CHAPTER II

HISTORICAL POSITION OF WOMEN IN HINDU LAW

Advancing equity for women through property rights and economic entitlements is pivotal in the journey towards women empowerment and is instrumental bringing forth the dawn of social change in India. The constitution of India not only grants equal rights but also equality of opportunities for women in all spheres of life for overall development and growth. Women who constitutes, half of the population is denied basic human freedoms and rights in the name of culture, religion, and social norm and customs.

Majority of women in India are deprived of basic education, health facilities, employment opportunities and economic participation and adversely effecting their social development. The root cause for this is the traditional mind set and patriarchal norms prevailing in our culture which defines women as only nurturers and caretakers. Their primary obligation and duty is towards their husband children and family, cooking for and cleaning after them. Women from inception have been denied an identity of their own, and reduced to the status of a daughter sister wife daughter in law and mother but never an individual. The basic reason for this status and deprivation is their economic dependence. Until and unless the women achieve a level of economic freedom, the equality between the sexes will remain an elusive concept.

In this chapter a critical examination of the development of succession rights of Hindu women from ancient to pre-independence period, is attempted from feminist perspective. It tries to examine debates about women rights and family law reform in inter-war India. Focusing on the Hindu Code Bill, an attempt to reform
and codify Hindu family law that began in 1941 and culminated in 1956, it argues that these reforms sought to alter the way in which male authority was exercised within the Hindu family but also to consolidate the power of north Indian Hindu men over other regional Hindu and non-Hindu communities.

**Concept of Women's Property in Ancient Hindu philosophy**

From the earliest time in Hindu legal system as well culture women’s legal right to hold possess as well as inherit property was restricted. In the ancient text *Manusmriti,*¹ Manu writes: "Her father protects her in childhood, her husband protects her in youth and her sons protect her in old age; a woman is never fit for independence."

In Narada Smriti Narad writes "Through independence, the women go to ruin though born in a noble family….."²(Narada, XIII, 30.)

Though a woman was not denied inheritance, her rights were severely restricted and limited. Her share in the property of her father/husband was far less than her male counterparts.³ The reason attributed to this dependent and compliant status of women was their incompetency to perform religious sacrifices and to read the Vedas. Most of the rishis believed that in the smritis it has been clearly laid down that ownership of property was given with an obligation to perform religious rites and ceremonies and that the person holding the property was like a

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¹ The Manusmriti is the Hindu code of ancient India, which dealt with the relationships between social and ethnic groups, between men and women, the organization of the state and the judicial system, reincarnation, the workings of karma, and all aspects of the law. This Hindu Code is important for its classic description of so many social institutions that have come to be identified with the Indian society. Even after several centuries, it still generates controversy, with Manu's verses being cited in support of the oppression of women and members of the oppressed castes.

² Narad smriti was compiled around 400-500AD. It is based on Manu smriti. Cited in Supra Note 1

trustee in this regard. There women cannot hold property as it is clearly provided in the smritis that women were incapable and incompetent to perform religious services.\textsuperscript{4}

The Sanskrit saying "Na stri swatantramahatii-Swattantam Na Kachit Striyah"\textsuperscript{5} meant that women were unfit for any independent existence and this was the rule of ancient Hindu society. A woman was considered less than fully human, an object to be preserved by her male guardians. Even though the Puranas, the mythological stories passed on from the time of Krishna,\textsuperscript{6} described the Goddesses as Shakti (Goddess of universal power), Mahalakhshmi (Goddess of wealth), and Mahasaraswati, (Goddess of knowledge), mortal women were placed below the status of Sudra/ the lowest varna\textsuperscript{6} of Hindu society.\textsuperscript{7}

It is difficult to understand any concept until we know how and when the particular thing came into existence. When we discuss the property rights of Hindu women it does not have same connotations as we understand it today. The term property itself was not understood in its modern sense. The notion of property has changed with the industrial development and has become a very complicated concept.\textsuperscript{8} In general parlance property is defined as the right of person with respect to a thing and includes both tangible as well as intangible rights. The property system in most of the societies suggests that the meaning of property is derived and dependent upon the culture in

\textsuperscript{4} Supra note 1
\textsuperscript{5} A.M. Bhattachajee, Hindu Law and the Constitution 120 (2d ed., E.L. House 1994).
\textsuperscript{6} Varna system dawns in the most ancient text of the world the Rigveda. It is mentioned in the verse of the tenth mandal of Rigveda. Purusha hymn 90 of book 10 of the Rigveda, dedicated to the Purusha, the Cosmic Being. This Cosmic being is defined in verses 1 to 5 of the Sukta. It basically refer to class system found in anciet Hinindu text, depending upon the work a person do, which later changed to family one is born into. There are basically four varanas- Brahmans, Kshtariya, Vaishnwas and Shudra. For further details see Akshay Shivdas, “The Varna System: Forgotten Meaning” 15(4) Int. Res. J. Social Sci 1 (2016)
\textsuperscript{7} Supra note 4
\textsuperscript{8} Urusa mohsin Women Property Rights In India with latest Cases and Amendment 59,(kalpaz publication, 2010.)
which it originates and develop. 9 Lord Porter said “the property is not a term of art but takes it meaning from the context in which it is found”10

In the ancient Hindu society joint families were the norm. Their origin can be traced to the archaic patriarchal system where the head of the family was the eldest male member; he was an unquestioned ruler and called as Karta.11 He used to lay down the rules and norms for the members of the family. His words were like command and have to be obeyed by each and every member of the family unconditionally. This stemmed from the concept of general welfare and interest of family over individual interest which can be denied or sacrificed if the need arises.12 This ancient system started treating any property acquired by the members of joint family as joint family property in which every member had certain rights. With the transformation and development in society the concept of individual rights gained importance and with it came the self-acquired property of the member in which no other person has any right.

A Hindu family is a joint family until contrary is proven, implying that there is a presumption of jointness in every Hindu family.13 But this does not imply that any property held by individual member is always a joint family property. This fact needs to be proven with evidence by who is asserts the fact.14 As Derrett point out in keeping with what I have said there is no presumption that a joint family has any property, it is, in its property aspect a reservoir into which property flows from various quarters and out of which rivulets flow feeding the numerous categories of

9 Ibid.
10 Nokes v Donester amalgamated collierries ltd 1940 A.C. 1014 051
11 He is the senior most male ancestor in the joint family and looks at the management and functioning of the joint family.
12 Poonam Pradhan Saxena Family Law lectures Family law II 53 (Lexix nNxis 2016).
13 State bank of Travancore v Aravinam Kunju Panicker AIR 1971 SC 996
14 See babu nisar ahmed khan v babu raja mohan manucha AIR 1940 PC 204, selyaraj v radhakrishanan AIR 1976 Mad 156.
member and dependent. It is primarily a psychological set up and secondary a legal entity\textsuperscript{15}. The characteristic of joint family property is that it is either ancestral\textsuperscript{16} or is bought with the aid of joint family property and blended in the common stock. And this property collectively is called as coparcenary property. In which all the coparceners\textsuperscript{17} has certain right. Whereas self-acquired property is the property acquired by a family member in his individual capacity or acquired through his special skills or way of prize will gift salary remuneration etc. The individual is sole or absolute owner of the property and no other member has any right whatsoever in it. A person can have both ancestral as well as self-acquired property. And every property acquired by a member of coparcenary is not a joint family property unless blended in the common stock or acquired with the help of the joint family.\textsuperscript{18}

Furthermore in the ancient Hindu law the concept of property is different in different school of law.\textsuperscript{19} In the Mitakshara School the son, grandson as well as great grandson has a right in the joint family property from birth because the basis of the inheritance is the principle of propinquity which means nearness in blood relationship. Thus under the Mitakshara school both son and daughters should inherit together and equally. But this has not been the case as it admits two exceptions mainly complete exclusion of female from the inheritance and preference of agnates over cognates.

\textsuperscript{15} J.D.M Derrert \textit{A Critique of Modern Hindu Law} 587, (N.M.T.Ripathi, Bombay, 1970)

\textsuperscript{16} Here the term ancestor is not used in general or broad sense but specifically refers to three immediate male ancestor in the family line e.g. Father, father’s father and fathers father’s father, so when the property is inherited from these it is known as joint family ancestral property.

\textsuperscript{17} Coparcener in Mitakshara coparcenary basically means who can offer funeral cake to the father. And this right of offering spiritual salvation was with the son grandson and great grandson. Thus in a Mitakshara coparcenary son by birth has a right in the coparcenary

\textsuperscript{18} M/S Pyarelal Adishwar Lal v I.T. Commissioner AIR 1968 SC 678

\textsuperscript{19} There are basically two prominent school of hindu law dayabhaga or Bengal school and Mitakshara school. Dayabhaga school is based on ‘Jitamuhana’ smriti by the name “dayabhaga” and it is the dissident school of old benaras school and is found and followed in Bengal and part of Orissa and is regarded as progressive and enlighten. Whereas Mitakshara school is based on ‘Yajnavalkya’ smriti by ‘Vrijneshvara’ by the name ‘Mitakshara’. It is followed in rest of India and has many sub school like Benares madras, Bombay and mithila. It is conservative and orthodox school. Paras diwan \textit{Modern Hindu Law}, 55 ( Allahabad Law Agency, 2006)
Therefore the entire male line in a joint family has equal interest in the property of the father and can ask for partition at any point of time. All the members have community of interest and unity of possession and application of doctrine of survivorship. The women of the family only had maintenance rights. These rights are absolute in nature and a wife, and mothers are to be maintained despite faults.

Under the Dayabhaga School the son, grandson, or great grandson has no birth right in the property. Till the father is alive he is the sole owner of the property and can dispose of it in any way he wants to. Only after his death the property (ancestral or self acquired) devolves upon the heirs by way of inheritance or succession. The laws succession are based on the principle of spiritual benefit who ever will offer most religious benefits to the deceased shall be preferred. Therefore the sons cannot ask for partition during the life time of the father. All the coparceners have specified and ascertained shares in the Dayabhaga coparcenary. Further more in Dayabhaga School if the coparcener dies issueless his widow has a right to inherit property by asking for partition.

Under the Mitakshara School a coparcener has two kinds of rights – right by birth and right of ownership. The first right refers to the right of son in his father’s property where as the second refers to subsisting ownership acquired by a coparcener in a coparcenary property. Vrijneshvara has classified property (Daya) in to two categories

1. *Apratibandhaya*: Here *A* in *Apratibandhaya* refers to without and *pratibhand* refers to “obstruction” meaning a property or heritage which comes without any impediments or restriction also referred to as unobstructed heritage

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20 *Supra* note 12 at 37.
21 *Supra* note 12 at 38.
2. *Sapratibandhaya*: Here *Sa* refers to “with” indicating that a property which has certain impediments or is currently with an obstruction also referred as obstructed heritage.  

These terms have been explained in Mitakshara as follows:

“The wealth of the father or of the paternal grandfather becomes the property of his son or grandson, in right of them being his sons or grandson and that is inheritance not liable to obstruction. But property devolving on parents, uncles, brother or the rest, upon the demise of the owner, if there be no male issues and thus, the actual existence of a son and the survival of the owner are impediments to the succession and on their ceasing, the property devolves on the successor in right of his being uncle or brother. This is an inheritance subject to obstruction.”

So under Mitakshara school though the son has right by birth in property of the father and the grandfather meaning his obstructed heritage but both the rights are not the same rights because though the son and the grandson have equal right in the grandfather property it is not the same for the son in his father property where he will only get right after the death of the father.  

Basically under Mitakshara School a distinction is made with regard to separate and coparcenary property and their devolution and succession.

