the Hindu Succession Act provides that the three classes’ widows specified in the section shall not be entitled to succession if they have remarried. This appears to be logical if one were to examine section 25, ‘unchastity’ of a female here is no longer considered as a ground for exclusion. If a widow is living in adultery from the date succession opens, she would not be excluded from inheritance but would be excluded if she has married again. This law thus, appears to favour adultery but punish legal marriage.

Allied to this is another clause in this Section which states that a step mother who remarries is not excluded from the succession despite the fact that she succeeds not on the strength of direct blood but only as a father’s widow and on remarriage she ceases to be such a widow. Unlike other three classes widows specified in Hindu Succession Act, she is not excluded from the inheritance. This is indeed discriminatory and violative of the right to equality as it amounts to unreasonable classification without any rational nexus. Thus, it is evident that differentiation among the category of ‘women’ has been discriminatory. Justice for one category of women cannot be secured at the expense of another.

Another critical source of gender inequality which will be dealt with in details in the chapter III of thesis is the question of agricultural land. The Hindu Succession Act of 1956 in Section 4(2) exempts significant interests in agricultural land. Section 4(2) of the Act provides that: “.... Nothing contained in this Act shall be deemed to affect the provisions of any law for the time being in force providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings.”

Hence, interests in tenancy land devolve according to the order of devolution specified in tenurial laws, which vary by state. Broadly, states fall into three categories-

(i) In most central and eastern states, the tenurial laws are silent on devolution, so that inheritance can be assumed to follow the personal law, which for Hindus is governed by the Hindu Succession Act of 1956.39

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39 E.g. Andhra Pradesh, Karnataka, Kerala, Tamil Nadu, Bihar, Gujarat, Maharashtra, Orissa, West Bengal.
(ii) In a few states, the tenurial laws explicitly note that the Hindu Succession Act or the personal law will apply.\(^{40}\)

(iii) In north western states of Haryana, Punjab, Himachal Pradesh, Delhi, Uttar Pradesh and Jammu and Kashmir the tenurial laws not only specify an order of devolution that is highly gender unequal. Here, retaining the vestiges of the Mitakshara system, primacy is given to male lineal descendants in the male line of descent and women come very low in the order of heirs. Also, a woman gets any a limited estate, and loses the land if she remarries (as a widow) as fails to cultivate it for a year or two. Moreover in Uttar Pradesh and Delhi, a ‘tenant’ is defined so broadly that this unequal order of devolution effectively covers all agricultural land.

Agricultural land is the most important form of rural property in India and ensuring gender equal rights in it is significant not only for gender justice but also for economic and social empowerment. Gender equality in agricultural land can reduce not just woman’s but her whole family’s risk of poverty, increase her livelihood options, enhance prospects of child survival, education and health, reduce domestic violence and empower women. It is thus critical to bring all agricultural holdings within the Act’s purview.

On the whole, it becomes evident the underlying motive of the Hindu Succession Act of 1956 which is still projected as the ideal piece of legislation for having ‘liberated’ Hindu women was consolidating the powers of the state and building an integrated nation. This crucial objective could be achieved only by diluting women’s rights, to arrive at a minimum level of consensus so that the agenda of reform could be effected without much opposition.

‘COPARCENARY’: RELEVANCE AND ALTERNATIVES FOR GENDER EQUALITY

It is apparent from the previous Section of the study that discrimination against women is writ large in relation to property rights. The retention of the Mitakshara coparcenary has indeed abrogated all safeguards for the protection of women’s rights. Equal treatment for women in both social and economic sphere is essential for women’s empowerment. The exclusion of daughters from participating in coparcenary property ownership merely by

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\(^{40}\) E.g. Madhya Pradesh and Rajasthan.
reason of their biological identity (i.e. sex) is unjust. A long felt social need is thus to radically reform the *Mitakshara* law of coparcenary to provide equal distribution of property not only with respect to the separate or self acquired property of the deceased male but also in respect of his undivided interest in the coparcenary property.

There are five states in India - Kerala, Andhra Pradesh, Tamil Nadu, Maharashtra and Karnataka - that have taken cognizance of the fact that this right by birth and the discrimination inherent in it can be amended. According to the law of four of these states, excluding Kerala, in a joint Hindu family governed by *Mitakshara* law, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son. Kerala however, has gone one step further and abolished the right to claim any interest in any property of an ancestor during his or her lifetime founded on the ground that he or she is born in the family. In fact, it has abolished the joint Hindu family system altogether including the *Mitakshara*, Marumakkattayam Aliyasantana and Nambudri systems. Thus, enacting that joint tenants be replaced by tenants-in-common.

**Andhra Model: Daughter as Coparcener**

The approach of the Andhra Pradesh, Tamil Nadu, Maharashtra and Karnataka state legislature is distinct from that of Kerala. These four states instead of abolishing the right by birth have strengthened it but at the same time they have broadly removed gender discrimination in the *Mitakshara* coparcenary. Barring essential changes, the texts of the amending Acts are the same while Karnataka effected marginal changes only. These state legislations provide equal rights to a daughter in the coparcenary property and contain a non-obstante clause. In these four states:

The daughter of a coparcenary in the joint Hindu family governed by *Mitakshara* law-

(a) shall become a coparcener by birth in her own right in the same manner as the son and shall have similar rights in the coparcenary property and be subject to similar liabilities and disabilities.

The Hindu Succession (Andhra Pradesh Amendment) Act, 1986.
The Hindu Succession (Tamil Nadu Amendment) Act, 1989.
The Hindu Succession (Maharashtra Amendment) Act, 1994.
The Hindu Succession (Karnataka Amendment) Act, 1994.
(b) On partition of the Joint Hindu family of the coparcenary property, she will be allotted a share equal to that of a son. The share of the predeceased son or a predeceased daughter on such partition would be allotted to the surviving children of such predeceased son or a predeceased daughter on such partition would be allotted to the surviving children of such predeceased son or predeceased daughter, if alive at the time of partition.

(c) This property shall be held by her with the incidents of coparcenary ownership and shall be regarded as property capable of being disposed off by her by will or other testamentary disposition.

(d) The state enactments are prospective in nature and do not apply to a daughter who is married prior to or to a partition which has been effected before the commencement of the Act.

However, these four Hindu Succession (Amendment) Acts have not been fool proof as they have given rise to multiple difficulties at various levels of operationalisation. These Acts have in fact, altered the concept of the Mitakshara joint family and coparcenary by elevating the daughter to the position of a coparcener. The underlying assumption of these Acts is that these legislatures are clearly of the view that Mitakshara right to birth re violates equality before the law. 42 Again, once a daughter becomes a coparcener she naturally continues to be a member of the natal joint family and after marriage, she will also be a member of her marital joint family. 43

It may be mentioned that during the parliamentary debates on the Hindu Succession Bill, 1955, Pataskar, the then Minister of Law, observed “to retain the Mitakshara joint family and at the same time put a daughter on the same footing as a son with respect to the right by birth, right of survivorship and the right to claim provide for a joint family unknown to the law and unworkable in practice”. 44

In a much broader context, the issue of making daughters coparceners at birth in ancestral property raises some critical questions. To begin with, the amendment will benefit those women who are born into families that have ancestral property there is no

44 Ibid, pp 27-34.
precise definition of ‘ancestral property’. Given the fact that the families have long since been fragmented and the fact that joint family is on the decline, it is not at all clear whom the law will benefit.

