

SELF-ACQUIRED BUT NOT SELF-CONTROLLED

*Tanya Saxena

**Ritik Tenguria

ABSTRACT

The repeated and strong Constitutional guarantees of equality to women sound hollow as the property rights of Indian women are far from gender-just even today, though many inequalities have been pulled out in courts. This article aims to articulate a treatise on the discriminatory rule laid down by the legislature concerning the devolution of the self-acquired property of Hindu females. The criticism of this unjust law is cornered on the touchstone of fundamental rights and Directives of State Policies which have been enshrined in the Constitution without any prejudice. Part one of this article traces the rules laid down by the Hindu Marriage Act for devolution of the property for males and females, which is the genesis of the bias towards females with respect to the self-acquired property. Moving on, Part two discusses the constitutional framework which form the foundational basis for the equal rights and it is argued that the Fundamental Rights and Personal laws cannot be read in exclusion when they directly impinge upon the freedom guaranteed to women. Part three analyses the judicial response of our Courts interspersed with the International Treaties and laws on this matter which have contributed to making them less gender unjust. Simultaneously, the article lays emphasis on the power of judiciary to bring about monumental changes in the society through its judgment which go a long way in fostering women empowerment in a patriarchal society. Part four of the article ends on a promising note after throwing light upon the various amendments brought in by the legislature in the Hindu Marriage Act which solidify its role in the society as pro-active in strengthening the women's right to property and bringing out provisions which empower the women financially. The author leans towards the belief that this article is merely an aid to the legislature in the path of justice and thus, also provides some suggestions which the legislature may consider to make the Hindu Marriage Act more gender neutral and an epitome of equality.

KEYWORDS: Right to equality, self-acquired property, Indian women, Hindu Succession Act, 2005, Inheritance, Property Right.

1) The Present Position of Property Rights of Indian Women:

The Hindu Succession Act, 1956 (*hereinafter* “HSA”), was the first law to provide a comprehensive system of inheritance among Hindus and Jains, Sikhs and Buddhists and address gender inequalities in the area of inheritance. It applies only in the case of intestate succession. While it is important to reflect on the ceilings that have been shattered by the courageous women, it is equally important to acknowledge the inequalities that still exist. The form may differ but there’s no denying the fact that women in the 21st century are still tormenting¹⁴⁰⁰ and the narrative needs to change. In this part, we will study the difference in the way law works for both the men and the women but that will be strictly in relation to the self-acquired property where the law forms distinction.

1.1) System of devolution for the women and men under HSA

a) Women: Section 14¹⁴⁰¹ of the Hindu Succession Act 1956 reads as follows:

“Property of a female Hindu to be her absolute property”.

On a contrary, the general rules of succession as laid down in section 15¹⁴⁰² of the Act read as follows:

The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16¹⁴⁰³, —

(a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband;

(b) secondly, upon the heirs of the husband;

(c) thirdly, upon the mother and father;

(i) What does the word ‘property’ mean here?

The word ‘property’ includes both movable and immovable property acquired by a female Hindu by inheritance or at a partition, or in lieu of maintenance or by gift from any person, or

* National Law Institute University, Bhopal

** National Law Institute University, Bhopal

¹⁴⁰⁰GENDER JUSTICE AND WOMEN’S RIGHTS, <https://www.oxfam.org/en/what-we-do/issues/gender-justice-and-womens-rights>.

¹⁴⁰¹Section 14 Hindu Succession Act 1956, <https://indiankanoon.org/doc/685111/>.

¹⁴⁰²Section 15 Hindu Succession Act 1956, <https://indiankanoon.org/doc/685111/>.

¹⁴⁰³Section 16 Hindu Succession Act 1956, <https://indiankanoon.org/doc/685111/>.

by her own skill or exertion, or in any other manner whatsoever.¹⁴⁰⁴ Therefore, we are not wrong in assuming that this section also includes the self-acquired property of the female. Self-acquired property has a wide ambit and covers any property which the deceased has not only earned from her salary or earning but also any property she might have received in a form of gift or by a virtue of a will.

(ii) How is the term 'female' being interpreted?

The term female includes not just the wife and the mother but also the 'daughter'. This has to be given a wider interpretation in consonance with the wishes and desires of the framers of the Constitution.¹⁴⁰⁵ If that is so, the expression "female Hindu" which occurs in Section 14(1) would take in "daughter" also, consequently we hold that the limited interest of the daughter would get enlarged to full right¹⁴⁰⁶ under the act and so even after her death, her right on the self-acquired property remains to decide what it to be done with them.

b) Men: Section 8¹⁴⁰⁷ of the Hindu Succession Act 1956 reads as follows:

General rules of succession in the case of males. —The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter—

(a) firstly, upon the heirs, being the relatives specified in class I of the Schedule;

(b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule;

Here, I schedule¹⁴⁰⁸ includes son, daughter, widow, mother etc. and II schedule includes father etc.

When we compare the devolution of the property of both the sexes, we realise that how the property first goes to the husband and children in case of a female while for the male, it is the children, widow and the mother. How the mother has been included for a male but not for a female. The arrangement of both the sexes vary right after the first category where 2nd category in females is the husband while for the wife, it is the heirs of the husband. The order of succession provided by the Act is based on the concept of love and affection¹⁴⁰⁹ but if the

¹⁴⁰⁴ *Supra*.

