Critical Response to Prof. Archana Mishra's Article on Women's Equal Right to Property - Recent Judicial Developments in India

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Abstract

This piece is a critical reflection upon Prof. Archana Mishra's article on " Towards women's equal right to property : Recent judicial developments in India." I've critically evaluated the judicial approach towards the right of women, whether literal or pliable towards the statute. The piece also inscribes the transition of the developments and also tend to justify it by various genus of legal maxims. The original article upon which the reflection has been carved out reckons its reasoning much upon constitutional law aspect and is highly skewed towards reasoning of fundamental personal laws. The critical reflection covers the Tribal and Hindu perspective, as well. It expounds & compares the women position from the date of transition up until now.

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Introduction

In a patriarchal society like India where women, who constitute 50 percent of the population, own only two per cent of the assets[1] which becomes imperative to achieve egalitarian society when social arrangements are highly skewed towards one side. The piecemeal reforms with more rights to counter patriarchy is the way forward. It's also proven that Rights emerge as a facilitator during bad days for women.

* Tribal Women : Rights over Property *

At the very ***first transition phase***, recognition and preservation of the culture and customs of tribal have been diluted significantly and is furthered by *Bahadur* vs. *Bratiya*[2]. I think, it upholds the constitutional protection but severs the status of recognition and is ultra vires and tried to legitimise in popular eyes(HSA[3]), by making all instruments limited, (Constitution[4]) reflects hegemonic-paradigm[5]. I believe, tribal rights are subject to collective rights and not individual or subdivisions among them and cannot be held unconstitutional, even encroaches upon Part3[6789] as tribal customs were much advanced, matrilineal, and egalitarian than current modernity. So, hindu consciousness cannot be socialised and assimilated into Institution of Special Usages of women rights, which are unlike the widespread arrangement than other religions and thus reform to their customs are subject to their Panchayat Bodies[1011]. Both *Bahadur*[12] & *Labishwar*[13] transgressed upon tribal laws and coincides, a crisis into

[1] https://indianexpress.com/article/india/india-others/rajya-sabha-approves-bill-to-make-divorce-friendly-for-women/
[2] 2015 SCC Online HP 1555 (High Court of Himachal Pradesh)
[3] Hindu Succession Act 1956; Section 2. Application of Act.—
(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of Article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.
[4] Article 366 of Constitution of India, 1950 (IND) – Meaning of Scheduled Tribe
In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them.
[5] Model of cultural assimilation cannot be by asserting certain kind of whiteness into Black people- Loren in his book *WhiteShift*.
[6] Madhu Kishwar vs. State of Bihar 1996 SC
[7] Gopal Singh Bhumij vs. Girbala Bhumij and Ors. 1991 Pat-Bhumij
[8] Butaki Bai vs. SUkhbati 2014 Chattisgarh - Halba
[9] Ram Dev Ram vs. Dhani Ram & Others 2016 Chattisgarh - Uraon
[10] The Provisions of the Panchayat (Extension to Scheduled Areas) Act, 1996 ; ensures self-governance by organizing Gram Sabhas. Critics do argue it as Constitution within Constitution which provides a recognition apart from formal system of State laws.
[11] Report of the High-Level Committee on Socio-Economic, Health and Educational status of Tribal Communities of India ; Ministry of Tribal Affairs, Govt. of India, May2014, Pg.93.
[12] Bahadur vs. Bratiya 2015 SCC Online HP 1555 (High Court of Himachal Pradesh)

[13] Labishwar Manjhi vs. Pran Manjhi and Ors. 2000 SC - Santhal

cultural identities of elites (HSA[14]) as to provide social justice but ultimately lead to anti-instrumentalization pathway. The special usages though identical to Hinduism is still recognised differently because of their indigent nature, culture, and customs[15][16]. Consequences of such would demand careful consideration upon identity crisis intensely, like *Adivasi* and *Mongoild* tribes[17][18]. I believe the unfair advantage by such tribal cards can be obtained cleverly since almost segment is uncodified and for that proving the customs should be kept higher in threshold.

The silences of special usages[19] over inheritance rights are affirmative to injunct and uphold the social justice, equity, and god conscience. The ***successive transition*** according to me, where judiciary strikes a balanced approach, as such custom overrides and violates Equality[20], and such shall be eliminated[21]. However, the fundamental rights which ensures Equality supersedes personal liberty - 'Community and Sect thereof', vice versa, negates each other because right draws the power from one cannot be withdrawn by that same. The fine SC precedent regarding tribal are lacking due to indigent nature of women among tribal and their fiscal sensitivity to contest litigation thus, legislation shall intervene to reform property rights among tribal women, as judiciary resist to survive with professional integrity and ethics and do justifies even by anti-instrumentalization.

[14] Hindu Succession Act 1956 (Hereinafter HSA)
[15] Ravi Rebbapragada, The Importance of the Samata Judgement : A Weapon of the Weak and the Marginalised, Common Cause, Vol. 36 (3), 1-4.
[16] Intelligible Differentia and Just classification and Report of the High-Level Committee on Socio-Economic, Health and Educational status of Tribal Communities of India ; Ministry of Tribal Affairs, Govt. of India, May2014, 52-54.
[17] National Commission for Women, Customary Laws in North East India : Impact on Women.
[18] Report of the High-Level Committee on Socio-Economic, Health and Educational status of Tribal Communities of India ; Ministry of Tribal Affairs, Govt. of India, May2014, 51-66.
[19] Smt Kajal Rani Noatia vs. Sri Raybahadur Tripura, High Court of Tripura, RSA No 38 of 2009 decided on 26 February 2015.
[20] Under Article 14 of Constitution of India, 1950 (IND) – Equality before law with Equal Protection before law.
The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.
[21] Madhu Kishwar vs. State of Bihar, (1996) 5 SCC 125

* Hindu Women : Rights over Property *

Different transitions which strengthen women-property-rights over series of judgements which tested the conundrum upon ***retrospective and prospective vis-a-vis legislature intent***[22]. In *Vaishali*[23], an engrossing-ruling, believing logical by its interpretation but stands irrational where nature of the right qualifies upon the birth of the daughter which particularly entitled particular segment of daughter while discriminates other disqualified daughter within the same-family such radical-departure limits the coverage that mother won't be a coparcener while her daughter would be. The conceit remains discriminatory unless doesn't provide a coverage to all daughters and remains passively contained, since it partly serves fundamental faith of such social legislation.

Concerning *Ashok*[24], the concurrent ruling made-out prospective-application and overlooked the aspect that if both father & daughter are surviving-coparceners and partition effectuated before 20-December-2004 then it legitimises the partition, regardless of whether they are surviving. However, it deconstructed the *elite-perusal – "the historical-cultural-patriarch"* and reformed the ideological-institution from *patriarchy* towards *equality*.

Concerning *Badrinarayan*[25] according to me seems very persuasive which strikes a composite-balance[26] and extended the coverage to living daughter considering antecedent i.e., birth of the daughter prior to commencement – by *retroactive intent*. The conditional aspect to S.6 HSA[27], which arises the abuse, imprudent-use, and alienation of property when daughter exercises her right. Though it provides a coverage value to every living daughter but forgets to mention the living criteria of the father, but later *Prakash* suffices such question of law.

The SC in *Prakash*[28], suffices the inadequacy of previous judgement, partly. The Notional-partition[29] and Preliminary-decree of partition were used against women when

[22] Section 6(1) of the Hindu Succession Act (1956), Devolution of interest in coparcenary property. —
(i) On and from the commencement of the Hindu Succession (Amendment) Act, 2005*, in a Joint Hindu family governed by the Mitakshara law.

