CHAPTER IV

WOMEN’S PROPERTY INHERITANCE LAWS IN INDIA

INTRODUCTION

The laws considered as one of the main pillars in granting equal rights in the democratic state like India. Gender justice in respect to property rights is keys in empowering women. Democracies embraced justice, liberty, equality: the ingredients that enable every human being to achieve their aspiration. After independence, India was declared a sovereign, socialist, secular, democratic republic, that enumerated power and responsibilities of an individual. Although, the Indian Constitution professed equal rights and a harmonious relation among its citizens, there are also many murky areas where a large swath of women, are denied their rights. They have to negotiate for their rights under the roof of traditional customs, practices and the conventional theory of justice. Indian society is known to be built upon a deep-rooted structure of patriarchal settings and a widely-accepted notion of male domination and which further degrades a woman’s position.

In this context, this chapter contextualised the discourse between the different existing laws and the status of women in India. Indian society designated as multi-cultural and pluralistic in nature, has communities that are governed by their own laws and regulations, in-spite of Constitutional provision. The ideology of multi-ethnic society represents the diversity of culture, customs and faith in religious matters, where individuals determine their identities or demand rights according to their respective communities: this is known as personal laws. The first objective of this chapter is to understand the provision of the Constitution of India that guarantees equal rights to Sikkimese people. Further, it tries to analyse the research question: what are the major obstacles in the implementation of the constitutionally-enshrined PIL to women?
4.1. WOMEN IN INDIA

This section deals with women’s status in different phases: a) ancient period (Vedic and pre-colonial period) b) colonial c) independent period.

4.1.1. ANCIENT PERIOD (VEDIC OR PRE-COLONIAL PERIOD)

The early Rig Vedic period society appears to be the almost egalitarian—gender-wise. In thus period, there was no individual ownership, but only community ownership of property and wealth, among the tribals (Bhattacharyya, 1999, 116-7). Women then, would enjoy equal position in the fields of education and where free to choose their life partners too (Nandal and Rajnish, 2014; Nair, 2011). Women observed a high standard of morality and they were permitted to own jewelery and clothing. Also, after the death of a mother, property was passed on to daughters (Aggarwal, 2016). Many women made a mark as renowned scholars and philosophers like Visvavara, Ghosala and Apala (Chavan and Kidawai, 2006, 46). A patriarchal system was followed in ancient India where, male domination was prevalent. Here, women were respected, revered and, participated in religious ceremonies. They were free to select their conjugal partner and exercised free-will in entering into the matrimonial bondage; in fact they even married at a mature age (Kant, 1997, 16). Women enjoyed sense of justice in the sphere in public and private spheres.

On the other hand, studies exhibit that a debate revolves around the status and position of women in the Vedic period. What is revealed is that, though women participated in the hymns, they were deprived from political rights and property inheritance rights. Their status was counted at the level of Shudra (Kant, 1997; Chavan and Kidwais, 2006). Despite the other privileges they enjoyed, women in the Vedic period, could not own or inherit property. Only those who had the power to defend themselves from the enemies from the enemies could hold land as property. Obviously, women were lacking in such areas, which further deprived them of ownership. In Vedic society the birth of a son would be followed be rituals and prayers: even the pantheons
consisted of only men. So, patriarchal was the society then that the birth of male child was believed to bring nirvana in the family (Mohanty, 2006, 252).

Agricultural practices was absent in the early Vedic period and land was not considered as an important asset. What was counted valuable was mostly pastoral: like cattle (Bhattacharyya, 1999, 116-7). It has been argued that if inter-tribal conflict for cattle, then the king would supposedly be the protector of cattle and not the land (Thapar, 1978, 109). The seed of private ownership of property emerged only in the post-Vedic period, with pattern of patrilineal inheritance system. Vedas a sacred Hindu text in the Vedic period, later became the main source of Hindu law, along with customs and traditions of the tribal people. This Hindu ideology carries the ethos of patriarchal system. It likely exhibits women as a subservient and a dependent. This gives her very little scope for inheritance of property rights, in male-dominated society (Thapar, 1978; Patel, 2007; Nair, 2010).

Women were not entitled to inheritance and their position also get deteriorated due to the injunctions of religious texts such as Dharmasastras, Manusmiriti and other work of law-givers such as Jimutavahana along with Vijnanesvara. The introduction of Dharmasutras and Sastras explicitly favoured male inheritance. If there was an absence of a son in the family, then property would be given to the male descendents. While dealing with Dharmasastra, Manu identified, two contradictory principles with regard to women’s property rights i.e. stridhana, because on the one hand, women’s exclusive ownership of the property was obtained as gifts from relatives and on the other side, only men were sole inheritor and women had no right to inherit parental property (Bhattacharyya, 1999, 116-7). The tradition of men as sole inheritors further sidelined women's property rights. stridhana refers to property that women obtained from her relations, gifted to her at the time of marriage, by both sides of the family. It also, known as a bridal price (Malik, 2009, 295). Sometimes unmarried daughters were given maternal property as stridhana, but they were not granted a direct inheritance share in the family.

Under Dharmasutra or the smritis tradition, sisters were entitled to only one-fourth of their brother’s share, on the account of their marriage (Bhattacharyya, 1999;
Patel, 2007). Even in the absence of a brother, Manusmriti was not recognised: daughters did not have the right to inheritance or a share of the parental property. Wives or widows were also not allowed to entitled husband’s property during his life-time or after his death (ibid 88). Moreover, introduction of inheritance laws for women under Hindu law undoubtedly challenged the deep-rooted patriarchal structure of the society (Sinha, 2012, 14).

Similarly, the injunction of Manu’s Manusmriti recommended a rigorous discipline and strict seclusion for women. Manu also permitted child marriage and polygamy which further worsed the lives of women (Kant, 1997, 27). According to Manu, the legal positions of women were based on the notion of dependency—the belief that women always needed protection. The dictum, “a woman is not entitled to independence; her father protects her in her childhood, her husband in her youth, and her son her old age” (The Laws of Manu, verse 3), reiterated the philosophy that a women should always remain under the guidance of a male member in the family. That she should never be free and should strengthen the hold of patriarch. That, she must be kept busy in drudgery, to keep her mind from wandering. And in the matter of inheritance, after the death of the father and mother, her brothers—would inherit parental property equally. With that, the eldest brothers would be entitled to the whole estate and rest of the brothers would remain under his consideration.

The concept of dana\(^1\) also changed in the later Vedic period. Earlier, animals especially cattle, was considered to be significant as a dana. But, in later era, land as well as gold replaced animals (Thapar, 1978, 112). The donation of land emerged as a new concept in giving dana. Gradually, the emergence of market economy gave the flow of currency exchange, which also impacted gift-exchange activities. Agriculturally speaking, the importance of land over cattle could not be denied because of its lucrative value (ibid 116-117). Land is an immovable property: it can be owned either by gifted or inherited on the bases of the legal system.

\(^1\) This means to offer something as a charity or gift or donation to someone, for example, money, cloths, etc.
As mentioned above, the Vedas were treated as the root of Hindu law, and was also known as sastric/smiriti (Hindu Canonical) laws. Prior to Hindu Succession laws 1956, Hindu Canonical and customary laws governed Hindus, varying from region to region (Jaising and Sakhrani, 2007, 193). The law of sastras imposed many disabilities and the position of women was pathetic. Child-marriage was enforced, the female child was thrown in the junction of the Ganges and the sea, there was the practice of sati pratha and widows were known by kulinism, etc. (Shastri, 1959; Sivaramyya 1970a). Women were identified at the level of slaves, or were subordinated and left out, confined only to domestic activities (Singh, 1989, 103). Only after the appearance of Buddhist heterodox, women witnessed a series of upliftment in areas like education, inheritance of property rights, etc. They were also welcomed as nuns in monasteries (Nair, 2010, 35). Buddhism believed in the concept of equal human being, and equality before law. Their preaching and practices, however, failed to tackle the historical orthodoxy of Hindu tradition.