A Mitakshara coparcenary consists of male’s up to four generations who shall jointly own the property. There is a collective right, collective usage as well as collective disposal of the property. A property is a coparcenary property only when a male Hindu inherits it from his father and forefathers (grandfather and great grandfather).and this property will remain ancestral or coparcenary property in the

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23 *Id.* at 216-17.
24 *Supra* note 12 at 109. See also *Devi Parshad V Thakur Dial*.
hand of his progeny (son, grandson...). It is seen that though in western and northern India the authorities of Mitakshara remained unquestioned. In the areas of Gujarat, Bombay city and north Konkan vyavahara mayukha were given preference. This though based on the Mitakshara school of thought was much more liberal in recognition of women rights in inheritance and also in coparcenary property. He gave daughters absolute right over the property inherited by the father in absence of a male heir and widowed mother. His works are given highest authority in the region of Gujarat.

Though it is clear that in the Hindu society (Mitakshara and Dayabhaga) male members owned the property, this ownership cannot be equated to the ownership understood in the modern sense of ownership where the right of alienation is an essential right. The basic feature of joint family property is its inalienability. No single person can alienate the property by way of will, sale or gift. So until the property is partitioned no coparceners have absolute right. Furthermore even after the partition the property in the hand of coparceners is in the nature of joint property with regard to his progeny.

Therefore we see that there is a vast difference with regard to the concept of ownership in the two schools of Hindu law itself. The women in general are excluded from succeeding or inheriting property, though the rules are little relaxed in

26 Ibid.
27 Ibid
28 Vyawahara Mayukha is the digest written by Nilkantha bhatta and is based on mitakashara. It was written in 17th century and is one of the part of 12 part of his greater work called Bhagwat Bhaskara (sun of God) and each part is called Mayukha (ray of sun). he is regarded as master of science of interpretation. He applied mismansa rule of interpretation to the dharamshastras and adopted valuable technique of giving precision to the words used. He greatly admired the work of his predecessor like vrijneshwara but did not followed them blindly and gave lot of dissenting opinion too.
30 Favia Agnes Women and law in India, 13 (oxford University Press 2016).
dayabhaga in comparison to the traditional and rigid Mitakshara School, wherein the women can only claim maintenance rights.

**Stridhanam**

In Vedic literature though women were denied inheritance and general property rights, they had certain property in the name of Stridhanam.\(^{31}\) The concept itself is very controversial in the Hindu jurisprudence because of the great differences of opinion among the smritikars and Vedas with regard to its composition, nature, the rights of women over it and its succession.

The word “Stridhanam” has been derived from the words ‘Stri’ meaning a woman and the word ‘dhana’ meaning property. Therefore on combining these two words we get ‘property of woman’.\(^{32}\) It is used, however, in different senses in different schools and it has a technical meaning. This term is referred by different names as 'Manjal Kanio', in south, *Bangdicholi* in Bombay, *'Kalnam'* in Andhra Pradesh and *'Patnibhagam'* in Madras.\(^{33}\) Stridhanam is in essence type of property given to women at different occasions at different stages of her. An interesting historiographical debate concerning the nature and parameters of concept of Stridhanam in Smritis and Commentaries can help further an understanding of this concept.

Manu\(^{34}\) has given property rights to women but within the four corners and ambit of family, an institution to be sustained within the patriarchal set up of society.\(^{35}\) Manu defines rules and property rights of women in three different capacities as of daughter, wife and mothers. Firstly, dowry to be given to daughter not by demand but it is the duty of the father, also a she gets certain share from the brother, a quarter share of the

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\(^{31}\) The first mention of this term is found in Gautama Dharamsutra. He gave not only concept of women property but also separate rules for its succession. *Supra* note 30.

\(^{32}\) Goordaas Banerjee *Hindu Law of Marriage and Stridhan* 280, (Gale, Making of Modern Law, 2013)

\(^{33}\) *Ibid*

\(^{34}\) Author of manusmriti. See supra note 1

inheritance from their parents. Second, as wife, her property is clearly defined by Manu as, ‘what was given before the nuptial fire, what was given on the bridal procession, what was given in token of love, and what was received from her brother, mother, or father, is called six fold property of a woman’\textsuperscript{36}. Third, a wife or woman is placed at the centre of the family, never marginalized; she should be made part of and kept in high esteem in every matter whether pertaining to marriages religious ceremonies or general household affairs. She is an integral part of the family and is ordained to behave and conduct herself in a manner which upholds the honour, prestige and dignity of the family.\textsuperscript{37}

Whereas according to Kautilya\textsuperscript{38} a woman should be given a right to hold and possess property in order to afford protection in times of calamities, disease and also for her subsistence. According to him Stridhanam is jewellery given to her and dowry at the time of marriage. The right of a woman to hold property is dependent upon her status: maiden, married or widow. For example a wife has control over her dowry and ornaments, she retains control even after the death of the husband but loses it on remarriage except in conditions where it is acceptable to her father-in-law. Kautilya in essence did not give women exclusive property right but accorded certain degree of social security, dignity and recognition at the family level.\textsuperscript{39}

As per Yajnavalkya “what was given to a woman by the father, mother, her husband or her brother, or received by her at the nuptial fire or presented on her super session (adhivedanika) and the like (adi), is denominated woman's property that which is

\textsuperscript{36} Ibid
\textsuperscript{37} Ibid.
\textsuperscript{38} (c. 370 – c. 283 BCE), he wrote the well documented book: Arthashastra, Principles of Economics. He was the Philosopher and advisor to King Chandragupta Maurya in the years of about 2300 years back.
given (to the bride) by her bandhus, sulka, anvadheyaka, these her Kinsmen (bandhavas) take if she dies without issue.\textsuperscript{40}

In summary according to different smritikars Stridhanam constitutes following property:-

1. Gifts from parents and relation\textsuperscript{41}
2. Gift and bequest from strangers
3. Property acquired through skills and mechanical arts\textsuperscript{42}
4. Property bought with the Stridhanam
5. Property acquired by compromise
6. Property by adverse possession\textsuperscript{43}
7. Property in lieu of maintenance\textsuperscript{44}
8. Property obtained by inheritance
9. Share obtained on partition\textsuperscript{45}

The following enumerations are based on both the schools of thought\textsuperscript{46} though with regard to last two enumerations there is a controversy whether it is Stridhanam or a women estate.\textsuperscript{47} In this regard Gooroodas Banerjee\textsuperscript{48} very aptly said

\textsuperscript{40} Paras diwan Hindu law 365 (Allahabad Law Agency 2006)
\textsuperscript{41} Gifts which are made during the maidenhood widow, cobverture or to married women. This includes Adhyagni, that is, gifts made before the nuptial fire; (ii) Adhyavahanika, that is, gifts made at the bridal procession. (iii) Padavandanika, that is, gift made to a woman when she makes obeisance at the feet of elders; (iv) Anvadheyaka, that is, gifts made after marriage; (v) Adhivedanika, that is, gifts made on suppression; (vi) Sulka, that is, gratuity or marriage-fee; (vii) Pritidatha, that is, gifts of affection made by the father-in-law or mother-in-law; Bhartridatta, that is, gifts from the husband. As enumerated by katayana and given Mulla Hindu Law. Supra note 32
\textsuperscript{42} Such as by manual labour, by employment, by singing, dancing etc. or by any mechanical art. According to all Schools of Hindu law, the property thus acquired, during widowhood or maidenhood is her Stridhana. During husband's lifetime it is subject to his control.
\textsuperscript{43} In all Schools of Hindu law it is settled law that any property that a woman acquires at any stage of her life by any adverse possession is her Stridhana, because acquisition of title by adverse possession is creature of law and is independent of Hindu law. Supra note 32
\textsuperscript{44} "Her sustenance, her ornaments, her perquisite and her gains, are the separate property of a woman." Under all the Schools of Hindu law, payments made to a Hindu woman in lump sum or periodically for her sustenance is maintenance. Further any property moveable or immovable given as gift in lieu of her maintenance is included. Supra note 32
\textsuperscript{45} Supra note 40 at 367
\textsuperscript{46} Mitakshara : That, which was given by the father, by the mother, by the husband, or by the brother; and that which was presented (to the bride) by the maternal uncles and the rest (as paternal uncles,
“The difficulties besetting an enquiry into the question what constitutes Stridhanam arise from the fact that majority of sages and commentators give neither exact definition of Stridhanam nor an exhaustive enumerations, and if the Mitakshara gives a simple intelligible definition, the definition has been qualified and restricted in its application by our court, in consequence of its disagreements with the view of other authorities. 49

Basically whether the property of woman is to be taken as Stridhanam or the women’s estate depends upon the source from where it is acquired, and the status of woman when she acquired (maiden widow etc). The essential features of Stridhanam are: that they are in nature either of a *saudayaka* (meaning gift of love and affection) means gifts received from husband or parents from either the husband or the wife. Or they can *non-saudayaka* all other types meaning gift by strangers, property acquired by self etc. In the case of married a woman she has full rights over the first category but with regard to the second she requires the consent of her husband before alienation. 50

Whereas during widowhood the woman has an absolute and unrestricted right of alienation of property, irrespective of the fact whether it has been acquired prior or after the death of the husband. 51 Thus she can alienate the properties without any constraint. As far as the question of succession to the property of a woman of bad character is concerned, her bad character does not extinguish the blood relationship.
Thus her near relatives, who have not professed the profession of bad character, can inherit the property.\(^5\)

Stridhanam differs from woman’s estate in the essence that of the former she is an absolute owner and on her death her heirs shall inherit it without any defect. Whereas, in respect to the latter, she is only a limited owner and on her death it devolves upon the next heir of the previous full owner. Also she has no power to alienate this property ever which is not the case in Stridhanam. Gooroodas Banerjee while describing the nature of Stridhanam quoted Katyayana:

"Neither the husband, nor the son, nor the father, nor the brother, has power to use or to alien the legal property of a woman. And if any of them shall consume such property against her own consent he shall be compelled to pay its value with interest to her, and shall also pay a fine to the king... Whatever she has put amicably into the hands of her husband afflicted by disease, suffering from disease, or sorely pressed by creditors, he should repay that by his own freewill."\(^5\)

The Supreme Court also in the case of Pratibha rani v Suraj kumar\(^5\) has held that the Stridhanam is an absolute property of the woman and it can be willed alienated or gifted without the consent of the husband. It is in no way a joint property. Further a misappropriation will make the husband liable to be prosecuted under IPC.

Thus it can be said that with the change in society and passage of time the concept of Stridhanam developed into two distinct concept and two different right depending upon the source: Stridhanam of which she was an absolute owner and woman’s estate of which a she is a limited owner. Also the Privy Council in Janaki v Narayansami\(^5\) very aptly observed “her right is of the nature of right of property, her

\(^5\) Hira Lal vs. Tripura, 40 C 650: WN679 (FB).
\(^5\) Supra note 33
\(^5\) 1985 SC
\(^5\) 43 LA.207 (1916)
position is that of the owner, her powers in that characters are, however limited.... So long as she is alive, no one has vested interest in the succession”.

**Stridhanam under customary law**

Customs are one of the most important sources of law. There were lot of castes and tribes which were not governed by the ancient smriti laws. Many smritikars like Manu, Gautama and Brihaspati granted special recognition to custom. Smrities have widely used terms like achara, sadachara, shistachara… etc. which denotes custom.