[23] Vaishali Satish Ganorkar vs. Satish Keshavrao Ganorkar, 2012 (5) BomCR 210.
[24] Ashok Gangadhar Shedge vs. Ramesh Gangadhar Shedge, 2014 (4) BomCR 797.
[25] Badrinarayan Shankar Bhandari vs. Omprakash Shankar Bhandari, AIR 2014 Bom 151.
[26] Taking into consideration history and development of Hindu law, 174th Law Commission Report, the report of the standing committee of Parliament, and Statement of Objects and Reasons of the Bill introduced in Parliament.
[27] The Amendment to Section 6 made daughter to be coparcener exercising right as similar as the son.
[28] Prakash vs. Phulvati, Supreme Court of India, Civil Appeal No. 7217 of 2013 *decided on 16th October 2015.*
[29] the notion that a partition occurs as on the date of the death of a male member, and shares crystallize into vested rights at that point in time. The term has no meaning in Classical Mitakshara Law but had been coined by the judiciary.

claiming her interest, with counterargument that it has already been effectuated before Dec,2004 which deprives her right in coparcenary. Overturning *Ashok*, the validation of partition i.e., individual-interest in coparcenary only upon final-decree reflects plausible-development as it fixed the previous-fallacies including notional-partition as not being classical concept. I came to see a legitimate demand for inclusion of canonical daughters, since equally discriminatory of marital status. Further, lack of clarification changes judiciary's approach in each case, thus enactment can only clarify the dubiety[30]. To me, the living-nature of the daughter which acquires the interest in the coparcenary but inadequacy in definition & untouched segment by judgement demands further clarification whether child have undivided interest in coparcenary of predeceased-daughter. SC's chosen originalist-perspective and subsequently interpretation of black letter, explanation provided vis-a-vis denial of the retrospective-application being legislator's-intent is irrational because it remains discriminatory until the enactment isn't compatible with equality. And such Social-Norms aren't higher than Constitutional-Norms, firstly. Secondly, being Social-Legislation, it's correct that previous discrepancies in society should not have retrospective-effect, as such steps are not to rectify the former-discrepancies but to piecemeal-reform the existing fallacies towards exact-correctness in society. However, the recent-development in *VineetaSharma*[31], the question-of-law dealt extensively and upholds equality reflects departure from classical-patriarchy.

Concerning *Kale*[32], the plausible-development towards the inclusion of Oral-Partition[33] made evidentiary-support imperative and until such has not been reduced into writing donot affects *de-facto-partition*[34] subsequently makes property not-transferable[35]. Most-interestingly, Oral-Partition contended as Constitutional-Issue[36] when excluded from the explanation appended to 6(5)HSA[37] while *Prakash*, legitimises draconian Oral-Partition as

[30] Poonam Pradhan Saxena, Family Law lectures, Family Law II (4th Edition), 12-16.
[31] Vineeta Sharma vs. Rakesh Sharma, MANU/SC/0582/2020
[32] Kale vs. Deputy Director of Consolidation, (1976) 3 SCC 119.
[33] Halsbury's Laws of England (Butterworths, 3rd ed, 1952-1963) Vol 17, 215-216.
Defines as an agreement between members of the same family, intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour.
[34] De Jure Partition is a division of right, i.e., severance of status here partition has taken place but actual possession has not been given and De facto Partition means when the partition has actually taken place by metes and bounds, here ownership, as well as possession of a property, has been transferred
[35] Gurdev Singh vs. Ajmer Singh 2018 P & H 197
[36] Puttalinganagouda vs. Union of India, MANU/KA/0420/2015.
[37] Explanation appended to Section 6(5) - Nothing contained in this section shall apply to a partition, which has been affected before the 20th day of December 2004. Explanation. —For the purposes of this section "partition" means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a court.

valid form which acts against the daughters when ask upon partition with burden-of-proof on higher-threshold, to be proven by daughter what furthered the disappointment in *Puttalinganagouda* & *Badrinarayan*, which denied the legitimate-share of daughters and rather dealt the bonafides-of -parties. The Oral-Partition is an instrument to unsettle women-rights in organised-manner but had later been overturned by *Vineeta*. However, in family-affairs, the oral-partition is limited to the *de jure partition* hence the recommendation[38] shall be taken into consideration to enhance the scope.

Hindu-Widow's partition right in husband's coparcenary vis-a-vis dying intestate, apart from division of property, the concurrent-discriminatory-reason for not recognising widow as coparcener, because the widow is recognised as *lady-cursed-by-gods* hence not permitted to have presence in any holy-societal-arrangements. The widow is not born-coparcener but by-virtue of deriving her interest in coparcenary through deceased-husband and exercises every incident identical to her husband. The transition in women property rights begins by 1937's-enactment[39], however the reversionary & limited-rights into husband's estate the net-effect wont led to division of estate as it reverts in the common-pool of coparcenary, which puts the widow's children at the receiving end as it gets restored to cognates-of-husband i.e., Class-1 & Class-2 heirs[40]. However, S.14[41] turns out into absolute-rights, but the patriarchal-notion always tried to unsettle the Absolute-Rights of widow in husband's estate resulting into *Santosh*[42]. The token-interpretation of the doctrine in *Santosh – ubi-jus-ibi-remedium*[43], is what basically the right any petitioner exercises, however the legislature fails to provide preventive & punitive remedial-treatment if such rights are taken away, which reflects right-without-remedy. The only recourse in violation of Partition & Succession is by way of reopening it through litigation which further aloof the lockstitch between widow-societal relationship[44]. Most significant-development is the right of widow remains intact in deceased-

[38] Report No. 208th, Proposal for amendment of Explanation to Section 6 of the Hindu Succession Act, 1956 to include oral partition and family arrangement in the definition of "partition", LAW COMMISSION OF INDIA, Govt. of India

[39] The Hindu Women's Rights to Property Act, 1937; was the first legislation which created property rights for Hindu women, though limited i.e., in case the husband died, woman would step into his shoes and acquire husband's property and after her death, the same property would revert to its source or husband's heirs, known as reversioners. Hence, she had no right to pass on the ownership in the property to anyone.

[40] Paras Diwan, Family Law, 10th Edition 2013, reprint 2016 ,396-407

[41] Section 14 in The Hindu Succession Act, 1956 - Property of a female Hindu to be her absolute property.

[42] Santosh Popat Chavan vs. Sulochana Rajiv, High Court of Bombay, Second Appeal Nos. 119 and 405/2013 decided on 12 December 2014.

[43] 'Where there is a right, there is a remedy', postulates that where law has established a right there should be a corresponding remedy for its breach.

[44] The Sunday Story: Haryana's Out-lawed Daughters | India News, The Indian Express, Sunday, February 17, 2019

husband's coparcenary even upon subsequent-remarriage[45] which protects the widow along with the interest of the child born out of first marriage and allows dual-control over property[46].

Compensation not followed by Succession-Law, the rights of coparceners are collective-rights and collectively-challenged – by or against. While compensation to legal-heirs is an individual-right cannot be claimed collectively as its not subject to any estate or coparcenary[47]. The state, services the relief secularly to family of deceased-daughter and not by their religious-status & position thus has no indulgence by any personal-laws. But daughters are meant to be part of both marital & natal-home, where it should flow towards both families substantially for just-and-fair treatment.

In *Jayalakshmi*[48], the liberal interpretation of S14(1)[49] provides coverage to all possession which entails over every afresh & pre-existing rights. The marriage upon subsistence-marriage is cruelty, & social-unacceptance. While granting restricted-interest, a *quid-pro-quo* cannot be acceptable to please the validity of second marriage, right vis-à-vis duty of husband and *insult-to-an-injury* is when second wife furthered the claim of her from first wife. The plausible-development is the possession by women itself confers absolute right[50] and limited rights in-lieu of her pre-existing right until the creation of new one do not deprive her to exercise absolute-right[51]. But do not confer absolute-right until the right is not pre-existing right[52]. It is pertinent when husband abandons his first-wife or treats unwell, it acts against the recalcitrant of the legal-duty of husband, which keep first-wife at higher acknowledgement for settlement before proceeding towards litigations.

[45] Cherotte Sugathan (Died Through … vs Cherotte Bharathi & Ors on 15 February 2008 – Supreme Court of India
[46] Paras Diwan, Family Law, 10th Edition 2013, reprint 2016, 402-408.
[47] Paras Diwan, Family Law, 10th Edition 2013, reprint 2016, 354-355.
[48] Jayalakshmi Ammal vs. Kaliaperumal, 2014 Mad. 1985.
[49] Section 14(1) in The Hindu Succession Act, 1956
(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

[50] Section 14(1) in The Hindu Succession Act, 1956
(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

[51] Suba vs. Gaurange 1971 Ori. 242
[52] Basanti Devi vs. Rati Ram, 2018 SC 2336.

