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Personal Law and Property Rights of Hindu Woman in India - The Need for Codification

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Abstract

In India, the familial relations of any citizen, including inheritance, are governed by law related to his or her religion, which came to be known as personal law. The property rights of Hindu woman from the vedic age reflected that daughter was given a share equal to that of a son, who in the later age of smritis (traditional law), came to inherit only in the absence of male issue. The nature of property of a Hindu woman, stridhanam (woman's property) thus came to be distorted from absolute property right to 'limited estate' known as 'woman's estate'. That is, the property passed only to the next heirs of the last male owner of the female intestate. The legislations in the pre-independent India strengthened the position of Hindu woman. But the later laws limited her interest in property to the sense that she could alienate it for certain purposes only and the property possessed by her devolved on the heirs of her husband and not on her own heirs. The retention of testamentary power has further undermined gender-equality largely. Even at present, the Hindu Succession (Amendment) Act, 2005, allows existing property disputes to continue and does not affect rights that became vested prior to its implementation. Therefore, the codification of personal law on succession becomes the need of the hour, since the patriarchal norms retained in the law have to be dropped.

Introduction

In India, the rights of women in society are inextricably linked with familial relations. The familial relations of a citizen, involving marriage, divorce, guardianship, minority, succession, inheritance etc. are being governed by law related to his or her religion. It applies to persons solely on the ground of professing the one or the other religion, which are discriminatory in respect of right to equality and on grounds of religion, race, caste, sex, place of birth or any of them.

The original concept of Hindu religion was based on *dharma*, righteousness, by which the entire aspects of both individual and social life were, ought to be maintained. It pervaded through all stages of life. The personal laws assimilated the religious principles and doctrines in the different ages as contained in the *srutis* (vedas), *smritis* (traditional law), digests and commentaries, till they took the form of statutes.

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Evolution of the Property Rights of Hindu Women

In the *vedic* age, women had equal status to that of men. During that period, women were held in high esteem. They took part in *yajnas* and offered funeral oblations (*pindas*) to fore – fathers¹. Since property rights were derived out of ones participation in offering spiritual benefits, women were also considered as heirs to property. Thus they came to enjoy equal rights in the ancestral property proportionate to their share in offering *pindas* to their ancestors.

The position continued up to the period of *smritis*², but started deteriorating since then. The *smriti* literature, including the commentaries, digests and the earliest legislations, interpreted the *smritis*, to restrict the rights of women on landed immovable property. That was followed by the evolution of a peculiar limited interest known as ‘woman’s estate’ or ‘widow’s estate’. The concept of *stridhanam*, meaning ‘woman’s property’, thereafter, came to be confined to movable properties including cash, kind and ornaments.

The Concept of Woman’s Estate and the Hindu Law

The *concept of woman’s estate* was retained in the pre-independent legislations on property rights of Hindus. That disparity was clearly visible through the provisions in the laws governing the inheritance and succession to property of members in Hindu joint families. The discriminations created were so deep and systematic that it placed women at the receiving end³. The hard-core of the personal law derived from religious norms remained redundant and were never attempted to be addressed by the State while framing legislations⁴. It finally led to a shifting away from the liberal rhetoric of equal rights for women, even withdrawing the legal rights, which they already had. The part of the legislations that remained as archaic, come to restrict the absolute enjoyment of property rights by women⁵.

The Hindu women did not come to have full enjoyment of the property due to retention of limited estate, survivorship and coparcenaries⁶. *The Hindu Law of Inheritance (Amendment) Act, 1929*⁷, was the first enactment on property right of Hindus in

¹ *Rigveda* 1.31. 3 and 5.43.15.

² The *smritis* stand as the second source to, *vedas* or *srutis*, in the tradition. The important *smritis* include *Manusmriti*, *Yajnavalkyasmriti*, *Baudhayanasmriti*, and *Naradasmriti*. The *Yajnavalkyasmriti* attained dominance through the two authentic interpretations on it – *Mitakshara*, by Vijnanaeswara and *Dayabhaga* by Jimutavahana.

³ *The 174th Report of the Law Commission of India*, ‘Property Rights of Women: Proposed Reform in Hindu Law’, May 2000, p. 3. That suggested for equal rights for women in both separate and ancestral properties.

