CHAPTER – III

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Much like those of women of any other country, property rights of Indian women have evolved out a continuing struggle between the status quo and the progressive forces. And pretty much like the property rights of women elsewhere, property rights of Indian women too are unequal and unfair: while they have come a long way ahead in the last century, Indian women still continue to get fewer rights in property than the men, both in terms of quality and quantity.

What may be slightly different about the property rights of Indian women is that, along with many other personal rights, in the matter of property rights too, the Indian women are highly divided within themselves. Home to diverse religions, till date, India has failed to bring in a uniform civil code.

Therefore, every religious community continues to be governed by its respective personal laws in several matters – property rights are one of them. Infact even within the different religious groups, there are sub-groups and local customs and norms with their respective property rights. Thus Hindus, Sikhs, Buddhists and Jains are governed by one code of property rights codified only as recently as the year 1956, while Christians are governed by another code and the Muslims have not codified their property rights, neither the Shias nor the Sunnis. Also, the tribal women of various religions and states continue to be governed for their property rights by the customs and norms of their tribes. To complicate it further, under the Indian Constitution, both the central and the state governments are competent to enact laws on matters of succession and hence the states
can, and some have, enacted their own variations of property laws within each personal law.\textsuperscript{124}

There is, therefore, no single body of property rights of Indian women. The property rights of the Indian woman get determined depending on which religion and religious school she follows, if she is married or unmarried, which part of the country she comes from, if she is a tribal or non-tribal and so on. Ironically, what unifies them is the fact that cutting across all those divisions, the property rights of the Indian women are immune from Constitutional protection; the various property rights could be, as they indeed are in several ways, discriminatory and arbitrary, notwithstanding the Constitutional guarantee of equality and fairness. For by and large, with a few exceptions, the Indian courts have refused to test the personal laws on the touchstone of Constitution to strike down those that are clearly unconstitutional and have left it to the wisdom of legislature to choose the time to frame the uniform civil code as per the mandate of a Directive Principle in Article 44 of the Constitution. Following is an attempt to chart this interesting interplay of socio-legal forces leading to the property rights of Indian women as they stand today, and the challenges ahead.

- **Indian Constitution: Framework of Equality, formal and substantive, through affirmative action, positive discrimination\textsuperscript{125}:**

  Indian Constitution has a substantially elaborate framework to ensure equality amongst its citizens. It not only guarantees equality to all persons, under Article 14 as a fundamental right, but also expands on this in the subsequent Articles, to make room for affirmative action and positive discrimination.


Article 14 of the Constitution of India states that: “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.” In practice this guarantee has been read to infer ‘substantial’ equality as opposed to ‘formal’ equality, as judicially explained and elaborated upon in several judgments of the Supreme Court of India as well as the Indian High Courts. The latter dictates that only equals must be treated as equals and that unequal may not be treated as equals. This broad paradigm itself permits the creation of affirmative action by way of special laws creating rights and positive discrimination by way of reservations in favour of weaker classes of society.\textsuperscript{126}

This view is strengthened by Article 15 of the Constitution, which goes on to specifically lay down prohibition of discrimination on any arbitrary ground, including the ground of sex, as also the parameters of affirmative action and positive discrimination:

Article 15\textsuperscript{127}: Prohibition of discrimination on the grounds of religion, race, caste, sex, place of birth or any of them:

1. The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

2. No citizen shall on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to:

   a) access to shops, public restaurants, hotels and places of entertainment; or

   b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of state funds or dedicated to the use of general public.

\textsuperscript{126} Ibid
\textsuperscript{127} The Constitution of India, 1950.
(4) Nothing in this Article shall prevent the state from making any special provision for women and children.

(5) Nothing in this Article or in clause (2) of Article 29 shall prevent the state from making any special provision for advancement of any socially or educationally backward classes of citizens or for Scheduled Castes and Scheduled Tribes.”

As can be seen, firstly, women are one of the identified sections that are vulnerable to discrimination and hence expressly protected from any manifestation or form of discrimination. Secondly, going a step further, women are also entitled to special protection or special rights through legislations, if needed, towards making up for the historical and social disadvantage suffered by them on the ground of sex alone.128

The Indian courts have also taken an immensely expansive definition of fundamental right to life under Article 21 of the Constitution as an umbrella provision and have included within it right to everything which would make life meaningful and which prevent it from making it a mere existence, including the right to food, clean air, water, roads, health, and importantly the right to shelter/housing.129

Additionally, though they are not justiciable and hence cannot be invoked to demand any right there under, or to get them enforced in any court of law, the Directive Principles of State Policy in Chapter IV of the Indian Constitution lend support to the paradigm of equality, social justice and empowerment which runs through all the principles. Since one of the

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purposes of the directive principles is to guide the conscience of the state and they have been used to constructively interpret the scope and ambit of fundamental rights, they also hit any discrimination or unfairness towards women.

