

RIGHT TO PROPERTY IN INDIAN LAW: UNDERSTANDING GENDER INEQUITY IN HINDU SUCCESSION ACT, 1956

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The concept of equality and justice has gained much prominence in the constitutional history of India. In order to enable the creation of an egalitarian state various legislation were enshrined in the fundamental rights of the Indian constitution. However, Fundamental rights in Indian constitution are an aspect that is often subjected to contentious debate. In the constitutional history, right to property occupies a disputed space for multiple reasons. Right to property in general and in the context of women particularly that of Hindu women is conventional. Forty fourth amendment of the Indian constitution removed Right to Property further converting it into a legal right thereby upholding the concept of socialist nature of state. However, as a legal right, the gender aspect remained absent in Right to property. Personal laws pertaining to marriage, right to inheritance, divorce have been articulated within the religious framework. Hence every religion has its own personal law in accordance to their religious customary laws.

In the legal framework laws pertaining to female inheritance have occupied a significant space both during pre-independence as well as post-independence. The Hindu Wills Act 1870, Hindu Transfer of Bequests Acts 1914-1921, Hindu Disposition of Property Act, 1916, Hindu Law of Inheritance (Amendment) Act 1929, Hindu Women's Right to Property Act 1937 concentrated on various aspects of inheritance with least mention on Hindu daughters right over ancestral property.³ In 1941, Hindu Law Committee report was set up under the chairmanship of B.N. Rau with an objective to analyse the Hindu civil code pertaining to the status of women. However, the committee proposed uniform civil code allowing reforms with reference to women rights but within the framework of ancient Hindu traditions further allowing the setting up of the second Hindu law committee in 1944.⁴ The proposal to amend the Hindu legal code was the first ever attempt in independent India by the constituent

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³ K. B. Agrawal, *Family Law in India*, The Netherland: Kluwer Law International, 2010, pp.42-43.

⁴ Nandini Chavan and Qutub Jehan Kidwai, *Personal Law Reforms and Gender Empowerment: A Debate on Uniform Civil Code*, Social Justice Series, Volume II, Personal Law Reforms and Gender Empowerment, Gurgoan: Hope India Publications, 2006, pp. 84-86.

assembly that seized the necessity of addressing equal rights to women. Proposed in 1947 by Ambedkar, the Hindu code bill addressed numerous aspects that would enhance the socio-economic stature of Hindu women in India. Ambedkar viewed that beyond the constitutional framework India was in much need of a social revival consequently Hindu Code Bill was a statement that addressed the very purpose.⁵ The Hindu Code Bill was intended to provide a civil code in place of the body of Hindu personal law.⁶ The Bill aimed to amend and codify certain aspects of the Hindu Law that placed severe restrictions on socio-economic rights to women.⁷ Since the initial dialogue, Right to property to Hindu women witnessed serious repercussion from various political quarters in the constituent assembly. Nevertheless, the placing of the Bill before the constituent Assembly raised issues of utmost importance like gender equality, succession to property, marriage, divorce and so on. Despite being one of the longest discussed bills in the constituent assembly the Hindu Code Bill remained unapproved. The absence of equivalent rights to property for Hindu women was against the philosophy of the Indian constitution and the right to equality that prohibits discrimination on the basis of gender.⁸ Subsequently, the Hindu Code bill was enacted on separate line that included: Hindu Marriage Act 1955, Hindu Succession Act 1956, Hindu Minority and Guardianship Act 1956 and the Hindu Adoption and Maintenance act, 1956.⁹ Eventually, in the course of time laws pertaining to gender equality has consistently surfaced in the parliament. Limitations pertaining to the Hindu succession Act were time and again raised in various cases. Subsequently various states recognised the necessity of the legal rights women are entitled to. States like Tamil Nadu, Kerala, and Karnataka introduced new legislations like The Hindu Succession (Tamil Nadu Amendment) Act, 1989, The Hindu Succession (Karnataka Amendment) Act, 1994, The Joint Hindu Family System (Abolition) Act, 1975. The changes in these Acts remained nominal for instance the in states like Karnataka and Tamil Nadu the legislation stated that 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

⁵ Christophe Jaffrelot, *Dr Ambedkar and Untouchability: Analysing and Fighting Caste*, London: C.Hurst & Co Publishers, 2005, p.117.

⁶ Christophe Jaffrelot, "Nehru And The Hindu Code Bill", *Outlook*, 8th august 2003, Available at www.outlookindia.com/website/story/nehru-and-the-hindu-code-bill/221000 (Last Accessed on 11 August 2016)

⁷ Vasant Moon, *DR. BABASAHEB AMBEDKAR WRITINGS AND SPEECHES*, Vol. 14, PART ONE, (Sections I to III), Dr. Ambedkar Foundation Ministry of Social Justice & Empowerment, Govt. of India, 2013, p.3-5.

⁸ Article 15, Part III, Indian Constitution.

⁹ K. B. Agrawal, *Family Law in India*, The Netherland: Kluwer Law International, 2010, p.43.

before the commencement of the Act.¹⁰ Thus these legislations failed to evolve to the expected stature.