Towards women's equal right to property: Recent judicial developments in India

Archana Mishra*

This article investigates judicial developments in the Indian law of succession whereby laws have recently been interpreted by the courts to grant more property rights to Indian women. Tribal women who had been denied inheritance rights under their customary laws have been granted rights in their favour. Also, the applicability of coparcenary claims by Hindu daughters, granted under the Hindu Succession (Amendment) Act, 2005 (IND), has now been finally settled by the Supreme Court of India. Applying legal maxims for recognising the right of a Hindu widow to claim partition of her deceased husband's share in coparcenary property, in the absence of a definite statutory right, is another judicial development; while the interpretation of Hanafi law to grant inheritance rights to a sister in the presence of daughters of the deceased shows a judicial approach of uplifting the position of women even under uncodified Muslim personal law. At the same time, however, restricting the right of a Hindu daughter to claim her coparcenary right only after a certain date when no such limitation has been fixed for a male coparcener shows clear discrimination on the basis of sex. Further, granting preferential rights to agnates over cognates under Hindu law appears to have no justification. More than a decade after the passing of the Constitution, the courts continue to adopt a cautious approach when considering the constitutional validity of personal laws. With the increase in social integration, economic independence and reform movements, there needs to be a further call for the improvement of the woman's position in Indian society with respect to equal property rights.

INTRODUCTION

The law relating to the devolution of property by way of inheritance has not been settled in India even after six decades of national independence and having a Constitution which guarantees the right to equality without discrimination on the basis of sex and religion. A survey of 2014-2015 judgments of the Supreme Court and various High Courts demonstrates remarkable changes in recognising the rights of women in property. These judgments significantly impact the rights of women in India as India, with its inherent diversity in personal laws due to a patriarchal mindset, has refused to give up traditional ideologies in the framing of its laws. The progressive approach of the courts in recent times has been to strike down discriminatory and unjust laws affecting women. Judicial recognition of the inheritance rights of tribal women in property, the interpretation of statutory provisions giving rights by birth to Hindu daughters in coparcenary property,[1] and granting Hindu widows partition[2] rights to their husbands' shares in ancestral property,[3] all show a judicial approach of recognising more rights of women. Further, permitting an absolute right to the Hindu woman in property given to her with restricted estate in lieu of her consent to her husband's second marriage, and granting residuary rights

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[1] "Coparcenary property" means property where only certain person, they being the sons, grandsons, and great-grandsons of the holders of the property, acquire by birth an interest in the property, for the time being. These persons, termed to be "coparceners", enjoy a coparcenary right, ie a right by birth in the coparcenary property, a right of ownership and possession over the entire coparcenary property.

[2] "Partition" in the ordinary sense means a severance of joint family or separation of members thereof which results in defining the shares of either all the members or the separating members. It is an incident of the Hindu joint family whereby joint family status comes to an end.

[3] Ancestral property is a specie of coparcenary property.

to a sister in the presence of other heirs under Hanafi law, are steps towards securing equality of status for women with respect to property rights. At the same time, however, dismissing public interest litigation filed through a writ petition challenging the constitutional validity of the Shariat Act on the basis of being discriminating towards women, and retention of the devolution of property on the heirs of a husband upon the death of a Hindu woman who dies issueless, both show the need for a more robust approach in protecting women's rights to property. Despite positive steps taken by the legislature and the judiciary, the law relating to succession continues to perpetuate inequality on the basis of sex against the mandate of the Constitution.

RIGHTS OF PROPERTY GRANTED TO TRIBAL WOMEN IN INDIA

Inheritance rights granted to tribal women in ancestral property

In a recent landmark judgment, the Himachal Pradesh High Court in *Bahadur v Bratiya*[4] has observed that tribal women could inherit property. It has set aside age-old customary law that allows only males to inherit ancestral property. Rajiv Sharma J, while dealing with the inheritance right of daughters, held that daughters in the tribal areas in the State of Himachal Pradesh shall inherit the property in accordance with the *Hindu Succession Act, 1956* (IND) (HSA, 1956) and not as per customs and usages as laws must evolve with time if societies are to progress. This was required to protect the women from social injustice.

The plaintiff had filed a suit for declaration that the attestation of mutation[5] by the Assistant Collector, wherein the property was mutated in favour of the defendants (the plaintiff's sisters), was null and void because under the customs governing their Schedule Tribe the daughters did not inherit the property of the father. The court looked into the consistency of the impugned custom in the Gaddis tribe which did not give rights to daughters to inherit their father's property. The plaintiff failed to prove conclusively, on the basis of oral or documentary evidence, that the impugned custom was ancient, invariable, consistent and unbroken.

The High Court said that tribal belts have modernised with the passage of time, they profess Hindu rites and customs and do not follow different gods. It added that their culture may be different but customs must conform to the constitutional philosophy. The Court considered a series of rulings of the Supreme Court and State High Courts on the issue of the overriding effect of the HSA, 1956[6] over custom which deprives daughters of inheritance rights. Giving due weight to the constitutional requirement of equality of status to be given to womenfolk and recognising the conversion of restricted or limited rights of women to absolute rights under the HSA, 1956 the Court ruled that daughters in the tribal areas in the State shall inherit the property in accordance with the HSA, 1956 and not as per customs and usages. It also clearly held that in tribal areas where Hinduism and Buddhism are followed, the provisions of s 2(2) of the HSA, 1956[7] will not hinder the inheritance of property by daughters. The High Court, speaking about the constitutional commitment to prohibit discrimination on the ground of sex and to provide socio-economic justice to women further opined that:

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[4] *Bahadur v Bratiya*, High Court of Himachal Pradesh, RSA No 8 of 2003 decided on 26 June 2015.

[5] Mutation of property is the recording in the revenue records the transfer of title of a property from one person to another.

[6] *Hindu Succession Act, 1956* (IND), s 4 – Overriding effect of Act:

(1) Save as otherwise expressly provided in this Act,–

(a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus insofar as it is inconsistent with any of the provisions contained in this Act.

[7] *Hindu Succession Act, 1956* (IND), s 2 – Application of Act:

(1) …

(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

- women have to be advanced, socially and economically, to bestow upon them dignity;
- daughters in a society, who are Hindu, cannot be left and segregated from the mainstream – they are entitled to an equal share in the property; and
- gender discrimination violates fundamental rights guaranteed under the Constitution.

However, the Court concluded by holding that the observations which it made only pertained to the inheritance rights of the daughters under the HSA, 1956 and did not confer other privileges enjoined by the tribe in the tribal areas.

Inheritance rights granted to tribal women in absence of customary law

In another recent historic judgment recognising the property rights of tribal women, the High Court of Tripura in *Smt Kajal Rani Noatia v Sri Raybahadur Tripura*[8] ruled that tribal women from all tribal groups or clans in the State of Tripura have inheritance rights in property. The appellant in the case filed a declaration suit for title and for permanent injunction in respect of the suit land. The appellant submitted that he had purchased the land by sale deed from the daughters of the deceased. The daughters had inherited the property from the deceased. The deceased had been allotted said land by competent authority as recorded in the public record and the respondents attempted to intrude into the possession of the appellant. On the other hand, the respondents challenged the transfer on the ground that people belonging to a Scheduled Tribe community were governed by their customary right whereby only males inherited property and they were not governed by s 2(2) of the HSA, 1956 until a notification to the effect was made by the Union Government. The respondents did not adduce any evidence to show the existence of customary law but the bar in s 2(2) of the HSA, 1956 was not disputable as no notification of the Union Government was brought to the notice of the Court.

The major issue before the High Court of Tripura in this case was whether the appellant, who was a member of a Scheduled Tribe within the meaning of cl 25 of Art 366 of the *Constitution of India*,[9] had the right, title and interest to institute the suit to resist the action of the respondents. Talapatra J made a significant observation that the absence of an existing law both at Union and State level cannot mean that the property of the deceased male of a Scheduled Tribe community would become the property of the State while the daughters of the deceased are alive. Property in such cases will automatically devolve on the daughters, in the absence heirs by the law of inheritance, who shall have every right to dispose of the property as per their customary laws. The High Court agreed with the finding of the trial court, being in conformity with the principles of justice, equity and good conscience, that in the absence of the male successor the land would devolve to the female heirs of the male deceased "in terms of the customary law".