However, as mentioned above, notwithstanding the repeated and strong Constitutional guarantees of equality to women, the property rights of Indian women are far from gender-just even today, though many inequalities have been ironed out in courts. Below are some of the highlights of the property rights of Indian women, interspersed with some landmark judgments which have contributed to making them less gender unjust.\textsuperscript{130}

The Hindu Succession Act, 1956 marks a new era in the history of social legislation in India. A vigorous attempt has been made to bring some reforms of far reaching consequences in the system of inheritance and succession. The law in these areas needed complete overhauling as some of the legal provisions under the old textual law had become obsolete. For example, the non-inclusion of female relatives to inherit the property and giving preference to the males. The law in this respect needed some revolutionizing changes so as to recognize the long felt right of inheritance of Hindu females at par with males.\textsuperscript{131}

Proposals for reforming the Hindu Personal Law particularly, relating to property, have been before the country in one form or the other since the forties and the setting up of Rau's Committee to inquire into and suggest reforms in Hindu Law. The question of codifying the Hindu Law of succession was engaging the attention of the Government since 1941 when a Committee was formed which is known as Rau's Committee to report on the desirability of codifying Hindu Law and more particularly to examine the Hindu Women's Rights to Property Act, 1937, to remove the doubts as

\textsuperscript{130} Supra
\textsuperscript{131} R.K. Aggarwala, \textit{Hindi Law}, 22nd ed. 2007, p.243
to the construction of the Act and so to remove any injustice that might have been done to the daughter. The Committee while suggesting amendments in the existing law recommended that the best course would be to codify the entire Hindu Law in successive stages. The Rau Committee’s Hindu Code of 1947 was the result of that recommendation.

The draft Hindu Code prepared by the Rau’s Committee underwent substantial changes in the course of its examination by a Select Committee of Provisional Parliament in 1948. But the positive problem of modernization of Hindu Law on important issues could not be dealt with except by a straight legislation. The Hindu Code Bill introduced in the Provisional Parliament based on the recommendation of Rau’s Committee, was in part vigorous attempt to incorporate radical reforms.

In pursuance of its accepted policy to codify Hindu Law in gradual stages, the Legislature passed the Hindu Marriage Act in 1955 dealing with the law relating to marriage and divorce among Hindus and it thus facilitated the passage of the Hindu Code Bill. The second of such positive measures is the enactment of the Hindu Succession Act, 1956, which became law on 17th June, 1956, the day on which it received the assent of the President and got published in the Official Gazette on 18th June, 1956. The third installment of the Code dealing with Minority and Guardianship among Hindus has also become law on 5th August, 1956, and the fourth is the Hindu Adoptions and Maintenance Act, 1956, which became law on 21st December, 1956.132

The Rau Committee vested a Hindu woman with full rights over stridhan property and laid down certain rules of succession with respect to stridhan. The Select Committee on the Hindu Code incorporated the substance of all these provisions in a separate chapter headed “Women’s Property” and provided that after the commencement of the Code, whatever property was acquired by a woman becomes her absolute property and

132 Ibid
devolved on her own heirs. Clause 16 of the draft Bill followed the Select Committee’s draft and declared that whatever property is acquired by a Hindu woman after this law, it shall be her absolute property.

Women’s right to property has been substantially improved since the birth of Hindu Succession Act 1956. The concept of women being entitled to a limited estate when they acquire property by inheritance is abolished and women are entitled to an absolute estate like men when they inherit any property. The daughter of a predeceased son and the daughter of a predeceased daughter are raised to a higher rank. They became Class – I heirs and get a share along with the son, and other Class – I heirs. The daughters are included in the Class – I in order to remove the discrimination on the basis of sex. Similarly, succession to a women’s property or stridhanam of whatever nature is made uniform irrespective of the nature of stridhanam. In the same way the distinction between male and female heirs in the case of succession has been taken away and now they are treated on equal basis if they belong to the same degree of relationship.