The position of women married into the joint family will actually become worse under this Act. All women of the family, be they daughters or wives, were members of the Hindu Joint Family they had an absolute right to the maintained out of the joint family properties. Daughters have a right to Stridhana and marriage expenses. Wives and widows had the right to be maintained for life out of joint family property. It was this regime of property laws among Hindus that was sought to be ‘reformed’ by Hindu Succession Act, 1956 and by other Hindu laws. It was in the 1950s that this unqualified right to be maintained was eroded, with the introduction of the right to divorce. Under unmodified Hindu law, a woman’s marital status could not be altered by divorce, as divorce was not permitted. This right to maintenance could be secured by a charge on the property of the joint family. However, the reforms in the 1950s introduced the right to divorce without simultaneously giving the divorced wife the right to her share of the joint family property. Divorce meant an expulsion from the joint family and the loss of the right to be maintained. Thus, the seemingly progressive right to divorce has turned out to be nothing more than the right to divorce along with the loss of the right to the use of joint family property. The right of daughters to become coparceners makes the position of the female members of the joint family worse with the daughter along with the sons acquiring a birth right, which she can presumably partition at any time, the rights of other members of the joint family get correspondingly diminished. While the reforms of the 1950s disadvantaged a divorced wife, the Andhra model disadvantages married women as well. Until now, the only protection women had in the marital home was the status of being married, which carried with it the right to be maintained, not only by the husband, but by the joint family and its assets as a whole. Thus, married women who lived in joint family property had the protection of the family home. This protection gets eroded, to the extent that the total divisible amount gets reduced.

These state enactments explicitly lay down that the right of a daughter who was married prior to the commencement of the Act will be excluded from the coparcenary property. However, a daughter who is married after the coming into force of the
Amendment Act is spared of such discrimination. One can only surmise the reasons behind the exclusion of a married daughter from the scope of the Act. The patriarchal notion that the married daughter belongs to another family or the practice of giving dowry and sometimes property at the time of marriage may account for the practice of excluding daughters. But it is undoubtedly true that the share of property or material wealth which daughters receive is smaller in value compared to what the son inherits. In fact, the gifts that parents give seldom include immovable property. It becomes apparent that there is no persuasive justification for the blanket exclusion of the married daughters. Again, the distinction between a married and an unmarried daughter is not a reasonable classification and is grossly unfair. A recent Supreme Court decision lends support to this view. In *Savita Samvedi v. Union of India* it was held that the distinction between a married and an unmarried daughter may be unconstitutional. The observation made by Justice Punchi is relevant: "The eligibility of a married daughter must be placed on par with an unmarried daughter (for she must have been once in that state), so as to claim the benefit..."

Another infirmity of these state enactments is that conferment of equal coparcenary rights on sons and daughters implies that the widow’s successional share gets reduced. This is because with the increase in the number of coparceners, the interest of the husband decreases. This is unfortunate as it goes against the concept of marriage as equal partnership of the husband and wife.

It is definitely birth right, in Hindu laws that is the root of the problem. Birth rights as we have discussed, is by definition a conservative institution, belonging to the era of feudalism, coupled as it was with the rule of primogeniture and the inalienability of land. When property becomes disposable and self-acquired, different rules of succession have to apply. It is in the making of those rules that gender justice has to be located. What the Andhra Model does is reinforce the birth right without working out its consequence for all women. Justice cannot be secured for one category of women at the expense of another.

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Kerala was the first state to vehemently criticize the right by birth and the gender inequalities embedded in it. It enacted the Kerala Joint Family system (Abolition) Act, 1976 which abolished the concept of coparcenary following the recommendation of the Hindu Law Committee called B.N. Rau Committee. The logic behind this move is clear in the observation of P.V. Kane:47 “And the unification of Hindu law will be helped by the abolition of the right by birth which is the cornerstone of the Mitakshara School and which the Draft Hindu Code seeks to abolish.”

The Kerala Joint Hindu Family System (Abolition) Act, 1975 abolished the right of birth of males under the Mitakshara as well as the Marumakkattiyam law. It states that after its commencement, a right to claim any interest in any property of an ancestor, during his or her life time founded on the mere fact that the clamant was born in the family of the ancestor, shall not be recognized. Thus, the Act is wholly prospective and fails to confirm rights of daughters in the existing coparcenary property unlike the Andhra Model legislation. Section 4 (1) of the Kerala Act lays down that all the members of Mitakshara coparcenary will hold the property as tenants-in-common on the day the Act comes into force as if a partition had taken place and each holding his or her share separately. The major drawback in the legislation is that it fails to protect the share of the daughter from being defeated by the making of a testamentary or other disposition.

It was conceded that the Kerala Model probably resulted in maintenance of greater family harmony and it appeared to be a fair decision as in Kerala both matrilineal and patrilineal joint families existed. If the joint family was abolished today in the other states then a deemed partition would take place and women not being coparceners would get nothing more. Whereas, if they were made coparceners, then they would become equal sharers.

However, one common drawback of both the Kerala Model and the Andhra Model is that it fails to protect the share of the daughter, mother or widow from being defeated by making a testamentary disposition in favour of another, or by alienation. This criticism of course against testamentary disposition can be also used to disinherit a son.

Chapter II

It is noteworthy, that there is hardly a case of a daughter claiming equal rights to property in the parental family, even though her dowry may not be equal to the son's share. This is mainly due to overweighing consideration of modesty and desire for amity and the fear of social disapproval. A study prepared for the Ministry of Education and Social Welfare on the succession rights of women in Andhra Pradesh, is very revealing in this regard.\textsuperscript{48} It is observed that 38 percent of women in Godavari and 12 percent of women in Krishna district, 27 percent of the respondents in both the district reported consideration of getting bad name among the relatives and others, for not taking resort to the Court of law in getting their due share in property. Cost of litigation, complicated procedures of law and uneconomic nature of the deal in terms of cost involved in property are the other reasons stated by respondents.

In view of limited assertion of equal rights to property by women, it is necessary to understand that unless there exists majority awareness and approval of the majority of the people, it cannot be realized by a section of women socialized in the tradition of inequality, thus, there is need to create social awareness and to educate people to change their attitude towards the concept of gender equality.

**HINDU SUCCESSION (AMENDMENT) ACT 2005: A STEP TOWARDS SUBSTANTIVE EQUALITY?**

The Amendment to the Hindu Succession Act in 2005 needs to be located within the critical re-examination of the Hindu Succession Act as well as the consequences of the modified versions of it which are operational in some states like Kerala, Andhra Pradesh, Tamil Nadu, Maharashtra and Karnataka.

The Hindu Succession (Amendment) Bill, 2004 was cleared by the Union Cabinet and was introduced in the Rajya Sabha on 20th December, 2004. The Statement of Objects and Reasons of the proposed law referred to the guarantee of equality for women under Article 14 and 15 as a justification for the amendments. This Amendment has been undertaken almost five decades since the Hindu Succession Act of 1956 was passed and the government's move was considered a "milestone" by many feminists. The most

\textsuperscript{48} Law Commission of India, *Property Rights of Women: Proposed Reform under the Hindu Law*, 174\textsuperscript{th} Report, No.6 (3) (59)/99 LC (LS), May 5, 2000.

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important feature of the Amendment is to include daughters as coparceners in the Hindu joint family along with son. She can claim partition, become the ‘karta’ and also share the liabilities. The Act includes two generations of the children of pre-deceased daughters as class I heirs and thus, makes the heirs of the pre-deceased sons and daughters more equal.