The High Court relied on the Supreme Court judgment in *Madhu Kishwar v State of Bihar*[10] where the Supreme Court analysed the provisions of s 2(2) of the HSA, 1956 from the constitutional vantage point and from the perspective of human rights. The Supreme Court in *Madhu Kishwar* observed:

> the human rights for woman including girl child are inalienable, integral and indivisible part of universal human rights. It is imperative for the State to eliminate obstacles, prohibit all gender based discriminations as mandated by Article 14 and 15 of the Constitution of India. Law is an instrument of social change as well as the defender for social change. Customs which are immoral are opposed to public policy, can neither be recognized nor be enforced. It is essential that the customs inconsistent with or repugnant to constitutional scheme must always yield place to fundamental rights. The State has

[8] *Smt Kajal Rani Noatia v Sri Raybahadur Tripura*, High Court of Tripura, RSA No 38 of 2009 decided on 26 February 2015.

[9] Article 366 of *Constitution of India, 1950* (IND) – Definition:

> In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say
>
> …
>
> (25) "Scheduled Tribes" means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under article 342 to be Scheduled Tribes for the purposes of this constitution;

[10] *Madhu Kishwar v State of Bihar*, (1996) 5 SCC 125.

> to step in to set right the imbalance and the directive principles, though not enforceable; mandate of Article 38, to restructure social and economic democracy, enjoins to eliminate obstacles and prohibit discrimination in intestate succession based on sex.

Guided by the principles of the changing social order as laid down in *Madhu Kishwar*, the High Court in *Kajal Rani* clearly declared that the Scheduled Tribe women would succeed in the estate of their parent, brother, husband, son et al who dies intestate as their lineal heir and inherit the property in equal share with other male heirs with absolute right similarly to the general principles of the HSA, 1956 or of the *Indian Succession Act, 1925* (ISA, 1925) which applies to the tribal Christians.

The court concluded by holding:

> it is high time to recognise the property right of the tribal women by inheritance as the lineal descendants of the male parent, brother, husband, son et al in the manner as provided under the Hindu Succession Act or Indian Succession Act subject to accomplishment what the Directive Principles of the State Policy under Chapter IV of the Constitution, in particular, under Article 44 cherishes.

These decisions, reinforcing the tribal daughters' inheritance rights, though they meet the aspirations of hundreds of thousands of women in tribal districts, give rise to new dilemmas about achieving a fine balance between the customary tribal law and the rights as granted by the court. These judicial developments, granting property rights to tribal women, whether on the basis of equity, justice and good conscious, or by denying customs which have debarred women from rights in property, show the firm approach of the courts to give previously denied inheritance rights to tribal women. As these judgments, being given by different High Courts, are concerned with their respective States, it is high time for the Supreme Court of India to rule in favour of tribal women.

COPARCENARY PROPERTY: RIGHTS OF DAUGHTERS AND WIDOWS

The Law Commission of India in 2000 proposed reforms in Hindu law to grant property rights to women.[11] Its candid comments highlighted the state's continued support for patriarchy in not granting equal inheritance rights to Hindu women in India:

> discrimination against women is so pervasive that it sometimes surfaces on a bare perusal of the law made by the legislature itself. This is particularly so in relation to laws governing the inheritance/succession of property amongst the members of a Joint Hindu family. The exclusion of daughters from participating in coparcenary property ownership merely by reason of their sex is unjust. It seems that this discrimination is so deep and systematic that it has placed women at the receiving end.

Social justice demands that a woman should be treated equally both in the economic and the social sphere. Based on the Law Commission's recommendations, the Parliament of India passed the *Hindu Succession (Amendment) Act, 2005* (IND) (Amendment Act, 2005), for granting the same coparcenary rights to daughters in the Hindu Mitakshara coparcenary[12] as apply to sons.

Coparcenary right of daughter: Prospective or retrospective effect of s 6 of HSA, 1956 as amended by Amendment Act, 2005

The prospective or retrospective operation of s 6 of the HSA, 1956,[13] as amended by the Amendment Act, 2005, had been an issue with different High Courts but has now finally been settled by the

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[11] Law Commission of India, "174th Report on Property Rights of Women: Proposed Reforms under the Hindu Law" (May 2000).

[12] Under the Mitakshara School of Hindu law sons have a right by birth in coparcenary property and are joint tenants; whereas, under the Dayabhaga School, after their father's death, sons inherit his property and form coparcenary but are tenants-in-common and not joint tenants.

[13] *Hindu Succession Act, 1956* (IND), s 6 – Devolution of interest in coparcenary property:

> (1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,–
>
> (a) by birth become a coparcener in her own right in the same manner as the son;
>
> (b) have the same rights in the coparcenary property as she would have had if she had been a son;
>
> …
>
> 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.

decision of the Supreme Court's two-judge Bench, AK Goel and Anil R Dave JJ, in *Prakash v Phulavati*.[14] While discussing the operation of the amendment the Court made it clear that the text of the amendment expressly provides for prospective application as the right conferred on a "daughter of a coparcener" is "on and from the commencement of Amendment Act, 2005". Further, the Court held that there is neither any express provision for giving retrospective effect to the amended provision nor necessary intention to that effect. Speaking about retrospective application, the Court ruled that even social legislation could not be given retrospective effect unless so intended by the legislature. In the present case, the Court noted that the Amendment Act, 2005 had expressly made the amendment applicable on and from its commencement, and the proviso keeping dispositions, alienations or partitions prior to 20 December 2004 (the day the Bill was tabled for the first time in Parliament) unaffected, did not lead to the inference that the daughter could be coparcener prior to the commencement of the Amendment Act, 2005. The Court stressed the need to read harmoniously the "Explanation" with the substantive provision being limited to a transaction of partition effected after 20 December 2004. It categorically laid down that the object of giving finality to transactions prior to the said date was not to make the main provision retrospective in any manner. The "Explanation" could not be permitted to reopen any partition[15] which was valid when effected. Finally it has settled the issue that the rights under the amendment are applicable to surviving daughters of living coparceners as on 9 September 2005 – the day of commencement of Amendment Act, 2005 – irrespective of when such daughters were born. Disposition or alienation, including partitions which had validly taken place before 20 December 2004 as per law, is to remain unaffected but the partition effected thereafter is only to be governed by the "Explanation".

Thus the Supreme Court has finally settled for the prospective application of the Amendment Act, 2005. It has further ruled that statutory notional partition[16] is not required to be registered as it does not fall within the traditional concept of partition. The literal interpretation of the court, though it appears to be logical, has resulted in giving limited rights to daughters in coparcenary property. A daughter born after 9 September 2005 becomes a coparcener by birth in ancestral property where property has not been partitioned. A daughter born before 9 September 2005 does not become coparcener in ancestral property if property had been validly partitioned in accordance with accepted modes of partition before 20 December 2004. The accepted modes of partition under classical Hindu law were by way of notice, filing of suit, appointment of arbitrator, oral partition, family arrangement, making a will of undivided share, etc. As per the Amendment Act, 2005, after 20 December 2004 only those partitions are recognised which have been done either by way of registered deed or by decree of court, ie after the said date, a daughter having a right in coparcenary property could claim reopening of a partition if the partition has not been done either by way of registered deed or by decree of court.

The issue of the prospective or retrospective effect of s 6 had also come before the single judge of the Bombay High Court in *Ashok Gangadhar Shedge v Ramesh Gangadhar Shedge*.[17] Due to doubt about the correctness of the decision rendered by the Division Bench of the Bombay High Court in *Vaishali Satish Ganorkar v Satish Keshavrao Ganorkar*,[18] the single judge Bench in *Ashok*

…

(5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004.

Explanation – For the purposes of this section "partition" means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a court.

[14] *Prakash v Phulavati*, Supreme Court of India, Civil Appeal No 7217 of 2013 decided on 16 October 2015.

[15] Meaning a redistribution of coparcenary property.

[16] Notional partition means the assumption that partition had taken place before the death of a coparcener and that a share is reserved for him which passes by rules of intestate succession.

[17] *Ashok Gangadhar Shedge v Ramesh Gangadhar Shedge*, 2014 (4) BomCR 797.

[18] *Vaishali Satish Ganorkar v Satish Keshavrao Ganorkar*, 2012 (5) BomCR 210.