Further, the concept of inheritance rights was basically associated with Hindu laws, in ancient period. In this context there existed two schools of thought in Hindu tradition i.e. Mitakshara of Vijnaneshwar (eleventh century) and Dhayabgha (twelfth century). Hindu law divides property into two classes –a), joint family property also known as ‘coparcenary’ property and b) separate property or self acquired property. Under the joint/coparcenary property, all the members have a common interest and common possession, with rights in property partition. Whereas, in separate property, the owner has exclusive possession of property, and on his death intestate it is succeeded by his heirs.

The property of a Hindu male may devolve jointly through survivorship, upon four generations of male heirs by birth in Mitaksara law system (Sivaramyya, 1970a; Agnes, 1999a; 2011b). In joint-family a legal institution consisting of male heirs by birth that is known as coparcenary. Joint or coparcenary property cannot be easily deposed by way of sale, gift, or will: such property is managed by the head of the family i.e. karta (eldest among the coparceners), for the benefit of the entire family including female members (Sivaramyya, 1970a, vii). The doctrine of Mitaksara purported ownership of ancestral property in favour of son by birth held by his father, by rule. Here, females have
no rights of succession. Therefore, property is known as unobstructed property and son can demand for partition during his father’s lifetime. Hindu women never become karta or members of the coparcenary, of the Hindu joint family. Daughters were completely excluded from property right by birth.

So much so, that they did not even have notional right of joint ownership. Her right was reduced only to maintenance (Gonsalves, 1993; Sarkar, 1999; Nair, 2000; Jaising and Sakhriani, 2007; Saxena; 2008; Agnes, 2011b). The right to becoming a member of the joint Hindu family by birth, was extremely restricted to male members of the family. Women could not demand partition, but they had maintenance facility from the joint property, including right to residence. An attempt to modify the law in 1937 was made, by granting rights to coparcener’s widow in the property, that he owned prior to his death. Thus, law itself perpetuated gender discrimination and secured a patriarchal structure, in which women were deliberately reduced to a dependent category (Gonsalves, 1993; Saxena, 2008).

The Mitakshara joint Hindu family did not have right to be coparcenary or inheritance as the son: but in the concept of stridhana, women could enjoy property. This law laid down, that woman could acquire property through the means of inheritance, purchase, partition, seizure and finding. They were granted absolute ownership over stridhana under this law (Agnes, 1999a, 14). Under the scope of stridhana, unmarried daughters and childless widows could also succeed husbands’ and fathers’ property respectively (Bhattacharyya, 1999, 121).

The Dayabhaga School neither accords a right by birth, nor by survivorship, through a joint male ownership of coparcenary and joint property. It lays down only one mode of succession and the same rules of inheritance apply irrespective of whether the family is divided or undivided, and whether the property is ancestral or self-acquired. Neither sons nor daughters succeed property in the family, and they do not become coparceners at birth. They also do not have rights in the family, during their father’s lifetime (ibid). Coparcenary is unknown: the father is the absolute owner of the property so long as he is alive; his sons cannot claim share by birth, and on his death, his property
devolves by succession amongst his heirs (Chavan and Kidawai, 2006, 67). In Mitakshara, the son has a right to control and interdict unauthorised alienations of ancestral property. Whereas in Dayabhaga, the son has no right to demand partition because father controls all the family property.

The Dayabhaga school of thought shared liberal view toward female members: they could enjoy equal inheritance of property rights in the family. Daughters, widow and mothers could also succeed the deceased’s property, just as the male member (Agnes, 1999a, 17). However, the modern Hindu law of inheritance, marriage and divorce, is based on the ancient Hindu dharmasastras or bhraminical smiriti law, which recognised customs and traditions, as an important source of law.

Kautilya's Arthashastra: Book III, "Concerning Law", property means subsistence or jewelries constitute a woman’s property, which can be used as household investment and can also be used by her husband, during emergencies such as famine, disease, or scarcity, etc. If a widow with son remarries then the property would revert to the son (Kautilya, Chapter II). He was obscured about inheritance rights, on the one hand, yet allowed property rights for women. On the other hand, daughters could inherit parental property, only in the case of absence of male heirs in the family (Kautilya, Chapter V). So, Kautilya himself was confused or reluctant to grant equal property rights to women. However, Kautilya allowed equal rights for women, in the field of widow remarriage, which was restricted in the laws of Manu (Kant, 1997, 48-49). This shows that woman in Arthashastra had limited interest of property rights and suffered seclusion in many areas. Further, Nair’s (2010) thesis Indian Women Down the Ages, exhibits that Alexander’s invasion also affected the Aryan society, and they started to impose strict moral laws for the custodian of Hindu religion.

In medieval period, position of women declined due to the invasion of Muslims which led to further deterioration of women’s status. Women were treated as property of her father, husband and their son to the invaders (Chakraborty, 2006; Nair, 2010). Women were categorised in subordination. They were dependent upon men and were treated like as objects for male service. Women relied on men in economic, political and
social fields. Their position was counted as inferior and even limited to their own family property rights (Aggarwal, 2016). The caste system became very rigid; women were deprived in the decision-making process (Nair, 2010). Several social evil practices came into existence such as child marriage, sati, female infanticide, purdha, etc. Purdha or veiling system was famous among the Muslim women. Education was absent, girls married at an early age and widow remarriage was non-existent, both the Hindu and Muslim communities. Divorce was uncommon among Hindu women (Kant, 1997, 52). This period saw the position of women deteriorate to the lower strata in the family and society (NATRSS).

### 4.1.2. WOMEN’S MOVEMENT IN COLONIAL PERIOD

In the Colonial period, women’s position appears to be status-quo as in the medieval period, with notion of male domination, structural in early period of British rule. It has been argued that the Britishers were not concerned about the discriminatory personal laws of the different communities with regard to property rights (Nair, 2000; Bano, 2003; Jaising, 2005a). While, their efforts to transform a barbaric society into civilised one, could be considered as the creation of some freedom among the oppressed women. One such example could be the introduction of English education: its liberal ideologies inspired many Indian, to breakdown some of the evil customs and practices (Biswal and Mohanty, 2007, 351).

The 19th century social reformers-like Raja Ram Mohan Roy, K.C. Sen, Ishwarchandra Vidyasagar, Swami Vivekananda, Swami Dayananda and other prominent social activists-took keen interest in ameliorating the condition of women. They were against the existing social evils like sati pratha, child marriage, infanticide, oppression of widows and tried to apply rational and humanitarian criteria to these problems (Gupta, 2001, 53). British made some legal reforms regarding the abolition of sati in 1827, the suppression of infanticides in 1725 and 1804, and the removal of restriction on remarriage of the widow in 1856 (Kant, 1997, 61). Raja Ram Mohan Roy opposed the custom of sati system and polygamy and encouraged widow-remarriage. This reform
somehow brought certain changes, albeit women faced subordination position in the family and society.

The second phase observed as a large number of women participation in freedom struggle, under the guidance of Mahatma Gandhi, because he believed in freedom and equality between men and women. This phase of Indian feminism attempted to unfettered the caste and class hierarchies and demanded gender equality (Gupta, 2001, 54). The Indian National Congress was formed in the year 1931, in which gender equality, was accepted as one of its main objectives. Similarly, various women’s movements emerged in the first half of the 20th century, such as the Women’s Indian Association (WIA) in 1917 in Madras, the National Council of Indian Women (NCIW) in 1925, and the All India women’s Conference in (AIWC) 1927. The main aim of these organisations was women empowerment through education, socio-political and legal reforms (Aggarwal).

Several laws were passed in the colonial period such as Women’s Right to Property Act in 1856, Hindu law of Inheritance Act, 1928 (Amendment act, 1929). The development of women with regard to property rights could be seen when Woman’s Right to property Act of 1937 was passed. This Act provided a widow an equal share as her husband and her son in the intestate’s separate property (Bano, 2003; Anita, 2007; Kumari, 2013). Though, this Act conferred limited interest in the property rights for Hindu women, it was considered as the first legal legislation in the landscape of Hindu law of joint family in areas of partition, inheritance/succession. The Hindu Married Women’s Rights to Separate Residence and Maintenance Act was enacted in 1946. Under this Act Hindu married woman could claim separate residence and maintenance from her husband2. So, such kind of laws somehow brought changes in the position and status of Hindu women, it only applied to Hindu women.