¹⁴⁰⁵ Gupte,; Hindu Law, II Ed. 2010, Vol. II, P. 1388, Para i

¹⁴⁰⁶ Hindu Women's Right To Property: Position After Passing Hindu Succession Act, 1956, https://shodhganga.inflibnet.ac.in/bitstream/10603/129459/11/11_chapter%204.pdf.

¹⁴⁰⁷ Section 8 Hindu Succession Act 1956, <https://indiankanon.org/doc/685111/>.

¹⁴⁰⁸ Heirs In Class I And Class II, <http://egazette.nic.in/writereaddata/1956/e-2173-1956-0038-99150.pdf>

¹⁴⁰⁹ *Supra*.

pattern is such then why is the spectrum to judge a son's love for his parents and a daughter's love for his parents is placed do differently? It is argued that once a female marries into a family, she ceases to belong to her own family and though this may not be taken as a traditional rule any longer, for the purpose of succession the concept must prevail. It is argued that therefore, the heirs of the husband must come first. Consequently, with the succession growing more remote also, the same family ties continue. But to maintain a uniformity in the succession, people cannot be allowed to justify this discrimination saying that it is not solely on the basis of gender but on the basis of maintenance of family ties. To defund this argument, we may refer to the observation made by the Court in *Sonubhai Yeshwant Jadhav v. Bala Govinda Yadav*¹⁴¹⁰ where the court noted that while the property of the female inherited from her husband or father is legislated to remain within the respective family, the property of a male Hindu is not legislated to remain in the family where it originated. The heirs of the Hindu male under Class II of the Schedule to the HSA include his daughter, sister's son and sister's daughters. However, the rules of succession for males and females from the same family, who would presumably have the same kind of incentives to maintain those family ties are completely different.¹⁴¹¹

Attention should also be paid to the usage of the word 'husband' in section 14 while usage of the word 'widow' in schedule I of the act. How unknowingly patriarchy swims into our daily life and we hardly pay attention to it but it's time that our legislations become sensitive to gender-neutral terms. Despite the fact that there are paired words – widow and widower – the way they are used varies greatly. The unequal usage of the two words is evident in countless written work referring to a deceased man's spouse as his widow or the widow of X. In contrast, widower is not regularly used in the same way.¹⁴¹²

1.2-The crucial question is why are the females being treated differently from the males of the Hindu community governed by the same personal law for this purpose?

The property rights of the Hindu women are dissected on the basis of several factors. Property rights of Hindu women also vary depending on the status of the woman in the

¹⁴¹⁰*Sonubhai Yeshwant Jadhav v. Bala Govinda Yadav* [AIR 1983 Bom 156]

¹⁴¹¹Devendra Damle, Siddharth Srivastava, Tushar Anand, Viraj Joshi and Vishal Trehan, Gender discrimination in devolution of property under Hindu Succession Act, 1956.

¹⁴¹²Women and men are still unequal – even when they are dead, <https://www.theguardian.com/media/mind-your-language/2012/apr/16/women-men-widow-widower>

family and her marital status. It also depends on the kind of property one is looking at: whether the property is hereditary/ ancestral or self-acquired, land or dwelling house or matrimonial property.¹⁴¹³ The patriarchy has given birth to these rules of succession and patriarchal notions stem from this act even in the 21st century which leads to a lot of social problems for the females when there is already no dearth of problems for them. The narrower view that a wife's share which has been earned with the same level of labour and dedication goes to the husband's heirs while the husband's property does not go to the wife's heirs leads to unintended consequences, and will also adversely affect the status of these women.

There are two scenarios which are very common in Indian societies. We cannot study law in isolation but will have to look at the social structure:

- (I) The bride's parents in India treat marriage as a total estrangement of the daughter's relations from her maternal house. Once she has been married away, her life and whatever she derives out of that life is supposed to belong to the husband's family.
- (II) Another common scenario is when the husband pre-deceases the wife then the widow is asked to move out of the matrimonial home and sent back to her own home but when it is a question of her self-acquired property then the in-laws are eager to lay their hands on the property.¹⁴¹⁴ Under section 25¹⁴¹⁵ of the HSA, a murderer is barred from inheriting any property from the individual they have murdered. This is surmised on the belief that no dead person would want their murderer to benefit from their death. But the provisional mandate under section 15(2) goes against the very own section of the act and defies the principle of good conscience and equity.

In such a case, the working woman has to suffer a lot because she has not been dependent on anybody and has established her own realm. If we want to raise such women then we ought to provide them with the suitable environment. Supporters of this provision say that the woman has all the freedom to write a will and bequeath her self-acquired property and yes, that indeed is true but why is the procedure not same for the men? Death is unpredictable and so it is a possibility that the will couldn't take shape? Why is it that even after they die, the women

¹⁴¹³Shruti Pandey, Property Rights of Indian Women.

¹⁴¹⁴*Omprakash and others v. Radhacharan & others*, (2009) 15 SCC 66.