It is to be noted that though customs varied from place to place, southern states have granted women much greater rights than others. Dravidians followed pro women inheritance rights and gave liberal construction to Stridhanam like, the custom of giving a piece of land to a daughter at the time of her marriage. The income from such land was for her exclusive use only. This could only be devolved on female heirs and passed from mother to daughter. This was called manjal kani and was practised in Madras presidency. A similar custom was also present in Bombay presidency known as bangdi choli. Further in the coastal Andhra region similar practice was there in the name of katnam. According to Carol Upadhya this land owned by women was distinct from the land owned by her husband family and was in no way regarded as dowry practiced in north India also among various castes and tribes along the Malabar coast the females headed the joint family and a matrilineal inheritance patterns could be seen. The female headed joint families were called tarwad and tavazi. In the lower caste communities of Lingyat of Dharwar region the women were given greater

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56 In 13 and 14 century Tamil Nadu during the reign of Cholas, Pallavas and Pandyas, inscription indicates that women not only owned property but also had the power of alienation through gifts and sale. Pranjivandas Tulsidas v Devkavarbai (1861) 1 BHCR130

57 Supra Note 30 at 19. Also see Mukund k “Turmeric Land” 44 EPW (1992).

58 Carol Upadhaya in Mukund k “Turmeric Land” 44 EPW (1992)

59 Ibid
property as well matrimonial rights. The Buddhist literature too suggests that women could own and gift property.\textsuperscript{60}

Therefore we can say that the issue of succession and inheritance right of Hindu women in ancient Hindu philosophy is based on the notion of family in the ancient society. The gender ideology prevalent regarded women, to be of a central importance in a family, but still relegated to the realms of household responsibilities and familial duties.\textsuperscript{61} Even if educated, the woman was never regarded fit for management and alienation of the property for herself, she might have been made the manager only in cases of distress or where a rights of a minor needed to be protected. In general she was always the dependent in need of male protection and supervision.\textsuperscript{62} Also it can be concluded that the strict control over women sexuality and property was followed more in the upper caste Brahminical Aryan custom as compared to the women of lower caste and in the Dravidian region. The main reason was that the upper caste wanted to maintain its caste purity and family honour.\textsuperscript{63}

Another important observation given by Debarati Halder and K. Jaishanker\textsuperscript{64} is that most of the socio-religious crimes had their roots in ancient succession laws. A Hindu woman was never regarded as an absolute owner of any property and especially landed property. According to Manu\textsuperscript{65} if a woman was an only child of her parents, they should adopt a male baby to look after the parental property as women in ancient law were not capable of managing property on their own. Such was their inferiority to men. This thinking and outlook led to birth and wide practice and acceptance of a number of socio-religious crimes such as female infanticide, bigamy for purpose of

\textsuperscript{60} Supra note 30 at 22
\textsuperscript{61} K. Gill Hindu Women Right to Property (Deep and Deep publication, New Delhi 1986)
\textsuperscript{62} Ibid
\textsuperscript{63} Supra note 58.
\textsuperscript{64} Supra note 3 at 664
\textsuperscript{65} Supra note 1 at 112
male heir, and forced sexual intercourse to produce a male child. They may not have been legal or directly sanctioned by religion but in the name of religion they became a norm in the society.\textsuperscript{66}

**Property Rights of Women from Post Vedic to Medieval period.**

There is a huge decline seen in the property rights of the women in the post vedic period. With the passage of time already restricted right became further limited. Medieval period is referred to as “Dark Ages” in the context of women rights in general.\textsuperscript{67} As established by the Vedas, Smritis the tradition of patrilineality and primogeniture was prevalent, the inheritance of titles and property passed through the male line to the oldest son thus for a woman in medieval times, her most important role was to produce a suitable male heir.

Furthermore we see that with Muslim invasion\textsuperscript{68} the property and succession rights of women became darker than ever. The Muslim rulers of the period introduced a new set of law and rules called as Shariat.\textsuperscript{69} these rules however were only used in the personal space and also not made applicable on the majority population, which were left to govern by their own sets of laws and traditions with regard to marriage succession etc.\textsuperscript{70} This period saw the decline of Stridhanam as its concept, became more of a status symbol given to the newlyweds at the time of marriage by the bride’s parent in the form of matrimonial gifts called varaa dakshina\textsuperscript{71} or better understood as dowry to the groom.

\textsuperscript{66} Supra note 3 at 666
\textsuperscript{67} Ibid.
\textsuperscript{68} The first Muslim invasion on the Indian Sub-continent was in 7\textsuperscript{th} century by Mohd. Qasim in Sindh but the Muslim rule in india started after the invasion of ghaznvi in 11\textsuperscript{th} century and establishment of Muslim dynasty by Qutub-uddin Aibak in 1150 which continued till 17 century. See Romila Thapar *A history of India* (Penguin Books, 1996)
\textsuperscript{69} Shariah law is the religious laws derived from the Quran and teachings and sayings of prophet of Islam.
\textsuperscript{70} Supra note 3 at 668
\textsuperscript{71} In the ancient Hindu philosophy there were basically 8 types of marriages. Four approved- *Brahama daiva Arsha and prajapatya. And four unapproved Ganadharava, Rakhsa, Asura and Paischaa. In*
The position of woman worsened in the medieval period with the introduction of systems of Purdah and Jauhar by Muslim and Rajput community respectively. The Purdah system was more rigid and stringent in Muslim community than others. Another evil which gained momentum was the practice of sati. Also the concept of woman’s estate gained importance and recognition in the society due to the prevalent social, cultural and political conditions. Whenever a woman was given landed or immovable property either as a share on partition of the property or as inheritance from the father, husband or the father-in-law she could become the owner with conditions attached. Firstly she had no power to alienate the property and secondly on her death the property shall devolve upon the heirs of the last full owner not on her heirs. Thus she was given a limited estate. This was to a large extent contrary to the customary and Shastric rules which gave her three options in which she could alienate the property vested in her as limited estate

1. Legal necessity
2. Benefit of the estate
3. Discharge of indispensable duties

The approved form Brahma marriages were the best among all in which the father used to give his daughter to a learned and a good character boy, who shall be adorned with jewellery and dresses. Thus originally there was a custom that girls used to receive dowry and gifts from her parents and relations at the time of marriage in the form of Stridhanam which was her for use. But varadakshina implied honourium or payment to the groom at the time marriage. This was a forceful demand by the groom and his parents. Never in the ancient society existed something of this accord. Either it was Stridhanam or bride price in the unapproved marriages but never a groom price which is a distortion of the concept of Stridhanam supra note 25

Purdah means that women body should always be covered from head to toe. Also she should not come in contact with any outside men or strangers.

Jauhar means, woman with their own consent immolate themselves so as to save their body and property from detention of enemy, if they are from defeated Warriors family.

This is the practice of burning the widows alive with their husband. The main reason was to protect the chastity of the women and honour of the family.

Mitakshara school never regarded share receive on partition or inheritance as Stridhanam but referred to as women property. See supra note 12

The word implies taking care of one’s as well as dependents needs in time of emergency if sufficient funds are not available. E.g.- providing basic necessities to the family members. Supra note 12

Implies that if by the transfer of joint family property or by its sale proceed, their property or any other family estate is benefitted the transaction would be for benefit of estate. Benefit means an advantage, betterment or profit. Supra note 12
In summary her position was reduced to a stand-in holder of the property for the male members. She had neither has any say nor any rights whatsoever.\textsuperscript{79}

This practice became very popular and common in the medieval era as a means to protect ancestral property from the grab of Muslim rulers in cases where the owner died without a male heir and interstate. The young widows were immediately used to transfer property to the nearest male member of the husband’s family.\textsuperscript{80} They were forced to live a life of a destitute wearing only white and participation in any social or cultural activities was prohibited and were condemned to live their life in utter misery and loneliness. In this way they were unable to exercise even limited control over the property. Also in vast cases they were forced to submit to the ritual of sati. Sati was thus used as mechanism to kill the widowed women so that she wouldn’t be able to make a claim on the property of the husband.\textsuperscript{81}

This period also saw an increase in child marriages, with a view to protect the honour and chastity of women. Girls below the age of nine and ten were married. This period saw staggering increase in socio-cultural crimes against women including polygamy, forced marriages, child marriages, Sati and the purdah system. All of this contributed to weakening of the position of women and stripping them of basic rights and freedom.\textsuperscript{82}

\textbf{Colonial Rule and Reforms in Hindu Personal Law}

With the advent of the colonial rule in India, a change was witnessed with regard to condition of women. The colonial rulers were faced with the biggest socio-legal problems with their Hindu subjects in form of the Hindu religious practices and

\textsuperscript{78} Implies money required for the funeral rites of the husband or the father, marriage of daughters, sharifs and gifts to brhamans for the salvation of the deceased soul. \textit{Supra} note 12

\textsuperscript{79} \textit{Supra} note 12 at 166-172.

\textsuperscript{80} \textit{Supra} Note 3

\textsuperscript{81} Arvind Sharma, \textit{Sati: Historical and Phenomenological Essays} (Motilal Banarsidass,1988).

\textsuperscript{82} \textit{Supra} note 30 at 22
customs. The position and status of women was deplorable at the time of British invasion. The society was plagued with crime against women such as female infanticide, child marriage, restriction on female education, the menace of dowry, sati and purdah system and likes. Most of this stemmed from reason to deny women their basic and legitimate right- to possess, own and hold property.

In response to such time arose reform movements aimed at curbing and abolishing social evils present in the society. Social reformers such as Raja Ram Mohan Roy, Ishwarchandara Vidyasagar and Jyotiba Phule struggled for the improvement of status of the women in Indian society. These reformers with their zeal and dream of better and equitable Indian society paved the way for women to regain her lost status and rights in the society. Despite these reformation movements the position of women was far from equal. They were still denied the succession as well inheritance rights. The problem of dowry remained unsolved and was still claimed as part of Stridhanam. Child marriage, female infanticide and forced marriages continued to plague the society.

The British in general governed Indians in accordance with their local institutions and laws. This approach can be traced back to the Warren Hasting’s plan of 1772, where a

84 Bipin Chandra History of Modern India (blackswan, 2009).
85 He was a 19th century social reformer who played the pivotal role in abolishment of sati practice in India by the Sati regulation, XVII of 1827. Sati became a crime and punishable act after the enactment of Indian Penal Code 1860 which established that such practices amounts to murder and homicide. He also started the Brahmo Samaj movement to reform the existing Hindu society in the year 1828. Supra note 84
86 He was a social reformer of 19th century who tried to bring transformation in the orthodox Hindu society from within. With his efforts he was successful in enactment of widow remarriage Act 1856, which subsequently improved the condition of women to a considerable extent. He also campaigned vehemently for female education and eradication of child marriage within the Hindu society. Supra note 84
87 He was a social reformer who worked relentlessly for the betterment female education and also established the first school for girls in 1848. He wanted to eradicate social evils like child marriage and sati system for the society. He also fought for the rights of the untouchables and so-called lower caste people. Supra note 84
88 Supra note 82
hierarchy of courts was established in order to implement the personal laws of both Hindus and Muslims.89 To carry out this task the company specially employed a range of indigenous personnel – for instance pundits, maulavis and muftis- who were trained to administer and interpret the ancient text /Shastra’s of Hindus as well as Islamic Shariat.90 The charter of 1781 in section 17 stated ‘the laws of Quran with respect to the Muhammadan and those of the shastras with respect to Gentoos’. The communities were categorized on the basis of their religion but very soon the British understood that the ancient text and the abstract religious categories in no way could narrate the story of India’s vast cultural diversity and overlapping customs.91 The colonial judges in the formative years allowed customs to be prevailed over the codified personal law but with the passage of time the need for legal uniformity was realized by the courts which forced them to put litigants more firmly under one religious group or head.92

The colonial system was very clearly divided into personal and public sphere as opposed to the functioning of the Hindu kings and Mughal rulers, where religious rites and social status was integral to their political power. Social practices, rituals and custom were a part of the political state and not separate and distinct.93 From the 1860s there was a steady decline in the number of litigants succeeding at altering their personal law by proving custom. The colonial state with time assigned

89 Supra note 81.
90 Ibid
91 In those times people were more inclined towards their customs and traditions as opposed to religion based laws. A Muslim followed more Hindu customs than the Shariat. The society was fractured more on the lines of caste and gender in comparison to religion. The litigants used to use all their resources and power to prove a particular custom and accord them legal recognition, for example in Punjab where the legal system differentiated between landowners and non-landowners, irrespective of their religious identity. see Robert tavers ideology and empire in eighteenth century india : the British in Bengal Cambridge university press 20007 David 189-95. David Gilmartin, Empire and Islam: Punjab and the making of Pakistan (I.B. taurius, London 1988)
92 Supra note 81
litigants their legal identities, with little response from below. These changes had quite different consequences for Muslim and Hindu personal law. It was seen that Muslims were taken as comprising of property owing individuals whereas the natural condition of Hindu family was assumed to be ‘joint’. The size and diversity of the many Hindu communities in India meant that the exact operation of this joint structure varied from region to region and between the schools of Hindu law that had gained a more standardised form under British rule.