⁴ The principles of ‘*sapindas*’, meaning kinsmen connected by particle of the same body, pious obligation, and survivorship, retained in the legislation made it patriarchal.

⁵ See Archana Parashar, *Women and Family Law Reforms in India*, Sage Publications, New Delhi, 1992.

⁶ See M. Indira Devi, ‘Women’s Assertion of Legal Rights to ownership of property’ in Lotika Sarkar & B. Sivaramayya (ed), *Women and the Law: Contemporary Problems*, Vikas Publishing House, New Delhi, (First edition), 1994, pp. 168-184.

⁷ *Act II of 1929*.

India. It introduced more female heirs other than widow, mother and daughter, recognized as heirs as per traditional Hindu law, to the share of a deceased person in the joint family estate. The provision reads:

A son's daughter, daughter's daughter, sister and sister's daughter shall, in the order so specified be entitled to rank in the order of succession next after a father's father and before a father's brother...⁸

Thus *the Act II of 1929*, enacted towards reforming the Hindu Law on Inheritance did not come to make any radical change in the property rights of Hindu women. The widow or daughter or mother was not provided with the right of inheritance. It emphasized that certain remoter male heirs would be postponed in favour of the nearer degree of female heirs, during their life - time, which was a welcome step originally.

*The Hindu Women's Right to Property Act, 1937*⁹ for the first time granted property rights to widows in the separate intestate property of their husbands. The widow came to inherit in the like manner as a son. The provision applied *mutatis mutandis*, meaning considering the changes that must be made, to the widow of a son and the widow of a predeceased son of a predeceased son. The provision conveyed the same interest of the deceased on his widow in the joint family estate. But the concept of a limited interest known as 'woman's estate' was retained in all the properties provided she had the same right of claiming partition as a male owner had¹⁰.

*The Hindu Succession Act, 1956*¹¹, converted every limited interest, which the woman had on any property possessed by her at on or before the commencement of the Act, into her absolute property¹². But the woman's position was retained in the order of succession, without disrupting the *Mitakshara* coparcenaries (patriarchal joint families)¹³. Further, the daughter or the widow has the chance of getting disinherited by retaining the provision to will away one's property and possession to whomsoever one liked. Those come to be restricted by making daughter too a coparcener and placing certain limitations on the testamentary power¹⁴.

The property right of daughters in the existing coparcenaries and the right of married daughters in the coparcenaries since the commencement of *the Hindu Succession (Amendment) Act, 2005*, as well as the State Amendment Acts by the five Indian states - Kerala, Andhra Pradesh, Tamil Nadu, Maharashtra and Karnataka, have also caused problems, which required to be solved. It caused no changes in the ancestral property

⁸ Ibid, s 2.

⁹ Act XVIII of 1937.

¹⁰ Ibid, s 3 (2).

¹¹ Act No. XXX of 1956.

¹² Ibid, s 14

¹³ Ibid, s 6

¹⁴ See s 30 of *the Hindu Succession Act, 1956* as amended by the *Hindu Succession (Amendment) Act, 2005*; See also the Indian States *Andhra Pradesh, Tamil Nadu, Karnataka, Maharashtra, Hindu Succession (Amendment) Acts*, in 1986, 1989, 1994 and 1994 respectively and *the Kerala Joint Family System (Abolition) Act, 1975*.

partitioned prior to the date of the commencement of the Acts. The position of daughter whose father died intestate before the commencement of *the Hindu Succession (Amendment) Act, 2005*, in the existing coparcenaries too was left undecided¹⁵.

Role of State in reforming Personal Laws

In the independent India, the principles of equality and gender justice embodied in the Constitution of India, called for reforms in Personal Laws¹⁶. The State could have brought in such reforms giving women equal rights as well as providing for special rights to women, in view of the constitutional guarantees for equality and protective discrimination in favour of women. However, it did not happen that State has adopted a consistent approach in reforming all the personal laws alike¹⁷.

All personal laws, including the amended Hindu law have got certain pro-women features, which reinforces in particular, the matrilineal and patriarchal family. Government interventions through changes, for example, in laws of inheritance have tended to retain their patriarchal authority¹⁸. The future of the State to ensure legal equality for women is not explainable on the basis that a secular state lacks the legislative capacity to reform the personal laws. The decision of the State to reform personal laws, is not often seen to be made in view of the constitutional principles of equality and protective discrimination but on political motives. They remained as redundant and archaic for a longer period. Today the challenge before the State is not to make the rhetoric of equality into a concrete reality in a single step. The safeguarding¹⁹ of women's economic rights is the first step towards that direction.