¹⁴¹⁵Section 25 Hindu Succession Act 1956, <https://indiankanoon.org/doc/685111/>.

have to subjugate their choices and not exercise their individual freedom? Nobody works throughout their life just to give their property to a person who never cared for them. The deceased husband's family which had subjected the female Hindu to indignity and failed to take care of her has been privileged to enjoy the fruits of her hard labour instead of old mother who was with her daughter till the end.¹⁴¹⁶

Today we see that the courts are developing a recital that daughters even though married, are obliged to take care of their old parents and are as responsible as the son. Bombay High Court while pronouncing a judgment based on maintenance rejected the pre-conceived notion that a married daughter has obligations only toward her husband's family and not her own parents.¹⁴¹⁷ Such judgments are the harbingers of a progressive society but they come with caution. If we have empowered the women with the right to be a coparcener with the amendment of 2005¹⁴¹⁸ then we have forgotten to protect our women because the act does give financial autonomy to the women over the land but after her death, the property goes to the husband's family and that is beyond our cognition. How can the legislature justify such an approach where two human beings are treated differently just because they differ by their gender?

Such laws that are supposed to empower women have also had an antagonistic impact, according to a 2018 study.¹⁴¹⁹ The report¹⁴²⁰ states that awarding inheritance rights to women between 1970 and 1990 led to increased female foeticide and higher female infant mortality rates, a finding supported by the Economic Survey 2017-18. This is because some people consider girls to be a liability since the inherited property falls into the hands of her in-laws. Let's try to understand this with some illustrations:

- (i) Parents toil to raise their daughter with a hope that in future they will reap the results. They marry her off but they hold on to her because of the parental instincts. With the education provided to her, she is able to work and earn some

¹⁴¹⁶J. Starli, M.L, Critical Analysis of Disparity in Property Rights of Women in India.

¹⁴¹⁷*Vasant vs. Govindrao Upasrao Naik*, Criminal Revision Application No. 172/2014

¹⁴¹⁸The Hindu Succession (Amendment) Act, 2005.

¹⁴¹⁹Dr. Supriya Jha, Property Right of a Daughter; Can it Help a Woman to Reinstate her Identity, [https://www.krishisanskriti.org/vol_image/29Nov201911114129%20%20%20%20Supriya%20Jha%20%20%20%20%202083-85.pdf](https://www.krishisanskriti.org/vol_image/29Nov201911114129%20%20%20Supriya%20Jha%20%20%20%202083-85.pdf)

¹⁴²⁰This was a survey conducted by King's College London, New York University and the University of Essex.

money. Sometime later in life, she passes away. It has been observed in the Indian society that once the daughter is no more, the groom's family severs the connection. The parents have no resources to fall back on because they get nothing out of the self-acquired property of her daughter. Whatever she builds out of it, lands up in the hands of the in-laws or far off cousins of the husband. This ingrains into the minds of the many Indians that in the old age, it is the boys who will support them while girls are a burden. You spend so much so much of your time and money on them but then they are married to another household. You also pay for the dowry but you get nothing in return. How is this fair to the parents of the girl?

- (ii) At this juncture, we can refer to a case decided by the Bombay High Court where the Petitioner is one of the sisters. In her petition she has shown her brother and three sisters along with her as the only heirs of the deceased sister. Though the deceased was a married Hindu female but she wasn't survived by any of the three as mentioned in Section 15(1) (a) of the HSA and neither of her parents were alive. So, section 15(1)(c) also does not come into play. Her brother and sisters are the heirs of her father as well as her mother under Section 15(1)(d) & (e). She has shown them as heirs. Under Section 15(1) as it now stands legislated, the heirs of the husband would have precedence over the heirs of the father and the mother of the deceased married female Hindu under section 15(1) (b).¹⁴²¹
- In a case decided by the Supreme Court of India [*hereinafter* SC], the deceased wife during her life time did not visit her in-laws' place. She had not been lent any support from her husband's family and all support had come from her parents. The Court here gave a very narrow interpretation to the provision because it is not permissible by the law. It said that it is a well settled principle of law that sentiment or sympathy alone would not be a guiding factor in determining the rights of the parties which are otherwise clear and unambiguous. But the issue at hand is absolutely clear on the discrimination being perpetuated and it would be a travesty of justice if this issue is muzzled as something trivial. All of these judgments hesitate to pick-fault in the existing provision and we don't hesitate to say that personal laws indeed are a menace

¹⁴²¹ *Mamta Dinesh Vakil and Ors. vs. Bansi S. Wadhwa and Ors. (06.11.2012 - BOMHC): MANU/MH/1869/2012*

when it comes to the right to equality. A law which discriminates the daughter only on the ground of her sex cannot stand the test of equality of the males and females and it is no longer justified on the ground of "family ties".¹⁴²² HSA, in particular, has given us a lot of provisions which are bent towards patriarchy:

- The property that a daughter acquires from her mother, they go to the father's heirs on her death and not the mother's?
- The fact that agnates are preferred over cognates is another loophole in the act.
- Even in cases where the women/men's family stands to inherit their property, the father's heirs have a higher priority over their mother's heirs. Either we make the law same for both the genders or remove the bias from section 15 of the Act.