The other most significant change is omission of section 4(2) of the Hindu Succession Act of 1956. It brings agricultural land at par with all other forms of property. This implies that now Hindu women have equal rights in agricultural land. In many ways such a reform has overridden inconsistent state laws and customary practices which have governed inheritance of agricultural land. In the context of growing feminization of agriculture, Bina Agarwal argues that these rights will provide women with supplementary subsistence.49

The third important aspect of the Hindu Succession Act 2005 is the equal residence rights to daughters and sons in the parental dwelling house. Now the daughters also have the right to seek partition in the dwelling house. Again remarriage is no longer a ground for disinherance. It has deleted section 24 of the Hindu Succession Act which barred certain widows from inheriting the deceased property if they remarried.

Criticism of the new Amendment rests on several counts. The retention of the Hindu Joint Family and the introduction of daughters as coparceners are two oppositional features. It has been suggested that such a perplexing situation could be avoided by abolition of the joint family. Pradhan Saxena observes that a daughter who is born in the family will be a coparcener and a member of the joint family of her father.50 She would retain her rights to be coparcener even after marriage, and consequently, upon marriage she would be member of two joint families at the same time, one of her father, and the other of her husband. Further, her own daughter would be a member of two joint families by birth, one that of her own father and the other of her maternal grandfather, and third, upon her marriage of that of her husband. This would lead to legal complexities and in practice, would be a space for marginalization of women. Making daughters coparceners will decrease the shares of other class I female

50 P. Saxena, opp. cit., pp. 21
heirs, such as the deceased's widow and mother, since the coparcenary share of the deceased male from whom they inherit will decline. In states where the wife takes a share on partition, as in Maharashtra, the widow's potential share will now equal the son's and daughter's. But where the wife takes no share on partition, as in Tamil Nadu or Andhra Pradesh, the widow's potential share will fall below the daughter's. Finally, the unrestricted testamentary power or right to will away property could be a threat to women's inheritance rights. Very often, fathers will away their property to their sons or close male kins, as discussed in the later section of this chapter.

The amendment has far reaching implications for women in India. However, it will be impossible to deal with succession laws in isolation. One has to simultaneously look at laws of matrimonial property, divorces and succession to ensure gender just regime of laws. A critical observation made by Indira Jaising in this regard is that the exercise undertaken to reform succession laws only of Hindu women will enforce the system of separate and discriminatory personal laws. Reforms must be sought in those commonly agreed areas that will benefit women. "There is no law concerning the family that does not have a negative impact on women of all communities". The major gap in our laws is the absence of rights of women within marriage. Thus, reform in marital property law and succession law must be discussed simultaneously. Thus, the Hindu Succession Act has ample lacunae which can be amended to end the gender discrimination which results from the asymmetrical property relations in which women and men have differential access to resources and distinct degrees of control over property.

GENDER, HINDU SUCCESSION RIGHTS AND THE STATE: POLITICS OF IDENTITY AND JUSTICE

Indian women's lives continue to be characterized by formidable amount of pervasive discrimination and substantive inequalities. The concepts of equality and social justice which form the foundation of the Constitution are at odds with inequalities gender inequality embedded in the traditional values and practices of Indian society. Despite

51 The Hindu, September 25, 2005.
guarantees of formal equality being enshrined in the Indian law, there is sex discrimination. The judicial approaches that have evolved to address the questions of both equality and gender difference has been problematic. Constitutional law has been influenced by two competing paradigms of equality. First, the formal equality paradigm is a traditional understanding of equality. Equality has been interpreted as “treating like alike” and its constitutional manifestation is evident in the expression of equal protection doctrine. The principle is that all persons are to be treated alike except where circumstances require different treatment. Equality is thus, equated with sameness. The entitlement to equality is based on sameness and discrimination is defined as any difference in treatment between similarly situated individuals. 53 This ‘similarly situated’ test requires the Court to begin by providing a definition of the relevant groups and classes for comparison. 54 The legal mandate of equal treatment- both as systemic norm and a specific legal doctrine- becomes a matter of treating like alike and unlikes unlike, while the sexes are socially defined as such by their mutual unlikeness. 55 That is, gender is socially constructed as difference epistemologically and sex discrimination law binds gender equality by difference doctrinally. The same /difference doctrine ignores an important aspect- how to get a woman access to everything women are or have been allowed to become or have developed as consequence of their struggle either not to be excluded from most of life’s pursuits or to be taken seriously under the terms that have been permitted to be women’s terms. The sameness approach cannot distinguish between ‘differential treatment that disadvantages and differential treatment that advantages’, as Kapur and Cossman put it.

In fact, in the recent times there has been a perceptible shift in the approach from formal equality model to substantive equality model but the latter continues to be

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55 The philosophy underlying the sameness/difference approach applies liberalism to women. Sex is a natural difference, a division, a distinction, beneath which use a stratum of human commonality, sameness. The emphasis of the sameness principle is that it conforms to normative rules to analyze empirical reality by granting women access to what men have: to the extent are no different from men, women deserve what men have. The difference legal feminists, which view women for what they are or have become distinctively as women- by which is meant unlike men, or to leave women as “different” as equality law finds them. It continues to insist that the only way for women to achieve legal recognition of their equal status to men is to deny the legal relevance of their difference to the degrees that it exists. Women should be recognized as gender-neutral legal persons.
thwarted by the deeply embedded assumptions regarding equality as formal equality.\textsuperscript{56} Subsequently, the question of the relevance of gender difference can be examined through three competing approaches—protectionist, sameness and corrective. These debates form the context of the Supreme Court and the High Court cases in the next Section of the chapter which seeks to examine and illustrate how the legal system itself contributes to the gap between the formal guarantees of gender equality and substantive inequality that plagues women’s lives.

The second paradigm is the substantive equality paradigm of equality is critical of the formal equality and its emphasis on sameness. It recognises the fact that equality sometimes requires that individuals be treated differently. The problematic linkage between equality and sameness has been elaborated by Martha Minnow: “The problem with this concept of equality is that it makes the recognition of difference a threat to the premise behind equality. If to be equal you must be the same, then to be different is to be unequal”.\textsuperscript{57} The substantive equality approach emphasizes on the actual impact of the law rather than focusing on the equal treatment under the law. Its main aim is to eliminate substantive inequality in the form of individual, institutional and systemic discrimination against the marginalized and disadvantaged groups in society. It seeks to enable such groups to engage in full and equal social, economic and cultural participation in society.\textsuperscript{58} This is attempt to make law more sensitive to a more complex notion of equality which takes into account the comparative disadvantages of persons under existing unequal conditions.

The argument further gains currency when the paradigm of equality analysis shifts from sameness and difference to disadvantage. The substantive equality model views differences not to preclude an entitlement to equality. It is embraced within the concept of equality. Differential treatment may be required but “not to perpetuate the


\textsuperscript{58} The main argument of this line of thinking is that Courts must adopt an approach which considers the effect of the rule or practice being challenged to determine whether it contributed to the actual inequality of women and whether changing the rule will actually produce an improvement in the specific material condition of the women affected.
existing inequalities; to achieve and maintain a real state of effective equality”. The substantive equality approach is illustrative of the problematic nature of the discourse of legal rights. The inherent assumption is that of independence and separateness of the judiciary and the legal system from the institutions of the state and the economic and cultural practices which constitute the present condition of inequality. “It seems to suggest that all that is required is for judges to be sensitized to the notion of substantive equality and social conditions will be gradually transformed by law”. The apparent objection to this is that if the morality underlying the notion of substantive equality were so self-evident and unthreatening to the dominant social order there would be no need for law to bring about social justice. On the whole, in Frug’s words, "Sameness feminists have been thwarted by the repeated recognition of difference; difference feminists by the devaluing of women’s differences".