Codification of Personal Laws

With the pronouncement of Warren Hastings in 1772 for application of *Shastras* to *Gentus* (Hindus) and *Koran* to *Mohammedans*, the systems of Hindu law and Muslim law thereafter came to be known as Anglo-Hindu Law and Anglo-Muslim Law. This remains the pattern of what came to be known as the then Personal Laws. The criminal and civil procedural laws in India had been, of course been codified long back during the British regime with the introduction of *the Civil Procedure Code (1859)*, *the Indian Penal Code (1860)* and *the Code of Criminal Procedure (1861)*. But the British held back from codifying the personal law matters involving marriage, dowry, dissolution of marriage, parentage and legitimacy, guardianship, adoption, maintenance, gifts, will, inheritance, succession and so on. These matters were, in the judgment of British Administrators and their courts, inextricably intertwined with the customs

¹⁵ See *the Hindu Succession (Amendment) Act, 2005*; See (n 14) for the State Acts.

¹⁶ See generally arts 15 (2), 15 (3) & 16 of *the Constitution of India*, 1950, ensuring equal status and protective discrimination for women.

¹⁷ See Archana Parashar (n 5).

¹⁸ Amrita Chhachhi, 'The State Religious Fundamentalism and Women Trends in South India', vol. 24, no. 11 *Economic and Political Weekly (EPW)* p.567, 18 March 1989, p. 571.

¹⁹ Flavia Agnes, 'Maintenance for Women as Rhetoric of Equality', vol.27, no.41, *EPW* p.2233, 10 October 1992, p. 2235.

and usages associated with their religions²⁰. The Privy Council, the highest Court of Appeal in British India, remarked in its judgment in *Skinner v Order* that while Brahmin, Buddhist, Christian, Mohammedan, Parsi and Sikh are one nation, enjoying equal political rights and having perfect equality before the tribunals, they co-exist as separate and very distinct communities, having distinct laws affecting every relation of life. The laws of husband and wife, parent and child, the descent, devolution and disposition of property are all different, depending, in each case, on the body to which the individual is deemed to belong, and the difference of religion pervades, and governs all domestic wages and social relations²¹.

The personal laws go with a person within the territory where it is part of the laws of the land and is entitled to have that applied and not the *lex loci* or the law applied to persons professing some other personal law, or subject to the residential law (if any) or even that same personal laws as declared by a court other than the court of his domicile²². Shortly there are no *lex loci* in India with regard to the topics for which personal laws provided²³. Thus the codification of personal laws becomes the need of the hour.

The Law of the 'Hindu'

A 'Hindu' is a person both of whose parents are Hindus²⁴. They happen to be the original inhabitants of the Indian sub-continent. With the invasion of Arabs and the English, Mohammedans and Christians formed the minorities in the country.

The tradition of property rights of a 'Hindu' starts from the age of the *Rigveda* (from 2500 BC to 1500 BC). It passes through the age of the later *Sambhitas*, *Brahmanas* and the *Upanishads* (1500 BC to 500 BC), the age of the *Dharmasutras*, Epics and the early *Smritis* (500 BC to 500 AD), up to the age of the later *Smritis*, Commentaries and Digests (500 AD to 1800 AD).

The laws in India remained non-codified till 1772, when the East India Company started civil administration. In 1772, Warren Hastings codified criminal law together with the notion of equality before the law for both Hindus and Muslims. But he also provided that:

in the suits regarding marriage, inheritance, the laws of the Koran with respect to Mohammedans and those of the *Shastras* with respect to *Gentus* (Hindus) shall be invariably adhered to.²⁵

²⁰ See Gerald James Larson (n 25), p.4.

²¹ 14 *Moore's Indian Appeal (I.A)* 309, p. 323.

²² See *Balwant Rao v Baji Rao*, (Indian Law Reports (ILR) 47 I.A 213 in Derrett, D.M., *Introduction to Modern Hindu Law*, OUP, Bombay, 1963, p. 26.