Despite the clear Constitutional mandate to eschew discrimination on grounds of sex in article 15(1) of the Constitution, there is a distinct gender bias in its implementation against women. This prevents her from holding property as the sole owner and precludes her from the legal management of her own property after death. The choice should be left on the female as to what she desires to do with her self-earned property. She can choose to dispose it off in a charity work, to her parents or enter into a contract with any 3rd party and in no case, should the law take this choice into its own hands and entitle the husband's heirs to be the legal owner of this property. If a widower dies in a similar fashion, his property will go only to his parents and family, but not to his wife's parents. Such a legal regime is nothing less than creating 'double standards' within the legislations.

2) **Indian Constitutional framework: Disentitlement of women's property rights is a violation of Constitutional propriety**

2.1- **The reluctance and un-welcoming nature of the Indian Society:**

There has been a long-held notion in our society that women are mere agents with multiple identities and that they are not prominent but it's the roles they perform that makes them a crucial part of a family. This is not a scenario of the past but it still subsists and many women's property rights have not seen the light of the day. According to the parochial members, females don't need to have properties to their name because at the end of the day, they are 'dependants' and somebody will protect them or support them. Women shy away

¹⁴²² *Supra.*

from asking for their rightful share in the family property and happily give away their hard-earned properties to a person who is remotely connected to them. Family members also are reluctant in conferring the title of 'Karta' to a woman because they can't envision a woman managing the family affairs or telling the male counterparts about the future course of action for the family business.

2.2- How does property safeguard the socio-political rights of a woman?

Human beings have always had a hankering to hold land or any property that is valued and gives them some stable position in the society. No wonder that people have died to seize or defend territory¹⁴²³ but it becomes all the more pressing issue for women; in many cases it can even be said that the question of land itself is a prism through which organic patterns of gender inequality can be revealed. Throughout the world, it is the women who overwhelmingly work on the land, producing food for themselves, their families and communities but have to fight it out when it comes to claiming any right over the same land. This relationship is vital for women in general, but becomes all the more significant when women head the household due to men's migration, divorce, abandonment or death of a spouse or male relative. Thus, the livelihoods and welfare of women is irretrievably linked to their secure rights to land as it makes them less vulnerable to eviction at the hands of State authorities, family or developers. Further, we can see that women's secure rights to land are a precondition for their ability to enjoy many of the other rights as enshrined in The Convention on the Elimination of all Forms of Discrimination Against Women [*hereinafter* CEDAW] and other international human rights treaties.¹⁴²⁴

Secure rights to land for women are an important step to achieving gender equality as:

- It leads to women's increased decision-making power, greater self-determination and fiscal independence.
- Prevent the spread of HIV by promoting women's economic empowerment, thereby reducing their vulnerability to some forms of gender-based violence and exploitation, unsafe sex, and other AIDS-related risk factors.¹⁴²⁵

¹⁴²³Dominic D.P. Johnson and Monica Duffy Toft, *Grounds For War: The Evolution of Territorial Conflict*.

¹⁴²⁴Using CEDAW to secure women's land and property rights, http://static1.squarespace.com/static/5a6e0958f6576ebde0e78c18/5ab294e72483d636f1909c81/5ab295012483d636f190a025/1521652993943/Global_Initiative_Using_CEDAW_web8.pdf?format=original.

¹⁴²⁵Strickland, R. (2004), *To Have and To Hold: Women's Property and Inheritance Rights in the Context of HIV/AIDS in Sub-Saharan Africa*. International Center for Research on Women (ICRW) Working Paper. See

- Such women are less likely to report experiencing physical and psychological violence within the context of their intimate partner relationships.¹⁴²⁶

2.3- How is Section 16 of the Hindu Marriage Act violating the constitutional and fundamental rights of women?

Article 14 of the Constitution of India reads as under:

“The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”

The said Article has two aspects – while it commands the State not to deny to any person ‘equality before law’, it also commands the State not to deny the ‘equal protection of the laws’.¹⁴²⁷ Former is a negative concept while the latter is positive in character. Relying on this very positive attribute of the concept, the legislature enacts laws which allow for positive discrimination to help the groups who are vulnerable to any sort of bias and this is what is termed as affirmative action.¹⁴²⁸

RIGHT TO EQUALITY:

i) Article 14 makes promise to each individual of this country to treat equals equally and to treat the unequals unequally but the rules mentioned under Section 16 of the Act tell a different story. We already saw what constitutes a ‘property’ of a Hindu female and keeping that in mind if we have a look at Article 16 and Article 8 then it leads us to the conclusion that when a male dies intestate then his self-acquired property in the absence of any children and wife goes to his own parents while a Hindu female placed in the same position, loses her self-acquired property to the husband’s heirs in absence of her children/husband.

How does the law tend to create a reasonable nexus with the objective of Article 14 when it treats two similarly placed individuals on a different pedestal? How does this classification

also: Panda, P., (2002). Rights Based Strategies in the Prevention of Domestic Violence. ICRW Working Paper No. 344

¹⁴²⁶Gupta, J. Property Ownership of Women as Protection for Domestic Violence: The Best Bengal Experience, in ICRW (2006), Property Ownership and Inheritance Rights of Women for Social Protection – The South Asia Experience, at 45.