Again, there has evolved different approaches to understand the question of relevance of gender differences within the judiciary. The discrimination law is fundamentally undercut by its concept of sex, inequality and law. It reflects more or less the same arguments of the judicial approaches to the interpretation of equality rights. The formal model of equality largely informs the sex discrimination law. Its focus on sameness led to the question of relevance of gender difference. There are three distinct judicial approaches - protectionist, sameness and corrective. Each of them has conceded to the assumptions of formal equality and indeed represents a problematic approach to gender difference.

The protectionist response has favoured the construction of women as weak, marginalized and subordinate justifies the need for protection to them. Differential treatment is accorded as this is precisely the Court’s understanding of women’s difference. This ‘essentialisation’ of difference- to take the existence of difference as the natural and inevitable point of departure is deemed to be preferential treatment. Unfortunately, in the name of protecting women, this approach endorses and reinforces the ideology of male domination and subordination of women. The second approach, the sameness approach conceives equality and gender as issues of sameness and difference.

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60 N. Menon, *Gender and Politics in India*, Oxford University Press, 1999
Equality is an equivalence and not a distinction and gender is a distinction, not an equivalence. Gender difference is considered as irrelevant and women ought to be treated exactly the same as men. The third response is known as the corrective Approach: In this perspective, special treatment for women is justified on the ground of past discrimination. Gender difference is held to be relevant and also considered to require recognition in law. Gender differences have to be recognized to avoid the reinforcement and perpetuation of the difference and the inequalities underlying it. Gender difference is not essentialised. The simple gender neutrality in law based on male standards and values. Thus, as long as women conform to these male standards, they qualify for equality. The corrective approach is critical of such assumptions and argues that substantive equality for women necessarily must account for gender difference in its analysis of women's experiences. Gender difference is contextualised in terms of the historical disadvantages and discrimination. Though it has often been conceded that the corrective approach is most promising and balanced but such straightjacket conclusions cannot be drawn. In fact, the question of relevance of gender difference is contextual. In a particular context, treating women differently may further enhance their chance of disadvantage and thus conclude that women ought to be treated the same. In some contexts the substantive approach may require a sameness approach while in other context it will require a corrective approach.

Marc Galanter's work attempts to introduce into the law, a conception of 'identity', which is constituted by interacting and negotiating with other elements of society. This understanding of identity requires the Courts to be informed by an 'empirical' approach which stands in contrast to a 'formal' approach. The latter views the individual to have single membership status of one group only and thus, have rights which that group is entitled to. Contrastingly, the empirical approach accepts multiple group membership of individuals. It addresses cases according to its contexts. Galanter is

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62 S. Jahwari, 'Women and Constitutional Safeguards in India', *Andhra Law Times Journal*, 40, 1979, pp11. He observes: "The true meaning of the principle of equality between men and women is to be treated as normally is irrelevant in law and that consequently is not to be treated as constituting in itself a sufficient justification for unequal treatment.

63 One can explain this with the help of an example, like, right to vote is a political right. Here, gender is considered as irrelevant in pursuit of equality. Any recognition of gender would only reinforce or contribute to women's subordination. In contrast, with regard to employment rights, a substantive approach may require recognition of women's reproductive differences in so far as the pursuit of equality will require that women are provided with maternity leave and benefits.

64 M. Galanter, *Competing Equalities, Law and Backward Classes in India*, Oxford University Press, Delhi, 1984.

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aware that this approach may lead to a gap between judicial formulation and actual administration. He hopes that Courts will make reasonable distinctions, which has to be translated into workable rules.\textsuperscript{65}

All these different approaches to the understanding of gender equality become operational when judges decide on different succession cases relating to property rights. In fact, the question of dispensing property cases dealing with the exclusion of women is indeed a complex matter. The study of these cases shows that there is an oscillating tendency between the protectionist and the corrective approaches. Often extra-legal ideologies are also invoked in legal decision making which either favour or not favour gender discrimination. Family law becomes a crucial site for the examination of the intricate dynamics of the working of “heteropatriarchy” and for studying what Patricia Oberoi calls, “judicial ethnosexology”, the ways in which “a set of widely shared cultural assumptions” inform the substance of legal decisions.\textsuperscript{66} Ratna Kapur and Brenda Cossman have extensively analysed women and law in post- Independence India. According to them, “the legal regulation of women is informed by and serves to reinscribe family ideology”.\textsuperscript{67} Family ideology is defined as “a set of norms, values and assumptions about the way, family life is and should be organized; a set of ideas that have been so naturalised and universalized that have come to dominate common-sense thinking about the family”.\textsuperscript{68} The culture of modern Hindu family law is embedded in the traditionally defined specific roles of women as subservient and dependent on ‘other relationships’.\textsuperscript{69} The dominant conceptions of family and familial ideology get interpolated in complex ways with in the practice of law.

**Challenging Sex Discrimination**

Constitutional challenge to family laws on the ground of sex discrimination have met with mixed results. In some cases, the Courts have held that laws which treat women differently than men, are discriminatory and thus, violates equality guarantees. Such

\textsuperscript{65} Ibid, pp.167.


\textsuperscript{68} Ibid.

\textsuperscript{69} Here, the ‘other relationships’ constitute women’s relationship with other male relatives of the family, such as father, brother, husband etc.

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discriminatory treatment is based on sexist attitudes and practices which reinforce women's subordination. The approach adopted by those Courts is one of formal equality and sameness. However, other cases have rejected the challenges to family laws. These are cases, though also adopting a formal equality, emphasise the differences between men and women, and thus, preclude interrogation of substantive inequalities.

Challenges made to the laws of succession on the ground that it discriminated on the basis of sex, brought overwhelming by men have been rejected by the Court. For example, in *Kaur Singh v. Jaggar Singh*, Section 14 of the Hindu Succession Act, which provides a female Hindu with the right of absolute ownership over her property, was challenged as discriminatory.\(^70\) While the Court acknowledged that the Hindu Succession Act did create an apparent anomaly in the power of alienation of property it held that removal of such remained the prerogative of the legislature, not the Courts. The Court held that "it may well be that in view of the inferior status enjoyed by the females, the legislature thought fit to put the females on a higher pedestal", which was within the purview of Article 15 (3) of the Constitution.\(^71\) It further held that women as a class were different from men as a class and the legislature had merely removed the disability attaching to the women.

In *Pratap Singh v. Union of India*, Section 14 (1) of the Hindu Succession Act was again challenged as violating Article 14 and 15(1) of the Constitution.\(^72\) The Court found that Section 14(1) was enacted to address the problem faced by the Hindu women who were unable to claim absolute interest in property inherited from their husbands, but rather, who could only enjoy these properties with the restrictions attached to widow’s estates under the Hindu law. As a special provision intended to benefit and protect women who have traditionally been discriminated against in terms of access to property, it was not open to Hindu males to challenge the provision as hostile discrimination. Rather, the Court concluded that the provision was protected by Article 15(3), which in its view, "over reads clause 15(1)", while the Court thus upheld the provision, the

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\(^70\) The plaintiffs argued that the effect of Section 14 was discrimination in the powers of alienation of property between women and men. While women had by virtue of Section 14 absolute ownership and thus, absolute right of alienation, men who were still governed by the Punjab Customary law were not free to dispose of ancestral immovable property by will.