Women will no longer be disinherited on the ground of unchastity. Under Section 14 of the Hindu Succession Act 1956, the limited interest of Hindu female is converted into absolute rights. If she gets property from her husband she can sell it and the purchaser gets absolute right in the property.\textsuperscript{133}

Formerly she was not given the power of alienation.\textsuperscript{134} The provision has been given retrospective effect. Consequently the limited estate becomes absolute. Another important change brought out is to the

\footnotesize{133} Prior to the Act, she could sell it only for the necessities of the family or to perform religious ceremonies for the benefit of her deceased husband.

\footnotesize{134} See Section 14 of the Hindu Succession Act 1956. Section 14 is wide in its ambit. The legislation has defined women’s property in the widest possible manner. The property includes both movable and immovable property acquired by a female by inheritance, partition, in lieu of maintenance, arrears of maintenance, gift from any person, a relative or not, before or after marriage or by her own skill, exertion, by purchase or by prescription or in any other manner whatsoever and also any such property held by her as stridhanam immediately before the commencement of the Act.
Upon the death of a coparcener the property devolves upon his mother, widow and daughter along with his son by testamentary or intestate succession and not by survivorship. This rule confers on the women an equal right along with the male members of the coparcenary.

It is to be noted that Section 6 still retains the Mitakshara coparcenary excluding women from survivorship as a result of which father and sons hold the joint family property to the total exclusion of the mother and daughter despite providing a uniform scheme of intestate Succession. This unique concept of coparcenary is the product of ancient Hindu jurisprudence which later on became the essential feature of Hindu law in general and Mitakshara School of Hindu law in particular.

The concept of coparcenary as understood in the general sense under English law has different meaning in India or Hindu legal system. In English law, coparcenary is the creation of act of parties or creation of law. In Hindu law, coparcenary cannot be created by acts of parties; however, it can be terminated by acts of parties. The coparcenary in Hindu law was limited only to male members who descended from the same male ancestors within three degrees. These coparceners have important rights as regards to property of the coparcenary but so long the coparcenary remains intact no member can claim any specific interest in any part of the property of the coparcenary because of the specific nature of coparcenary in the Mitakshara School of Hindu law.

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135 Section 6 of the 1956 Act provides: Devolution of interest in coparcenary when a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship up on the surviving members of the coparcenary and not in accordance with this Act: provided that if the deceased has left him surviving a female relative specified in class – I of the schedule or a male relative specified in that class who claims through such female relative the interest of the deceased in Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be under this Act and not by survivorship.

However, under Hindu law, the coparcenary in the Mitakshara and the Dayabhaga Schools of Hindu law have different meanings with the result that this difference in the concepts of coparcenary of the Mitakshara and the Dayabhaga Schools of Hindu Law resulted in the difference of definition of partition and the duty of the son to pay the debt of his father. Therefore, the deviation in the original concept of coparcenary is the result of social and proprietary influence. Hence, when females are made entitled to become coparceners it does not militate against the nature and concept of coparcenary because it is the social and proprietary aspect which prominently make it necessary that females should be included in the concept of coparcenary. However, the term Apatya (child) is a coparcener because according to Nirukta, Apatya means child which includes both son and daughter. Therefore, when a female is made a coparcener, it is only the recognition of the meaning of child in its true sense without making any distinction between a son and a daughter.¹³⁷

Now, a question which may arise in the case of a daughter is how the coparcenary interest will be determined at the time of her marriage. In fact, it would pose no problem because the male members of a coparcenary can determine the coparcenary interest any time at their will so why should there be any difficulty in the case of daughters. In fact, the main emphasis is on granting the proprietary rights to female children equal to the proprietary rights of male children. Therefore, the marriage of a daughter may or may not have any impact on the proprietary interest rather it will depend upon the will of the female herself. The division of property of a coparcenary will depend on the nature of the property whether the property which is in the hands of the coparceners is ancestral property or it is the self-acquired property of the coparceners. This problem has already been in existence both in the Mitakshara and the Dayabhaga Schools of Hindu law and the solution of the problem of division or partition of coparcenary

¹³⁷ Supra
property may follow either the pattern followed in Hindu law or statutory provisions may be made in this behalf.