Gangadhar Shedge requested that the matter be referred to a larger Bench. The issue was then referred to a larger Bench in *Badrinarayan Shankar Bhandari v Ompraskash Shankar Bhandari*.[19]

The issue involved in *Vaishali Satish Ganorkar* was whether a daughter, who was born before 9 September 2005 could claim to be coparcener when her father remained alive on and after 9 September 2005. The Division Bench comprising of Mohit S Shah CJ and Mrs Roshan Dalvi J held that on and from 9 September 2005, the daughter of a coparcener would become a coparcener by virtue of her birth in her own right just as a son would be, and she would have the same rights and liabilities as that of a son. Emphasising the words used in the provision such as "shall be", "on and from" and that vested rights could not be unsettled by imputing retrospectivity upon legislation by judicial interpretation or construction, the court ruled in favour of prospective application.

Disagreeing with the view expressed by the Division Bench of the Bombay High Court in *Vaishali Satish Ganokar* the single judge RG Ketkar J, in *Ashok Gangadhar Shedge* went on to hold that even if the daughter of a coparcener has by birth become coparcener in her own right and she has the same rights in the coparcenary property as she would have had if she had been a son, the same shall not affect or invalidate any disposition or alienation including any partition which is duly registered under the *Registration Act, 1908* (IND) or effected by the decree of a court or testamentary disposition of property which had taken place before the 20 December 2004. Considering that the Amendment Act, 2005 is for giving equal rights to daughters in the Mitakshara coparcenary property as those of sons, the court observed that by excluding a daughter from participating in the coparcenary ownership not only contributed to discrimination against her on the ground of gender, but also has led to oppression and negation of her fundamental right of equality guaranteed by the *Constitution*. An appeal against the order of the Division Bench in *Vaishali Satish Ganokar* was dismissed by the Supreme Court but at the same time the Supreme Court held that the question of law would be kept open for consideration.

The Full Bench consisting of MS Shah CJ and MS Sanklecha and MS Sonak JJ, was constituted in the case of *Badrinarayan Shankar Bhandari* on the reference in the *Ashok Gangadhar Shedge* case. The questions of law which were referred before the Full Bench were: whether s 6 of the HSA, 1956 as amended by the Amendment Act, 2005 is prospective or retrospective in operation; and whether it applies to daughters born before the commencement of the HSA, 1956 or is limited in application to daughters born after the commencement of the amended Act. The Full Bench went into the history and development of Hindu Law, the Law Commission Report, the Report of the Standing Committee of Parliament and the Statement of Objects and Reasons of the Bill introduced in Parliament to find out the true intent of the Parliament in amending s 6 of HSA, 1956 by the Amendment Act, 2005. The court ruled that a bare perusal of the first part of the new provision showed it to have prospective application to grant coparcenary rights by birth only to daughters born on or after 9 September 2005, whereas the later part of the provision showed the retroactive intent of the legislature by granting rights to daughters who were born before the amendment but were alive on the date of coming into force of the amendment. Hence, if a daughter of a coparcener had died before 9 September 2005 she had not acquired any rights in the coparcenary property and so her heirs had no rights in the property. The court laid down two conditions necessary for applicability of the amended s 6:

(i) the daughter of the coparcener (daughter claiming benefit of amended s 6) should be alive on the date of the amendment coming into force; and
(ii) the property in question must be available on the date of the commencement of the Amendment Act, 2005 as coparcenary property.

Before the Supreme Court ruling of *Prakash*, the Bombay High Court's decision in *Badrinarayan* brought in some clarity and entitled daughters to enjoy their coparcenary share. The progressive approach of the Bombay High Court was considered by various High Courts for ruling in favour of daughters. The dilemma about the applicability of s 6 of the HSA, 1956 as amended by Amendment Act, 2005 has now been settled after the decision of the Supreme Court in *Prakash*. Even after the Supreme Court's ruling as regards a daughter's right in coparcenary property, the question remains to

[19] *Badrinarayan Shankar Bhandari v Ompraskash Shankar Bhandari*, AIR 2014 Bom 151.

be answered about the status and share of a child of a living daughter, particularly when a share in coparcenary property is to be reserved for a child of a predeceased daughter. If the right of a daughter is restricted before a certain date then one fails to understand the significance of the birth right given to a daughter born before 20 December 2004. The Amendment Act, 2005 raises other issues. Neither HSA, 1956 nor the Amendment Act, 2005 has defined the meaning of the terms "coparcenary", "coparcenary property", "survivorship", "partition" etc. Continued reliance on the classical meaning of the concepts of a coparcener and his rights and duties, coparcenary property, partition, rules of devolution of coparcenary property on partition etc, has brought in more ambiguity, particularly due to the inclusion of daughters. The Court has also not emphasised the need to define the different terms used under the classical Hindu law.

Partition: Constitutional validity of "Explanation" appended to s 6(5) of the HSA, 1956

The Amendment Act, 2005 defines the term "partition" under the "Explanation" appended to s 6(5) of the HSA, 1956[20] to mean partition made by registered deed or by the decree of court. The essence of recognising partition in such a way was that the proof of partition would become easy and it would also do away with other modes of partition prevalent and recognised under classical Hindu law. The constitutional validity of the "Explanation" came before the Karnataka High Court in *Puttalinganagouda v Union of India*.[21] Petitioners contended that as oral partition was a well-recognised mode of partition, its exclusion from the definition of partition in the "Explanation" was unreasonable and arbitrary and hence violated Art 14 of the *Constitution of India*.[22] It was further urged that persons whose rights have accrued by virtue of a registered partition deed or a court decree, and those whose rights flow from an oral partition, should stand on the same footing and form the same class.

The concept of "partition" has changed from Shastric law to that under statutory law. According to the Mitakshara school of thought,[23] "partition" had two distinct meanings: first,– the severance of joint status with legal consequences; and second,– the adjustment of the diverse rights of different coparceners into specific shares. What was necessary to constitute a partition by way of severance of status was a definite unequivocal indication of intention by a coparcener to separate him from the family. Members of a family after severance of status enjoyed a right of tenancy-in-common rather than joint tenancy. Since partition did not amount to a transfer of property within the meaning of s 5 of Transfer of Property Act, 1882 (IND), it was not required to comply with the primary formalities of transfer of property, ie writing attestation and registration. However, the HSA, 1956, as amended by the Amendment Act, 2005, makes it clear that partition refers only to those partitions made by execution of a written partition deed duly registered under the Registration Act, 1908 (IND) or which have been undertaken in pursuance of the decree of a court. It is to be noted that apart from these modes of partition, the amended HSA, 1956 does not also include "family arrangement" or "oral partition" within the definition of "partition". *Halsbury's Laws of England* defines "family arrangement" as:

> an agreement between members of the same family, intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour.[24]

[20] See n 13.

[21] *Puttalinganagouda v Union of India*, MANU/KA/0420/2015.

[22] Article 14 of *Constitution of India, 1950* (IND) – Equality before law:

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

[23] See n 12.

[24] *Halsbury's Laws of England* (Butterworths, 3rd ed, 1952-1963) Vol 17, 215-216.

While dealing with the term "family arrangement", the Supreme Court in *Kale v Deputy Director of Consolidation*[25] held that the family arrangements are governed by a special equity peculiar to themselves. Dealing with registration and memorandum of family arrangement through family settlement, the Supreme Court further went on to hold:

> Family arrangement may be even oral, in which case no registration is necessary. Registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between the document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the court for making necessary mutation. In such a case, the memorandum itself does not create or extinguish any rights in immovable properties and therefore does not fall within the mischief of section 17(2) of the Registration Act and is, therefore, not compulsorily registrable but can be used in evidence of the family arrangement and is final and is binding on the parties.

Since oral partition and family arrangement have been the most common and legally accepted modes of division of property under the Hindu Law, Indian courts have always taken a liberal view of their validity. Taking note of low literacy and the humble financial level of families, the Law Commission of India has suggested the inclusion of "oral partition" and "family arrangement" in the definition of "partition" under the Explanation.[26]

In *Badrinarayan* the court made the distinction between an oral partition or partition by unregistered document which was not followed by partition by metes and bounds on the one hand, and an oral partition or partition by unregistered document which was acted upon by metes and bounds, and where entries about such physical partition, and the names of sharers as individual owner/s, were made in the public record, on the other hand. The court ruled that it is only where an oral partition or a partition by unregistered document is not followed by partition by metes and bounds, evidenced by entries in the public record, that a daughter would be in a position to contend that the property still remains coparcenary property on the date of coming into force of the Amendment Act, 2005.