4.1.3. POST-INDEPENDENT WOMEN’S MOVEMENT

After independence, the Constitution of India guaranteed equal rights for men and women, under articles 14\(^3\), 15\(^4\), 15 (3)\(^5\), 16\(^6\), etc. A series of legal legislation emerged such as Woman’s Legal Right, 1952, the Special Marriage and Divorce Act, 1954, the Hindu Minority and Guardianship Act, 1956, and Intestate Succession Act, 1956. Post independence witnessed several women’s movements which include Telengana Movement, Bodhgaya Math movement (1978), Chipko Movement, etc. Among them, the Bodhgaya Math movement specifically dealt with property a right which was initiated in 1978. This movement also addressed women’s issues such as domestic violence, access to political rights, access upon natural resources and many more, which was carried by Chatra Yuva Sangha Vahini (CYSV). It is considered to be first land rights movement in Bodhgaya district, in Bihar (Biswal and Mohanty, 2007, 355). It was a struggle of the Dalit landless peasants who demanded the legal right to their land, which they had cultivated over a long period, with a low wages (Rao and Rana, 1997, 1307). Women were active participants of this movement: they basically wanted to destroy the rules which was imposed by math, and demanded access to land rights.

4.2 PROPERTY RIGHTS AND PERSONAL LAWS

Personal law refers to those rights which an individual can enjoy by virtue of being a member of a religious or ethnic group or community (Ghosh, 2007; Jaising, 2005b). It is a “range of religion-based family laws governing marriage, separation, inheritance, maintenance and adoption, which vitally affected the status of all Indian women, even as they were wholly instituted and implemented by men” (Nair, 2000, 180). Agnes argues (2011) that the personal develops from the religious, in aspects, ideologies and is considered as pre-ordained, static and infallible. Such unfeasible character defines the communities’ attire (Agnes, 2011b, 2). The interpretation can be made from this

\(^{3}\) Constitution of India guarantees equality before law and equal protection of laws.

\(^{4}\) Prohibits act of discrimination on the ground of religion, race, caste, sex or place of birth of any Indian citizens.

\(^{5}\) Make special provision for women and children in protecting their rights from any kind of discrimination and ameliorate women’s social, political and economic status and accords for gender justice.

\(^{6}\) Provides for equality of opportunity in the matters relating to public and employment.
definition that personal laws draw its legitimacy from an individual’s religious background and it is not possible to challenge the domain of such laws for its, attachment with a particular community. Individuals can claim their rights on the basis of being a member of that particular community. Pre-independent as well as independent India proved to be biased in women ownership and inheritance of property, set strongly in a patriarchal domain (Sivaramayya, 1991b, 90).

Personal law evolved during the colonial period, through the Regulation Act of 1776, which declared that in matters relating to marriage, inheritance, adoption, etc. communities were governed by their respective laws (Jaising, 2005b, 324). Personal laws have no Constitutional validity, in fact, it derived its sources from religious scriptures, and whatever laws come from personal laws need to be consistent with the Constitution. Otherwise they become annulled under Article 13, if they violate fundamental rights (Bhattacharya, 2006, 73). It was basically the colonial legacy’s way to address pluralistic society with their various religious identities (Agnes, 2011b, 4). However, as mentioned subsequently, the colonial legitimacy spread in different parts of the country and changes took places in many areas. However, personal laws remained stagnant. In fact, colonial legacy had very little concerns about religious, personal laws (Parashar, 2008b).

Indian society is multi-cultural and multi-ethnic: different communities are governed by their own customs and religious aspects. Different communities such as Hindu, Muslim, Christian and Parsi have their own personal laws and plausibly women’s rights are more vulnerable than men’s, in all the religious argument (Parashar, 2005a; Hasan, 2005). The notion of cultural pluralism contradicts with the notion of gender equality, despite the fact that constitutional provision promises gender equality in all areas (Parahsar, 2008b). The personal law in India is based on different religions which reinforce the concept of lineal descent and inheritance from the male one. These laws reinforce the hegemonic structure that places a man’s control over a women’s body as well as economic resources, where women have been treated in real life as subject of man (Gonsalves, 1993; Bhattacharya, 2006).
Hence, amendment of personal laws enmeshed with the violation of religious faith. For instance, Muslim orthodoxy was hostility towards amendment of the Muslim Personal law in Shah Bano case (Hasan, 2005, 357). Archana Parasar (2008b) argues that women have less amount of rights as compared to men. The historical reforms elucidate that the goal of gender equality have always been look down on, even in independent era. Even in the formal legal equality, women’s rights have been denied or limited on the ground of religious personal set of laws, within and outside the families (Parashar, 2008b; Nair, 2000). Under Article 13 of the Constitution, all the contrary or inconsistent laws with the fundamental rights are void. Still, personal laws are able to maintain its supremacy, anchoring female suppression (Bhattacharya, 2006, 79).

4.2.1. HINDUISM, BUDDHISIM, SIKHISM AND JAINISM

As mentioned, the ancient Hindu law was gender-biased in nature with respect to property rights. Women substantially could not claim property inheritance rights and in cases where they could, they would inherit only a small portion of land. Hindu Succession Act (HSA), 1956 was enacted on the basis of equality of inheritance rights for both daughters and sons. However, it considerably does not guarantee full rights in the joint family property, in which sons have coparcenary rights by birth but daughters have no such rights. This, because they are not considered as a part of coparcenary (Bates, 2004; Parashar, 2005a; Roy, 2011). The joint family system purported joint ownership and such practices still govern the rural areas.

The concept of joint family is biased, further cripple down the inheritance rights for women in India. Under classical Hindu law, women were denied entitlement of independent share in property rights. HSA 1956, under section 6, the fathers’ one third interest in the family property, will be divided among the children (Sivaramyya, 1970a; 1991b). Denial of ownership of property inheritance rights of Hindu women basically rely within the provision of Hindu law. “It has been argued that Hindu law are rooted upon the dominance of religion principle as well as largely based on the false assumptions of the cultural and social reality which are not necessarily given due recognition within official legal frameworks and processes” (Patel, 2007, 116-118).
Independent state witnessed some changes in the position of Hindu women with the enactment of HSA, 1956. The Hindu includes, Hindus by religion, Buddhists, Jains or Sikhs by religion, HSA of 1956, governs these four religious communities, i.e. Hindus, Buddhists, Jains and Sikhs. Section 6 of HSA, 1956, provide equal intestate property where sons not only inherit the share of the father’s property but also have a direct right by birth to an independent share of the joint family (Roy, 2011, 8). Under this Act, sons could demand partition of joint Hindu family property. For example, if the dwelling house is the family property, then sons were allowed to claim it, but daughters were only allowed for residence, not ownership or possession of rights.

Section 14 of HSA 1956, provides female with absolute property. Before this Act, a woman’s ownership of property was limited with regard to disposal, and right—was dependent upon her status as maiden, married or widow (Patel, 2007, 47). For example, \textit{Ajit Kumar Maulik versus Mukunda lal Maulik} (AIR 1988 Cal 196) and \textit{Dharam Shing versus Aso} (AIR 1990 SC 1888), in which law had stated that daughters are not entitled to father’s property upon her marriage. HSA, 1956 applied to all countries except Jammu and Kashmir in India (Roy, 2011). Bates (2004) empirical study shows that, despite progressive legal initiatives in Maharashtra, women in Bheema did not enjoying inheritance rights because people did not make use of the provision of Hindu Succession Act (Amendment 2005) and also argues that “the effects of this law providing women coparcenary rights have yet to be seen” (Bates, 2004, 126). This argument shows the ambiguities in the implementation of this Act in Indian states.

A reform to the Hindu Succession Amendment Act 1956 was made in 2005, to establish egalitarianism, by making daughters as a coparcener in the joint family. It sets women out to be equal coparceners, that the inherent discrimination of the Mitakshara system of exclusive membership in joint family formally eliminated. However, the legislation, at the same time leaves women with lesser rights, than men in terms of inheritance rights (Patel, 2007; Saxena, 2008).