Thus, the Hindu Succession Act, 1956 is passed to meet the needs of a progressive society. It removes inequalities between men and women with respect to rights in property and it evolves a list of heirs entitled to succeed on intestacy based on natural love and affection rather than on efficacy. The present Act has been passed to codify and amend the Hindu Law regarding succession.\textsuperscript{138}

3.1 Scope, Application and Scheme of Hindu Succession Act, 1956:

In India, inheritance laws are applied according to religion. The Hindu Succession Act governs inheritance laws of Hindus that is of Hindus, Buddhists, Sikhs and Jains.\textsuperscript{139} It lays down succession rules of Hindu males and females dying intestate. The Act, passed in, was primarily created to unify inheritance laws that governed Hindus.\textsuperscript{140} In addition, it aimed to reduce gender inequalities in inheritance and thus, allowed females to have full ownership and testamentary rights over all property. However, it failed in addressing several inequalities in succession law of daughters in relation to sons.

The property of a male dying intestate under the Hindu Succession Act, is divided into separate and joint family property, (Agarwal, 1994). Separate property refers to all property that was self-acquired throughout the life-time of the individuals. Joint family property consists of ancestral

\textsuperscript{138} Sabzwari, Hindu Law (Ancient & Codified), 2nd Ed. 2007, p. 1078.
\textsuperscript{139} The act is not applicable in the state of Jammu and Kashmir and in the northeastern states of Arunachal Pradesh, Manipur, Meghalaya, Mizoram and Nagaland because these states are mainly ruled by customary laws (Agarwal, 1994). These states are not included in the analysis.
\textsuperscript{140} The Act of 1956 unified the systems of Mitakshara and Dayabhaga. The Dayabhaga system was mainly followed in the states of West Bengal and Assam while the Mitakshara system was followed in the remaining states. The main difference between these two systems was that for those who followed the Dayabhaga system, all property was considered as self-acquired property. However, the Act of 1956 unified these two system and the rules of the Mitakshara system were those who prevailed. For a deeper discussion of inheritance rights previous to 1956 refer to Agarwal (1994).
property i.e., property inherited from ancestral members of the family. This property, in particular in rural areas, would mostly consist of land and ancestral home which is often family-owned.

Under the Act of 1956, daughters of a male dying intestate had rights to an equal share in separate property along with their brothers but not over joint family property. This created gender inequalities between sons and daughters' rights. Daughters had a right over their share of separate property and to the share of the joint family property. Sons had the right to their share of separate property, their share of joint family property and an additional independent share on joint family property by virtue of birth. Sons would be given this additional share by being part of the Hindu male coparcener. The Hindu male coparcener consisted of male members of Class I, II and III heirs which were, by virtue of birth, entitled to an individual share in the joint family property. Consequently, sons would in addition to the amount of the daughters’ inheritance, inherit an individual share because they were part of the male coparcener. Mr. Roy suggests that this could imply that sons would inherit twice as much as daughters.

In addition to this source of discrimination, a father could declare his separate property as part of the joint family property and this would will out the daughter in this part of the property. Furthermore, a male coparcener could renounce his rights in the coparcener. This would not have any repercussions for his son, which would still have his independent share of the ancestral property. However, this would exclude daughters and Class I female heirs in this share of the property.141

The Hindu Succession Act, 1956 created these three forms of inequalities between sons and daughters which greatly affected inheritance rights of daughters and ultimately their economic conditions. Mr. Agarwal

emphasized on the implications of unequal inheritance laws and stated several reports of women who claimed that the lack of land ownership greatly affected their well-being. For retaining the land they would be tied to the man, even if he beats them.

The Hindu Succession Act applies –

(a) to any person, who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj;

(b) to any person who is a Buddhist, Jaina or Sikh by religion; and

(c) to any other person who is not a Muslim, Christian, Parsi or Jew by religion,

unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matter dealt with herein if this Act had not been passed.\(^{142}\)

The Act shall apply to the members of any Scheduled Tribe within the meaning of Clause (25) of Article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.\(^{143}\)

The scheme of the Act in the matter of succession to the property of a Hindu who dies intestate after the coming into force of the Act is as that section 6 to 13 lays down the set of general rules of succession to the property of a Hindu male including the rules relating to ascertainment of the shares and portions of various heirs which may be explained as the Statute of Distribution. It is part of this scheme that Sections 15 and 16 are enacted providing for separate general rules affecting succession to the property of a female intestate. Section 17 provides for modifications and changes in the general scheme of succession to the property of a male and