Nevertheless the 2005, Amendment to the Hindu Succession Act 1956, transformed the foundation of the legislation. With regard to gender equity within the framework of right to property the Hindu Succession (Amendment) Act, 2005 made significant changes to the existing law. The new addition to the act made the daughter by birth become a coparcener in her own right in the same manner as the son.¹¹ Further a daughter is entitled to similar liabilities in respect of the said coparcenary property as that of a son.¹² In addition, the act made an explicit mention of daughter's right to hold the property with that of the male heir. Thereby section (6) Devolution of interest in coparcenary property, of the Hindu Succession Act allowed Hindu daughters the right to inherit ancestral property at par with the sons. The amendment omitted section 23 that deprived a female heir to ask for partition in respect of a dwelling house wholly occupied by a joint family until the male heirs choose to divide their respective shares therein.¹³ The amendment to the Hindu Succession Act endowed the socio-economic status to Hindu women that was denied for centuries. The alteration in the act can be viewed as a progressive step by the parliament that defied the age old patriarchal system.

However, the amendment to the Hindu succession act witnessed discrepancies in terms of period within which a female heir is entitled to the property. The amendment to the act stated that any reference to a Hindu Mitakshara¹⁴ coparcener shall be deemed to include a reference to a daughter of a coparcener: Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.¹⁵ Partition of the property prior to 20th December 2004 drew serious limitation in terms of daughters' rights over the property. In addition Judgment dated 1st November 2015 by the apex court, a bench

¹⁰ Law Commission of India, Property Rights of Women: Proposed Reforms under the Hindu Law", LAW COMMISSION OF INDIA 174TH REPORT, 2013, <http://www.lawcommissionofindia.nic.in/kerala.htm>

¹¹ The Hindu Succession (Amendment) Act 2005, Available at www.hrln.org/admin/issue/subpdf/HSA_Amendment_2005.pdf (Last Accessed on 12 August 2016)

¹² Ibid.

¹³ THE HINDU SUCCESSION (AMENDMENT) ACT, 2005, 5th September, 2005, Available at www.hrln.org/admin/issue/subpdf/HSA_Amendment_2005.pdf (Last Accessed on 10 August 2016,) See also, Hindu Succession Act, 1956

¹⁴ Mithakshara is a Hindu school of thought that majorly deals with the right to succession and inheritance.

¹⁵ The Hindu Succession (Amendment) Act, 2005, Available at www.hrln.org/admin/issue/subpdf/HSA_Amendment_2005.pdf (Last Accessed 10 August 2016)

of Justices Anil R Dave and Adarsh K Goel is on and from the commencement of the Act.¹⁶ Overruling the judgement of the high court in the case of **Prakash & Ors v. Phulavati & Ors** the bench stated “The text of the amendment itself clearly provides that the right conferred on a ‘daughter of a coparcener’ is ‘on and from the commencement’ of the amendment Act. In view of plain language of the statute, there is no scope for a different interpretation than the one suggested by the text,”¹⁷ Accordingly retrospective aspect in the case of death of the father or division of the property is discounted. Law pertains only from the commencement of the Amendment act. Similarly various high courts judgements held that the 2005 amendment to Hindu Succession Act is prospective in nature and not retrospective.¹⁸ Time period of the demise of father or the division of property determines the right to inheritance of Hindu daughters. These judgements and constraint within the legislation limits the scope of equality for women.

In the light of the above amendments, it is necessary to re-examine the amendments incorporated to the Hindu Succession Act. On the one hand it attempts to establish equity in terms of gender disparity whereas on the other it limits the space to create the same. Factors like the time period of partition of family property and survivorship of the father has barred large section of women from right to inheritance. These amendments to the Hindu Succession Act are against the very spirit and philosophy of Indian constitution. The Inclusion of such aspects derails the journey of equality within the constitutional framework. It is essential to examine and analyse the patterns in which the laws pertaining to gender equity are changed time and again. The regulations in the Act to right to inheritance to female have conveyed the existence of a conventional perspective within the judiciary. Even today large population of women reside in the rural parts of India, wherein immovable property particularly land remains as the only source of income for majority of the population. Hence the recent amendments will have serious repercussion on women thus depriving them the basic socio-economic rights they are entitled to. At this moment it is of utmost importance that judiciary outlaws restrictive laws thereby creating space for socio-economic empowerment of women. In India, several civil codes are governed by religious aspects; however it is the role of the judiciary to observe that traditional customs don't supersede the modern conception of

¹⁶ Utkarsh Anand, Supreme Court sets 2005 cut-off on women right to ancestral property, November 2, 2015, Available at <http://indianexpress.com/article/india/india-news-india/supreme-court-sets-2005-cut-off-on-women-right-to-ancestral-property/>. (Last accessed on 25/08/2016)

¹⁷ *Ibid.*

¹⁸ Vaishali S. Ganorkar v. Satish Keshavrao Ganorkar and Others, BOM.CR, 2012 (5), p.210.

equality that allows equal space to women. Simultaneously the legality of the amendments needs to be reviewed in the background of gender equality. While Indian constitution allows for proportional representation of women in politics, education and employment, complimentary laws that empowers the socio-economic condition of women need to be formulated.

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