²³ Mayne, *Hindu Law and Usage*, pp. 89-90 cited in Derrett, D.M., *Introduction to Modern Hindu Law*, OUP, Bombay, 1963, p. 39.

²⁴ See s 2 of the *Hindu Succession Act, 1956*. The expression 'Hindu' includes Hindus of all castes - in fact anyone who is not a Muslim, Christian, Parsi, or Jew, is a Hindu; Sikhs, Jainas, *Arya Samajis* and Buddhists are also 'Hindus' as per the *Hindu Law*.

²⁵ Gerald James Larson (ed), *Religion, Personal Law, and Identity in India*, Social Science Press, Delhi, 2001, p.5.

The Hindu religion or nomenclature never comes to the whole as a class denoting a particular class or at any age of India's tradition. According to Monier Williams, it is difficult to define 'Hindu' religion, who observed:

The Hindu Religion is a reflection of the composite characters of the Hindu, who are not one people, but many. It is based on the idea of universal receptivity. It has ever aimed at accommodating itself to circumstances and has carried on the process of adoption through more than three thousand years. It has first borne with, and then so to speak, swallowed, digested and assimilated something from all creeds²⁶.

The Chief Justice Dr. Gajendragadkar, delivering the judgment expressed the Supreme Court of India (SC)'s view on 'Hindu' religion in *Sastri Yagnapurushadji v Muldas Brudardas Vaishya* as follows.

When we think of Hindu religion, we find it difficult, if no impossible to define Hindu religion or even adequately, describe it. Unlike other religion in the world, the Hindu religion does not claim any one prophet, it does not believe in any one philosophical concept, it does not follow any one set of religion, rites or performance, in fact, it does not appear to satisfy the narrow traditional features of any religion or creed. It may broadly be described as a way of life and nothing more²⁷.

In this behalf, Rene Guenon observed as follows:

This catholicity of Hindu religion is reflected in Hindu Jurisprudence... Hence Hindu law adapted itself to the changing society. It is acknowledged by sociologists and jurists that Hindu system of law occupies a unique place in the world. The date of the origin of the Hindu Law is not known. It is accepted that this is the oldest system of law that has survived through centuries of human existence. A kind of continuity is seen in this system of law, which may be compared to the gathering together of the mighty volume of the Ganges, smaller by a continual influx of tributary rivers and rivulets, spreading itself over an increasing area of country, to quote the words of Monier of laws was ever developing, receiving new principles invented by great jurists like *Yajnavalkya, Vijnaneswara etc.* and adopting itself with changing society by the incorporation of customs and usages²⁸.

The status of Indian women is summarized in the proceedings of an All

²⁶ Monier Williams, 'Religious Thought and Life in India' cited in *Dr. P. B. Gajendragadkar Endowment Lectures* (1978), p.57; *Hindu Family Law and Social Change*, in Dr. T. K. Tope (ed), University of Bombay, 1982, p. 8.

²⁷ *Sastri Yagnapurushadji v Muldas Brudardas Vaishya*, 1966, 2 *Supreme Court Journal (SCJ)* 502, p.513.

²⁸ *Hindu Family Law and Social Change*, in Dr. T. K. Tope (ed), University of Bombay, 1982, pp. 8-9.

India Collegium on Ethical and a spiritual volume on the basis of National Integration held in 1966, as follows:

In the *vedic* age, women enjoyed full freedom for learning and even for choosing their own companies in marriage. A change comes with the onset of Brahmanism. The position of women gradually declined with the rigidity of the caste system and lowering of the age of marriage. Buddhism and Jainism also affected women adversely. During the golden age of civilization in the early fifth and sixth centuries AD, women enjoyed equal rights and were ever allowed to exercise public rights. However further secularism of the Indian women started with the unsettled conditions inside and in various from outside in the eight century AD. The decline in the status of women became complete with the mogul era, as *purdah* come to stay etc²⁹.