\(^{143}\) Section 2, The Hindu Succession Act, 1956.
female Hindu as governed by Marumakkattayam and Aliyasantana Laws. Sections 18 to 28 of the Act are given the title “General Provisions relating to Succession” and lay down rules which are supplementary to the provisions in Sections 5 to 17.\textsuperscript{144}

Thus, in the present scheme of the Act the two separate systems of inheritance to the property of a Hindu male prevailed under the Mitakshara and Dayabhaga Law have been abolished and a uniform system comes into operation as propounded in Section 8. The three recognized classes of heirs of sapindas, samanodaks and bandhus cease to exist after the coming into force of the Act. Now the heirs are divided into four classes under the Act, viz,

(i) heirs in class 1 of the schedule,

(ii) heirs in class II of the schedule,

(iii) agnates, and

(iv) cognates.

The Hindu women’s limited estate is abolished and any property possessed by a female Hindu howsoever acquired is now held by her as her absolute property and she has full power to deal with it or dispose off it by will as she likes. The restraints and limitations on her power cease to exist even in respect of existing property possessed by a female Hindu at the date of the Act coming into force whether acquired by her before or after the commencement of the Act. It is now held by her as full owner and not as a limited owner (Section 14).\textsuperscript{145}

The disability of women in inheriting the father’s property was undone under Section 6 of the 1956 Act.\textsuperscript{146} Similarly section 15 is the first


\textsuperscript{145} Ibid

statutory enactment that deals with succession of Hindu female’s property when she dies intestate before the Act the property of women dying intestate was governed by customary Hindu law. She had only limited interest which would be terminated on her death. It is heartening to note that the Act provides two different laws based on the sex of the intestate. This double scheme is the traditional method intended to protect the family property.\(^{147}\)

The property of a female Hindu dying intestate shall devolve according to the rules set out under Section 16:

- (a) Firstly sons and daughters (including the children of any predeceased son or daughter)
- (b) upon the heirs of the husband
- (c) upon the mother and father
- (d) upon the heirs of the father and
- (e) lastly upon the heirs of the mother.

Any property inherited by a female Hindu from her father or mother shall devolve in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the heirs referred to in sub section (1) in the order specified there in, but upon the father. So also any property inherited by a female Hindu from her husband or from her father –in –law shall devolve in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub section 1 but upon the heirs of the husband. This separate scheme of succession reflects a strong patriarchal and orthodox outlook.\(^{148}\)

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\(^{147}\) Section 15 of HSA provides general rules of succession in the case of Hindu females.

Further Section 15 (2) provides that the property inherited from the father would revert to the heirs of the father when the Hindu female dies without issues. The section also provides that the property inherited from the mother would revert to the heirs of the father and not to the mother’s heirs. The Legislative intent of conservation of property becomes questionable here because if the object is to conserve the family property, the property inherited from the mother should revert to the mother’s heirs.\textsuperscript{149} A similar situation occurs in the Christian families where daughters are denied property rights on the ground that it would result into disintegration and fragmentation of family property. The Judiciary has also played a significant role to widen further the scope of Section 14 of the Hindu Succession Act 1956.

In \textit{Tulsamma v. Sesha Reddy},\textsuperscript{150} the Supreme Court observed that the shackles placed on the Hindu women over her property have been broken by this Act and her status has been brought on par with men. In the instant case the trial court decreed the suit on the ground that the appellant had a limited interest in the property allotted to her by the respondent, her deceased husband’s brother. The appellant was entitled to maintenance out of the joint family property when she leased out her property. The respondent filed a suit for a declaration that she had no absolute right over the property. Instead her right was only a limited interest. The contention of the appellant that she had become the full owner of the property by virtue of Section 14 of The Hindu Succession Act 1956 was upheld by the Supreme Court.

The Supreme Court through its judgment in fact went beyond legislative language. The Court said that Section 14 is wide in its scope and ambit. It says that any property possessed by a female Hindu whether acquired before or after the commencement of the Act shall be held by her

\textsuperscript{149} Ms. Indira Jaising, \textit{Mapping women’s gains in inheritance and property rights under the Hindu Succession Act,1956}, Lawyer’s Collective, p.14

\textsuperscript{150} \textit{Tulsamma v. Sesha Reddy} AIR 1977 SC 1944
as full owner. The words ‘any property’ are large enough to include her stridhanam obtained immediately before the commencement of the Act. The Hindu women’s right to maintenance is not an empty formality or an empty claim being concluded as a matter of grace and generosity, but it is a right against property which flows from the spiritual relationship between husband and wife and is recognized and enjoined by the customary Hindu law and had been strongly stressed by Hindu jurists starting from Manu to Yajnavalkya.\textsuperscript{151}