¹⁴²⁷EVOLUTION OF PART III, <https://iitr.ac.in/internalcomplaintscommittee/annexure.pdf>

¹⁴²⁸Govt. of A.P. v. P.B. Vijayakumar, (1995) 4 SCC 520.

satisfy the intelligible differentia?¹⁴²⁹ The legislature should ask this question every time when it asserts that personal laws are gender-neutral.

ARTICLE 15

Under Article 15 of the Constitution of India the State cannot discriminate between citizens solely on the basis of religion, race, caste, sex, or place of birth. This implies that the state cannot make laws which treat people differently on the basis of the aforementioned grounds. Despite this explicit prohibition under Article 15(1), provisions of the act discriminate between men and women solely on the basis of gender. While there are conflicting judgments on whether the different treatment of men and women constitutes discrimination violative of Article 15, the law as it stands today has led to more unfortunate ramifications than good ones.

RIGHT TO CHOOSE:

In the recent judgment in *Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors.*¹⁴³⁰, SC has very categorically stated that-

“to choose how to convey thoughts and ideas or interact with others, these are crucial aspects of personhood. The freedoms Under Article 19 can be fulfilled where the individual is entitled to decide upon his or her preferences. Read in conjunction with Article 21, liberty enables the individual to have a choice of preferences on various facets of life including what and how one will eat, the way one will dress, the faith one will espouse and a myriad other matters on which autonomy and self-determination require a choice to be made within the privacy of the mind.”

This unequivocally leads us to the conclusion that Right to choose is very much a part of our Right to life under Article 21.¹⁴³¹ 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.¹⁴³² We cannot take away a person's

¹⁴²⁹ *Ajay Hasia v. Khalid Mujib Sehravardi*, (1981) 1 SCC 722.

¹⁴³⁰ MANU/SC/1044/2017

¹⁴³¹ Alok Prasanna Kumar, Right to Choose as a Fundamental Right, <https://www.epw.in/journal/2016/43/postscript/%E2%80%98right-choose%E2%80%99-fundamental-right.html>

¹⁴³² For instance in *Shantistar Builders v. Narayan Khimalal Tortame*: (1990) 1 SCC 520), *P.G. Gupta v. State of Gujarat* ((1995) Supp 2 SCC 182), *Chameli Singh v. State of U.P.*: (1996) 2 SCC 549, *Nawab Khan's case*

right to choose and then savour our right to life under the constitution. Applying this analogy to our present case, it would be safe to say that it is a woman's choice as to how her self-acquired properties are to be treated after her death and this squarely fall under her right to life which is intrinsic to the exercise of liberty.

RIGHT TO PRIVACY

Privacy is the ultimate expression of the sanctity of the individual. It is a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination. The wordings of section 16 of HSA very conveniently invade in the private affairs of the woman and take away the power to self-determination. Men get to decide that how will the property come to them, how it stays and how it's disposed off while women just get to establish the property without any further managerial rights. Personal laws are internal matters and must be according to the religion's ethos but they must evolve with the changing social fabric of our society. Hence, a statutory provision belonging to the hoary past which demeans or degrades the status of a woman obviously falls foul of modern constitutional doctrine and must be struck down on this ground also.¹⁴³³

3) JUDICIAL RESPONSE

3.1: The ongoing tussle between Fundamental Rights and Personal Laws

Under the Constitutional scheme any law enacted by the Parliament or State legislature which goes against the spirit of fundamental rights can be struck down by not just the SC but by any of the High Courts in India. The validity of these laws is contingent upon them meeting the criteria prescribed under Articles 13 and 372 of the Constitution. Article 13 very clearly lays down that any law which has been in force before the constitution and even laws made after the drafting of the constitution, will be void to the extent that they go against the part III which deals with the Fundamental Rights. This is not a very complex thing to understand that

(Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan & Ors.: (1997) 11 SCC 121)), right to education (Bandhua Mukti Morcha v. Union of India (1984 3 SCC 161), Mohini Jain v. State of Karnataka (1992) 3 SCC 666) and Unnikrishnan J.P. & Ors. v. State of Andhra Pradesh & Ors. Union of India (1993) 1 SCC 645), right to health (C.E.S.C. Ltd. v. Subhash Chandra Bose (1992) 1 SCC 441, Consumer Education & Research Centre & Ors. v. Union of India & Ors.: (1995) 3 SCC 42), right to food (People's Union for Civil Liberties v. Union of India & Ors.: Writ Petition No. 196 of 2001), right to clean water (Attakoya Thangal Vs. Union of India [1990(1) KLT 580].

¹⁴³³ *Joseph Shine vs. Union of India (UOI) (27.09.2018 - SC) : MANU/SC/1074/2018*

fundamental rights are essential and therefore, any law going against Art 14, 15 or 16 should be declared null and void.

A) Cases where SC has held that personal laws have to pass the test of fundamental rights:

Though in many decisions the personal laws under challenge may not have been struck down, but the fact that the decisions were considered on merits go to show that the discriminatory aspects of personal laws can definitely be challenged as being violative of the fundamental rights of women under Articles 14 and 15 and can be struck down.¹⁴³⁴ The SC has in a number of cases held that personal laws of parties are not susceptible to fundamental rights under the Constitution and therefore they cannot be challenged on the ground that they are in violation of fundamental rights especially those guaranteed under Articles 14, 15 and 21 of the Constitution of India¹⁴³⁵.