Need for a Uniform Civil Code

The persisting demand for a secular uniform civil code persisted at all times of the legal history³⁰. It was the time when free India's constitutional goals were being framed, that attempts were first made to secure protection for personal laws. An amendment was suggested to Article 44 of the Constitution of India, 1950, (the original Article 35 of the Draft Constitution), which would allow every citizen to follow his or her personal law. Opposing the proposed amendment, the Chairman of the Constitution Drafting Committee, Dr. B.R. Ambedkar, said that such a clause saving personal laws would disable the benign legislature from enacting any social measures whatsoever. He maintained that personal law should be brought out of the purview of 'religion'; since this personal law was a religious matter 'every aspect of life from birth to death' would be covered by religious conceptions. Dr. Ambedkar, however pointed out that the State was only claiming the power to legislate and not an 'obligation' to do away with the personal laws. The 'State' could not exercise that power in a way which was objectionable to any community³¹. He concluded his

²⁹ Joachim Alva in *Record of Proceedings, July 1967*, Bharatiya Vidya Bhavan, p. 419. The Committee of the Colloquium comprised of the then President of India, Dr. Sarvepally Radhakrishnan, the then Vice President, Zakir Hussain and many leading personalities of Indian political and cultural life, cited in Gabriele Dietrich, 'Women's Movement and Religion', vol. 21, no. 4, *EPW* p.157, 25 January 1986, p. 158.

³⁰ The Privy Council had stated the significance of the Code in its decision, *Gokul Mandar v Pudmanund Singh*, I.L.R 29 Cal. 707, in the following words: "The essence of a Code is to be exhaustive on the matters in respect of which it declares the law and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction". Lord Herschell in *Bank of England v Vagliano*, (1891-1894) All England Reporter (All E.R) 93, while discussing the decision of the court of Appeal in *Wilkinson v Wilkinson* made clear the essence of codification that "..... the proper course is in the first instance to examine the language of the statute and ask what is its natural meaning, influenced by any considerations derived from the previous state of law and not to start with enquiry as to how the law previously stood...." (AIR) 1923 Bombay(Bom) 321 (Full Bench)

³¹ *Constituent Assembly Debates (CAD)*, Volume VIII, Lok Sabha Secretariat, New Delhi, (4th edition), 2003, pp. 721; 761-62.

thoughts upon religion with the following observation:

..... Sovereignty is always limited, no matter even if you assert that it is unlimited, because sovereignty in the exercise of that power must reconcile itself to the sentiments of different communities. No government can exercise its power in such a manner as to provoke the Muslim community to rise in rebellion. I think it would be a mad government if it does so. But that is a matter which in relation to the exercise of that power and not to the power itself³².

Being placed in Part IV of the Constitution of India, which contains the directive principles of state policy, Article 44 reads: 'the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India'. By a 'civil code' was meant in the Article, a code of law regulating civil matters like marriage, divorce, inheritance and those other subjects which were then governed by different personal laws.

Thus, Article 44 does not give the State any guidance regarding the features of the future civil code. It only seeks to institute uniformity. It also does not say whether uniformity in the civil laws has to be effected at a stretch or in fragments. Like all other directive principles specified in the constitution, the provision of Article 44 too 'shall not be enforceable by any court 'but is 'nevertheless fundamental in the governance of the country and has to be applied by the State 'through laws'³³.

The essence of Article 44 is that the State should gradually prepare the people to accept and adopt a uniform civil code³⁴. The courts also construe it in such a way that a 'civil code' is not necessarily to be enacted at a stretch. In *State of Bombay v Narasu Appa Mali*, the Bombay High Court observed:

One community might be prepared to accept and work social reform, another way not yet be prepared for it, and Article 44 does not lay down that any legislation that the state may embark upon must necessarily be of an all embracing charter. The state may rightly decide to bring about social reform by stages and the stages may be territorial, or they may be community wise³⁵.

Dr. B. R. Ambedkar, has made his point strongly that diversity in family laws violates the principles of Fundamental Rights that there should be no discrimination³⁶. *The*

³² Ibid, pp. 781-82.

³³ *Constitution of India, 1950*, art 37.

³⁴ The mandate of Article 44 therefore is that the State shall endeavour to secure, a Uniform Civil Code. The word 'enact' is not used, since the Constitution - makers were quite alive to the difficulties likely to be faced on the way to its enactment. They therefore, directed the State 'to endeavour to secure it' and not 'enact' it.

³⁵ *State of Bombay v Narasu Appa Mali*, AIR 1952 Bom 8, p.87.