In the instant case the Court further added that apart from right to maintenance a Hindu woman is also entitled to right in the family property. A widow is also entitled to maintenance out of the deceased husband’s estate which is in the hands of male issue or other coparceners. The principle enunciated by the Supreme Court in \textit{Tulsamma case}\textsuperscript{152} had been applied in \textit{Pratap Singh v. Union of India}.\textsuperscript{153} The petitioner challenged even the validity of Section 14 (1) of the 1956 Act on the ground that it is unconstitutional and violates Articles 14 and 15 (1) of the Constitution since it favored one section of the community namely the Hindu women. Relying on Article 15 (3), the court rejected the contentions. Article 15 (3) enjoins the State to make special provisions for women and children. It overrides Article 15 (1) which prohibits discrimination on the ground of sex, race, caste, religion etc. The Court added that Section 14 is a special provision enacted for the benefit of Hindu women. These two cases show that the Supreme Court has utilized every opportunity to uphold the true spirit and intention of the legislators.

Again in \textit{Komalamma v. Kumara Pillai and others}\textsuperscript{154} the Supreme Court stated that maintenance includes a provision for residence also. The purpose of giving maintenance is that the lady can live in a manner in

\textsuperscript{151} AIR 1977 SC 1944  
\textsuperscript{152} Tulsamma v. Sesha Reddy AIR 1977 SC 1944  
\textsuperscript{153} Pratap Singh v. Union of India (1985) 4 SCC 197  
\textsuperscript{154} Komalamma v. Kumara Pillai and others MANU/SC/8262/2008
which she was accustomed hither to. The Court was of the opinion that the concept of maintenance is therefore must contain provision for food and clothing and the like. It also includes provision for a roof over her head which is also a basic need. Provision for maintenance can be made by giving a lump sum amount or property. The Court went on to add further rights like giving her additional amount for necessary expenditure over and above maintenance.¹⁵⁵

However, the exclusion of women from a coparcenary goes against the constitutional mandate of gender equality and it is left untouched by the 1956 Act. The Hindu women were denied the coparcenary status which was given only to the male members of the Hindu Joint Family. For that reason alone women could not become Karta.¹⁵⁶ Moreover the 1956 Act still perpetuate the centuries old gender bias because:

i. there is a general preference to agnates,

ii. restricts female heir to demand partition of the dwelling house

iii. retention of Mitakshara coparcenary under Section 6 of 1956 Act.¹⁵⁷

Even the Hindu law committee had recommended for the abolition of Mitakshara coparcenary and its concept of survivorship.

### 3.2 Fundamental Features of the Act:

Thus, the rules of intestacy and testamentary succession prevailing under the existing system of Hindu Law (i.e in Mitakshara and its schools generally it is consanguity and in Dayabhaga the guiding principle of religious efficacy) have been considerably altered. In the Act an entirely new line has been substituted, based on love and affection. The other important features of the Act are as follows:

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a. Daughter is also included as a simultaneous heir along with son, widow, etc.

b. The share of daughter in the property of the father is made equal to that of a son.

c. Married and unmarried daughters are placed on the same footing and both are the heirs to the father’s property equally along with the other heirs.

d. Under Section 6 of the Act provision is made to provide a share to the daughter in Mitakshara coparcenary property of a Hindu male also.

e. Certain relations, such as brothers and sisters, etc are grouped together for the purpose of simultaneous succession.

f. Elimination of all widows of gotras from heirs specified in Class II of the Schedule except the father’s widow and brother’s widow.

g. Providing the right of pre-emption.\textsuperscript{158}

Though Hindu Succession Act brought radical reforms in the property rights of woman, the most important of which was to introduce equal rights of succession between male and female heirs in the same category like brother and sister, son and daughter, simplification of law by abolishing the different systems prevailing under the Mitakshara and Dayabhaga schools and abolition of life estate for female heirs. But still there are certain inherent loopholes under the Hindu Succession Act which still discriminate the females. To overcome these discriminations four states introduced amendments in Hindu Succession Act, 1956 and these amendments were implemented by those states also.