Endorsing the view of *Badrinarayan*, Anand Byrareddy J in *Puttalinganagouda* held that the petitioners in that case were not really aggrieved as, pursuant to their oral partition in the year 1980, the parties after actual partition had been enjoying their respective shares. By completely relying on the decision of *Badrinarayan*, the court opined that there remained no necessity to address the constitutional validity of the provision.

The concept of partition and severance of status under Hindu law has no application under the amended HSA, 1956. A registered partition deed could not be prepared nor antedated, and similarly a final decree for partition cannot be created or manipulated, hence partition by registered instrument and a decree for partition that has attained finality reflects the bona fide conduct of the parties and not conduct just to deny daughters their legitimate share in the coparcenary property. Whether *Badrinarayan's* interpretation of the provision, by allowing oral partition or partition by unregistered document followed by actual partition and recording the names of sharers as individual owners in the public record maintained by government, amounts to partition as defined under the amended HSA, 1956 remains arguable in view of the Supreme Court's decision in *Prakash* being silent about the ways of considering a document to be registered.

Hindu widow's partition right in husband's ancestral property

Women were not recognised as coparceners in the family under ancient Hindu law. The object of not giving such rights to a widow under Shastric Hindu law was to avoid division of property and separation of joint family. Under Shastric law a woman was entitled to an equal share on partition between sons or between father and sons but she had no right to claim partition. The *Hindu Women's Right to Property Act, 1937* (IND) (HWRTP Act, 1937), which was passed with the object of uplifting the status of widows, for the first time statutorily gave an enforceable right to a widow to demand

[25] *Kale v Deputy Director of Consolidation*, (1976) 3 SCC 119.

[26] Law Commission of India, "208th Report on Proposal for Amendment of Explanation to Section 6 of the Hindu Succession Act, 1956 to include Oral Partition and Family Arrangement in the Definition of 'Partition'" (July 2008).

partition of her deceased husband's share, but it was only "limited estate". Property on her death did not pass on to her heirs but reverted back to the family of her husband. HSA, 1956 promoted the limited estate right of a woman in property to absolute property[27] and a widow is a Class I heir of the husband in the Schedule of the HSA, 1956. Parliament amended HSA, 1956 to grant a coparcenary right to a daughter but the same principle was considered for granting such a right to a widow or mother.

The right of a widow to claim partition of her husband's ancestral property was questioned recently in *Santosh Popat Chavan v Sulochana Rajiv* (2014).[28] The issue was whether the widow could file a partition suit to claim partition of her husband's share in ancestral property. AB Chaudhari J of the Bombay High Court in that case looked into the Shastric Hindu law and various other statutory laws with respect to a widow's right to claim partition of joint family property belonging to her husband's family. The Court noted that the HWRPA, 1937 gave a widow a right to claim partition in order to provide her with some source of income for her survival and maintenance; but the progressive reason behind the HSA, 1956 was to provide a full right to a widow in her husband's share in ancestral property. It further held that by virtue of a widow being a Class I heir in the Schedule under the HSA, 1956, she is entitled to succeed to the entire joint family property share of her deceased husband with the same magnitude of estate which her husband would have received had he been alive, ie her right to receive an estate after the death of her husband, like that of other coparceners in the family, has been fully recognised and accepted by the HSA, 1956. It observed that since the HSA, 1956 has abolished the concept of limited right or the concept of reversion, a widow could deal with the property of her husband without any threat of reversion.

Referring to the Latin phrase *sui juris*, which means "one's own right", in terms of rights under the HSA, 1956, the Court opined that the right of a widow under the HWRPA, 1937 was of a limited nature, but under the HSA, 1956 she has an absolute right and, hence, she can act *sui juris*. It further held that the HSA, 1956 does not impose any prohibition on her from filing the suit independently. Applying the other doctrine – *ubi jus ibi remedium* – to the HSA, 1956 the Court held that when there is a right there is a remedy, therefore if she has a right in property then she also has a right to claim her share and is independent of other coparceners to demand partition. The Court further pronounced that the right having been given to a woman under the HSA, 1956, she cannot be told that although she has a right to receive a share, she is not entitled to file a partition suit. The Court concluded by holding that it would amount to a retrograde step if a contrary interpretation was given.

COMPENSATION NOT TO BE GUIDED BY SUCCESSION LAW

The payment of compensation to families of people who have died in natural disasters also raises questions about women's rights. For example, should death compensation be distributed according to the notified policy or devolve according to the law of succession governing the deceased? These were some of the questions which came recently before the Bombay High Court in *Gitabai v Anusayabai*.[29]

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[27] *Hindu Succession Act, 1956* (IND), s 14 – Property of a female Hindu to be her absolute property:

(1) Any property possessed by a Female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.
Explanation: In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act.

(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property.

[28] *Santosh Popat Chavan v Sulochana Rajiv*, High Court of Bombay, Second Appeal Nos 119 and 405/2013 decided on 12 December 2014.

[29] *Gitabai v Anusayabai*, High Court of Bombay (Aurangabad Branch), Second Appeal No 476 of 2004 decided on 9 April 2015.

The Government of Maharashtra had notified surviving relatives of those who had died in an earthquake about financial assistance. It had specifically set out the manner of payment, amount of compensation and persons entitled to claim compensation. An amount of compensation/financial assistance of Rs 50,000 per deceased person was payable to the surviving mother or father. The deceased, along with her husband and all their children had died. The mother-in-law of the deceased claimed the entire compensation as her legal heir, whereas the mother of the deceased submitted that the law of inheritance would not be applicable as compensation could not be equated to the estate of the deceased. The mother-in-law of the deceased claimed as legal heir in respect of the devolution of property of a Hindu female because the HSA, 1956, in the absence of the husband and issue, grants preference to heirs of the husband before the parents of the deceased.[30] Heirs of the husband include his mother or mother-in-law of the deceased. Thus, statutorily, the mother-in-law of a deceased woman has better rights in the property of the deceased than the deceased's own mother. The issue before the court was whether death compensation could be treated as part of the estate of the deceased capable of devolution by the rules of intestate succession?

The Court considered the rationale as laid down by the Delhi High court in *Smt Ganny Kaur v The State (NCT)*[31] which related to the apportionment of compensation given to a riot victim. The Delhi High Court had concluded that the compensation awarded in respect of the death of riot victims could not be equated with the estate of an intestate. Since the compensation was never part of the property held by the deceased, there could not be any question of inheritance in respect thereof. The Court was of the view that personal law of the citizen operates mostly in the domain of citizen versus citizen contests and has little or no relevance whenever the relationship between the state and a citizen is in issue. Compensation awarded by the state does not function under any personal law. In the instant case of *Gitabai*, the Court, while endorsing the view of *Ganny Kaur*, and after considering the government's circular, came to the conclusion that the mother of the deceased was rightly entitled to the compensation as being the surviving mother of deceased.

The decision of the Bombay High Court not to rely on personal law on succession seems to be justified, as the *ex-gratia* amount of compensation provided by the state is not under the personal law of the victim but under the secular law of the state. The state for itself and its agency is under a duty to protect and prevent the loss of life of its citizens. Compensation for death in a natural disaster by government is to provide financial support to the dependents of the deceased; therefore, such compensation could not be equated to the estate of the deceased. The strict interpretation of the circular by the court, however, differentiates between mother and mother-in-law, and indirectly rules against the assumption prevalent in Hindu society that a Hindu wife, after her marriage, merges with her husband's family and his family becomes her family for all purposes.

PROPERTY OF HINDU FEMALE

Devolution of property of female dying intestate on heirs of husband

The issue of devolution of the property of a Hindu widow who died issueless recently came before Rajasthan High Court in *Umrao Devi v Hulas Mal* (2015).[32] The widow had inherited property from her husband on his death who had died prior to the passing of the HSA, 1956. Under uncodified classical law prevalent before the HSA, 1956, women enjoyed only limited rights in the inherited property. Once the HSA, 1956 came into force, the limited rights of property in the hands of a widow

[30] *Hindu Succession Act, 1956* (IND), s 15 – General rules of succession in the case of female Hindus:

(1) The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16:
   (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;
   (d) fourthly, upon the heirs of the father; and
   (e) lastly, upon the heirs of the mother.

[31] *Smt Ganny Kaur v The State (NCT)*, AIR 2007 Delhi 273.