³⁶ Dr. B. R Ambedkar revolted not only against, inequality amongst the different communities, but also for equality between men and women belonging to all castes; he thus stood for the emancipation of all downtrodden sections and not for the backward classes alone.

Report of the Committee on the Status of Women in India, 1975, takes a clear stand on this matter as follows:

The absence of a Uniform Civil Code in the last quarter of the 20th century, 27th year after independence is an incongruity that cannot be justified with all the emphasis that is placed on secularism, science and modernization. The continuance of various personal laws which accept discrimination between men and women violate the fundamental rights, and the preamble to the constitution which promises to secure to all its citizens 'equality of status' and is against the spirit of national integration and secularism³⁷.

The first attempt towards uniform civil code was made in 1948, with the framing of the Hindu Code Bill, which lapsed in 1951. Thereafter, the Indian Parliament introduced and passed that, piece-meal in 1955 as four *Acts* - *the Hindu marriage Act 1955, the Hindu Adoptions and Maintenance Act, 1956, the Hindu Minority and Guardianship Act, 1956, and the Hindu Succession Act 1956*.

The exclusion of women from the rules of 'pious obligation'³⁸, and from offering oblations or '*pindas*', devoid them of ownership in property as well. The motive was clearly of religious origin and it provided that all heirs must pay the debts of the deceased. In the joint family system, if the debts were not cleared off by the manager of the joint family, the creditor could enforce payment after the debtor's death against the joint family property upon the basis that the debtors in the property had passed that to his sons, sons' sons and sons' sons' sons and that the share of the latter must be debited with the amount. All property acquired by any means became for most purposes joint family property until a partition, and at that time could one who had acquired separate property, keep it as an additional share. That made the sons, sons' sons and sons' sons' sons liable to the extent of their interest in the ancestral property, though no further³⁹.

The right to offer funeral oblations known as *theory of spiritual benefits* was applied to store a conflict of claim amongst the heirs. It was once generally believed that succession to the property of a male, neither a female nor a male, who was a member of re-united coparcenaries, was regulated in accordance with the degree of spiritual benefit which he could obtain from the heir's making his offering to his spirit or on behalf in the *sraddha*⁴⁰, meaning funeral rite or ceremony performed in honour of the departed spirit of dead relatives. It served the most useful purpose of providing an intelligible reason which one relative should be preferred to another⁴¹.

³⁷ See 'Towards Equality', *Report of the Committee on the Status of Women in India (1974-1975)*, Government of India, New Delhi, December 1974.

³⁸ See Derrett (n.22), p. 113. It is said that *the Hindu* owes three debts, to the Gods, to the ancestors and to human beings; and by begetting a son he will pay off all those three classes of debts.

³⁹ *Ibid*, pp. 113-115.

⁴⁰ *Ibid*, pp. 115-117.

⁴¹ See PV Kane, *History of Dharmasastra (H.D)*, vol. III, Chapter 19, at 100; *Manusmriti (Manu)* (IX, 137)

Interpretations on the Property Rights of Hindu Women

It has been authoritatively ascertained through in-depth studies, that property rights of Hindu women in India first find place in the *Rig Veda*⁴². The daughter, who was considered equivalent to a son, was given a share equal to that of a son. The term '*dubita*' was taken to mean one who takes wealth from her own family and fills her husband's house. Passing from the *vedic* period to the *smritis*, women were allowed to inherit in the absence of male issues.

The immovable property was mostly intended to be preserved for the enjoyment of future generations. The interests of members in the joint family determined their rights to property. As the foremost duty of the wife was to honour and serve the husband, she must always stay with him and she had a right of residence in the house. A wife was further entitled to be maintained in the house by the husband⁴³. Among the heirs (apart from the male issue) of man as regards, his separate property, the first comes the widow. But the women had all along the right to enjoy the estate of their husbands and that they should not waste or destroy the husband's estate⁴⁴. A daughter's interests were also similar to that of a widow. She succeeded only in the absence of the widow. The limited estate enjoyed by a widow and daughter, on their death, passed to the next heirs of the husband and father, as the case may be, and not to her own heirs.