In-fact in one case the SC has held that that personal laws, to the extent that they are in violation of the fundamental rights, are void.¹⁴³⁶ It is very important to note that any custom or usage irrespective of even any proof of their existence in pre constitutional days cannot be countenanced as a source of law to claim any rights when it is found to violate human rights, dignity, social equality and the specific mandate of the Constitution and law made by Parliament. No usage which is found to be pernicious and considered to be in derogation of the law of the land or opposed to public policy or social decency can be accepted or upheld by courts in the country.¹⁴³⁷

B) Cases where SC has denied to interfere in questions of law arising out of the dispute between personal laws and fundamental rights:

The travails of the women right activist have been long and arduous one and it still continues. From the reproachable judgment of SC in *Sant Ram v. Labh Singh*¹⁴³⁸ then in *State of Bombay v Narasu Appa Mali* to the Sabrimala Judgement shows a massive change in outlook of our judiciary and the efforts to emancipate women from historic oppression. The decision

¹⁴³⁴ *Anil Kumar Mhasi Vs. Union of India* (1994 5 SCC 704), *Madhu Kishwar Vs. State of Bihar* (1996 5 SCC 125), *Githa Hariharan Vs. Reserve Bank of India* (1999 2 SCC 228), *Daniel Latifi Vs. Union of India* (2001 7 SCC 740), *N. Adithyan Vs. Travancore Devaswom Board & Ors.* (2002 8 SCC 106), *John Vallamattom Vs. Union of India* (2003 6 SCC 611).

¹⁴³⁵ *Krishna Singh Vs. Mathura Ahir* (AIR 1980 SC 707), *Maharshi Avdhesh Vs. Union of India* (1994 Supp (1) SCC 713), *Ahmedabad Women Action Group & Ors. Vs. Union of India* (1997 3 SCC 573), *Pannalal Pitti Vs. State of A.P.* (1996 2 SCC 498).

¹⁴³⁶ *Masilamani Mudaliar Vs. Idol of Sri Swaminathaswami Thirukoil* (1996 8 SCC 525)

¹⁴³⁷ *N. Adithyan v. Travancore Devaswom Board & Ors.* (2002 8 SCC 106).

¹⁴³⁸ *Sant Singh v Labh Singh* AIR1965SC314

in Narasu was enveloped with patriarchal values where customs could take supremacy over the constitution and go scott free. On the other hand, Sabrimala originates from the personal laws of the Hindus but because they infringe upon the rights of women without any rationale, the SC ruled in favour of the women.

The Hindu Succession Act was drafted and brought into action in 1956. The times have changed tremendously and today, the unpaid for domestic work done by the stay at home parents is also valued then why is the self-acquired property out of a woman's control? Does the Parliament intend to transgress the Constitutional limits and ignore the fundamental rights guaranteed by the Constitution which essentially prohibits discrimination on the grounds of sex? The ultimate goal¹⁴³⁹ of our constitution is to achieve uniform civil code as has been ascribed by the Directive Principles of State Policy [*hereinafter* DPSP] under Article 44. If there is a rule and substantive connection between the provision of the law and a DPSP then the pith and substance to give effect to the DPSP would accord protection to the law but if there is no reasonable nexus to a provision of law then there is no proportionality and hence, such a law should be struck down.

So, what is the stance of the SC in such conflicts?

This still remains a grey area and the SC needs to settle down its position on whether personal laws can override the fundamental rights? This ambiguity needs to get clear so that other more important issues where personal laws stand as a barrier in attainment of fundamental rights can seek justice.

3.2: Reviewing the role of the Judiciary and the Legislature

A) Analysing the judicial pronouncements in light of pro-women judgments

The Constitution guarantees equality and prohibits discrimination on the grounds of sex. In consonance with this objective, the judiciary has been evolving and repealing such provisions which go against the constitutional framework and aggravate inequality. We will take a look at these changes which came from the cumulative work of the legislature as well as the judiciary.

¹⁴³⁹Uniform Civil Code: Give It A Serious Thought, <https://www.deccanherald.com/opinion/main-article/uniform-civil-code-give-it-a-serious-thought-762623.html>

- These are in respect of Section 6¹⁴⁴⁰ which came to be amended, which dealt with the devolution of coparcenary interest of a Hindu male.
- Section 24¹⁴⁴¹ which prevented remarried widows from inheriting also caused gender discrimination since widowers remarrying were not disinherited. Section 23¹⁴⁴² which dealt with a dwelling house which came to be repealed and Section 24 which came to be deleted by the Amendment Act 39 of 2005 with effect from 9th September 2005.
- For the devolution of interest in coparcenary property, the female coparceners who were recognised in 1956, were elevated to an equal status as the male co-parceners since 2005.