Still, there is no denying of the fact that it does bring changes in sections 6, 23, and 30, which discriminates women, under the provision of HSA, 1956. Under the
amendment of section 6, daughters can become equal coparcener by birth with son, in a joint Hindu family, governed by the Mitakshara law. Earlier it only dealt with the male heirs, but new amendment provided the daughters equal liabilities to dispose or to utilise such property rights. Amendment was made under Article 23 after 2005, in which daughters could also have the right to claim their equal share in the partition of the dwelling house, previously solely controlled by male heirs. Similarly, certain provisions were made under Article 24 of HSA, 1956 that forfeited a remarried woman’s property rights. Here, section 6, abolished such discrimination and under provision of amendment 2005, allowed remarried widows legal inheritance rights (HSA 1956). In this context, Moshin argues that, Hindu women will obviously benefit from this historical amendment act and be eligible to inherit agricultural land; yet daughters of other religion will still face the same gender-discriminatory legislation (Mohsin, 2010, 147). Women in other religious communities are still governed by their own personal law, which appears to imbibe gender inequalities with respect to inheritance rights.

4.2.2. ISLAM

Islam came to India through the trade routes of the Arabs via the Arabian Sea and some of the trader settled down in the Malabar Coast in eighth century (Agnes, 2011b, 31). Sultans of Afghan and Turkish rulers entered India around the twelfth to thirteenth century and they started to introduce Shariat law. They assimilated with Hindu people and also adopted Hindu customs and culture like the, caste system, joint family property system, etc. The development process of Islamic law in India can be identified from three stages. First, form the duration of Islamic law. Second, from the period of imperialism, and finally from what was marked as the beginning of independent period (Mohsin, 2010, 46).

Quran is considered the divine revelation and is an important source of Islamic law. Its first principles exhibit equality between men and women, in all spheres. Despite this, it has been criticised on the ground that it guarantees unequal inheritance share of property: because women only receive half the share of what her male counterpart does (for instance, a son inherits a share that is equivalent to that of two daughters) (Kaushik,
Though, Muslim women are supposed to receive half of what her brother would, in practice, they are frequently deprived of that entitlement as well (Owen, 1996; Parashar, 2005a; Jaising and Sakhrani, 2007). Practically, women still face gender inequality. It might be stated that Quranic laws is interpreted to suit the requirements of the male members and thus women are accorded an inferior position (Engineer, 1994, 60). Women’s limitations in inheritance rights are compensated by maintenance: this shows the notion of dependency, Muslim social structure, which is basically rooted on male dominance is considered as the diminishing women’s access to property rights (Moors, 1995). Though, Islamic laws offer property rights when compared to women of other communities, yet they may not experience the same degree as that of their male counterpart. Women’s rights are often negotiated with various factors, like customary law, religion, gender ideologies, or patrilineal systems of descent (Fazalbhoy, 2012).

As compared to Hindu and Christian Law, Muslim law appears to be superior in providing property rights for women, during independence period. The Islamic tradition, by and large remained patriarchal in nature and prohibited the growth of scholarship among women, particularly in the realm of religious thought (Siddiqi and Sarala, 2001, 309). Later, Islamic law made many reforms in the pre-Islamic world’s area of succession: here women got right to inherit property with absolute power, Quran also gives specific shares of rights to property in inheritance (Malik, 2009; Mohsin, 2010). Islamic law is more liberal towards women in terms of inheritance right and provides equal right to both men and women. However, women in Islam are not aware of their rights. They have been considered as subservient, because of the artificial norms and customs of the society, that were not actually imposed by Islam (Qureshi, 2003, 10). Islamic inheritance laws have been misunderstood in the world, but it is supposed to be one of most perfect laws in early period (Mohsin, 2010, 46).

Indian Muslims are governed by the uncodified quaranic principles of inheritance rights (Saxena, 2008; Agnes, 2011b), but there are some specific statues provisions of Muslim Personal law viz. the Dissolution of Muslim Marriages Act, 1939 and the
Muslim Women (Protection of Rights on Divorce) Act, 1986 in India, which gives absolute property rights to Muslim women.

Before the Shariat law 1937, there were broad principles of inheritance of Muslims in India, governed by customary law which was highly unjust and restored personal law, by preferring customs and practices (Jaising and Sakhrani, 2007; Malik, 2009). Before this Act, Muslims were guided by older traditions of ancient Persians, which treated women as inferior, as if second class citizens, with the imposition of purdha and other social evil practices (Nair, 2011, 25). In fact, one of the main arguments assigned to Shariat law is that it would provide equal right to property to women, which was often denied to them by terms laid by their norms, customs and religious ground (Fazalbhoy, 2012, 311). Shariat law makes no distinction between movable and immovable property and recognises the right of a female heir, like a widow or daughter. In fact, these rights-have always been recognised for absolute inheritance (unlike the old Hindu Law) (GOIMESW, 1974, 140). The Quran sanctions mehr to married women: it is a sum of money or other property given to a woman by her husband at the time of marriage, and she has full right over it. It is meant to protect the wife against the arbitrary exercise of the husband’s power to divorce, as well as it also stipulated at the time of marriage, future security (Agnes, 2011b, 100).

The judgment given by Supreme Court in the case of Shah Bano made a historical event, in Muslim women protection of rights on Divorce Act. This case challenged discriminatory rights of Muslim women: it created some relief from male hegemonic culture (Singh, 1989, 141). In the case of Mohammad Ahmad Khan v. Shah Bano (AIR 1985 SC 945), Bano was divorced by her husband and she filed a case in the court, for maintenance. The judgment was made without any basis from the Muslim personal law, since it is a part of criminal law that applies to all the citizens (ibid). But the husband refused to make payment and argued that under Muslim personal law there is no such obligation to maintain once wife gets divorced (Nair, 2011, 28). The argument of husband was rejected by the court and he was to oblige to maintain his divorced wife only during iddat (a three-month period after talaq) (Singh, 1989; Jaising, 2005b). Court also declared that those divorced women who are not able to maintain themselves can get
remedy from Central Government Act 125 Code of Criminal Procedure, 1973 (Singh, 1989, 141). Shah Bano also argued that her divorced husband had the obligation to maintain his divorced wife, until she was remarried. Even the Quran shows that there is an obligation for Muslim husbands to be fair to their divorced wives.

The Court judgment favoured Muslim women and some of the Muslim groups criticised the judgment by saying that it violates their personal law (Balasubrahmanyam, 1985, 1260). Women demanded that government should implement a uniform civil code applicable to people of all religions. This right was promised long ago under Article 44 of the Indian Constitution, but was not implemented properly, for women. This led to the acrimonious debate among the Muslim fundamentalists, in order to placate the situation and Muslim Women (Protection of Rights on Divorce) Bill, 1986 was introduced and it has been argued that it was only in the name protecting Muslim women and actually, in fact was only a patriarchal conspiracy against women (Singh, 1989, 144). This Act was in contradiction to the judgment and clearly excluded Muslim women for they could not recourse their rights, through Criminal Code (Hasan, 2005, 356).

However, such enactment also “brought concerns among the religious and political leaders in perpetuating gender discrimination against women in the name of religion” (Parashar, 2005a, 301). Further, Parashar (2005a) argues that the content of cultural identity very significantly constructed in private sphere and is often an disadvantage for women. Such gender-biased constructions of the society need to be deconstructed. In this case, Supreme Court expressed that Article 44 of the Constitution for “uniform civil code has so far remained a dead letter” (Singh, 1989, 146). On the other hand, any interference in personal laws provoked interference in their religious aspects. It has been seen that all personal laws are religion-based that clearly serve the patriarchal scheme.

It was only in Danial Latifi [(Danial Latifi v. Union of India, (2001, 7 SCC 740, 742-73)], Muslim divorced women get some relief in the provision of maintenance. This case could be seen as some kind of gender equality by providing maintenance provisions for divorced women. On other hand, the Court also described that Indian society as male
dominated, both economically and politically. It also places women in a dependent sphere (Mackinnon, 2005, 273). Though, this case challenged the root of patriarchy but Indian courts are seen as paralysed from the cultural sensitivity.