HINDU WOMEN PROPERTY AND PRIVY COUNCIL

With regard to women rights the British albeit with nudging from the social reformers enacted welfare legislation. They did not stop there but extended to two more sphere first was in relation to legislation with regard to individual property of men and second which is more important as well as disturbing was with respect to judicial decisions with regard to women property right

The different schools of Hindu law expanded the scope of Stridhanam by including the property received by women by the way of inheritance or as a share in the partition property. Also included sources such adverse possession or buying from the

94 This was done by what is referred to as Anglicization of scriptures, meaning by translating the ancient scriptures into English. This process was started by Hastings and facilitated further by Jones, Halhed, Colebrook and Macnaghten. They translated most of the Hindu and Muslim text in English so as to provide uniformity. The plurality in practices and customs among the natives was creating chaos and problems for the colonial administrators. Several Sanskrit scholars also wrote treatise to the demand of British. But they unequivocally preferred and trusted European scholars, thus dismissing the genuine shastric work. See Madhu kishwar “Codified Hindu Law: Myth and Reality” 29(33) EPW (1994).

95 There are clear textual Quranic injunction dividing a man property between his children and other heirs. This in turns disintegrate the family structure as understood. Details in chapter III of the thesis.

96 This kind of generalization with regard to jointness of Hindu property created a lot of friction as those consisting of trading and business family there were lot of struggle and problem in regard to alienation, sale and in general of transfer of property. This decade also saw a boon in the number of court cases involving the dispute regard to partition and protection of joint ownership in coparcenary. See hari singh gaur bill to define the liability of Hindu coparcener in the year 1923 government of Bombay. Home department Maharashtra state archives. Cited in supra note 15


98 Sati regulation Act 1829, widow remarriage act 1856 and the prohibition of female infanticide act of 1872.

99 Gains of learning 1930 and Caste disability Act 1854.

100 In the earlier discussions we have seen how the concept of women estate was introduced by the Privy Council.
Stridhanam property etc. But the judicial decisions changed this completely and held the property inherited by female through male or female as well as share receive on partition is not Stridhanam. Further the women were also denied the right to will or gift the property and it acquired a character of limited estate. It was said that any alienation by the women need to be justified on grounds like legal necessity or religious duty. Also upon the death of women the property shall revert back to the heirs of husband (mainly male relatives).

This introduction of the concept of reversionary which is an English concept gave the male relatives of the husband a right to challenge the dealings by the widow. Some cases from the newly evolved legal machinery of British India could be studied in this regard.

Most of the judgement delivered had many commonalities like litigations against the widows were started by the husband’s heirs and local custom as well as the judiciary decided in the favour of the women. All the significant cases were from the Bengal presidency but due to the consolidated scheme of the hierarchy of courts, they became binding on other presidencies too.¹⁰¹

In 1868 in *Srinath Gangopadhyya v Sarbamangala Debi*¹⁰² the Calcutta high court held that once a Stridhanam property devolves upon a heir it loses the characteristic of Stridhanam and becomes general property to be devolved as per the ordinary rules. Around the same time the Privy Council in the landmark judgement of *Bhagwandeen Doobey v Mayna Baee*¹⁰³ held that a as property inherited by a women by her husband cannot be regarded as Stridhanam under the law of Benares school no property whether moveable or immovable succeeded by a woman could be regarded as her Stridhanam.

¹⁰¹ *Supra* Note 30
¹⁰² (1855)12 MIA 487
¹⁰³ (1867) 11 MIA 487
Thus the legal precedent set by the Privy Council resulted in a severe blow to the property rights of Hindu women which can be seen in the later on judgments of the different High Courts.

In *Gonda kooer v kooer Gody Singh*\(^{104}\) a widow bought certain property from her accumulated sum of Stridhanam and pleaded that it should be regarded as her Stridhanam and be allowed to dispose of this property by way of will. The Calcutta High Court following the Privy Council rule held that the property was not Stridhanam and upon her death shall devolve upon her husband heirs. The courts also ruled that the property inherited by daughters from their fathers were not Stridhanam\(^{105}\) and later extended this principle to the entire female line thus closing all doors for continuation of devolution of property in the female line.\(^{106}\)

The last blow denying women the complete ownership of property was the decision given by Privy Council in the case of *Mussammat Thakoor deyhee v Rai Baluk Ram*\(^{107}\) Here a childless widow gifted her property inherited from her husband to her niece. Despite being a *pardahnashin* lady she was an excellent business woman. The heir of her husband challenged the deed on the ground of it being fraudulent and claimed that she had no power of alienation over her husband’s immovable property. *Suudder Ameen* of Benaras held that a widow had power to alienate property. But the *Sudder Dewaney Adawlut* held the deed to be forged and reversed the decision. At no point of time the competency of widow to hold or alienate property was questioned. But when the case came before the Privy Council, it held that the widow has no right to gift or alienate the immovable property of the husband (ancestral or self acquired) as she was not the owner and the ownership rests in the heirs of the husband.

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\(^{104}\) (1874)10WR488  
\(^{105}\) Dev Prasad v Lujoo Roy (1873) 20 WR 102  
\(^{106}\) Dowlut kooer v Burma deo sahay (1874) 22 WR 54, chotay lal v chunno lall ILR (1879) 4 Cal 744  
\(^{107}\) (1886) 11 MIA 139
It is very interesting that the ancient text which during the early colonial administration was favoured in comparison to the contemporary practices was now been regarded as old and obscure by the anglicized Courts. The only diverse opinion came from the Bombay high court which applying the Bombay school, relied upon the local authority *Vyavahar Mayukha* of Nilkantha Bhatta provided women property rights. Like in one of case a women inherited property from her father and died leaving a daughter and daughter’s son. After her death her husband took the property. In the suit for reclaim of the property the Bombay high court held the in accordance to the usage of the caste and interpretation of Hindu law by the authorities the daughter is the absolute owner of her mother’s property and no one else.

Thus a trend was seen from period between1850 to early 1900’s of eliminating wide range of customs which were different from the translated Anglo- Hindu law as the standard of proof required was very high. It was required to prove the antiquity reasonableness as well it being in consonance with the public policy to be regarded as valid and applicable. As Derret points out that this led the spread of Anglo Hindu law as never before, with tendency towards to ignore the diversity and plurality within the Hindu law and impose a uniform legal Hinduism as understood by them. Also contrary to most of the beliefs the largely crushed customs were those which favoured women as a class.

**COLONIAL RULE AND LEGISLATIVE INTERVENTIONS**

With regard to legislation the first law which created a dent in the family law system in India and especially with regard to property was the Caste Disabilities Removal

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108 The angelicisation of scriptures leads the English biases to creep into the translated text, which was further given authority and validity by the colonial courts.
109 Supra note 28.
110 Navalram atmaram v nand kishor shivnarayan. (1861) 1BHCR 130.
111 JDM Derret *Hindu Law Past and Present* 78 (Mukherjee and co. Calcutta 1957)
Act 1850 enacted by the British parliament which was an extension of the section 9\textsuperscript{113} Regulation VII 1832 known as Bengal regulation. This law in essence was not enacted to affect the old system of family law practiced in India. It was not contemplated to change or have any bearing on the classical concept of coparcenary but was directed at improving the position of specific class of people or a member of a group. They affected certain laws without meaning to do so.\textsuperscript{114}  

**CASTE DISABILITY REMOVAL ACT, 1850**  
Before passing of this Act, the classical rules of inheritance under the Hindu law included strict rule on non-transfer of property through inheritance to the heir who has renounced Hinduism and converted to other religion. The difference of religion between the intestate and the heir worked as a disqualification for the heir to succeed the property. \textsuperscript{115} Further a person who has been excommunicated from the community cannot also inherit or succeed the property of his forefathers. The Act has nothing to do with the removal of caste disabilities but was an attempt to protect the temporal rights of a convert while ensuring his place in the next. The main reason for this enactment was to facilitate conversion by removing disabilities which were attached to it. Arguing before the Privy Council Sir Ameer Ali argued that this Act had virtually set aside the Hindu law of succession.\textsuperscript{116}

\textsuperscript{113} This section specified that if the parties to the civil disputes were of different religions, no party would be deprived of a share in property because of his (or her) faith. But in 1837 there was an interesting exchange of letters involving the government of Bombay, the government of India at Calcutta, and the Court of Directors of the East India Company at London\textsuperscript{1} which indicated that the authorities had changed their august minds and this regulation was withdrawn in the wake that maintaining strict neutrality in the religious matter. As it was said that if the British tried to intervene in the matters of religion by taking the sides of the missionaries it could affect their authority and rule in India as earlier also Portuguese were thrown because of their intention to converts the native which backfired.  

\textsuperscript{114} Supra note 12 at 255  

\textsuperscript{115} Supra note 12 at 256  

\textsuperscript{116} Vasudha Dhagamwar “Freedom of religion” 5 *EPW* (2003)
By this enactment\(^{117}\) a Hindu could continue to be a member of his former family despite the conversion and could also inherit from his deceased relatives. However, this posed problem to the converts own relatives as well as descendants because they could not inherit from him owing to difference of religion. For instance, a Hindu man converted to Christianity died. His relatives—spouse, children could not inherit from him due to difference of religion, but if his wife or son dies during his life time he had a right to inherit.

After this there was a gap with regard to legislation in matter of family law, the reason could have been the legacy of 1857\(^{118}\) uprising and the state’s subsequent declaration of religious neutrality. This discouraged the British officials from intervening in the personal and religious matters of the natives. Despite this the period witnessed massive social reformation movements and the rise of Indian representatives in the British Society.

A change in the attitude as well as policies of colonial rulers and a campaign to alter personal laws can be seen after the World War I in particular.\(^{119}\) The enactment of Government of India Act 1919, became a catalyst in mobilising a greater range and quality of financial resources and manpower. It also brought officials closer and in contact with new groups of men: those who were outside the patronage but had

\(^{117}\) Section I So much of any law or usage now in force within \{ Subs. by Act 3 of 1951, s.3 and Sch. for "the territories subject to the Government of the East India Company", \}[India ] as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of, any religion, or being deprived of caste, shall cease to be enforced as law \{ Subs. by s.3 and Sch., ibid, for "in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories "; \}[ in any court ],

\(^{118}\) Also known as first war of independence pr revolt of 1857or Indian Mutiny which occurred due to the strong rumour among the company army that the cartridges used in warfare were laced with cow and pork fat. This brought both the communities together and resulted in first Indian Mutiny. Supra note 62

\(^{119}\) The Government of India Act 919 marked a change in the colonial state’s approach to securing its aim. The impact of war on global trading could be clearly seen. devolution and policy of Indianisation provided means of extending state powers, the cost of which was born by the Indian taxpayers rather than British taxpayers. J Gallanagher “Nationalism and the Crisis of Empire 1919-1922” 15 Modern Asian Studies, 355-368 (1981).
benefited due to the social and economic changes of the last half century. This included apart from professionals and mercantile business, a number of Hindu lawyers making mark on the legislative business of the new representatives.\textsuperscript{120} As a consequence we see that concept of coparcenary and coparcenary rights moved from courts in to the legislative realms.