The objectives for the amendment of the Act in these states are to provide equal rights and share to the daughters in the coparcenary property

also. The exclusion of daughters from participating in coparcenary property ownership merely on the basis of sex is unfair. It is long felt social need to improve their economic condition and social status by giving them equal rights by birth. For this purpose, a radical reform of the Mitakshara law of coparcenary is needed to provide equal distribution of property not only with respect to the separate or self-acquired property of the deceased male but also in respect of his undivided interest in the coparcenary property.

The idea of making woman a coparcener was suggested as early as in 1945 in the written statements submitted to the Hindu Law Committee by number of individuals and groups. This idea was again given in 1956 also, when the Hindu Succession Bill was being finally debated. Prior to its enactment an amendment was also moved to make a daughter and her children members of the Hindu coparcenary in the same way as a son or his children. But this progressive idea was finally rejected and the concept of Mitakshara coparcenary was retained. Since then the concept of the Mitakshara coparcenary property retained under Section 6 of the Hindu Succession Act has not been amended.

In this type of setup, it is a matter of great satisfaction that five states in India namely, Andhara Pradesh, Kerala, Karnataka, Maharashtra and Tamil Nadu, have taken note of this fact that a woman needs to be treated equally both in the economic and the social spheres. Thus, these states introduced an amendment in the Hindu Succession Act, 1956 in their own respective states. As per the law of four of these states (excluding Kerala), in a joint Hindu family governed by Mitakshara law, the daughter of coparcener shall by birth become a coparcener in her own right in the same manner like the son. Kerala, however, had gone one step further and abolished the right to claim any interest in any property of an ancestor during his or her lifetime founded on the mere fact that he or she was born in the family159.

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Thus, Kerala has abolished the joint Hindu family system altogether including the Mitakshara, Marumakkattayam, Aliyasantana and Nambudri systems. The approach of the Tamil Nadu, Maharashta, Andhara Pradesh and Karnataka, State legislatures is remarkably different from that of Kerala. These four states instead of abolishing the right by birth in the joint family strengthened it, at the same time these States broadly remove the gender discrimination existed in the Mitakshara Coparcenary by making daughters also the coparceners and giving them same rights which is given to other coparceners. The broad features of the legislations in these States are more or less understood in the same language in each of these Acts.160

The amending Acts of Andhra Pradesh, Tamil Nadu and Maharashatra add three Sections namely, 29 A, 29 B and 29 C but Karnataka numbers them as Sections 6 A, 6 B and 6 C of the Act. Now these State enactments provide equal rights to a daughter in the coparcenary property. The position of daughter in these four states is as under:

a) The daughter of a coparcener in a joint Hindu Family governed by Mitakshara law shall become a coparcener by birth in her own right in the same manner as the son and have similar rights in the coparcenary property and be subject to similar liabilities and disabilities.

b) On partition of a joint Hindu family’s coparcenary property, she will be allotted a share equal to that of a son. The share of the predeceased son or a predeceased daughter on such partition would be allotted to the surviving children of such predeceased son or predeceased daughter, if alive at the time of the partition.

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

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

Thus, these four states Amending Acts have considerably changed the concept of the Mitakshara Joint family and coparcenary by enhancing the position of a daughter similar to that of a coparcener. Once a daughter becomes a coparcener she naturally continues to be a member of her natal joint family and after marriage, she will also be member of her marital joint family\textsuperscript{161}.

However, these four states Hindu Succession (Amendment) Acts have been criticized as they have given rise to various difficulties in their working and application. Along with this in various states these Amendment Acts fails to achieve the desired objectives like it was noticed that in the State of Tamil Nadu, when this Amendment was made, many properties were partitioned between the coparceners before the Tamil Nadu (Hindu Succession Amendment) Act, 1989 came into force. These partitions were made with the sole objective i.e. with a view to defeat the daughter’s right to become a coparcener. These partitions were by and large fraudulent partitions which were pre-dated only because that no coparcenary property was made available to the daughter. Thus these types of malpractices have to be checked thoroughly in order to achieve the intended results, otherwise the very objective of the Act, which was to remove discrimination inbuilt in the Mitakshara coparcenary against daughters, stands defeated.

In order to stop these fraudulent partitions, (though the Tamil Nadu Act received the President's assent on 15.1.1990, and was published in the official gazette only on 18.1.1990), the Act provides that partitions effected contrary to the Act after 25.3.89 will be deemed to be void. Another infirmity of these state enactments is that these states enactments discriminates married and unmarried daughters. These states law exclude

\textsuperscript{161} \textit{Supra}
the right of a daughter who was married prior to the commencement of the Act, from the coparcenary property, though the right is available to a daughter who is married after the coming into force of the said Amendment Acts.