Muslim societies discriminate against women from cradle to grave (Siddiqi and Sarala, 2001, 295). Muslim personal law is not only a form of discrimination, but it also seemingly disadvantages women in many areas. The unequal rights become the main source of subordination of women, and such social constructions are maintained as a tool for women’s oppression (Hasan, 2005, 121). The recent case regarding the triple talaq which was filed by Muslim woman, Shayara Bano, was the first that challenged the Muslim personal law practices, because it was considered as unconstitutional (Nair, 2016). Even triple talaq, though enshrined in shariah, has been frequently misused by irresponsible husbands (Ghosh, 2007, 115). It has been argued that there is a popular perception of Islam to be rigid, inflexible and immutable often placing women in an inferior position (Hansan, 2005, 123). In order to enhance a women’s position and alleviate their suffering, legal reforms seems to be imperative, like the, Hindu Succession Act 1956 (Amendment 2005).

4.2.3. CHRISTIANITY

The law governing system of Christianity in India was influenced by the colonial legacy, especially from British imperialism. Christians were governed by Indian Succession Act of 1865 as well as customary laws, with regard to matter of inheritance. Further, until nineteenth century the converted Christian still followed their previous-customs and practices, with respect to inheritance, marriages ritual (Agnes, 2011b, 66). It was only during the later-half of the nineteenth century that statutory law was enacted, by British and the Portuguese. Indian Succession Act 1925, connotes a liberal view towards gender equality, on the ground that it creates equal rights for daughters and sons, in parental property. Even widows are entitled to one-third of her husband’s property (Sivaramayya, 1991b; Parashar, 2005a).
A large section of Indian Christians were still governed by the customary laws, which prohibited daughters from inheriting rights in parental property. Though, Christians were governed by the provision of the Indian Succession Act, 1925, with respect to inheritance or succession, yet owing to legislative and judicial decisions, they were also governed by discriminatory personal laws in some regions (Sivaramayya, 1991b, 99).

Similarly, in Cochin and Travancore, Christians have their own succession act, the Cochin and Travancore succession act. Which is discriminatory in nature, on the ground of property inheritance rights. When succession of an immovable property of the intestate is concerned; a widow or mother shall have only life-time interest (Malik, 2009, 304). However, the concept of coparcenary or rights by birth in ancestral property for daughters not been recognised in Indian Succession Act, 1925. It gives some kind of gender-discrimination with respect to property inheritance rights, among the Christian community. Under the Travancore Succession Act of 1910, the rights of daughters were limited to one-fourth of the share of the son’s or rupees 5000, whichever was less. Under the Cochin Succession Act, 1922, the share of daughters was one-third of the son’s or Rs. 5000, whichever was less (Agnes, 2011b; Sivaramayya, 1991b). If property appeared to be excess, then it was inherited by sons and if there were no sons, it would be devolved to the nearest male relatives.

In 1957, the Cochin and Travancore Succession High Court affirmed that Christians, in the region, are not governed by the Indian Succession Act 1925. But, the princely territory of Cochin and Travancore were generally governed by this Act, which provide entitlement of stridhana for daughters. In fact, the main characteristic of the Travancore and Cochin Christian Succession legislations is that they are based on the former notions of the Hindu Law of inheritance (GOIMESW, 1974, 132). Christian women, whether married or unmarried were excluded from inheritance of property and parental property was passed on to male’s line. Both the laws followed the Hindu law in matters of succession. They severely restricted the property rights of women belonging to the Indian Christian community.
The controversy was finally resolved by the judgment of the Supreme Court in the Mary Roy case. The judgment was made in *Mary Roy v. State of Kerala* (AIR 1986 SC 1011), which challenged the two provisions of pre-independence laws i.e. the Travancore and Cochin Christian Succession Act—which discriminated daughters. Mary Roy’s brother excluded her from sharing the parental property and she filed a petition in the court. Petition was filed under Article 32 of the Constitution of India. If anyone’s fundamental right was in threat then he/she could approach the court for justice. After independence, the court repealed all the discriminatory provisions of law, practiced in pre-independence period. This verdict was challenged on the ground of discrimination against women, in inheritance of property rights, as unconstitutional and a violation of the right to equality under Article 14 and 15 of the Indian Constitution (Agnes, 2011b; Malik, 2009; Nair, 2011). In this case, Supreme Court curtailed all the discriminatory laws which govern Christian women by replacing it with the Indian Succession Act, 1925.

4.2.4. Parsi

Parsi personal law is not based on a religious Zoroastrian foundations, un-like the Hindu and Muslim personal laws. Instead, their law is largely based on the Hindu customary laws and English common law. After the passing of Indian Succession Act 1925 (mainly governing Christian community), the Parsi intestate succession act was also incorporated, under the under section 50 to 56 (Act No. 39 of 1925). Before the passing of Act 1925, Parsi was governed by English common laws, which was discriminatory gender-wise, where married women were denied their own property (Mohsin, 2010, 172). Parsis were the ones who suffered in the British regime with respect to succession, due to the rule of common laws. With the result of their struggle, Parsi Intestate Succession Act was passed in 1864. Under this Act, widows and daughters enjoy equal property inheritance rights. Before this act, they were limited to maintenance facilities (ibid 72).

The amendment was made in the Indian Succession Act, 1991 (51) which provide equal shares for both sons and daughters, in parental intestate property (under section 51 sub- section, 2). Earlier “a female intestate’s daughters and sons received equal shares in
the intestate’s property, while a male intestate’s daughters received only half of what the sons received” (Indian Succession (Amendment) act, 1991). This amendment Act provides remedy from long-standing discrimination against Parsi women (Saxena, 2008, 294). It has been argued that Parsi laws are apparently quite gender-just, because the intestate property of the deceased is divided in equal share, among the widow and each child. If there is no widow, then there is equal share among the children (Malik, 2009, 303). Although, Parsi law provides women equal share in the property, but practically, her rights are only reduced to papers (Saxena, 1991, 112).

4.3. PROPERTY RIGHTS IN INDIAN CONSTITUTION

The conquest of British in India led to the changes, in the land holding system in India. The new system introduced by the British led to the destruction of the traditional system of rights, of the village community. They basically engaged in activities such as collecting taxes and introduction of land reforms, which included the idea of permanent settlement (1793), in which zamindar were to pay a fixed amount of tax to the government (Narively, 1988, 75). They established landlordism and individual peasant proprietorship, with the help of zamindari and ryotwari system, based on the private property land holding system (Chavan and Kidwai, 2006, 24). Further, the British also started an agrarian revolution, which ultimately created the formation of individual ownership of land in India. The basic problem of zamindari and ryotwari system created elite land holding pattern. There was also large amount of land holding in the ryotwari system. This kind of situation led the notion of a serious political issue, and the Indian National Congress was the first to demand land reforms, especially the abolition of zamindari system and some intermediaries like landlords (Narively, 1988, 73-74). In order to address such a situation, the British Government introduced the right to property, in the section 299 (compulsory acquisition of land) of the Government of India Act, 1935. The section of 299 (I) states that, “no person shall be deprived of his property in British India save by authority of law” (The Government of India Act, 1935). The concept of right to property began with Government of India Act, 1935, and after independence Constitution of India, was also dominated by the provision of this Act.
The Indian Constitution guaranteed right to property as a fundamental rights in Part III. Under article 19 (1) (f) and 31, under Article 19 (1) (f), it states that every person shall have right to acquire, hold and dispose of property, and Article 31 provided that no person shall be deprived of his property rights and shall be respected by the law. It was repealed after the 44th Amendment Act, 1978, by inserting article 300A which states that, “no person shall be deprived of his property save by authority of law”. After this amendment, the right to property no longer remained a fundamental right: it became a legal and constitutional right. On the ground of any infringement of property rights, people do not have right to file writ to the Supreme Court and under the Article 32 of the Constitution, he/she can approach the District Session Court or file writ to the High Court under Article 226 (Joshi, 2013).

The passing of right to property as a fundamental right in the Constitution created much trouble and underwent a series of litigation between the government and citizens. The state and central government came out with various land reforms like abolition of zamindari system, property conferment to the tillers, redistribution of property land to the landless peasants, etc. In the promulgation of Constitution of 1950 under Article 19 (1) (f) and 31, land reform was introduced in state of Uttar Pradesh, Bihar and Madhya Pradesh in order to abolish zamindari system. Such Land Reforms Acts were ruled by Allahabad, Nagpur and Bihar High Court respectively, which were unconstitutional in nature (Narively, 1988, 113). This resulted to the first Amendment Act made on 18th June 1951 and two new articles -31A and 31B were inserted, which specifically dealt with the abolition of zamindari system and land reforms. The first Bihar Land Reforms Act, was challenged in Patna High Court in Kameshwar Singh versus Bihar (AIR 1952 S.C.R., 889), which contravened the article 14 of the Constitution.