The economic climate of 1920s provided a more national approach to issues of family structure and the access of resources. A lot of rural families were put under economic pressure due to the slowing down of the primary producers market. Furthermore where a son or any other male relative had left the village and taken up a salaried profession and thus started living in the city became a source of tension. A large number of Hindu men became very critical of the concept of joint ownership and coparcenary of the existing Hindu legal system with least emphasis of the men’s individual right to property.\textsuperscript{121}

The interpretation of Hindu law during the colonial rule was deeply gendered thus the opening of the patriarchal structure of the Hindu joint family unavoidably raised question with regard to position of women within the Mitakshara joint family and also her rights with regard to property and succession.\textsuperscript{122} The property rights of women were marked by the intersection of colonial rule with patriarchal Hindu joint family. Mytheli srineevas\textsuperscript{123} argues that the property rights of women arose not as favour to her or her individuality but the changing approach toward the conjugal relationship and property. Her rights were subjected to the changed course of economy. The male wishes and aspiration of individual ownership in property gave rise to the concept of

\begin{itemize}
\item \textsuperscript{120} Supra note 95 at 133.
\item \textsuperscript{121} See supra note 95 at 134 and Samita Sen, Women and Labour in Late Colonial India (Cambridge university press Cambridge 1999) chapters 1 and 2.
\item \textsuperscript{122} Mytheli sreenivas “Conjugality and Capital: Gender, Families and Property under Colonial Law In India” 63(4) The Journal Of Asian Studies (2004)
\item \textsuperscript{123} Ibid
\end{itemize}
women property rights as the individual ownership of property was against the colonial laws governing the Mitakshara coparcenary.\textsuperscript{124} As earlier discussed the rise of mercantile business and capital gave way to a new economy which couldn’t work in the atmosphere of ancient Mitakshara rules and principles. Within the legal discourse the voice for individual ownership can be seen with the introduction of Hindu Gains of learning Bill\textsuperscript{125} in 1891 by professional elite Sir V. Bhashyam Iyengar. Though this bill failed, it gave a new direction and for the re-interpretation of property law.\textsuperscript{126} Debates about the logic of property rights and inheritance developed which in turn resulted in the introduction of Hindu Coparceners partition Bill 1916\textsuperscript{127} in the Madras Legislature. This bill never saw the light of day because of an overwhelming opposition from the majority of landowners who regarded it as an influence of western education and philosophy which in turn would weaken the religion and custom of Hinduism and will lead to disintegration of joint family system.\textsuperscript{128} Though the decision of the Government of India not to introduce this bill created widespread opposition nor did it put an end to the regional debates with regard to property rights within the fold of Hindu Joint family.\textsuperscript{129} Further the 1919 government of India act has opened the colonial legislation to Indian representative which gave them a better forum to discuss and debate the reforms required in the economic and property sphere within the Hindu society. The 1920’s saw that the debates with regard to the individual property rights moved to the central

\textsuperscript{124}Ibid

\textsuperscript{125}This bill sought to separate the professional earnings of men from the joint family property. Earlier if a son has been educated by the income from the joint family property the income earned by him subsequently by that profession was blended in the joint property and regarded as coparcenary.

\textsuperscript{126}Supra Note 120 at 944

\textsuperscript{127}Forwarded by Ramachandra Rao Pantulu ,the aim of this bill was to simplify the rules and principles with regard to the process of partitioning of joint family property. This bill suggested for making it possible for coparceners to separate his property from the coparcenary by an unilateral declaration.

\textsuperscript{128}Supra note 120 at 946

\textsuperscript{129}Supra Note 95 at 76
legislature, with a number of Madrasi representatives. Learning from the failure of past bills, these representatives aimed at reform which shall improve the individual property right of men without affecting the patriarchal rules in general. Therefore they never advocated equal individual property rights for men and women but based their proposals on matrimonial relationship as means to improve property rights within the family.

Thus the proponents of male individual property contended that individual property is economically necessary as well as socially beneficial. It was argued that increase in male individual property will improve the position of women by giving them greater access to property rights in the separate property of the individual. They advocated that the rights of wife, widows and children are much more than of a distant agnatic kin "[There; is no reason whatever to deprive a daughter inheriting to her father, to favour the son of a brother. . . . There is equally no justification to deprive one's own widow and prefer the brother when the brother is not worthy of the confidence (which is mostly true) that he would treat the widow of the deceased brother kindly."

Another significant development with regard to women property right came to light in 1921 with the introduction of a bill in Bombay legislature “a bill to define the rights of Hindu women in property inherited from men” the main aim was to demand widows right to divide her husband’s coparcenary property and claim his share in the joint estate after the death of the husband. The bill was however rejected by the

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130 Supra note 91
131 Supra note 91
132 Argued by C.P. Ramaswamy. C. P. Ramaswamy Ayyar was a prominent lawyer in Madras and became the home minister in 1921.
133 (Government of Madras Order No. 2708 [Home (Judicial) 1, 17 November 1916, statement of C. Rajagopala Achariya)” A lawyer from Salem, C. Rajagopala Achariya became the chief minister of Madras in 1937 and resigned along with other Congress ministries in 1939. He was subsequently governor-general of India (1948-50), chief minister of Madras State (1952-54), and founder of the conservative Swathantra Party (1959)
134 It was introduced by R.R. Kale a Maharashtrain lawyer with link to Gokhale.
government. 135 Again in January 1922 Sambanda Mudaliyar 136 argued for the formation of a bill which would provide widows with maintenance accruing from the share of the husband in the joint family properties. Though this was a rather moderate demand compared to providing women with property, the aim remained the same challenging the coparcenary system. 137

On the above lines Seshagiri Iyer tried to introduce a measure to alter the succession for female heirs governed by Mitakshara School in Madras by pointing toward rules of inheritance in Bombay presidency which was governed by Mayukha law. Though at that point of time this measure was overstepped by the orthodox Hindu and the British too favouring them did not take any steps.138 But this paved the way for discussions and debates on legal reforms required in the then practiced Hindu personal law.

Another development which created a stir in the society was the application of the married women property act 1874 139 on the Hindu women from 1923. This act was amended by act XIII of 1923 so as to bring Hindu women and others in its jurisdiction. It provided insurance to wife and children of the insurer. This was a landmark step as it for the first time gave women (to be particular, the wife) right to property.140

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135 Supra note 120
136 Pammal Sambada Mudaliar (1873-1964) was a legal practioner in Georgetown and later became judge of the Small Causes Court. Like number of other Tamil lawyers, he combined his interest with love of theatre and music. He has been hailed as “the father of Modern Tamil Theatre” The Hindu 27th September 2002.
137 Recommendation to the central legislature, representing Salem and Coimbatore 12th January 1922. GOI home department F.755/1922 NAI. Supra note 95
138 This bill aimed to alter the order in which certain heirs of deceased Hindu dying intestate are entitled to succeed his estate. GOI Home Department Judicial, F.155/1922 NAI.
139 The Act focussed on empowering married women by providing them right to own property after marriage; it applied to women belonging to certain special communities. It emphasizes the fact that women who earns through employment certain wages, shall be their separate property.
140 This bill included widow and daughter in the list of nearest heirs to an intestate Hindu male. While it did not give women absolute property over their dead husbands or fathers estates it awarded them access to the estate for the duration of their lifetime.
Therefore it can be unequivocally argued that women especially wives/widows got certain right to property in view to provide more comprehensive rights to men. Women were neither the agent nor the subject in these legislative debates. They were shown to be vulnerable individuals in need of protection and benefits. The representatives generally remained ambiguous and careful as to avoid spelling out clearly the consequence of these reforms for the male members of the joint family.141 Furthermore development of various mass movements as nationalist movements changed the terms of political debate as a whole and of the property question in particular.142 This period / also witnessed an emergence in women empowerment movements represented by the Women India Association (WIA) founded in 1917 and also all India Women conference founded in 1927. These women mainly belonging to the elite class changed it course of debate and made women the agent as well as subject. They demanded absolute property rights for women.143 Thus the historical origin of women property right and reforms in personal laws were interlinked with the development of men’s individual rights and welfare claims. Mrinali Sinha iterates that the debates about the women’s rights in the context of child brides paved way to a new kind of citizenship and concept of a welfare state amongst the Indian nationalists.144 The enactment of child marriage restraint act 1929145 was regarded as revolutionary as it is regarded to have changed the existing legal framework and

141 Eleanor Newbigin The Hindu Family and Emergence of Modern India: Law Citizenship and Community, 136 (Cambridge University Press, 2013)
142 The dyarchy introduced by the Montagu-Chlemsford reform in 1919 which divided the administration into central and province and increases the importance of state institutions. It also became a catalyst in debates in legislature with regard to difference in ideologies and interest. Also the ongoing tussle between the landowners mercantile and professionals over the nature of the property was affected as influenced by these changes. The political changes bought directly change the terms of prevalent laws and policies. Non-cooperation movement. Supra note 84
143 Supra note 120
145 It was highly ineffective once passed. The government made it a point that it remain a paper law without any effective implementation.
introduced a new legal discourse where state was responsible for securing and defending individual right. Secondly it worked against the hierarchy of religious laws and gave importance to individual dignity and freedom. It can be stated as starting point for positive discrimination laws in legal discourse in India. The bill to restrain child marriages was introduced in the year 1926 in the central legislature. This is the same time as the debates with regard to women property rights was gaining momentum. Child marriage restraint Act also called the *Sarda Act*\(^{146}\) did not only affect the women rights but the very basis of state-society nexus of the colonial rule. Furthermore though the Hindu male legislators supported the reform for child marriage practices there was apparent gap in the use of language of women rights between them and the Indian women leaders. They were willing to support the reforms with regard to women right but on conditions that those reforms were in their interest and also did not interfere in their individual power.\(^{147}\)

During this time when the public furore with regard to *Sarda* act reached its height M.R Jayakar\(^{148}\) in 1929 drafted a Gains of Learning Bill which aimed at separating the professional earning of a member from the joint family property even though the earning is a result of special education funded by the property of the joint family. The bill was drafted almost in the same manner as the previous property rights bill that as the Mitakshara coparcenary excludes women from owning property, the widows left are exposed to poverty and life of destitution. This Bill was meant to address this problem as a wife has a right to inherit from her husband individual property thus

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\(^{146}\) It was named after its proponent Rai Harbilas Sarda, a prominent lawyer, social activists and legislator.

\(^{147}\) Supra note 139

\(^{148}\) He was an all India representative from the city of Bombay and his bill was a revised version of iyengar Bill of 1891 introduced in madras legislature. See supra note 87. He belonged to a high caste but was anon-brahmin , with is education in oxford and example of his widowed mother got intested in position of women in the Indian society.
granting her greater share in property and a Hindu women’s access to property will improve.\textsuperscript{149}

Further he argued that this bill would serve greater good of the Hindu community as a whole as it would equip the Hindu society for a modern world and remove the disadvantage faced by commercial community due to the coparcenary. It would provide Hindu men with greater power and means to provide for their female relatives and immediate family. Despite the claims of the bill what it essentially did was that it created a new patriarch, instead of the karta, this new class of people emerged as custodian and protector of females. This bill bought equality between the coparceners but did nothing for Hindu women in terms of economic or political parity.\textsuperscript{150} This bill again established the patriarchy over the women’s rights.