\(^71\) Ibid, 493, Para 13.

\(^72\) *Pratap Singh v. Union of India*, AIR 1985 S.C. 1695.
approach to equality and to gender on which it did so remains unclear. The decision could be informed by either a protective approach or a corrective approach. The Court’s reference to the traditional problem that women faced in property ownership is suggestive of the latter.

In *Sonubhai Yeshwant Jabhar vs. Bala Govinda Yadav and Others*, Section 15(2) of the Hindu Succession Act was challenged as discriminating on the basis of sex and thus, being in violation of Articles 14 and 15. Section 15(2)(b) provides that the property inherited from a husband of a female Hindu dying intestate will devolve upon the heirs of the husband, whereas Section 8, dealing with the property of the male Hindu dying intestate does not make any such provision regarding property inherited from his wife. In rejecting the challenge the Court held that the rules were enacted with the clear intention of ensuring the continuity of the property within the husband’s line. The assumption that property should be passed down through the male line is so deeply entrenched that the Court reinforced the gender biasness of the assumption. The historic discrimination against women in inheritance has created a norm – that property passed through the male line- and it is against this norm which any challenges to the practice are measured, and ultimately rejected.

**Judicial Immunity to Land Laws: Engendering Ceilings on Land**

The different levels and spheres where women’s rights as equal citizens of the nation have been denied have resulted in many contradictory provisions through which women have to establish their equal rights as individuals. Since land ownership is an important source of power- social, cultural as well as political- often disputes have emerged on this question. Over the years some of the ceiling acts which have been elaborately discussed in Chapter III of the Thesis, have been challenged in the Court of law. However, though they have been largely unsuccessful, the grounds for challenging them have often been sex discrimination against women. However, the First Amendment to the Constitution of India, enacted in 1951 had introduced a device for the protection of validity of land

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74 *Sonubhai Yeshwant Jabhar v. Bala Govinda Yadav and Others*, AIR 1983 Bombay 156.
75 Article 14 of the Constitution of India promises equality before the law and Article 15 prohibits discrimination on the basis of sex, etc. Both constitute part of Fundamental Rights
reform legislation. Under Article 31b of the Constitution, it provided that none of the Acts mentioned in the Ninth Schedule of the Constitution could be deemed to be void on the ground that they infringed on the Fundamental Rights. This provision provides the basis for dismissing pleas challenging the ceiling laws on various grounds, including grounds of gender discrimination.

The Uttar Pradesh Imposition of Ceiling on Land Holdings Act 1960 was challenged in Ambika Prasad Mishra v. State in Uttar Pradesh in 1980. The question of gender justice arose as a collateral issue but it was taken up by the Supreme Court. The Court not only reiterated the general assumption of women sacrificing their rights for community welfare and family interest but also held that agrarian legislation must be judged, not meticulously for every individual injury but by the larger standards of abolition of fundamental inequalities, frustration of basic social fairness and unconscionability. Among the grounds for challenging it were that it discriminated against the major unmarried daughters by not providing extra land to the fathers as it did for the adult sons and also that it discriminated against women in the fixation of ceilings, by regarding the husband as the tenure holder even when the wife was the owner. Justice Krishna Iyer stated: "No submission to destroy this measure can be permitted using sex discrimination as a means to sabotage what is socially desirable". Here, the language of law perpetuates the disadvantages of women. While admitting that the advantage granted to major sons and not daughters was discriminatory, he nevertheless justified the rule on the ground that in effective terms the entire land goes to the father as the tenure holder (not to the son) "for feeding this extra mouth". The question that arises then don’t adult daughters need to be fed? The explanation for the exclusion of women as tenure holders was provided as: “When all is said and done, married women in our villages do need their

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76 Section 5 (3) (a) of this Act provides for the addition of two hectares of irrigated land each of the tenure holder’s sons where family has a strength of less than five. Section 5(3) (b) similarly provides for two additional hectares of irrigated land for each of the tenure holder’s adult sons where the strength of the family is more than five. The father is allowed by Section 5(3) to hold an extra two hectares if the unmarried major is a son. Section 3(7) defines ‘family’ as: ‘family’ in relation to a tenure holder, means himself or herself and his wife or her husband, as the case may be (other than a judicially separated wife or husband), minor sons and minor daughters (other than married daughters); Section 3(17) makes the husband tenure holder even when the wife is the owner. These imply that the expression 'adult son' in clause (a) and (b) includes an adult son who is dead and has left surviving behind him minor sons or minor daughters (other than married daughters) who are not themselves tenure holders or who hold land less than two hectares of irrigated land.

husbands' services and speak through them in public places". Underlying these justifications was clearly the prioritization of class interests at the expense of gender concerns. “Large land holders cannot be allowed to outwit socially, imperative land distribution by putting female discrimination as a mask”. The success of land reform programmes in redistributing land between households is but a contested issue.

Similarly in the context of the Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act, 1973, Section 29 of the Hindu Succession Act was invoked for daughters of a Hindu joint family to acquire rights as a coparcener in a joint Hindu family and be treated on the same footing as major sons, thereby treat them as additional members of the family while ceiling on land is fixed. Here, the definition of the “family unit” as elaborated in the A.P. Land Reforms Ceiling includes an individual or his or her spouse and their minor sons and their unmarried minor daughters. Married major daughters are not included in this definition. The ceiling area for a family unit consisting of not more than five members is to the extent of land equal to one standard holding. An additional extent of one-fifth of one standard holding for each such member in excess of five but not exceeding two standard holding is prescribed. Again, an additional benefit is conferred on only ‘major sons’ by increasing the ceiling area.

Now in B. Chandrasekhar Reddy (D) By Lrs. V. State of Andhra Pradesh, the appellants claimed that such an advantage should be allowed for major unmarried daughters too. Section 29A was referred which gave daughters the right to be treated as members of the coparcenary and are entitled to equal shares as sons. The case was dismissed on the ground that Section 29A could only be invoked by major daughters if they are not married prior to the commencement of the Act and the claimant was married before such commencement. However, the point to be noted here is contention of Senior Counsel Shri M.N. Rao that if unmarried daughters are not treated as the member of the family unit and there is denial of justice to daughters, vis-a-vis sons, there is clear violation of principles of equality and there is discrimination between unmarried major daughters on the one hand, and the major sons and minor children on the other hand, in the matter of fixation of ceiling are under A.P. Land Reforms (Ceiling on Agricultural

78 Ibid, pp 729.
79 Ibid.
Holdings) Act, 1973, the appellant had not challenged the provisions of the Act and it would not be proper to look into the plea of discrimination at this stage, especially in relation to a legislation on agrarian reforms. The limitation of the judgment has been clearly stated and there is consensus that constitutional validity of such gender biased land legislation could be challenged.

The assessment of ceiling surplus land has been yet another issue which has been a cause of dispute and has required judicial intervention. The dispute stems from the fact that often in deciding the amount of land to be declared as surplus and consequently forfeited, consultation with the female owner of the land is avoided. This leads the wife’s land being forfeited without her having any say in the matter. Cases in which the wife has been able to establish her claim has been rare. In the Kunjalata Purohit v. Tahsildar, Sambalpur and Others, the government revenue officer in making an assessment of the ceiling surplus land, aggregated the land of both spouses as ‘family land’, including, land separately registered in the wife’s name and inherited from her father. But he gave notice only to the husband as the ‘person interested’. The two men settled the matter between them and the wife’s land was declared surplus. The wife appealed to the High Court asking that her separate land be excluded from the ceiling surplus, on the ground that since the land concerned was her separate property, she was the ‘person interested’ to whom prior notice should have been given. This, she argued would have given her a chance to ask the revenue officer to let her retain her land and instead declare part of her husband’s land as surplus. The Court under the constitutional principle of ‘natural justice’ accepted her appeal.