Under Article 31 (2) (deleted), person’s property could be acquired or requisitioned only under two conditions. Firstly the acquisition or requisition could be used for public purpose and secondly, the law must provide compensation or payment to the property owner (Singhal, 1995). The issue of payment for compensation resulted into six continuous Amendment Acts i.e. 1st, 4th, 7th, 25th and 42nd and finally 44th which removed article 19 (1) (f) and 31 from the Constitution.
The meaning of ‘compensation’ under Article 31 (2), was described in State of West Bengal versus Bela Banerjee (AIR 1954 S.C.R., 558), in which the word ‘compensation’ denoted ‘just equivalent’. Legislature must ensure full compensation to the owner of the property. In this case, the West Bengal Legislature passed West Bengal Land Development and Planning Act in 1948, in order to settle the refugees who came from East Bengal. This Act acquired Bela Banerjee and others properties and case it reached the local court on the ground of land acquisition.

The Fourth Amendment (1955), the Apex Court in famous R.C Copper’s case popularly known as Bank Nationalisation case (AIR 1970 S.C., 1461), “removed the question of compensation from the purview of the courts, the adequacy of compensation was not a justifiable matter” (Narively, 1988, 116). The Bank Nationalisation led to the 25th amendment (1971) which replaced the word ‘amount’ for the word ‘compensation’. This appeared to be next step of repealation of Article 31 (2) (Singhal, 1995). The case of Keshavananda Bharati’s Case (AIR 1973 S.C., 1461), held that parliament’s amending power was limited and it could not amend the Constitution, ‘the doctrine of basic structure’ was un-amendable. The 44th Amendment Act, 1978, repealed ‘right to property’ from its fundamental character, and placed it as legal and constitutional right, inserted in Part XII under a separate Chapter IV “Right to Property” of the Indian Constitution.

4.4. SEPCIAL PROVISIONS FOR NORTHEAST INDIA

The United Nations also declared the year 1993 as the Year of the Indigenous People, under Article 33 of United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) stating that, “Indigenous people have right to determine their own identity or membership in accordance with their customs and traditions” (UNDRIP, 2008). The International Labour Organisation Convention 107 on Indigenous and Tribal Populations Convention, 1957, identifies tribal people as socially and economically more vulnerable with the need for special protection, within independent countries, as well as allows governance by their own customs, culture and conventions.
Tribes are those people who have common name or communities, speak the same language within the community, occupy the same territory and are guided by certain taboos on the ground of marriage, inheritance, occupation, etc. Hence, they are separate groups of people having their own identity and cultural relevance (Baghel, 2011, 94). Tribal society is governed by kinship bonds and hence all individuals are equal. There is an absence of hereditary division of labour and hierarchy as well as religious disabilities (Ghosh, 2007, 128). Tribal communities have their own customary laws which are unwritten, but followed. After independence, these areas came under the special provision of Fifth and Sixth Schedule, which was guaranteed by the Constitution of India. Even, in the colonial period these areas were categorised as excluded and partially excluded areas.

4.4.1. FIFTH SCHEDULE

Fifth Schedule was established for the administration of the designated ‘schedule areas’, and Article 244 (1) provides for a Tribal Advisory Council at the State level. “The Fifth Schedule permitted the state to extend their executive power to the Scheduled Areas, and granted the Governor of each state, the authority to make regulations for peace and good government, of any area in a state” (Baghel, 2011, 238). The Tribal Advisory Councils need to be consulted together with the Governor, in order to promulgate regulation in matters related to maintain peace and good government in this area (Burman and Netam, 1994; Prasad and Pramod, 2012). Governor has to submit an annual report to the President of these areas. Though, Tribal Advisory Councils is a statutory body, it does not acted independently and often comes under pressure of the state government (Manchanda, 2009, 256).

Under 73rd and 74th Amendment to the Constitution which was established in 1993, in order to govern village level, a three tier structure of local self-government was introduced. Since, such laws do not cover the ‘Schedule Areas’, the Panchayat Extension to Schedule Areas (PESA), Act was enacted in 1996, under the provision of the Constitution’s Part IX, to enhance self-governing system. The Act recognises greater
‘tribal rule’ at the local level, as well as provides authority to control future land transformation, among the tribal people (Manchanda, 2009, 265).

According to the Land Transfer Regulation of 1959, that was amended in 1970, the transfer of tribal land to non-tribal was proscribed. However, non-tribals could transfer their land to tribals (ibid). Further, the Supreme Court judgment on Samatha v. State of Andhra Pradesh, 1997, declared that tribal lands leased to private company become void in Scheduled Areas. The PESA Act extended its provision to the areas covered by the Fifth Schedule, such as Andhra Pradesh, Chhattisgarh, Gujarat, Himachal Pradesh, Jharkhand, Maharashtra, Madhya Pradesh, Orissa and Rajasthan. Fifth Schedule allows union to give directions to a state regarding the administration.

4.4.2. SIXTH SCHEDULE

Under Sixth Schedule, there is a provision of autonomy to the tribal state. It especially demarcates the Northeastern states into an ‘autonomous’ region. This area enjoys its own administrative system, in laws are made and also judicial authority is exercised. Most of the Northeastern states come under the provision of Sixth Schedule which includes Assam, Meghalaya, Tripura and Mizoram. These states enjoy autonomous councils for governance and are not covered by the provision of PESA. Under Article 244 (2) there is a provision for Autonomous Districts, Autonomous Regions and Autonomous Councils. The Autonomous District Councils have wide range of legislative, judicial and executive powers. They have law making power that need the consent of Governor, otherwise they stand void (Burman and Netam, 1994; Bijoy et al, 2010). There are various state level statutes which debar ownership of land by outsiders or non-tribals in tribal societies (Bijoy et al, 2010, 49). The Sixth Schedule was specifically meant for the protection of minor tribes from the threat from marginalisation, domination and homogenisation by the major tribal group (Manchanda, 2009, 257).

4.4.3. WOMEN’S RIGHTS IN CUSTOMARY LAWS

The sources of customary laws may be a comprehended sets of traditional rules and norms, considered as intrinsic to the tribal people. Tribal customary law may be seen as a
pattern of individuals and groups behavior, which might be practiced from one generation to the next. Customary laws gain their strength from the habitual obedience of community members (Ghosh, 2007, 130). Customary laws are generally territory-specific and also enjoy legal recognition, whereas personal laws do not share such element. In State of Bombay v. Narasu Appa Mali (AIR 1952 Bom 85) case, the Court expressed that it could not interfere with the personal laws or customary laws of any community.

The traditional theories of justice, along with customs and traditional practices favoured male-centric and patrilineal inheritance interests. This can be considered as a form of violence, because women are at a large disadvantage, as far as land is concerned (Saradamoni, 1986; Bunch, 2004; Chowdhry, 2005; Chakraborty, K., 2006; Bhadra, 2006). However, these rights are derived from customs and traditions, and they have equal validity in framing the laws (Menon, 1998, 16). The notion of equal validity of sources of law creates some kind of gender discrimination, unable to incorporate women’s rights especially inheritance rights.

The Indian society carries the settings of patriarchal, patrilocal and patrilineal characters: patriarchy denotes the power of a cultural relationship, with enhanced man’s supremacy. The notion of patriarchy is a widely known norm. Such traditional and social structure of ownership in property inheritance ensures the governance of men, limiting a women’s right (Gonsalves, 1993; Anita, 2007; Saxena, 2008; Rao, 2008b). Most of the tribal communities in India also follow the patriarchal social structure. They too have son preference, but there are likely less discrimination pattern between daughter and son (Baghel, 2011, 21). Tribal societies share the same experience of inheritance of property rights, where tribal women do not inherit land (Kaushik, 2007), except in the case of a few tribal communities, where matrilineal inheritance is common or under special circumstances.