Another fact that needs to be highlighted here is that it took years for \textit{Sarda} bill to see the light of day but the Jayakar Bill was passed in a matter of months.\textsuperscript{151} This clearly shows that the intention behind most of the reforms were not to with to improve the legal position of women as well as to provide her greater access to property right but were most importantly for strengthening their own position in the family as well as before the then colonial Indian state. It can further be established that despite the enactment of Child Marriage Restraint Act, it was never fully implemented and remained ineffective. Thus in a way the legislators by focusing on the weak and vulnerable image of women gave rise to a new kind of maleness where a man was

\textsuperscript{149} Eleanor 95 at 140
\textsuperscript{150} Ibid
\textsuperscript{151} He introduced the bill in the late July 1929 and it became Hindu Gains of Learning Act in July 1930. The \textit{Sarda} Act was introduced in 1926 and was passed only in 1929. Three years after its introduction.
given power in order to support and provide for his family, leading to a new kind of patriarchal setup.\textsuperscript{152}

During this time again Sir Shanmukham Chetty moved the Seshagiri bill on the Hindu law of inheritance which was in abeyance since 1923. The bill provided that if a person dies intestate and the property is also not held in coparcenary if the surviving relatives were father’s brother and his granddaughter (son’s daughter) the granddaughter should be given preference as been a near relative. This led to a very interesting discussion. A group of legislator\textsuperscript{153} wanted this bill to be circulated in public as they felt it dealt with a very pertinent question for everyone who calls himself a Hindu. They asserted that the reformers have no right to interfere and impose their views on the general public. This group vehemently opposed as well as criticized the bill on the grounds that this bill amounts an insult to the dead as it is radically opposed the most cherished belief of Hindu society, a duty towards the dead. M.S. Aney argued that a lot of people did not make a will as they want the natural law of inheritance as envisaged under the Hindu law to be followed. He regarded laying of new inheritance rules and a different order of succession as hurting the sentiment and faith of individual dying intestate. \textsuperscript{154} Further Pandit Madan Mohan Malwiya also opposed the bill on it being intrusive as inheritance was a personal law matter in which the government has no role to play. Thus the legislators cannot alter it. Pandit Motilal Nehru also opposed the bill saying the no man of property dies without making will and if he had then it means that he wanted the natural order of succession. \textsuperscript{155} Only M.R. Jayakar supported the bill and wanted it to be passed and

\textsuperscript{152} Instead of karta, the husband became the authority and gained the pivotal position, thus changing the structure of family but acknowledging the dominance of male autonomy. Supra note 94 at 144

\textsuperscript{153} This group consisted of Siddheshwar Prasda and M.S. Aney

\textsuperscript{154} Monmayee Basu Hindu Women and Marriage Law- From Sacrament to Contract 121-122 (Oxford University Press, New Delhi, 2004).

\textsuperscript{155} \textit{Ibid}
stated that too much time has already elapsed. The Seshagiri bill got assent from the governor general on 21 February 1929 and the bill became Hindu law of inheritance Act 1929. The provision which included female heirs in its ambit read as follows

“A son’s daughter, daughter’s daughter, sister and sister’s son shall in the order so specified be entitled to rank in the order of succession next after father’s father and before father’s brother, provided that a sister’s son shall not be included ,if adopted after the sister’s death”. 156

This act was limited in its scope as well as implementation. It did not bring any radical change in favour of with regard to property, as it neither provided daughters the right of inheritance nor the widows were given any right in the property of the husband. Furthermore it was only applicable to the separate property of the Hindu male intestate. The act only gave rights to certain female in favour of remoter degree male heirs. The primary aim of the act was not to change any law with respect to women property, but to make sure that when a husband succeed to his wife Stridhanam it devolve it in the manner as if it belonged to husband himself. The legal position of women even after the legislation remained unsatisfactory.157

Realizing the shortcoming of the Act the legislators continued to fight for greater property and inheritance rights for the women. Two legislators V.V.Gogoi and Munshi Narayan Prasad tried to introduce another amendment in the Hindu law of inheritance with a view to provide certain heirs specially women more strengthened inheritance right.158 However the bills remained pending. Another prominent legislator Raishaeb harbilas Sarda159 introduced the Hindu Widow Right to


157 Supra Note 152 at 126.

158 supra Note 152

159 He was working for women rights for quite a sometime. His efforts led to passing of child marriage restraint act.
Inheritance bill in January 1930 the bill was widely discussed. The main clause of the bill was that a widow shall be entitled to get share of her husband in his joint family property in same manner as her husband. And this share shall be her absolute property. The object of the bill was appreciated and it was moved for circulation. Sarda again introduced the bill after the circulation in 1931 and the bill met heavy opposition and was only considered in 1932. Sarda in his speech tried to find authority in the *shastras* by pointing out that Hindu *shastras* made women co-owner of her husband property after marriage. While analysing the provision of the bill, he pointed out that when the bill was introduced earlier the main issue was the property becoming women absolute property after the partition. So he has deleted the words “this share shall become her absolute property”.  

Though the bill got heavy support from the women all over India who had demanded right of inheritance for women in different women conferences held all over India. It got heavy criticism from a number of legislators and majority of them were from Bengal. They felt that condition of Hindu women in Bengal was never deplorable, in fact she was in very good position as the Dayabhaga school prevalent in the area provides them sufficient share at the time of partition. Another member Raja Bahadur Krishnamachariar believed that the conditions of widow were fine and this bill would only increase the rate of widow remarriage as it would act as a great temptation to lure women.

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160 *Supra* note 152


162 Amar Nath Dutta, S.N. Sen, S.C.Sen, D.K.Lahiri and others. Most of them believed that if given more they will live a luxurious life and shall squander most of the wealth. Further the ancient text never approved of women independence or her absolute right of property. Also it was pointed out that in Bengal women get her legitimate share of maintenance too. *Supra Note 152*

163 *Supra Note 152*. 
But despite this criticism and strict opposition there were members like Rai Bahadur brij Kishore and dr. H.S.Gaur who not only supported the bill but also criticized the attitude of the government for not giving due importance to such a vital issue and counting head to decide whether it should be passed or not. 164 The bill also got great support from the public. Modern Review a mouthpiece of public opinion said that the question was not whether they were helpless or happily place, but a question of equality and self-reliance and Hindu women inalienable entitlement to.165

The government in their defence maintained the position that they would not pass the bill unless there is a strong public opinion about it. Consequently the bill like its predecessors never saw the light of day. Undaunted by the failures Sarda moved one more bill named “The Hindu widow right of maintenance bill”166 in August 1933. He proposed that since Hindu law provides for maintenance of widows and as there is no guide for judges to fix the amount so this bill will provide as a measuring rod for the judges.167 Sarda argued: “With the disappearance of moral safe-guard which existed while old Hindu law traditions were honoured and acted upon, and owing to their non-possession of legally enforceable rights to property, the position of widow is becoming precarious.” This bill too was severely criticized by the majority whom regarded it as preposterous and unnecessary as they didn’t agree with sarda’s view that widows need protection owing to their position and state in the society. Though this bill too was left in abyss the efforts didn’t go unrewarded as it got the eyes of few legislators and paved way for enactment of Hindu women property right Act 1937.

**Hindu Women property rights Act, 1937**

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164 Supra Note 139
165 Ibid.
166 This bill aimed that if there was a sonless widow, she will be entitled to get the entire share of her husband as her maintenance in the joint family estate as would have yielded on partition.
167 Supra note 139
The twentieth century marks the nation's struggle towards codified personal laws and an effort to provide better rights to women which were still being stifled by the civilizing project of the British administration with its rigid Victorian standard and morality on one hand and the projection of superior Hindu culture by the revivalist on the other hand.\textsuperscript{168} It was becoming more and more difficult for the reformers to break the barriers of these forces and provide for basic rights for women. The litigation, judgement as well as the bills proposed were laden with ironies. But with the efforts of some legislators and the entry of women into the political sphere after the call given by Gandhi\textsuperscript{169} women rights came into the limelight. Women leaders\textsuperscript{170} of the nationalist movement demanded comprehensive civil code with regard to status and property rights of women. Captain Laxmi, stated at 1933 AIWC meet “the members of the legislative assembly who are men will not help us in bringing any drastic change which will benefit women”. After the effort of another prominent member Renuka Ray 24th November 1934 was declared as legal disability day. Furthermore the AIWC took upon itself and initiated a detailed comparative study of family law of different community. They proposed a uniform family law which recognized basic women rights and freedom.\textsuperscript{171}

Due to the pressure from the women leaders the Congress adopted and ratified the demand for uniform Civil Code during its meets. But to utter dismay of protagonist of women rights when the congress acquired power after the legislation of government of India Act 1935\textsuperscript{172} it didn’t do anything substantial, further the reforms were

\textsuperscript{168} Supra note 110
\textsuperscript{169} Write about Gandhi role in bringing women in freedom struggle
\textsuperscript{170} Kamaladevi chattobadhya, sarojinidevi naidu, muthulaxmi reddy, begum shah nawaz and other prominent members of All India National Conference were the most vocal about these demands. Supra note 159
\textsuperscript{171} Supra note 159
\textsuperscript{172} The persistent demands for Constitutional Reforms and the dislocation caused by the Non-cooperation Movement led the British Government to review the Status of Government of India Act 1919 by a commission headed by Thom Simon. The main feature of the act was introduction of
inadequate as well as became a medium to further increase the gulf between the Hindu and Muslim. By this act the nationalist leader got an opportunity to legislate in to the family matter and reform the personal law of different communities to elevate the position of women.173

The most important impact of GOI 1935 on women rights was introduction of *women right to property bill* by G.V.Deshmukh174 on 4th February 1937 in the legislative assembly. The main aim of this bill was to set right the controversies created by the judicial decisions of the English courts which have diminish the concept and scope of Stridhanam during the late 19th century.175

He argued saying that

“The British concept like reversioners surrender etc. Had caused great loss to women right to property. The word ‘reversioners’ reflected an English notion peculiar their own country. From that moment, the widow began to be infested by those pest called reversioners. in fact a majority of the litigation in connection with the property of widows was by and account of the reversioners. The reversioners could harass the widow by challenging every act of her in dealing with the property.”176

This bill further aimed at inclusion of the dead man’s widow and daughter as heirs both in his individual as well as coparcenary property177, further it regarded the property to be absolute property of women and not limited. He argued that due the prevailing social conditions the colonial authorities as well as judges had arrived at a erroneous conclusion that the Hindu society was such that it did not wanted women to

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173 Supra note 110
174 G.V Deshmukh a surgeon by profession and link to Jayakar and HLRRA had a vision of Hindu family based around the conjugal unit.
175 Supra note 60
176 *Id, at* 104.
177 This would result in gradual phasing of the all male coparcenary and move to a situation in which property remained in the hands of a more nuclear family structure this was in fact questioned by many legislators when the bill was circulated for opinion.
hold or own property. 178 Deshmukh with this bill aimed at achieving equality between Hindu men and women with respect to property.179