[32] *Umrao Devi v Hulas Mal*, 2015 (2) WLN 267 (Raj).

under classical law before 1956, were immediately converted to absolute rights. The HSA, 1956 lays down separate rules for the devolution of property for Hindu males and females dying intestate. According to the rules of devolution for a woman dying intestate, in the absence of her husband and children, the heirs of the husband inherit her property[33] as if the property belonged to him. The HSA, 1956 lays down different categories of heirs for males dying intestate as: Class I, Class II, Agnates[34] and Cognates[35]. The order of succession is hierarchical and the heirs under Class I and Class II are mentioned expressly in Schedule of the present Act, the agnatic and cognatic heirs are not expressly mentioned.

The widow in *Umrao Devi* had become the absolute owner of the property upon the coming into effect of HSA, 1956, but died issueless. In the absence of her husband's Class I and Class II heirs, the other relatives of her husband – two relatives related to her husband by blood and another relative related to his brother's family by marriage – claimed rights in her property. Referring to the definition of agnates and cognates, the order of succession among agnates and cognates, computation of degrees and also the rules of devolution of property of females dying intestate as mentioned under HSA, 1956, the Court held that only the two relatives related by blood to her husband fell within the definition of agnate and thus were entitled to share in her property. In the matter of the devolution of property of a Hindu female, the law still favours the husband's close or distant relatives, whom wife may have never seen in her life, over her own parents, to have legal claim over her property. The legislature needs to re-examine the law in this regard as it is illogical and discriminatory.

Property with restricted interest given in lieu of consent for second marriage: Whether limited estate or absolute estate

The issue of whether an allotted property with restricted interest, given to a wife in lieu of her consent for her husband's second marriage, was enlarged into an absolute estate by virtue of s 14(1) of the HSA, 1956[36] came before the Madras High Court in *Jayalakshmi Ammal v Kaliaperumal*.[37] In that case, the husband, married to his first wife for 26 years, had no issue from her, and wanted to marry for a second time but with the consent of his first wife. After consent was given, the husband executed a settlement deed including recitals that the allotted property was settled in the first wife's favour as he wanted to lend support to her. She was to enjoy the property only for her lifetime and, upon her death, the property would revert back to the husband if no issue was born to her. Contrary to the terms of the settlement deed the first wife alienated the property by way of sale. The High Court took note of various constitutional provisions prohibiting discrimination on the basis of sex and provisions that provide protective discrimination in favour of women. It ruled that social justice demands that a woman should be treated equally both in the economic and the social sphere. The High Court laid down the following principles under s 14 of the HSA, 1956:

1. that the provisions of s 14 of the HSA, 1956 must be liberally construed in order to advance the object of the Act which is to enlarge the limited interest possessed by a Hindu widow which is in consonance with the changing temper of the times;
2. that s 14(2) does not refer to any transfer which merely recognises a pre-existing right without creating or conferring a new title on the widow;

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[33] See n 30.

[34] *Hindu Succession Act, 1956* (IND), s 3 – Definitions and interpretations:
(1) In this Act, unless the context otherwise requires–
(a) "agnate" – one person is said to be an "agnate" of another if the two are related by blood or adoption wholly through males;

[35] *Hindu Succession Act, 1956* (IND), s 3 –Definitions and interpretations:
(1) In this Act, unless the context otherwise requires–
…
(c) "cognate" – one person is said to be a cognate of another if the two are related by blood or adoption but not wholly through males;

[36] See n 27.

[37] *Jayalakshmi Ammal v Kaliaperumal*, AIR 2014 Mad 185.

3. that the HSA, 1956 has made revolutionary and far-reaching changes in the Hindu society and every attempt should be made to carry out the spirit of the Act which has undoubtedly addressed a long-felt need and tried to do away with the individual distinction between a Hindu male and female in matters of intestate succession; and
4. that s 14(2) is merely a proviso to s 14(1) and has to be interpreted as a proviso and not in a manner so as to destroy the effect of the main provision.

Applying the principles to the facts of the case, the Court held that taking a second wife during subsistence of first marriage was certainly a matrimonial injury and cruelty to the first wife who had been with him for 26 years. The Court was of the view that the act of the husband gave a right to the first wife under law to seek maintenance and even divorce. Conferment of property could not lessen her distress or her feelings of neglect. Consent of his wife, whether voluntary or not voluntary, would not exonerate her husband from paying her maintenance, observed the Court. It also went further by holding that even if consent was voluntary, there could not be consent for the punishable illegal act of bigamy and the conferment of property with limited right to enjoy could only offer solace to a minimum extent that the woman need not beg for food. The Court emphasised that since the allotment of property to the first wife was towards her maintenance, she became absolute owner after the commencement of the HSA, 1956, despite the limitations and restrictions contained in the instrument, ie the settlement deed, and therefore she had every right to dispose of the property. The sale was thus held to be valid. The High Court was of the view that if the alternative interpretation, that the settlement deed only conferred limited rights, was accepted, then that would promote and encourage more men to create broken families and indulge in illegal activities and also bring women back from the e-age to the stone-age.

Property with limited rights given to a Hindu woman in lieu of her maintenance under classical law enlarged into an absolute estate on the date of coming into force of the HSA, 1956. Various Supreme Court decisions have consistently held that a wife's right to maintenance against her husband is a pre-existing right and it does not depend upon the possession of the property by the husband. A husband, under personal obligation, is duty bound to maintain his wife irrespective of his possession of property. The High Court in *Jayalakshmi Ammal* was justified in establishing the rights of women through various social principles and giving preference to the maintenance rights of a wife rather than strictly interpreting the words of the settlement deed.

MUSLIM LAW OF SUCCESSION

Constitutional validity of Shariat Act in regard to succession: Public interest litigation not maintainable

Turning to the Muslim law of succession, the High Court of Kerala by a recent judgment in *Khuran Sannath Society v Union of India*[38] dismissed public interest litigation seeking a declaration that the *Muslim Personal Law (Shariat) Application Act, 1937* (IND) (Act of 1937), applicable in regard to the inheritance of Muslim women, violates Arts 14, 15, 19, 21 and 25 of the *Constitution of India* and is therefore void and unenforceable. The High Court dismissed the petition on the ground that the issues raised in the writ petition were for the legislature to consider and to frame laws and they could not be adjudicated in proceedings under writ petition ie Art 226 of the *Constitution of India*.

The petitioners, aggrieved by Muslim succession law, had made the following submissions:

1. there is discrimination on the ground of sex in so far as inheritance is concerned regarding females in the Muslim community, ie a female child does not receive an equal share compared to a male child born to a Muslim father;
2. a female child receives a lesser share as compared to her brother;
3. misinterpretation of holy Quranic edicts as practised in India leads to patent discrimination against female children alone, while the sons who succeed to their mother's or father's property

[38] *Khuran Sannath Society v Union of India*, High Court of Kerala at Ernakulam, WP(C) NO 31299 of 2008 decided on 2 July 2015.

need not share any portion of the inherited properties with anyone of the deceased's relatives other than the spouse and parents of the deceased;

4. if a deceased Muslim happens to leave only daughters, those daughters will not receive a share equivalent to that of the share which she would receive if she was a male, and will have to share the properties along with not so close relatives of the deceased; but if the deceased leaves only a male child he takes the entire property needing to share it only with the spouse and parents of the deceased;
5. the Muslim Personal Law as followed carries discrimination based on gender in the matter of inheritance which cannot have the acceptance of the constitutional principles enshrined in Arts 14, 15, 19, 21 and 25 of the *Constitution of India*.

The respondent raised preliminary objection as to sustenance of the aforesaid issue in public interest litigation and submitted that legislation challenging the personal law applicable to Muslims could be brought into effect only by the competent legislature. The respondent mentioned *Mohd Ahmed Khan v Shah Bano Begum*[39] wherein the court had the occasion to consider the Act of 1937 in the context of ss 125 and 127 of the *Code of Criminal Procedure, 1973* (IND). The Supreme Court in *Mohd Ahmed Khan*, after observing that there is no conflict between the Code and the Muslim Personal Law, contemplated the desire of the government for the Muslim community to take the lead and for Muslim public opinion to crystallise on the reforms in their personal law.