The women came to absolute enjoyment of certain kinds of property, known etymologically as *stridhanam*. The ancient texts did not attempt to give a comprehensive definition of *stridhanam*. According to *Yajnavalkya*, it include 'whatever is given by the father, mother, husband and brother, what was presented by the uncle and the like at the time of marriage before the nuptial fire, and gift (made by the husband) at the time of marriage as second wife'⁴⁵. The other *smritis* too include several other kinds of property. But *Dayabhaga*, the interpretation of *Yajnavalkyasmriti*, by *Jimutavahana*, restrict it to 'all gifts from even strangers made before the nuptial fire or on the bridal procession' constitute *stridhanam*, but property inherited by a woman or obtained on partition, gifts from strangers (other than those kinds noted above and property acquired by her by mechanical arts or by her labour are not *stridhanam*⁴⁶.

(which is the same as *Vasishtha DharmaSutra* 17.5 and *Vishnu DharmaSastra* 15.46) and *Yajnavalkyasmriti* (*Yaj.*) I.178, follows that the son, grandson and great grandson equally confer great spiritual benefit and so are the principal group of heirs.

⁴² *Rigveda* III-31.1, *Manu* (IX 126-128) interprets the word '*dubita*' as 'a daughter appointed as a son' or '*putrika*'. *Manu* (IX. 130) declares: 'one's son is like oneself and one's daughter is equal to one's son; how can another person take the wealth (of the deceased) when she who is the very self (of the deceased) lives.' As the usage of appointing a daughter as a son became gradually obsolete, the ordinary daughter came to be recognized by analogy as the heirs of a sonless man after the widow. P. V. Kane, *H.D.*, vol. III, Ch. XXIX, p.714.

⁴³ *Ibid*, vol. II, pp. 568 - 569. *Manu* (XI. 10) says, 'one must maintain one's aged parent, a virtuous wife and minor son by doing even a hundred bad acts'; *Yaj*(I.74), 'requires the husband to maintain wife whom he had superseded in the same way as before, who otherwise would be guilty of great sin'.

⁴⁴ *Ibid*, vol. III, Chapter XXIX.

⁴⁵ *Yaj.* II, 143; 148.

⁴⁶ P. V. Kane, *History of Dharmasastra*, Bhandarkar Oriental Research Institute (BORI), Pune, 1990, vol. III, Ch. XXX, p. 781.

In regard to succession to *stridhanam*, daughters were preferred to sons. In the order of succession, daughters came first. The scheme of succession was in the order – unmarried daughters, married daughters who were indigent, married daughters, daughters’ sons, sons, son’s sons (the rule of *per stripes* apply), husband, *sapindas* of her husband (family members connected by blood relationship), in the order of propinquity, on failure, her mother, then her father and then to his *sapindas*, before escheat to the crown⁴⁷. But if the woman was married in one of the unapproved forms in the absence of her descendants, to her mother, then to her father, then to his *sapindas* on failure, to her husband and then to his *sapindas* (before going to the crown)⁴⁸.

The concept of ‘woman’s property’ or *stridhanam* was interpreted by the British courts in the narrow sense. They recognized three types of *stridhanam*. The first being gifts from the kindred that is from male relatives of her natal family. The second type consists of ‘property’ acquired in lieu of maintenance and the third type consists of ‘property acquired by adverse possession’⁴⁹. Therefore, the share of a woman on partition was held not *stridhanam*, and she would not be the absolute owner of that⁵⁰.

The concepts of limited interest, survivorship and reversioner’s rights were construed liberally by the Privy Council and British Courts perpetuating the traditional limitation on the power of women to hold and transmit property. Even in the post constitutional period, the *concept of widow’s estate* was taken to mean that in the joint family estate where no partition was claimed by the widow, the rights of other members would be worked out on the basis that the husband died on the date the widow passed away. In case she asked for partition during her lifetime, on her death the succession would be traced on the basis that it was her husband’s separate property. If not, the property would pass to the surviving members of the coparcenary. This was because the females were never made coparceners even after the enactment of the *Hindu Succession Act* in 1956.

The word “possessed” was liberally interpreted by the Supreme Court of India, and the higher courts to mean all *de jure* rather than *de facto* possession only. That is, there was no need for actual possession, but only constructive possession by the female, to get her rights converted into absolute interest in the property possessed by her. She was held entitled to be the full owner of any such property in her possession, whether actual or constructive, except where a ‘restricted estate’ was created prior to the commencement of the Act⁵¹.