The bill met a strong opposition when it was circulated for opinion. Though a lot of legislators agreed with the general aim of the bill, most of them questioned specific provisions as they regarded that the bill would destroy the joint family and will also give too much power to the women. They feared that she will be placed in much better positions than the males as will inherit both form her father as well as husband.180 Baji Nath Bajoria holding the orthodox opinion held that it was not desirable to give widow unfettered right to have partition as she might come under the influence of her relatives and be deprived more. Dewan Lalchand Navalrani a progressive legislator agreed with the need for reform but pleaded for caution saying that in India educated women are fairly limited in number, so giving them unfettered partition right was not a practical or feasible proposition. 181

The bill was thus referred to select committee. Deshmukh was a member himself and the bill was subjected to significant revisions. The revised bill explicitly differentiated between the Mitakshara and Dayabhaga School of law with regard to partition and devolution of property when a Hindu dies intestate.182 Further any mention of daughter was removed from the revised draft.183 The bill after watering down most of

178 Supra note 60.
179 Some clauses of the bill were. Clause 3 stipulated that no person should be excluded from inheritance or partition on the basis of sex. Clause 4 dealing with the Hindu male dying intestate specifically provided the it will devolve upon the wife, daughter, son and widow of a predeceased son. And all of them shall have equal share. Clause 5 made men and women absolute owners of their property. Supranote 60.
180 Supra note 91 at 97.
181 Supra note 152 at 131.
182 Under Dayabhaga law, which did not recognise any system of coparcenry, the widow was to be given the same status as a dead man’s male relatives in succeeding to his property; while under Mitakshara a widow was to be allowed to inherit a share in her husband’s coparcenary equivalent to that held by him on this death, though only for the duration of her lifetime. Supra note 30
183 Deshmukh belonged to mayukha school of Bombay and thus added the daughters claim to property which was challenged by the majority of legislators and officials particularly those from conservative regions from north India. Most of them opined that daughter should only get share when there is no son
the provisions was passed in April 1937 as The Hindu Women Right to Property Act (Act XVIII) of 1937. The main provisions were: it was Extended to whole of India and abrogated all the laws and customs before it and would be applied to Hindu widows whose husband had died intestate. Some more were:

1. “When a Hindu governed by the Dayabhaga School of Hindu Law dies intestate leaving any property, and when a Hindu governed by any other school of Hindu Law or by customary law dies intestate leaving separate property, his widow, or if there is more than one widow all his widows together, shall, subject to the provisions of sub-section (3), be entitled in respect of property in respect of which he dies intestate to the same share as a son:]

Provided that the widow of a predeceased son shall inherit in like manner as a son if there is no son surviving of such predeceased son, and shall inherit in like manner as a son’s son if there is surviving a son or son’s son of such predeceased son: Provided further that the same provision shall apply mutatis mutandis to the widow of a predeceased son of a predeceased son. 184

2. When a Hindu governed by any school of Hindu Law other than the Dayabhaga School or by customary law dies having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-section (3), have in the property the same interest as he himself had.185

3. Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu woman’s estate, provided

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184 Section 3 of Hindu Women property Act 1937
185 Ibid
however that she shall have the same right of claiming partition as a male owner.

4. The provisions of this section shall not apply to an estate which by a customary or other rule of succession [or by the terms of the grant applicable thereto] descends to a single heir or to any property to which the Succession Act, 1925 (XXXIX of 1925), applies. 186

This act was criticised on several grounds for being ambiguous thus open to multitude of interpretation leading to discrepancies and problems. Deshmukh act has exposed the highly complex and diverse nature of Hindu law and family practices. Thus a amendment was made in the act a year later in 1938, this also was not able to resolve matter fully. 187

CHANGES BROUGHT BY THE ACT IN JOINT FAMILY

The foremost effect of the act was that it allowed widow to inherit property of her husband. Earlier the widow only succeeded to the property of her husband if there was no male issue but after the enactment she inherited equally with the son. And in cases where there was more than one widow all inherited the same share as of the son. 188 Furthermore she was also given right to ask for partition as the son but contrary to the right of the son her right in the property was not absolute she only took it as a limited owner or it was her limited estate. Also if she died before affecting the partition of the property, her share was to devolve upon the surviving coparceners by the rule of survivorship. 189 Taking the same share as son did not meant that there need to be a son. In absence of a son also she gets the same share as of son. 190

186 Ibid
187 Supra note 91 at 97.
188 Bhiwra v renuka (1949) ILR nag. 400
189 MP Obanna v KB anjaneyulu, 2000 (1) HLR 52 AP
Secondly this Act applied to both the separate as well as coparcenary property of male Hindu. Giving widow right in the separate property of the husband though strengthened the position of women; it did not radically depart from the earlier legislation. But giving property right to women in the coparcenary property of the husband bought revolutionary changes in the classical Hindu Law, which later on paved way for further enactments. This act provided that if a Hindu male having interest in the coparcenary dies leaving a widow she will have same interest in the coparcenary as her husband and the rule of survivor ship won’t apply. This introduction in to the coparcenary does not make her a coparcener or a karta but only a member of joint family, further this wont effect the unity of possession. Also till the time she doesn’t ask for partition she shall be represented by the Karta in all matters. Furthermore if there is any property that has been alienated by the Karta before partition ,the widow has no right to question as only coparceners can question the validity of the alienation. It was seen that a lot of time the women could get more through a decree of maintenance (applied to entire property) than her new right granted 1937 law. Thus the judges decided that even after the passing of Hindu women right to property Act 1937, the widow shall not lose her former right of maintenance. Thus despite getting the property rights the women get more benefitted from her long-standing status of dependence.

This act though specified the property rights of women in clear terms it has one too many defects. This act was completely silent as to on whom this property shall devolve after her death, as this act only talked about devolution of property of a Hindu male.
Thus in consequence the property of Hindu women was to be devolved in accordance to classical Hindu Law, which clearly demarcated the inheritance of Stridhanam and non-Stridhanam property. This further widened the gap between inheritance of property of a Hindu male and female. And thus the rule was evolved that if the women inherits her husband’s separate property it shall devolve upon her husband heirs after her death and if she has gotten a share in the undivided interest of joint family property it would devolve in accordance to rule of survivorship. In no circumstances the property could be inherited by female heir as Madras High court held that a women estate is not “an estate of inheritance”. Justice Venkatarama Iyyer founded this justification not in the text of 1937 law but the Hindu shastras. He said that a widow’s right according to Hindu theory were “founded on the fiction that her husband continues to live in her”. Thus because of ongoing life of the husband, wife can never be regarded as heir of husband and thus this estate was not “heritable among her heirs”.195

Despite the enactment of women property act 1937 the old Hindu law set the parameters for women’s right. Under the 1937 enactment there is no disqualification whereas under the old Classical Hindu Law unchaste widow is disqualified from inheriting any property of the deceased husband. This led to contrary opinion among the different High Courts. The Bombay196 and the Calcutta197 High court was of the opinion that as 1937 law doesn’t provide any disqualification the unchaste widow is entitled to inherit from the husband but the Madras High court198 took an contrary

195 Movva subba Rao v Movva Krishna Prasadam 1954 ILR Mad 257. This case basically deals with right of daughter born to a widow. The question was whether she could inherit her mother estate as the mother died during the pendency suit for partition under the 1937 Act.
196 Akabo laxman V Sai gemu AIR 1941 Bom 204.
197 Suraj Kumar Sardar v Mannadhanath AIR 1953 Cal 200. Though the same High court took a contray opinin and denied unchaste widow right of inheritance the very next year in the case of Kannai Lal Mitra v Pannasahi Mitra Air1954 Cal 588
198 Ramaiya Konar V Mottaya Mudaliar AIR 1951 Mad 954.
opinion stating “that widow needed to be chaste in order to inherit from her husband and this principle is well established within the colonial Hindu law. Also the legislators who passed the 1937 act has no intention changing Hindu norm of female sexuality”

Another serious defect in the act was that it gave undue preference to a predeceased son’s widow. Her rights were more specific and clear than the right of thee widow of the deceased, who was subjected to section 2 of widow remarriage act 1856, which state that she will return all the property of the deceased husband on her remarriage. Furthermore the deceased widow shall inherit the property as a women estate/limited ownership but no such limitation was there on widow of predeceased son.

Another glaring defect was its exclusion of daughter from this Act. According to the Hindu law giver it was a duty incumbent on the father to maintain his daughter and het her married. By the enactment of 1937 widow of a predeceased son came before in hierarchy of inheritance but no duty was imposed upon her with regard to maintenance of maiden daughter and her marriage from the estate devolved upon her. Thus the daughter was put in position where she could be deprived of her maintenance rights and shown to door.

Thus the Hindu Women Property Right Act which claimed to provide greater rights to women in effect gave very limited and far from equal to those of men. It gave right to property to widows on one hand and took away rights of daughters. While woman could own property they did not enjoyed absolute ownership. And the judicial decision too reinforced the idea of her traditional dependent status than an independent coparcener. These contradictions in notions of women property right

199 Ibid
200 Supra N0te 153 at 133
201 Ibid
continued into postcolonial India also, thus resulting in problematic and limited property rights to women in independent India.\footnote{202}

**Hindu code bill 1940-47**

In view of the shortcoming of the 1937 act and its amendment\footnote{202} the male legislators continued for calling reforms with reference to women rights and interest. A number of private bills\footnote{203} were introduced for the purpose. The government was faced with barrage of bill by 1940 which led it to realize the seriousness of the issues involved and appointing of a hindu law committee under the chairmanship of B.N. Rau, a judge of Calcutta high court along with three prominent lawyers\footnote{204} as its member. The committee was constituted with the purpose to look into the current state of Hindu personal law and also to consider different private bill which were introduced before in the legislature. The committee aimed at realizing the objective of the bill with minimum legal confusion and uncertainty.\footnote{205} The committee after six months of its constitution submitted a report which stated that the 1937 law along with its amendment in 1938 has created more problems and confusions. They advocated for a gradual reform and codification of Hindu law, taking one branch at a time, so there would be minimum resistance and maximum consensus could be generated. They stated in their report:

“Our own experience lead us to believe that a substantial measure of agreement will be possible, provided reformer and conservatives resolve to appeal to the best in each

\footnote{202} Supra note 91
\footnote{203} 1. First amendment bill to amend Women property right Act 1938 (by Akhil Chandra duttai n 1939)
2. The Hindu women rights to property (amendment) bill presented by aAN.Chattopadhyay 3. The Hindu women s right to property bill introduced by n.v.gadgil 4. The Hindu women estate bill by dr. g.v. Deshmukh. The Hindu law inheritance (amendment) bill promoted by MK Sanathan. The Hindu married women right to residence and maintanence bill by GV Deshmukh. Supra note 153.
\footnote{204} D.N.Mitter, ex-judge of Calcutta, Gharpure, principal law college Poona, and Rajratna Vasudev Joshi, a lawyer of Baroda.
\footnote{205} Report of Hindu Law Committee 1941 48-49.(government of India, 1948)
other. After all, no one however conservative his instincts, can fail to be moved by human problem\textsuperscript{206}

After the assent for GOI the committee started with their code, beginning with the common law for succession for all Hindus based on the dozen of private bills on the property, and chalking out a uniform code for other key branches of Hindu law\textsuperscript{207}. The committees tried to develop the code for succession laws on two key points: legal uniformity and removal of gender discrimination. The biggest problem faced by the committee was the amalgamation of Mitakshara and Dayabhaga rules of succession and controversial issues regarding the coparcenary property. Therefore in order to have a single and less gender biased rules of succession, the committee compiled the key practices of both the system with regard to intestate succession and concept of Stridhanam property but deliberately did not touch upon the complicated and contentious issues pertaining to coparcenary property.