A Division Bench of the Kerala High Court comprising Ashok Bhushan CJ and AM Shaffique J in *Khuran Sannath* relied on *Maharshi Avadhesh v Union of India*[40], where the Supreme Court, considering the prayer of the petitioner in the Writ Petition that the respondents be directed not to enact the Shariat Act which affected the dignity and rights of Muslim women, observed that those were the matters for the legislature. The Supreme Court, while dismissing the petition in *Maharshi Avadhesh* had made the following observation:

> to declare *Muslim Women (Protection of Rights on Divorce) Act, 1986* as void being arbitrary and discriminatory and in violation of Article 14 and 15 Fundamental rights and Articles 44, 38 and 39 and 39A of the *Constitution of India* and to direct the respondents not to enact Shariat Act in respect of those adversely affecting the dignity and rights of Muslim women and against their protection are all matters for legislature. The Court cannot legislate in these matters.

The Kerala High Court in *Khuran Sannath* accordingly ruled that "the issues raised in the Writ Petition cannot be adjudicated in proceedings under Article 226 of the *Constitution of India* in this Public Interest Litigation. It is for the Legislature to consider the issues raised and frame a competent legislation".

The Court missed an opportunity to give its opinion on the constitutional validity of personal law. The Court, with regard to the constitutional validity on issues related to personal law in earlier cases of a similar nature, has abstained from giving its opinion. In *Mary Roy v State of Kerala*[41] the Supreme Court had the opportunity to consider the constitutional validity of the *Travancore Christian Succession Act, 1092* (IND). The Supreme Court determined that the provisions of the *Travancore Christian Succession Act, 1092* were superseded by ISA, 1925 on the technical ground that, after independence, the laws enacted by princely states, which were not expressly saved by the *Part B State (Laws) Act 1951* (IND), had been repealed, and ISA, 1925 became applicable to the intestate succession of property of members of the Indian Christian community in the territories of the erstwhile State of Travancore. However, the Court declined to examine the provisions which affected the property rights of women belonging to that State. In *Madhu Kishwar v State of Bihar* (1996),[42] challenging the constitutional validity of the *Chhota Nagpur Tenancy Act, 1908* (IND), which disentitled tribal women to inheritance rights, the Supreme Court upheld the discriminatory provisions but allowed the women to assert their rights without declaring that the custom of disinheriting the

[39] *Mohd Ahmed Khan v Shah Bano Begum*, AIR 1985 SC 945.

[40] *Maharshi Avadhesh v Union of India*, (1994) Suppl 1 SCC 713.

[41] *Mary Roy v State of Kerela*, (1986) 2 SCC 209.

[42] *Madhu Kishwar v State of Bihar*, (1996) 5 SCC 125.

daughter offended Arts 14, 15, and 21 of the *Constitution*. The Supreme Court struck down s 118 of ISA, 1925 as being unconstitutional on the basis that it violated Art 14 of the *Constitution* even when the law was a pre-Constitutional personal law. Such an approach from the Supreme Court is desirable, but the Court generally adopts a cautious approach when considering the constitutional validity of personal laws and is yet to give a definite ruling and declare that personal laws are "laws" or "laws in force" under Art 13 of the *Constitution of India*. By engaging with the constitutional validity of personal laws, the Supreme Court could have set a precedent for examining gender discrimination under other personal laws.

Hanafi law of inheritance: Full sisters a sharer or residuary in presence of daughter

The right of full sisters to inherit property in the presence of a daughter of the deceased under Hanafi law recently came before the Bombay High Court in *Khairunnisabegum v Nafeesunisa Begum* (2014).[43] The deceased left behind his widow and daughter (the defendants) and two sisters (the plaintiffs), but no male issue. The issue was to decide the inheritance status of the sisters in the presence of the widow and daughter of the deceased.

As per the Hanafi law of inheritance, heirs are classified into three classes: (1) Quranic heirs or sharers – whose share is fixed in the Quran; (2) residuaries – after allocation of shares to the sharers, the residue is allocated to the residuaries; and (3) distant kindred – when there are no sharers and residuaries, the property is inherited by distant kindred. According to the Table of Sharers, a full sister is a sharer if there is no child or child of a son, howsoever low, and at the same time shows that a full sister in default of a full brother takes the residue, if any, if there be a daughter or daughters, etc.

The right of a full sister had come for consideration before the Jammu and Kashmir High Court in *Maqsooda Begum v Shahnawaz Khan*.[44] The question for determination before that Court was whether a full sister is an heir under the Mohammadan law. In that case, the deceased was survived by a widow, two daughters and a sister. The Jammu and Kashmir High Court considered the view of Hussain, wherein the rights of a sister to inherit the property of a Sunni Muslim are enumerated as follows:

> The full sister inherits in three capacities:
>
> a. She takes as sharer if there is no child, child of a son h.l.s. father, true grandfather or full brother and she is entitled to 1/3 share (or 2/3 collectively when there are two or more sisters).
> b. She inherits as a residuary with her full brother.
> c. She inherits as a residuary with daughter or sons daughter h.l.s. or one daughter and a son's daughter h.l.s. provided there is no nearer residuary.[45]

The Court observed that a sister has an interest in the property of the deceased and even if she does not receive the share as a sharer, she receives it as a residuary. It accordingly held that a sister has a residuary interest in the estate even in the presence of a wife and children.

The Supreme Court also had the opportunity to decide the rights of a full sister in *Newanness alias Mewajannessa v Shaikh Mohamad*,[46] where the deceased widow had left her two daughters and one sister. The Supreme Court considered the views of Mulla[47] and observed that if there are no sharers, or if residue is left after satisfying their claim, residuaries also inherit in the order set forth in the Table. In the absence of descendants, ie a son, son's son and ascendants like father and grandfather, then the descendants of the father take in the order mentioned therein, first to full brother, then to sister. The Supreme Court accordingly granted one-third share to the full sister and one-third share each to both the daughters.

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[43] *Khairunnisabegum v Nafeesunisa Begum*, High Court of Bombay (Aurangabad Branch), First Appeal Nos 1155 and 505 of 2013 decided on 22 September 2014.

[44] *Maqsooda Begum v Shahnawaz Khan*, AIR 1991 J&K 8.

[45] Imtiyaz Hussain, *Muslim Law & Customs (Jammu & Kashmir)* (Srinagar Law Journal Publications, 1989).

[46] *Newanness alias Mewajannessa v Shaikh Mohamad*, AIR 1996 SC 702.

[47] Dinshaw Mulla, *Principles of Mohammedan Law*, edited by Justice M Hidayatullah and Ashad Hidayatullah (NM Tripathi Private Ltd, 18th ed, 1977).

Placing reliance on the clear pronouncement of law by the Supreme Court as corroborated by the observations of the High Court of Jammu and Kashmir and in Mulla, the Bombay High Court in *Khairunnisabegum* concluded that after the allocation of shares to the sharers, ie to the widow and the daughter, the residue passes on to the full sister as residuary.

The interpretation of the court is logical and justified. A full sister is either a sharer or residuary in a given circumstance. If she could not claim as a sharer due to absence of conditions attached but is a residuary due to the fulfilment of other conditions, she then inherits as a residuary.

CONCLUSION

Contemporary Indian society has refused to give up traditional ideologies and continues to perpetuate age-old patterns of ownership in material assets. India's agrarian transition has been slow, uneven and highly gendered.[48] Deprivation of property rights is the root cause of the secondary status of women in India.[49] Across castes and religions, they share the similar difficulty of their lack of economic independence which leads to their oppression and subjugation.[50] Indian women have been struggling for more than half a century to bring the attention of the legislature as well as the judiciary to their property rights. The pace of the legislature has been slow in amending the laws but the judiciary in recent times has taken progressive steps in interpreting the law in favour of women. Despite some progressive interpretations and innovative legal maxims, the path to justice has not progressed in a linear trajectory for the property rights of Indian women. There is a far greater imperative to follow the principles under the *Constitution of India* of equality, justice and non-discrimination than to retain the archaic, irrational, arbitrary and discriminatory personal laws which demean the status of women in India.

[48] Bina Agarwal, "Gender and Land Rights Revisited: Exploring New Prospects Via the State, Family and Market" (2003) 3 *Journal of Agrarian Change* 184.

[49] Poonam Pradhan Saxena, "Succession Laws and Gender Justice" in Archana Parashar and Amita Dhanda (eds), *Redefining Family Law in India: Essays in Honour of Prof Sivaramayya* (New Delhi: Routledge, 2008) 282.

[50] Leila Seth, *On Balance: An Autobiography* (Penguins Books India, 2003).