As a result, in the same category, i.e., ‘of married daughters’ discrimination is there. Because the daughter who were married prior to the commencement of the Amendment Act, gets no rights at all in the joint property her paternal family, where as if the marriage of the daughter has taken place subsequent to the enactment, she continues to have her interest in the joint property of her paternal family. Such discrimination appears to be unfair and illegal. But still the positive feature of these state Amendment Acts is that it took the notice of the discrimination existed under the Mitakshara coparcenary and took the initiatives to remove it. These four states i.e. Andhara Pradesh, Tamil Nadu, Karnataka and Maharashtra have conferred equal coparcenary rights on sons and daughters, thus preserving the right by birth and extending it to daughters also in the Mitakshara Coparcenary.162

Kerala Model: The Kerala model is different from the model adopted by the above mentioned four states. The state of Kerala by accepting the recommendations of Hindu Law Committee headed by B.N. Rau (the committee which was given the responsibility of framing the Hindu Code Bill) has abolished the concept of coparcenary. The Kerala Model helped in the unification of Hindu law which will be achieved only by abolishing the concept of coparcenary and P.V. Kane supporting the recommendation of the Rau Committee also stated in this context that the unification of Hindu Law will be helped by the abolition of the right by birth which is the cornerstone of Mitakshara School and which the draft Hindu Code seeks to abolish.163

The Kerala joint Family System (Abolition) Act, 1975 (hereinafter known as the Kerala Act) in Section 4 (1) of the Act lays down that all the members of a Mitakshara Coparcenary will hold the property as tenants in common on the day the Act comes into force as if a partition had taken place and each holding his or her share separately. The notable feature of the Kerala law is that it has abolished the traditional Mitakshara coparcenary and the right by birth. But in Kerala, the Marumakkattayam, Aliyasanta and Nambudri systems were also present, some of which were matrilineal joint families and these joint families were also abolished in Kerala along with the concept of Mitakshara coparcenary and right by birth. The Kerala Model in all probabilities resulted in the preservation of more unity in the family. This model adopted in Kerala appears to be more fair and impartial because as in Kerala both matrilineal and patrilineal joint families existed. So to bring unity in Kerala among all the types of joint families Kerala abolished the joint family system. If the joint family was abolished today in the other states then a deemed partition would take place and women not being coparceners would get nothing more, whereas if they are made coparceners, then they became equal sharers in the partition of the property.\textsuperscript{164}

3.3 \textbf{Changes Brought about by the Hindu Succession Act, 1956}\textsuperscript{165}:

1) There were two schools in old Hindu Law namely i) Mitakshara and Dayabhaga governing the Hindu succession. However, the Hindu Succession Act, 1956 brings all the schools into a uniform system.

2) In old-law there was a distinction between male and female heirs, but the Hindu Succession Act, 1956 makes no distinction between male and female heirs.


3) Under the old law the rule of preference is based on right to offer pinda or propinquity of blood, but the order of succession provided by the Act is based on the concept of love and affection.

4) Under the old law simultaneous succession of different types of heirs was not recognized. Now class 1 heirs take simultaneously under the Hindu Succession Act.

5) While female heirs (except in Bombay) took only a life estate, under the Hindu Succession Act, all female heirs take an absolute estate.

6) The old law gave the benefit of the doctrine of representation only to the sons, grandsons and great grandsons of predeceased sons. But the Hindu Succession Act, 1956 extends the benefit of this doctrine also to the children of predeceased daughters and also to daughters of predeceased sons and daughters of a pre-deceased son of a predeceased son as also to the widow of a pre-deceased son and the widow of a predeceased son of a predeceased son.

7) Under old law, there were no rights to certain female heirs to succeed to the interest of a Mitakshara coparcener, but the Hindu Succession Act, 1956 has given the rights to a certain female heirs to succeed to the interest of a Mitakshara coparcener.

8) Under old law, there was stridhana and women's Estate (Limited Estate), but the Hindu Succession Act abolished stridhan and women's estate.

9) Under old law, succession to stridhana depended upon the nature of the stridhana and the nature of the marriage (whether approved or unapproved) and the particular school of law to which the parties belonged. The Hindu Succession Act devised a simplified system.