The primary difference between the two schools was in regard to which heir will inherit property and what order.\textsuperscript{208} To solve this committee suggested that in view of less gender biased rules of succession “the rules are mainly of the Mitakshara whereas the enumeration (heirs) is mainly of Dayabhaga”. The committee presented its bill for discussion in the assembly in March 1943. The salient features of the bill presented were: a uniform and common law for all the Hindus in British India with regard to intestate succession. It gave women right to inherit same as the men in the

\textsuperscript{206} Supra note 203 at 25.

\textsuperscript{207} The compartmentalized branches were 1) Hindu Marriage 2) Hindu Succession 3) Hindu Minority and Guardianship 4) Hindu Adoption and Maintenance. They regarded that it was very important that law relating to each part to be reduced in a statutory form, and then consolidate the various acts into a single code.

\textsuperscript{208} In dayabhaga school widow and daughter is included in the order of heirs whereas under Mitakshara females in general were excluded from the inheritance. Mayne Hindu Law
family by removing sex disqualification from the law. Lastly by removal of concept of women estate, the women were made absolute owner of their property. The war time Code Bill debates highlights a very promising as well as equally distressing state of affairs which played a role in shaping the property rights of women in Independent India. We have already seen that in the period of 20’s and 30’s the personal law reform movement was driven by conservative patriarchal interest to a large extent. The purpose of employing the women rights language was to further the male authority and establish individual right without compromising the patriarchal authority and rights of family collective. But the World War II brought significant change in composition of legislature, the congress boycott of the legislature made situation difficult for the conservative to influence the society as they had done previously. Thus the radical reformers were able to dominate the bill debates initially and disseminate the thought to a large segment. By this it is not implied the bills had a smooth sail.

The voices of concern were heard as soon as the reform with regard to inheritance and marriage was introduced in 1943. Though not all opponents of the bill condemn it out rightly the just wanted law committee be very cautious in their approach and reforms as they were treading on a dangerous ground.

Legislators like Babu Baji Nath Bajoria felt that if daughters were given same right as son, the brothers would not be morally oblige to marry off their sisters which will in turn destroy the family structure. Bhai Pramannad felt that government was unnecessary interfering in the matters of public, and taking the task of framing a Hindu code bill when there was never a demand for such change. Whereas lalchand

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209 This bill included widow, daughter and widowed daughter-in-law in class I heir as the son. The daughters share was to be only half of that of her brother and mother. Her marital status played no bar or role in her inheriting the property. Thus removing to a large extent discrimination faced by women all over India.

210 Supra note 203 at 24.
navrani raised the objection on the ground that if married daughters are also included in the code, they shall be getting two shares one from their natal family and other from her husband. But on the other hand there were legislators like Amar Nath Chattobadhya who wholeheartedly welcome the bill and favoured equal property right to both men and women. He greatly appreciated the idea of codification of Hindu law which will strengthen the country from within.\footnote{Supra note 153at 135-136.}

Renuka Ray while supporting the bill said that this could not come as a surprise to anyone. She highlighted the countrywide agitations which were carried out for last 10 years in support of women rights in general and property rights in particular. She argued that this denial of property rights to women was based on an old obscure text and it should not be carried out further. She refuted the contention on the bill that it will result in disintegration of family by making an example that when a man having six or seven sons and divide the property between them it’s not disintegration but if he gives equal share to son and daughter it will lead to disintegration of land as well as family structure. However she felt that bill was not in any way radical or bringing about any revolutionary reform but was only reviving the old Hindu law, which had become corrupt due to multitude of causes.\footnote{Supra note 152 at 137.}

We see that most of the legislators as well as historians felt that the Hindu law committee bill debates were a tussle between a conservatives and liberals, this is not the exact case as there was number of legislator who were against the codification itself rather than the reform.\footnote{Legislators like GV Deshmukh and Akhil Chandra Dutta who were sponsors of the Hindu women right to property bill and reason for the constitution of Hindu Law Committee. Though both these men were significant reformer of 30.s they refuse to endorse the codification process. Deshmukh argued that the succession bill should be able to stand alone and be completed in it. Note of dissent by GV Deshmukh “Report of the Joint Committee on the bill to amend and codify the Hindu law relating to intestate succession with the amended bill” (1943) IOR.} This dampened the spirits of Rau committee which
have started its with confidence that this bill will be granted legislative approval swiftly. The committee faced the problem as it started considering women rights on its own merit and not within the patriarchal framework as it was considered earlier. They emphasised of equal rights for both men and women and certain uniformity in the Hindu law. Though this bill never intended to introduce revolutionary changes to the Hindu legal system and has intentionally been indifferent to the complicated structure of coparcenary, it has to a large extent reframed the discussion about the individual rights within the Hindu joint family. The earlier debates employing women rights language aimed to provide greater individual right to men in the coparcenary without affecting their control over their wife and family. But this Code put women property right as a central reform, distancing itself from the joint family system. A joint committee was formed respectively and the bill was recommended for reference. On the submission of the report of the joint committee the Hindu law committee was revived on 21 January 1944 with B.N. Rau as its chairman. It is interesting to note though this bill divided the central legislature it never got the press coverage and was overshadowed by the congress anti-government attitude and the events of the war. Instead it created a stir in the public domain that regarded this bill to be anti-Hindu and disrupting the Hindu family and structure in general. The bill according to public sentiments “strikes at the root of institution that is the cherished pride of a vast majority of the people of this country”

214 Supra note 92 at 111.
215 Joint committee consisted of legislative member and council of states. The members were A.N. Chattopadhyaya, Renuka Ray, A.C.dutta, Babu Bajinath Bajaoria, GV Deshmukh lalchand navrani, and Sultan Ahmed.
216 The committee in order to construct the complete code took a six week tour of country to interview legal expert and members of general public. The written statements submitted to Hindu law committee showed a public unease about the law reform and the possible impact of the hind code bill. They heard over a 227 individual’s organisation including judges, lawyers women group as well as religious leaders, Hindu law committee 1945 Delhi.
217 Supra note 95at 115
Interestingly when the law committee met in 1945 in Bombay after its tour there was a uproar in the committee itself as the committee from its inception has envisaged to stay away from the complex system of *Mitakshara* coparcenary but this was proving to be a very difficult task in giving women her due right to property.\(^{218}\) The bill according to its proponents also has created unnecessary false impression that only those should come forward who was in opposition of bill and thus giving it a very negative image. However despite the opposition among its member and outrage in the public the final print submitted in 1947 regarded the public opposition as unimportant owing to the wider political event.\(^{219}\) The new complete code bill was introduced in the legislature in April 1947. Ironically the committee’s drive to have uniform and gender sensitive focus produced quite a radical Code, much more radical than what its own members had envisaged. The code faced serious opposition and tests after 1947 when the bill was introduced in the newly independent India’s constituent assembly.\(^{220}\)

The task of re-introduction of Hindu Code Bill was taken by then law member Bhim Rao Ambdekar\(^{221}\). Under his leadership and patronage the most controversial issue was discussed by the newly independent Indian-state. He completely supported the

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\(^{218}\) The coparcenary system and the rule of survivorship reinforce the principle of exclusion of women from property on basis of her sex alone. The daughter’s right after marriage as she move away from the joint family was cited reason of her exclusion. If the committee wanted to retain consistency and uniformity in the code they had to propose reforms in *Mitakshara* coparcenary too. Supra note 203 at 12-13

\(^{219}\) The world war II ended in 1945 and the British government decided to leave India as well as the partition of the country on religious line has provided an opportunity to the progressive Indian nationalism of the inter war years to prove its worth and merit. Reba Som “Jawahar Nehru and The Hindu Code Bill: a Victory of Symbol over Substance” 166-6928 *Modern Asian Studies* (1994).

\(^{220}\) The political condition of the country actually masked and downplayed the far reaching potential of the court. The declaration intention of Britain to leave India and the transfer of power produced a atmosphere of optimism and a sense that reforms that have been subordinated to freedom struggle may now be enacted. Supra note 217

\(^{221}\) Ambedkar belong to the low caste mahar community and was a labour leader. He was known for his struggle against caste inequality than for women rights. But he very early realized the interconnection between the position of women and caste hierarchies, and how annihilation of caste system can give wings and rights to women too. He has been present in parts during the debates of the code bill and realized its potential. Supra note 217
bill on its provision to given daughter their due share and said “If we want to stop fragmentation we would have to something else, not by law of inheritance but by some other law.”

The code faced its first opposition when in April 1948 full one year after its introduction, the constituent Assembly recommended it to the select committee comprising of the current legislative member which were not part of the initial discussions or debate as the result of the congress boycott. The committee was presented with not the bill drafted by the Rau Committee but redrafted version by the BR Ambedkar. Though he said that he hasn’t made any significant changes in the draft, this raised criticism and led to heated debate between the members. The most evident change with regard to succession laws was that as Ambedkar insisted upon uniformity he was in favour of abolition of all customary practices, Including the Marmulukuttum, Aliyastan and Nambodiri matrilineal system which were in favour of women. Another significant change was abolition of Mitakshara coparcenary and converting it to an extent a Dayabhaga coparcenary where all joint family properties would be held as tenet-in-common. Though as Eleanor newbigin had pointed that though Ambedkar code moved several steps further than the Rau Committee to free women from the patriarchal notions of a Hindu joint family, in his zeal for uniformity and abolition of custom the bill moved away from the its original aim of gender equality. Two women member of the select committee Renuka Ray and Ammu Swamidhan openly criticized the abolition of the matrilineal system under which women enjoyed “greater rights than under the new code”

222 Ibid
223 In the earlier draft also the rule of survivorship was diluted in favour of giving women more concrete rights but Ambedkar wanted to put an end to the tenure of concept of joint family as a whole. In both draft though agricultural land was excluded. Supra note 217.
224 Supra note 95
225 Supra note 91 at128.
We see that the inter-war reform debates raised significant questions about the Hindu joint family and its inherent patriarchy and efforts in providing widow and daughters their legal right. But in the period following the partition and independence the Hindu family and discussions around grew more conservative. The Code was seen as threat to patriarchy and Hindu social Structures. The reasons attributed to it by historians as well as legal luminaries were the trauma of partition violence and the communal tension that followed by transfer of power of debate and the mass migration of Muslims to the new founded state of Pakistan.  

Another prominent reason was the influence of north Indian male legislators which was absent during the initial debates of Hindu code bill. Thus after independence debate was more focussed and influenced by the rigid and conservatives view of role of women in family in particular and their position in society in general. The attack on women of both the communities during the communal violence re-established women as vulnerable and in need of protection which was in contradiction to the arguments put up in the Hindu code bill of women being equal participants in the Hindu society. The violence following partition re-instated the male as protectors of women. It became a norm to undermine the honour of women in order to challenge the authority and ‘maleness’ of the community. Women form both communities were raped abducted and forcibly married and taken to the ‘other’ side. It became an issue of prestige more than the humanitarian ground to repatriate these women “with or without their consent”. It is interesting to note that debates on the Abducted persons bills ran simultaneously along with the discussions on the Hindu code bill. But the former bill was passed in


227 Ibid.

228 The community strength and respectability depended upon its ability to protect the honour or the izzat of their women against the aggressors. Urvashi butalia, The Other Side of Silence: Voices from Partition of India (Duke University Press, 2000).
the span of one year without opposition\textsuperscript{229} as compared to the latter which was even after a decade stuck under debates. All these developments and the socio-economic conditions created a very distinct context in which the post independence Hindu code bill debates were seen.

\textsuperscript{229} This was passed in December 1949 as abducted person restoration Act 1950. This bill re-inforced the highly patriarchal view of women as property of a male family unit while the state played the role of patriarch re-claiming the women that ‘belonged’ to it. Ritu Menon and kamla Bhasin, \textit{Borders and Boundaries: Women in India’s Partition}. (New Delhi , 1998)