Essentialist Ideas of Indian Womanhood and Legal Entitlements

The issue of inheritance and succession is interpolated with culturally constructed ideas of gendered entitlements in diverse ways. The conflict between post colonial legal reform and male privileges inform judicial processes and decision-making. Often the space of law becomes the battlefield for reinvention of gendered identities and in this case, law becomes the space for distribution of new gendered entitlements through the judicial

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81 P.K. Das, Hindu Succession Property Rights of Women and Daughters, Universal Law Publishers, New Delhi, 2005
82 Kunjalata Purohit v. Tahsildar, Sambalpur and Others, AIR 1986a, Orissa 115.
pronouncements on property cases. There are a range of intriguing questions that
determine the judicial understanding of the complexities in division of property in
discourse on property rights of women like “extra-judicial ideas of family responsibility
(who does elder care? Who support the family?), resources distribution (what really
constitutes dowry and how does it measure against the total family resources?) and
meanings of access to property (what does it mean for women to have affinal family
property?)”. Thus, it becomes important to analyze the construction of gendered
subjects, the post-colonial state, and legal entitlements and responsibilities, which are
highlighted in the legal cases studied.

The legal cases, which are dealt with herein, reveal how in many of these cases
the judges invoke the essentialist depictions of “woman” in the form of moral
righteousness, helplessness, and weakness as deserving grounds for judicial support to
women. In Joti Dadu Navale v. Monikabai Kashinath Mohite, the judge rebuked a
brother’s attempt to disinherit his sister from their parental property. The manipulative
intention of the brother was condemned as it was observed: “The defendant has not
succeeded in painting a very glorious picture of himself before the Court. On his own
showing, he is a grabber. He has no regard for the right of his own sister, that she wants
only a quarter share but he was not inclined to give even that pittance.” The underlying
meaning to the judgment becomes prominent when it is contextualized. The very
language of the judgment reveals that the sister’s claim for a share less than what she is
actually entitled to is glorified. Thus, here the “subject” (sister) has been constructed to
be “passive” and thus, the “Indianness” depicted by the women are upheld through law.

The Court invoked sympathy for age and lack of legal knowledge as the basis of
the protectionist approach to decide some cases related to property entitlement top
widows. In A. Venkappa Bhatta v. Gangamma, the widow wanted a share from the joint
family property, which was under the control of the brother-in-law. The vulnerability of
the widow was taken into account when the judgment pronounced the verdict as: “an old
lady in the late sixties and literate, not well versed in the ways of the world....leading a

83 S. Basu, op.cit, pp.134.
85 Ibid.
sheltered life of a widow in an orthodox family.... very much under the influence of the first defendant, 'kartha'\textsuperscript{87} of the family and brother of the late husband. She had no sons of support to look to'. The justification for a favorable verdict to the widow was indeed based on the patrilineal assumption that sons are invariably responsible for the financial and social support of parents. The fact that she did not have sons was emphasized, while ignoring that she was the mother of two daughters. Here, again it becomes evident that the Court assumes that the role of daughters was passive as daughters often retained no interest in property or rather, were socialized to be "good sisters" and thus, the conclusion was drawn that the widow had no support to sustain her. In both these cases it is found that the ideology underlying the judgments becomes clear. Women's perceived helplessness and weakness are taken to be strong and valid grounds for judicial support to them. The judiciary, in the name of delivering gender justice, appreciated the conformity to a hegemonic favourable image of 'woman'.

Yet another reason, which the Court took into consideration while deciding property cases, was the question of "eldercare". However, the decision of the Court in this regard has oscillated between the validation of strong inequities in Hindu property laws on one hand, and an understanding of inheritance as a reward for care giving on the other. In Sushila Bala Saha v. Saraswati Mondal,\textsuperscript{88} the judge declared the validity of the will where the mother who had two daughters and a son, left her property to one of the daughters.\textsuperscript{88} This was because this daughter had resided with the mother and "looked after her comforts", whereas the son had not only failed in his "bounded duty" to maintain his mother but had also stolen from her, tried to defraud her and forced her to leave her home in fear of her life. The judge ignored gendered rights but favoured "eldercare" as the basis of property division. Son's right to deserve property share was legitimized on the ground that son's duties to maintain the parent was fulfilled. Again, in Ram Piari v. Bhagwant,\textsuperscript{89} the Court favoured "eldercare" when a will was contested by one of the two daughters and only the sons of one the daughters were the heirs.\textsuperscript{89} Generally, the basis of entitlement is a gendered one, where the primary entitlement is that of a son.

\begin{footnote}{87} 'Kartha' is defined as the titular head, usually senior male member of the Hindu joint family and manager of the coparcenary property with discretion to sell or acquire property in the family's best interest. Women cannot be karthas in accordance with the texts of Hindu law.\end{footnote}

\begin{footnote}{88} Sushila Bala Saha v. Saraswati Mondal, AIR 1990 Cal 166.\end{footnote}

\begin{footnote}{89} Ram Piari v. Bhagwati, AIR 1989.\end{footnote}
The boundaries for such entitlement are based upon the obligation to support. In this case it opens up the possibility of change and entitlement of the daughter within these boundaries.

Hindu Joint Family: Gendering Subjectivity

In other cases, like *Paramma v. Chikarangappa*, inheritance rights of male were protected. Often the legal notion of “joint family” to which only males could become coparceners restricted parents’ from giving daughters a share in that property. The father made a gift of one acre of land to the daughter he was residing with. He called the son lazy and vagabond. Since the land was a part of joint family property the daughter was not directly entitled to inherit it. The only way to enable the daughter a share in it was to claim that the land was a gift for pious purpose. The sons claimed that they were deprived of livelihood as the land that was gifted to their sister was the most productive in the joint family estate. The Court focused on the jointness of property and held that the gift was too large and thus, unjustifiable. Despite the attempts to overcome gender roles which rationalise their disentitlement, women face persistent obstacles in getting family property. In yet another case, *R. Kuppayee v. Raja Gounder*, the Supreme Court in dealing with the gift related property held that the father can gift of ancestral immovable property within a reasonable limits in favour of his daughters. This judgment brings us to the question whether “the reasonable limit” was reasonable enough to allow disentitlement of women to property rights?

Gender Stereotyping and Role Conflict: Interpreting Testamentary Power

There are times when the Court has invoked extra-legal ideologies about family roles and property which has indeed made legal reform appear superficial and illusory. In *Chandania v. Cyan Chand*, a man had left a will which disposed the property to his nephew and left only maintenance rights to his wife. The Court had to decide the question of the validity of the will. The judge argued: “He appears to have decided to keep the property within his family....There was apprehension in the mind of the testator

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91 R. Kuppayee v. Raja Gounder, AIR 2004 SC 1284
92 Chandania v. Cyan Chand, AIR 1989 Allahabad 75.
that after his death his brother-in-law usurps the immovable property". The contention that was accepted was that among the Hindus it is uncommon that if the owner of the property has no children he wills his immovable property in favour of some member of his family in whom he has implicit confidence so that the property is prevented from being transferred from the widow to her natal family. The judge implicitly accepted the predominance of the customary rules in deciding the legality of property transmission and ignoring the fact the Hindu customs were overridden by the new legislation. The contradiction that was apparent here was that the property in question was "self-acquired" and there could have been a scope to entitle the widow a share in it as it was also the result of her lifelong contribution through labour and savings. The ideology that was reinforced was that women after marriage had no responsibility towards their natal families. They could at best be thankful recipients rather than co-sharers of marital property.