⁴⁷ Ibid, p.794.

⁴⁸ Ibid.

⁴⁹ N. R. Madhava Menon (ed), *National Convention of Uniform Civil Code for All Indians*, Bar Council of India, New Delhi, 1986, p. 284.

⁵⁰ Vijaya Sharma, *Protection to Women in Matrimonial Home*, Deep and Deep Publication, New Delhi, 1994, p 972.

⁵¹ See s 14 (1) of the *Hindu Succession Act, 1956*. The object of sub-section (2) was to make it clear that a ‘restricted estate’ can even after the commencement of Act, come into existence in case of interest in property given to a female, by operation of transaction *inter-vivos* by testamentary disposition, by decree or order of a civil court or under an award.

Thus sub-section (2) was read only as a revised exception to sub – section (1) and its operation was confined to cases where property was acquired for the first time as a grant without any pre-existing rights, under a gift, will instrument, decree, order or award, the terms of which prescribed a restricted estate in the property⁵². In certain cases, the courts had adopted legalistically technical arguments to enduring widows an absolute estate. The emancipating scope of the section has therefore been tampered with by the courts and even equated widow to a trespasser⁵³.

Property Rights of Hindu Women and Intestate Succession – The Challenges Ahead for Codification

The rules of intestate succession apply to all the properties of the deceased owner who dies intestate in respect of his properties. One of the meanings given to the word ‘intestate’ is ‘a person who dies without making a valid will’⁵⁴.

Another definition, while dealing with ‘intestacy’ states:

Intestacy may be either total or partial; total intestacy occurs where a man makes no effective testamentary disposition of any of the property of which he is competent to dispose of by will. Partial intestacy occurs where the testator will though partly effective, either altogether fails to dispose of some specified property of the testator or hearing purported to dispose of all his property has failed to dispose effectively of some interest, which has cessation in consequence of the will, as for instance, a reversionary interest or a life interest⁵⁵.

Before a Court of law can determine whether a male Hindu has died intestate or not, it will have to determine whether he has not or as a matter of fact left a valid will which can be acted upon, and in accordance with which the properties can devolve upon the successors of the deceased⁵⁶.

The heirs of succession to the male and female intestates are determined with two orders of succession as per the existing law. The heirs are different in respect of the source of property of the male intestate as well. The absence of a uniform pattern of succession had of its own created anomaly⁵⁷.

Besides, the unrestricted testamentary power to dispose of any property of a person *ipso facto* is a measure to defeat the provision of intestate succession⁵⁸.

⁵² See *V.Tulasamma v Sesha Reddy (D) by L.Rs*, AIR 1977 SC 1944.

⁵³ See *Eramma v Veerupana*, (1967) 1 SCJ 746, where the Supreme Court observed that Section 14 (1) could not be resorted to but subjected to sub clause (2) because at the time the widow got possession in the case she had no vestige of ownership and hence held a position equivalent to a trespasser.

⁵⁴ See Davidson, Thomas (ed), *the Chamber's Twentieth Century Dictionary of the English Language*, London, 1903.

⁵⁵ *Halsbury's Laws of England*, 3rd edition, vol. 16, 1954, p. 394, para 761.

⁵⁶ See *Parmanand Abuja v Satya Deo Abuja*, AIR 1973 Del 190, para 26.

⁵⁷ See *Hindu Succession Act, 1956*, ss 8 & 15.

⁵⁸ *Ibid*, s 30.

Conclusion

The need of the situation calls for the abolition of the joint family and *Mitakshara* Coparcenary, retained within the Hindu personal law on property rights, altogether, coupled with the imposition of restrictions on testamentary power. *The Hindu Succession (Amendment) Act, 2005*, has secured the first part, though not fully, but had allowed the second part to retain.⁵⁹ It allows the testator to will away any kind of his property – either self-acquired or coparcenary, to disinherit all the female heirs. . If the legislators had adopted this two – way approach, it would have brought women on the same plank as that of men. The patriarchal norms are to be dropped to give the woman her due share. The way out is to reform the redundant, archaic laws on lines of equity and gender – justice. If women are to be paid what they deserve in proportionate to their contribution to the family, they should actually have to be paid more, rather than equal, to that of men.

⁵⁹ See (n 13); (n14).