Customary law does not recognise the right to property for women, because it appears that male-centric societies do not allow them such rights (Anita, 2007, 199). The discernible reason in denying property rights for women can be seen as prevention of land-fragmentation and agricultural holdings, as well as land shortage (Owen, 1996;
In a male-dominated society, the female child is unwelcome: they are subjected to subordination inside and outside their homes and are treated unequally. Women are therefore, the economically weaker sections of the society (Banerjea, 2006, 8). Though, legal statutes extend equal rights in theory, but in reality, if daughter and son get equal rights, it might lead to land fragmentation (Anita, 2007; Mohsin, 2010). So, such kind of dilemma also encourages women’s subordination position in the tribal society.

The Constitution of India provides contradictory provision with regard to tribal society, in the sense that Article 14 has enshrined equal rights and on the other hand, allows the practice of norms and customs (Mehrotra, 2006, 65). Customary laws are paramount among the tribal communities. Even the Constitution of India give special provision under the Fifth and Sixth Schedule, because tribal people are categorised as backward, in the context of social, economic and political sphere. Women do not enjoy the advantages of these laws; in fact, tribal women are still governed by the archaic system of customary laws of their tribe, in-spite of the Constitutional provision, not able to achieve the gender equity (Bano, 2003; Banerjea, 2006; Malik, 2009).

Large masses of women are untouched and unaffected by the provision of the Constitution. Similarly, tribal societies also fail to address gender disparity, in many areas such as women’s access to resources, because of the male-bias along with historical and cultural context and discriminatory customary laws (Mehrotra, 2006, 66-68). Tribal women suffer from certain disabilities. For instance, in agricultural activities, women are not allowed to plough land on the basis of religious ground, because they considered as impure (Chauhan, 1990; Baghel, 2011). However, among the tribal people their identity, culture and norms are paramount.

In the Garo and Khasi communities, mothers have the right to ownership in ancestral property and after the death of the mother, property is passed on to the chosen heirs (daughters). Inheritance/ succession are in the female lines (Roy and Rizvi, 1990; Sahu, 2002). Paradoxically, daughter who inherits property are perceived as the custodian of the property, not a sole owner, because the effective control of property is exercised by
men. Farnandez (2010) analysed that the Garos have female inheritance, but they remain a patriarchal tribe. Women inherit property no doubt, but they have to take permission from the uncle of the family, for the land alienation. If they married to non-Khasi or non-Jaintia men, then they forfeit their ancestral property. Hence, tribal women are demanding equal inheritance right but the customary laws been re-interpreted by men to suit their need. This has become an obstacle to gender equity, because their tradition has not changed (Farnandez, 2010, 47). Patriarchal ethos of the customary law ignores gender justice, that also plays an important role in the management and control of the natural resources including land.

The Chhota Nagpur Tenancy Act, 1908, established by Britishers, is an important act for the tribal population of Jharkhand. It restricts transfer of tribal land to non-tribal. This act was challenged by Madhu Kishwar v. State of Bihar case (1996) 5 SCC 125, which provided succession of property through male line, and women were left out from inheritance of tribal land, directly violative of Article 14 and 15. This case expressed serious concern that invalidating the existing law would bring chaos in the state. If tribal women marry to non-tribal and inherit tribal land, it would led towards the erosion of community identity as well as land alienation problem in tribal society (MacKinnon, 2005; Jaising, 2005b). The Supreme Court justified, that in this case, it is necessary to retain tribal land, otherwise communities’ identity will diminish (Jaising, 2005a, 7). The court allowed tribal women, land for the occupation and livelihood purpose under Article 21, but they were denied ownership on the basis of inheritance/succession (Hasan, 2005, 359).

Women have to negotiate their rights within the domain of state law and community-based laws. Statutory laws somehow protect women’s rights vis-à-vis community-based laws, which basically share patriarchal ideologies that support men’s supremacy (Owen, 1996; Agnes and Ghosh, 2012). Further, in conflict between formal and personal laws, formal is always seemingly uniform in nature. Srimati Basu (2012) argues that, laws by itself is too inadequate to secure women’s rights. Those women who claim legal right to inheritance of property in the family would often be called haklenewali (the woman who takes her rights). Such woman is seen as driven by some
kind of “overreaching greed, selfishness, lack of empathy and love for the natal family and a desire to cause family conflicts” (Basu, 2005a; 2012b). There is a notion that women seize parental property rights, grab the property and destroy their natal family (Basu, 2005a, 167). It shows that patriarchal settings and traditional practices remain as the obstacle in getting inheritance of property rights for women.

Most of the tribal population faced major problems in a) the migration of non-tribes to the tribal concentration areas as well as, b) in development activities such as construction of dams which result into land alienation (George and Sreekumar, 1994, 122). Land plays significant role for tribal people for agricultural activities and livelihood purpose and it also could enhance the social status of tribal women. Rao’s (2008b) study of Santal women in Dumkha district, Jharkhand, shows that land for them is not merely an economic resource but also secures social position and identity. However, men have distinct advantages. She examines that community identity of the adivasis has also been responsible for denying women rights to land.

4.5 GENDER AND JUSTICE

Gender justice refers to equal administration of justice, on the basis of sex and equal treatment in social, economic, legal, etc. or an absence of any kind of gender discrimination (Nair, 2011, 15). The social construction of male domination and patriarchal system is considered as ubiquitous and exercises unstoppable power, in which women remain as the marginal conditions. In most of the cases, they do not receive prerequisite justice. It has been argued that law and justice terminology cannot benefit women at the grassroots level, in a sense that it’s inaccessible and unaffordable (Kaushik, 2007, 181). It generally has been agreed upon, that one of the greater causes of oppression of women could be seen from the unequal legal status in matters, relating to marriage and inheritance system in Indian society (Jaising, 2005b, 3). As mentioned the laws relating to inheritance is not uniform in India. Most of the communities are governed by their own personal laws or family, which are driven by customs, usages or religious aspects, all gender-biased (Malik, 2009; Jaising, 2005b). In this context, the
demand of a uniform civil code is under the shadow of patriarchal cultural and male dominance settings, as well as, from the practices of personal laws.

4.5.1. UNIFORM CIVIL CODE: ISSUES AND CONCERNS

The Indian Constitution, in its part IV, under Article 44, states that, *State shall provide a uniform civil code throughout the territory of India*. It is a Directive Principle of State Policy, not a Fundamental Right, which can be enforced by the Supreme Court. During the debate of this right in the Constituent Assembly, framers also discussed the result of the implementation. They expressed that, in the future it will ultimately abrogate the personal laws of various community. There is a wide range of opposition in the incorporation of this Article, especially from the Muslim Community. They attack is on the ground that right of personal laws are very intrinsic to their life—it’s a part of their religion, culture—and if imposed it could ultimately lead to the erosion of their traditional culture and customs. In this context, Sri K.M Munshi had explained that there was nothing sacrosanct about the personal laws, as they covered secular activities like inheritance and succession (GOIMESW, 1974, 142). Further, he states that if the personal law is considered as part of a religion, then it is impossible to achieve women’s equality. This code might be bringing uniformity, as India is characterised by multiplicity in terms of community laws.

Article 44 states that there is no any relation between religion and personal laws. Article 25 provides religious freedom, where as Article 44 seeks to divest religion from social relations and personal law (Jani, 2013, 58). Hence, marriage, succession and other secular character cannot be brought under Articles 25, 26 and 27 which is enshrined by the Constitution of India, in religious matters. It only touches the personal life of a person but does not touch religion; such view was reflected by the Supreme Court of India, in the case of *Sarla Mudgal v. Union of India* (AIR 1995 SC 1531).