Every society has its own pace and each religion has been given the freedom to transform when its followers are ready to mould. Today, the social status of Muslim women is very different from what it was earlier. Therefore, the triple talaq judgment was hailed. If it had come out in the 1990s then maybe the reaction would have been different. Today when women are walking head to head with their counterparts, when we see the SC declaring women as being worthy and capable of permanent commission in the army, we see the Sabrimala judgment where the SC has principally intruded into the personal laws and have upheld the rights of menstruating women. Amongst the countrymen, an understanding of judicial activism has to be proliferated. That anything and everything under the garb of legislative power is not always right. It is the responsibility of the citizens to bring the discriminatory roots of legislations in notice of the government. Time and again SC has intervened in the personal matters of the people and it has kept the integrity and dignity of the judiciary intact. The government of Tamil Nadu abolished an age-old custom by an ordinance of 2006 that abolished the hereditary appointment of priests, and instituted a qualification-based selection process instead.¹⁴⁴³ Although, the case is *Lis Pendens*, this was tough to digest for the orthodox people but change is the law of nature and as long as we respect this law, all other laws will just be right. Therefore, the Hindu Succession Act is seen to merit still further change as it has yet fallen short of full gender equality. The court needs to ask if the rules as laid down under Section 16, even if they are essential to religion, could they subvert equality.

¹⁴⁴⁰ Section 6 Hindu Succession Act 1956, <https://indiankanoon.org/doc/685111/>.

¹⁴⁴¹ Section 24 Hindu Succession Act 1956, <https://indiankanoon.org/doc/685111/>.

¹⁴⁴² Section 23 Hindu Succession Act 1956, <https://indiankanoon.org/doc/685111/>.

¹⁴⁴³ Sacred Rights, <https://caravanmagazine.in/perspectives/sacred-rights>.

In *Mamta Dinesh Vakil v. Bansi S. Wadhwa*,¹⁴⁴⁴ the Bombay High Court goes on to note that, in contrast to the HSA, the rules of intestate succession set out in the Indian Succession Act [hereinafter ISA] are gender neutral. The scheme of devolution was similar to what we currently have in sections 8 & 15 of the act but they were amended way back in 1991 which leads us to the conclusion that while ISA was enacted in 1925, it has made greater strides towards gender equality than the HSA did.

The Bombay HC in the same judgment declares the discrimination to be against Article 15 of the Constitution of India. We also have the Report of the Hindu Law Committee which acknowledges that women have a lower socio-economic status as compared to men, and that the customary Hindu Laws perpetuate this discrimination. Even in cases, where a justification is provided, the fact that the law discriminates against women is not contested. In another case¹⁴⁴⁵, the High Court of Madras has conceded that Section 15 of the HSA is unfair to women and that it was drafted without anticipating the possibility that women could acquire their own property. It even recommends that the Law Commission look into the matter and draft amendments to make the HSA more gender-equitable but it does not rule on the validity of the provision so as not to transgress the principle of separation of powers.

Another heartening trend is that the Indian courts are increasingly relying on international standards, derived from various international declarations and conventions.¹⁴⁴⁶ Specifically CEDAW has been referred to and relied upon by the SC of India in some judgments.¹⁴⁴⁷ Article 21 of the CEDAW also states the same that the right of women, regardless of the gender, to share such property on equal terms with men should be carefully observed.¹⁴⁴⁸ These line of judgments give a firm basis for the women of India to demand gender justice and equal rights on par with the International standards.

While we appreciate the forward-looking approach of the judiciary, we must tread cautiously as one bad judgment can be the forerunner of many bad judgments. To illustrate this, we rely

¹⁴⁴⁴ *Supra* note 22.

¹⁴⁴⁵ *Saroja Chandrashekhar and Ors vs The Union of India and Ors* (MANU/TN/1905/2015).

¹⁴⁴⁶ For instance: *Jolly George Verghese & Anr. v. State Bank of India*: AIR 1980 SC 470, *Gramophone company of India Ltd. v. Birendra Bahadur Pandey & Ors.*: AIR 1984 SC 667, *People's Union for Civil Liberties v. Union of India & Anr.*: (1997) 3 SCC 433.

¹⁴⁴⁷ *Vishaka & Ors. v. State of Rajasthan & Ors.*: AIR 1997 SC 3011, *Gita Hariharan v. Reserve Bank of India*: AIR 1999 SC 1149, *C. Masilamani Mudaliar & Ors. v. The Idol of Sri Swaminathaswami*: 1996 8 SCC 525.

¹⁴⁴⁸ Using CEDAW to Secure Women's Land and Property Rights, http://static1.squarespace.com/static/5a6e0958f6576ebde0e78c18/5ab294e72483d636f1909c81/5ab295012483d636f190a025/1521652993943/Global_Initiative_Using_CEDAW_web8.pdf?format=original

on a case pronounced by the SC¹⁴⁴⁹ and the binding precedent set by this case which has further been relied upon by Courts to devalue the autonomy of women. This can be seen in the 2018 decisions of the *Madras High Court in Pushpa v. N. Venkatesh [(2018) 3 LW 249]*, *Saroja Chandrashekar and Ors vs The Union of India* and *Guwahati High Court in Anima Das v. Samaresh Majumdar [AIR 2018 Gau 114]*.

B) What is the Role of The Legislature?