In Balwant Kaur v. Chanan Singh, the pre-existing right of a daughter in father’s property was the issue of contestation.93 The father had executed a Will that gave his widow daughter rights in landed property. However, the dilemma of the father even while having willed the property after his death is evident as he restricts his daughter’s right to full ownership to the concerned property. While he entitles the daughter 1/3rd interest in the suit land and 2/3rd to his brothers, he adds that on her daughter’s death the property would revert back to his brother’s family.

A close reading of the will suggests the ways in which gendered norms manipulate the father’s concern for the welfare of the widow daughter and the conflictual pulls about what happens to the property after her death. The issue here is whether the daughter has the right to will way her share or even gift her share to someone outside the lineage. The father writes: “Unfortunately I have no male issues. Not only this, Waheguru is much angry with me that the daughter of the executant namely, Musammat Balwant Kaur, having become a widow is serving me and the real brothers of the executant Beant Singh and Teja Singh, who for the satisfaction and welfare of the executant also serve me and give every help, financial and otherwise to my daughter aforesaid and look after my daughter in every way and I have full confidence that in the future too they will serve me

and the brothers of the executant will maintain proper relations and good behaviour with the daughter of the executant and shall not leave any stone unturned in performing the custom after my death. Since in the absence of male issue, in the present time there remains dispute in respect of the rights of heirship of the female issue, as a result of which the property due to litigation is ruined and the owner is dishonoured in his world and among the relatives....therefore, I....execute this Will." 94 This will is representative of the social values and norms that engender behavioural patterns when the question at hand is that of property rights to a daughter. The father admits that the right to ownership of land by female is a disputed one and therefore justifies his reason for 'willing' a part of his land to his daughter. He however also asserts the dependent relationship that his widowed daughter shares with other members of the extended family. His helplessness is evident when he is optimistic that even after his death his daughter would be taken care of. Probably that is yet another reason for his giving a share in his property to his brother and his family thereafter. That the daughter would benefit from the property only during her lifetime restricted her right to property. In other words the patriarchal control over property relations and the dominant paradigm of not allowing property to pass through the daughter to members of another lineage is found here. In fact often such a concern is legitimized to build an argument to deny women right to property on this ground.

Naturalising Disinheritance of Daughters

Again in several other cases of property dispensation was considered to be "natural" when daughters were disentitled and were justified as adherence to customs. In Khusbir Singh v. The State, the Court claimed that a man's will made out to the son and excluding a daughter of a second marriage was quite rational because the “may well have wanted to solemnize his daughter's marriage during his lifetime and that may have led him to disinherit her.” 95 The Court in this judgment lent legitimacy that dowry or marriage expenses can be regarded as equivalent to property share. In other words dowry was considered to be legitimate ground for disinheritance. It cannot be denied that dowry is undoubtedly a much smaller share than what a woman can actually inherit.

94 Ibid.
95 Khushbir Singh v. The State, AIR 1990 Delhi 59.
From the above legal cases on sex discrimination relating to women’s property rights in both movable and immovable property, it becomes evident that mostly, the formal model of equality has informed the judgments. Women’s complex inscription within the legal system in contemporary India has been paradoxical. While largely women’s legal claims were not entirely discarded, there have been cases where the judges have felt squeamish about the entry of question of law into the holy precincts of the family. For instance, in the Harvinder Singh v. Harminder Singh the Court did not accept the fundamental concept of equal rights of women in the family.96

The Supreme Court in Narashima Murthy v. Sushilabai, held that a female heir’s right to claim partition of the dwelling house of the Hindu dying intestate under Section 23 of the Hindu Succession Act, 1956 would be deferred or kept in abeyance during the lifetime or even sole surviving male heir of the deceased until he chose to separate his share or ceases to occupy it or lets it out.97 Once again, the fear is that of the dwelling house at the instance of the female heirs and suspicion that the male heirs would be homeless and shelterless. Such a baseless fear needs reality check in a country where women are either scared to claim their right to property or are socialized to voluntarily forfeit such a claim.

In another case, Vallikannu v. R. Singaperumal, the Court disqualified the women’s right to property.98 This was a case where the daughter-in-law was claiming right in father-in-law’s property on the ground that the son had murdered his own father. The Court went through the matter on the ground of justice, equity and good conscience. The sole male survivor, the son was disqualified by murdering his own father. His wife who claimed to the property through him was disqualified too. This is a clear example of how property rights of women are meditated through men and therefore can be disadvantageous.

Inspite of the gendered role that law has largely played in the lives of women in their struggle for property rights and others, one needs to consider its positive implications as well. The Supreme Court in State of Maharashtra v. Narayan Rao held that the right of a female heir to the interest inherited by her in the family property gets

98 Vallikannu v. R. Singaperumal, AIR 2005 SC 2587.
fixed on the date of the death of a male member under Section 6 of the Act but she cannot be treated as having ceased to be a member of the family without her concurrence as otherwise it will lead to strange results which could not have been in the contemplation of Parliament when it enacted that provision and which will also not be in the interest of such females. 99 The Apex Court in *P.S. Sairam v. P.S. Rama Rao* held that the shares of the parties in the joint family property have to be determined in accordance with the provisions of Section 6 of the Hindu Succession Act, 1956, and accordingly decreed in favour of seven daughters of the joint family along with male heirs. 100

Some Pro-Woman Judgments: Legal Precedents to be followed

Post amendment of the Hindu Succession Act, there has been few judgments that have indeed established the right of women as equal stakeholders in property. In *Pravat Chandra Pattnaik and Others v. Sarat Chandra Pattnaik and Another*, the Orissa High Court had the occasion to consider the effect of the Amending Act and the new Section 6 of the Act. 102 It was a case relating to partition of Hindu *Mitakshara* coparcenary property. After decision by the lower Court, an appeal was preferred to the High Court. The Court held that the Amending Act was enacted to remove the discrimination contained in Section 6 of the Act by giving equal rights and liabilities to the daughters in the Hindu *Mitakshara* coparcenary property as the sons have. The Amending Act came into force with effect from 9-9-2005 and the statutory provisions create new right. The provisions are not expressly made retrospective by the Legislature. Thus, the Act itself is very clear and there is no ambiguity in its provisions. The law is well settled that where the statute's meaning is clear and explicit, words cannot be interpolated. The words used in provisions are not bearing more than one meaning. The amended Act shall be read with the intention of the Legislature to come to a reasonable conclusion. Thus, looking into the substance of the provisions and on conjoint reading, Sub-Sections (1) and (5) of Section 6 of the Act are clear and one can come to a conclusion that the Act is prospective. It creates substantive rights in favour of the daughter. The daughter got the

102 Pravat Chandra Pattnaik and Others v. Sarat Chandra Pattnaik and Another, AIR 2008 Orissa 133.
right of coparcener from the date when the amended Act came into force i.e., 9-9-2005. The Court also did not accept the contention that only the daughters, who are born after 2005, will be treated as coparceners.