---

7 Provides freedom of conscience and free profession, practice and propagation of religion, subject to public order, morality and health.
8 Provides freedom to manage religious affairs.
9 Gives freedom as to payment of taxes for promotion of any particular religion.
Further, in the judgment of *John Vallamattom v. Union of India* (AIR 2003 SC 2903) Article 44 is based on the concept that there is no necessary connection between religion and personal law in a civilised society (Bakshi, 1991, 105). John Vallamatton was a priest from Kerala, who filed a writ petition in the year 1997, stating that Section 118 of the Indian Succession Act 1925, was discriminatory against Christians as it imposed unreasonable restrictions on their donation of property, for religious or charitable purpose by Will (Jani, 2013, 57). India is a pluralist society, in which people have faith in their respective culture, customs or religious belief which binds them as in one community. The Constitution attempts to integrate or unify all the section of the people. That’s why, a secular character was provided to the Constitution, in order to achieve uniformity, within in diversity. However, a uniform law is highly desirable for the achievement of gender justice, as well as integrity and unity, among the different sects of people. On the other hand, more emphasis should be provided, that only rights are made uniform, not rituals, for they could violate the basic structure of the Constitution—secularism (Rout, 2013, 33).

Constitution of India, under Article 44, directs the states to enact a UCC, but personal laws in the name of ‘protecting religion’ constantly disadvantages women’s rights at large in the society: it grants limited sharing of property by inheritance or succession (Nair, J., 2000; Kaushik, 2007; Parashar and Amita, 2008; Malik, 2009). It has been widely agreed that women are always treated as inferior and their rights are sandwiched between the controversy over UCC and the discourse over personal laws (Ghosh, 2007, 38). Personal laws have come to be seen as a community identity, so it cannot be controlled by the state because of their religious aspects; it also justifies the preservation of minorities’ identity (Jaising, 2005b; Parashar, 2005a). Religious leaders also maintain that they have the authority to control personal laws (Hasan 2005, 368), that’s why it has become a very contentious issue, in the Indian context. It has been argued that initiative for change or reform of personal laws should come from within the community, and not be imposed by the state, which can better define justification for reform (Jaising, 2005b; Hasan, 2005; Mackinnon, 2005).
The demand of a uniform family law or personal law should be independent from any religious ideology (Parashar, 2005a; Parashar and Amita, 2008b). Then only can it ensure equal rights for women. When the state is unable to address the issue of personal laws, even the Court comes to the conclusion that it is not law under the Constitution (Jaising, 2005b, 238). There are several cases which challenged the provision of personal laws, such as Madhu Kiswar, Shah Bano, Shayara Bano, etc. but these cases read out that if UCC is imposed, then it automatically weighs down the religious and cultural identities of the community. It also leads towards the escalation of an acrimonious situation, among minority and majority communities. Personal laws have become an island within the Constitution, untouched by its ethos, in fact introduction of family law in the Constitution is like, ‘bull in a china shop’ (Jaising, 2005b, 337-338).

It has been generally argued that women in India theoretically enjoy a number of legal rights, under the provision of the Constitution, but in practice they are in an inferior position which is clearly articulated from the lack of control over ownership of property and inheritance (Agarwal, 1996a; Gangoli, 2007). The long tradition of discrimination against women’s claims on property rights is not only ideologically constructed but also materially affected (Patel, 2007, 117). Hence, laws relating to marriage, inheritance, succession are guided by a male-bias, which has led the dependency position of women.

CONCLUSION

Flavia Agnes argues that the law and justice are correlated to each other and if laws become unjust, then it can be reformed into fair justice. The law of the land, Constitution of India is the medium which proclaims for equal justice to the grass-roots or marginal people of the country. The Indian Constitution promulgates the secular and democratic principles and an individual’s rights can be secured under this provision. India is home to diverse communities and they are governed by their own respective laws, in areas like inheritance, marriage, divorce, adoption, etc. It has been argued that all-most all respective laws appears to be gender-biased. Therefore, women’s rights have revolved within the domain of community-based and statutory laws.
Community-based laws always driven by a traditional setting: including patriarchal or male hegemonic structure, where women have to negotiate for their rights. In this context, the historical background of women’s rights cannot be denied, in order to know the present position of women. In ancient Vedic period, the status of women was satisfactory. It was only in the post-Vedic era that women started to lose their grip with the expansion of private ownership of property. Undoubtedly, ownership of property favoured the male lineage and women were sidelined from inheritance of property rights. Further, the injunctions of various sacred religious Hindu texts such as Dharmasastras, Manusmriti, etc., further deteriorated the position of women, in the family and the society at large.

The introduction of two schools of thought i.e. Mitakshara and Dayabghaga in the Hindu tradition, itself occupied discriminatory position on the ground of inheritance rights. Under this classical law, women were excluded from inheritance rights, and not allowed to demand partition or inheritance rights. Women could enjoy property only in the scope of ‘stridhana’ in both the schools of thought, but it was given at the time of marriage as a bridal price. It has been argued that the concept of stridhana takes the form of dowry in the modern period.

The status of women in medieval period worsened with the foreign invasion and the introduction of various social evil practices such as child marriage, sati, purdha, female infanticide, etc. Women were treated like minors and their subordination further created a situation of dependency, upon men. In the colonial period, some reformation took place in areas like sati, ban on widow remarriage, female infanticide, etc. but, the context of inheritance rights was still governed by community-based laws. In fact, colonial legacy had no concern about the personal laws of the different communities. Though, reform took place in 1937, with the Woman’s Right to Property, which provide equal right to widow as their husband, yet the truth was, this was far from what was actually practiced. After independence, Hindu Succession Act 1956, was passed which provide some relief to depressive, again it was Amendment in 2005, which entailed equal coparcenercy for both sons and daughters in the joint family property. The Constitution of India became the benchmark in determining the scope of equal rights for women and
men. Right to property was inserted under Article 300A of the Constitution which stated that no person shall be deprived from property rights.

Indian society is characterised by pluralism, in which, different communities are guided by their own traditional culture and customs along with personal laws. Personal laws basically derived its sources from the religious aspects of the respective ethnic group or community, which govern in the area like marriage, inheritance and adoption. Different communities such as Hindu, Muslim, Christian and Parsi have their own personal laws, which have remained as discriminatory against women. These laws reinforce the concept of lineal descent or inheritance through male, and the patriarchal hegemonic structure always retain the dependency of women upon men in all the spheres. Shah Bano, Madhu Kiswar, Mary Roy and many more cases have challenged personal laws on the ground of violating Constitution provision, under Article 14, 15 (3) and 16 which guarantees equal rights to the citizens. Moreover, the amendment of personal laws endorsed the violation of religious faith and diminished the identities of the different communities. For example, Muslim antagonism towards amendments of the Muslim Personal laws in Shah Bano case.

The Constitution of India guaranteed special provision under the recognition of Fifth and Sixth Schedule for the administration justice of Northeast region. These areas were considered as ‘excluded and partially excluded area’ in the colonial period. Sixth Schedule exclusively focused on the protection of tribal areas and interests, culture, customs, etc., through the self-governance system. Constitution of India also created special provisions for the state of Nagaland (Article 371A), Sikkim (371F), Mizoram (371G), and Arunachal Pradesh (371H) with respect to their administration of justice. It has been noticed that vulnerability of tribal land is in terms of losing ownership, control over resources, and cultural identity. The state government has special constitutional provisions which empower the making of certain rules and regulations, regarding the prohibition on transfer of land from tribal to non tribal.

Generally most of the customary practices are necessarily favourable to women, but because of the presence of several traditional practices, women lag behind,
particularly in the realm of inheritance rights. Entitlement of inheritance forfeits if tribal women marry non-tribals in most of the tribal societies. Prevention of land alienation from tribal to non-tribal is the main objective of this rule. In Northeast region patrilineal system dominantly operates the tribal society, except matrilineal inheritance pattern in Garos, Jaintia and Khasis of Meghalaya. Women inherit from female line, but practically, daughters are perceived as custodian of property, not sole owners. She needs to take permission from uncle in the land alienation.

The debate of implementation of UCC remains controversial because it abrogates the personal laws of various communities. Personal laws are very intrinsic to community life. It is a part of their religion, culture and if UCC is imposed then, would lead to the erosion of traditional culture and practices. Article 44 states that there is no relationship between religion and personal laws. The latter only touches the personal life of person but does not touch the religion; such view was reflected by the Supreme Court of India in the case of Sarla Mudgal v. Union of India. It has been argued that reform should come from the community itself because it cannot be imposed from outside. On the other hand, theoretically women enjoyed equal rights but practically, it only reduced in paper work.