Traditional customary law was appropriate to the traditional society within which it developed, a society which was based on a subsistence economy where there was an elaborate system of reciprocal obligations between members of the family which sought to ensure that the needs of every member for food, shelter and clothing were satisfied¹⁴⁵⁰ but as we industrialise and develop, the social order has metamorphosed and the society is now highly individualistic, competitive and acquisitive.¹⁴⁵¹ Legal reform has to go hand in hand with social and economic changes in other spheres of private and public life to ensure real equal opportunity for all citizens. But such changes will not come on their own, deliberate steps have to be taken as a starting point. Homosexuality even today is not an accepted part of Indian society but legislature hastened and brought out the change. The society must follow the law and not the other way round. The remedy seems to lie only in legislative intervention. The legislature needs to evaluate the impact of an old legislation on today's socio-economic fabric. In those days, women hardly used to do any work on their own or earn anything. Therefore, no need was felt to promulgate or amend a law which valued the self-acquired property of females. Therefore, the codification has to keep pace with the current constitutional mandate of gender equality.

If we look at the law of Tanzania¹⁴⁵² then there too the self-acquired properties of a women were merged with that of the husband's after her death.¹⁴⁵³ Rule 20 in their family laws was found to be discriminatory and as people grew more aware, there were occasional

¹⁴⁴⁹ *Supra*.

¹⁴⁵⁰ Connors, *The Legal Position of Women*, in: *Women in Sub-Saharan Africa*, The Minority Rights Group, Report No 77, p. 12.

¹⁴⁵¹ Ndulo, *Widows Under Zambian Customary Law and the Response of the Courts* (unpublished), 1984, p. 22, quoted in Connors, *ibid.*, p. 13.

¹⁴⁵² Rose Mtengeti-Migiro, *Legal Developments on Women's Rights to Inherit Land under Customary Law in Tanzania*.

¹⁴⁵³ *An Equal Right to Inherit? Women's Land Rights, Customary Law and Constitutional Reform in Tanzania*, <https://core.ac.uk/download/pdf/144580217.pdf>.

observations¹⁴⁵⁴ by the judges that the rules were discriminatory but it was ultimately, the legislative intervention which removed the women's disability as it went against their Bill of Rights.

Government and Party policies as well as constitutional declarations appear to have little impact on the creative role of the courts.¹⁴⁵⁵ In particular, the constitutional rights have provided women with a firmer ground on which laws that perpetuate inequality may be dismantled but the legislature has to be a force to reckon with. We should therefore hasten to add that:

*While law is not the sole factor in the determination of women's status, the elimination of discriminatory laws and introduction of affirmative laws are essential first steps in the achievement of equality for women.*¹⁴⁵⁶

4) CONCLUSION AND SUGGESTIONS

While great strides have been made towards equality but a lot needs to be done. This article seeks to spread awareness and raise our voice even for the smallest of the wrongs committed to any person irrespective of the gender. The Government in its National Empowerment Policy for Women (2001)¹⁴⁵⁷, has committed to encourage changes in personal laws such as those related to marriage, divorce, maintenance and guardianship so as to eliminate discrimination against women. Similar policy should be formulated and appropriate changes to the archaic provisions should be made. Years of work has shown that just the constitutional mandate of equal legal status for men and women does nothing if the judiciary does not translate these de-jure principles into de-facto situations. A combined reading of Articles 14, 15 and 21 of the Constitution of India categorically provides that no law can be made or can be applied which discriminates against women. There are a large number of provisions of both codified and uncodified personal laws which are discriminatory towards women. Most of them are not sanctified by any religion. Even if they are, they would still not be allowed to circumvent the fundamental right of religion guaranteed under Part III. Thus, looked at from any angle those activities that are inherently associated with the civil status of individuals

¹⁴⁵⁴*Peter Byabato v Pastory Rugaimu- kamu HC (PC) C. App. No. 252/1986, Gabriel Vallery v Birungi Balilemwa HC (PC) C. App. No. 49/1988*

¹⁴⁵⁵(1968) H.C.D. 127.

¹⁴⁵⁶Connors, *supra* note 42.

¹⁴⁵⁷<https://wcd.nic.in/sites/default/files/National%20Policy%20for%20Empowerment%20of%20Women%2001.pdf>.

cannot be granted constitutional immunity merely because they are soiled in religious roots.¹⁴⁵⁸

The right way forward would be to include both the natal and husband's family when a female's self-acquired property is to be dealt with because we cannot totally ignore the ground realities where in many cases, the female is delightfully supported by her in-laws and hence, she wishes to return the favour not due to any obligation but out of sheer love and also wishes to do the same with her biological parents. In such a scenario, we cannot bring in a radical change in the legislation because patriarchal system is what is governing the Indian marriages¹⁴⁵⁹ and any drastic measure can result into a tumultuous situation. Socio-economic changes warrant corresponding changes in the law but let the society decide when the time has come and the degree of the change required. Society works best when there's a synergy between the legislature, judiciary and the time element involved in bringing out the changes.



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WORDS SPEAK

¹⁴⁵⁸Justice Chandrachud held while pronouncing the Sabrimala Judgement.

¹⁴⁵⁹Amreen Gill, Marital Inequality- "Traditional and The Subjugation of Woman, <https://feminisminindia.com/2017/01/10/marital-inequality-traditions-subjugating-women/>.