The same issue also arose before the High Court of Karnataka in Sugalabai v. Gundappa A. Maradi and Others. The Court was considering appeals where pending the appeals the Amending Act was passed by the Parliament. The Court held that as soon as the Amending Act was brought into force, the daughter of a coparcener becomes, by birth, a coparcener in her own right in the same manner as the son. Since the change in the law had already come into effect during the pendency of the appeals, it is the changed law that will have to be made applicable to the case. The daughter, therefore, by birth becomes a coparcener and that there is nothing in the Amending Act to indicate that the same will be applicable in respect of a daughter born on and after the commencement of the Amending Act. Such a judgment in both the Courts discouraged vested interests from disinheriting daughters.

The Supreme Court has ruled that a widow, even after her remarriage, is legally entitled to get a share of her first husband's inherited property. This reiteration of the legal provision came from a Bench comprising Justices S B Sinha and V S Sirpurkar while it dismissed a petition by C. Sugathan's heirs, who had challenged a Kerala High Court judgment allowing inheritance rights to their paternal uncle's widow even after her remarriage. The property in question belonged to Pervakutty, who willed it in favour of his sons - Sugathan, Surendran and Sukumaran. Sukumaran, who died in 1976, was married to Bharathi. Bharathi married Sudhakaran, who also died in 1979. But, when the question of sharing the property inherited from Pervakutty arose between his heirs, none were ready to give any share to Bharathi on the ground that she had remarried after Sukumaran's death. The High Court held that in the facts of the case, coupled with the provisions of the Hindu Succession Act, Bharathi was entitled to her share in the property. The apex Court, rejecting the appeal against the High Court judgment, said, "The succession law brought about a sea change in Shastric Hindu Law. Hindu widows were brought on equal footing in matters of inheritance and succession along with the...

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104 Times of India, 24 February 2005.
male heirs.” Justice Sirpurkar wrote, “Section 14(1) stipulates that any property possessed by a female Hindu, whether acquired before or after the commencement of the Act, will be held by her as a full owner thereof”. 105

From the above discussion it becomes clear that law can be an instrument of empowerment of women. The politics underlying the processes of adjudication and justice dispensation is complex. The institutionalization of engendered meanings into the structure of law is problematic. The problem is epistemological and political. Legal discourse becomes a crucial site for examination of social and political ideologies. Within social contexts, social identity is shaped through the judgments and appraisals made by others as evidenced by their interpretative responses and their interactional behaviour.

The rejection of the legal-juridical framework in totality would be only counterproductive in the long run. At the same time, women’s rights should not be collapsed entirely into the question of law and legislation on the assumption that the legal system is secular or gender neutral. The legal system itself establishes the equation between gender justice and law (arrogating to itself the role of social reformer) to legitimize the domination of the judiciary. 106 Apart from this, the role of the judges per se, in interpreting the legal cases is of utmost importance. It has been quite rightly commented by Justice M. Hidayatullah that “Judges have been swayed unconsciously by their own notions of equality and equal protection of law, by their reaction to the social structure of society, by their conception of protection of certain basic rights and even, by their respect for legislature. To some the written word has a meaning which they do fit into their scheme of thinking while others read their own notions and theories into the law itself, some others look at law with blinkers on”.

**Law and Possibilities of Social Change: Some Issues**

Any possibility of social change has to recognize that non-discriminatory legal frameworks provide the starting point for any negotiation of rights. The politics that constitutes the ways in which such frameworks are used to interpret legal provisions to discriminate against women is embedded in that cultural and

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105 Ibid.
social contexts in which such laws operate. Thus, rethinking of legal regimes in terms of its effectiveness in achievement of justice for women needs to address and analyse extra-legal factors that mediate its impact on women’s lives. Such spaces can also be the site for restructuring gender inequalities. For instance, the rules that bind individuals are not only codified law but also customary practices, religious rules and social norms. Often these customary practices are in contravention to statutory laws but in the context of patriarchies that permeate them, one finds interpolation between the two. In addressing the structural constraints of legal frameworks, legal pluralism offers to broader perspective on law as multilocalational, with various centres of power beyond the state to include the family and other social structures.

In India, there are plural systems of law that impinge upon lives of women. Customary laws other than formal laws often compete with each other as well constitute the understanding of women’s rights in particular contexts. As such, the rules which bind individuals are not only codified law, but customary practices, religious rules and other social norms. Such customary practices bind individuals to their communities and also play an important role in their identity formation. In the case of property rights of Hindu women, such normative systems affect not only their understanding of their independent succession right but also define the contours of such claims in terms of legitimacy. The complex relationship between law and women’s lives need to recognize such normative plural systems of customary practices. It provides for an understanding “of legal norms or legal sources as being engendered by different, overlapping, coexisting, co-operating and/or competing structures ... a more profound examination and evaluation of both diverse types of norms and of the different values underlying such different normative systems”.\footnote{W. Bentzon et al, \textit{Pursuing Grounded Theory in Law: South-North Experiences in Developing Women’s Law}, Tano Aschehoug, Oslo, 1998, pp 66-67.} In the context of property rights of Hindu women, it is essential to explore the inter-linkages between statutory law and customary laws to know the dynamics of politics underlying women’s lack of property rights and gendered access to resources. In the larger context, it can also unravel a comprehensive understanding of how both systems of law integrate ideas of justice in the discourse on property rights. The
commonality between the two lies in interdependence on cultural values, religious norms and gendered ideologies that inform their understanding of women's rights to property. The potential for social change in such multiple systems can be addressed through broader reconceptualization of gendered perspectives in law within different contexts.

The importance of statutory laws in creating non-discriminatory frameworks is the starting point for redressing discrimination on the basis of gender. Law is an arena of power, of potential change and a site for negotiation of dominant ideologies. It is one of the spaces in which "struggle to displace ideas of women's role and identities" continues and cannot be denied.\(^\text{109}\) Formal laws do play an important part as they allow arbiters to use them to steer through the myriad issues involved in dispute. The role that law can play and its limitations have been rightly observed in a perceptive analysis of gender and justice that "without a fundamental reordering of cultural values, women cannot hope to secure true equality in employment opportunities, economic security and social status. In that constructive enterprise, law can play a modest but more effective role".\(^\text{110}\) In the specific post colonial context, any discussion on family laws need to evaluate what would constitute 'just' family law. Legal theory would have to be informed by sociological, historical and economic contexts or what Cotterrell, 'politics of jurisprudence'.\(^\text{111}\)

Greater transparency and fewer ambiguities in the law help to bridge the gap between the law, the judiciary and the changing social reality. Discrimination against women can be direct or indirect. Indirect discrimination requires particular scrutiny by the judiciary, there is a need to ensure not only formal but also substantive equality for women and for that purpose affirmative action may be adopted if necessary. Legal solutions to pervasive gender discrimination must take into account the ways in which such discrimination receives meaning in and through other structures of Indian society. It is important also to critically evaluate the ways and extent to which law is both constructed by and constructs existing social and gender relations. Only by doing this can we develop strategies for change at relevant points of coherence or disjuncture between

\(^{109}\) R. Kapur and B. Cossman, op. cit., pp. 38
rules of law and the overall normative context provided by society. Legal strategies can mitigate the removal of entrenched inequalities in society which exclude or preclude women's equal access to resources. The extent that the issue of equality needs to be taken beyond generating neutral structures and towards creating structures for the empowerment of women to achieve equality in fact rather than only in principle, the commitment of the state, its institutions, laws and political processes need to be interrogated.