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CULTURAL IMPERIALISM: AN UNDERPINNING IN THE HINDU SUCCESSION ACT

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Abstract

Section 15 of the Hindu Succession Act (HSA) encapsulates Iris Marion Young's concepts of oppression and cultural imperialism. The Section reflects the dominant thinking that a woman has no family of her own – it is either the husband's or the father's that she lives in. It is in tune with the cry for patriarchy and the inherent patriarchal nature of a family unit and thus, must be amended, and the order of succession altered. It is contended that the Section is ultra vires the Indian Constitution since the difference between the way an issueless intestate man's estate and an issueless intestate woman's estate devolves is based only on gender, which violates Article 15(1) – this much was held in Mamta Dinesh Vakil v. Bansi Wadhwa by the Bombay High Court in 2012, but the judgment being passed by a single bench, is not yet binding. It is also submitted that Omprakash v. Radhacharan, which is an example of the adverse effects of Section 15, was incorrectly decided by the Supreme Court since the Parliament's intent while introducing it was to send the suit property back to the source and not to a stranger. Besides, it is no longer res integra that succession laws are not only about those who are entitled to the property, but also about those who should be disentitled. By not treating a woman as an independent individual capable of transferring her property to her blood relatives, moreover, the law also suggests that a woman has a limited stake in the property, and thus what was sought to be removed by Section 14(1) of the HSA still clearly lingers in the scheme of succession. The manner in which Section 6 has been

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interpreted, too, is testament to this.

Key Words: Oppression, Cultural Imperialism, Patriarchy, Hindu Succession Act, Section 15

INTRODUCTION

Her husband had died of a snake bite within three months of their marriage and she was promptly thrown out of her matrimonial home by her in-laws. Forty-two years later, an issueless Narayani Devi died intestate and the same in-laws who had not batted an eyelid before having driven her out found themselves in the middle of a courtroom battle. No, this was not over the way they had (mal)treated her – rather, it was a "hard case"[2] that revolved around the question of who would succeed to Narayani's property. The highest court of the country, after commenting that sympathy and sentiment had no place in determining the rights of a party which were otherwise clear, dismissed Narayani's mother's appeal, thus handing over Narayani's property to her deceased husband's heirs.

If all that was needed for the safety of women was enactment of laws, then those in India are on velvet. But reality stings. Laws are often not enforced effectively, are observed in the breach, the evil seen as an accepted practice, or women are defeated by "hard cases".[3] Sometimes, laws are not even gender-neutral because of the socio-political and historical context they find themselves in. In this paper, I seek to explore one such law – Section 15 of the Hindu Succession Act, 1956 ("HSA" or "the Act") – through the eyes of Iris Marion Young, and hope to establish my case for why it should be declared unconstitutional. In addition to this, I would also look at Section 6 of the Act and try to make sense

[2] *Omprakash & Ors v. Radhacharan & Ors* 2009 (7) SCALE 51 [10].
[3] Prabha Sridevan, 'A Law That Thwarts Justice' *The Hindu* (Chennai, 26 June 2011) <www.thehindu.com/opinion/lead/a-law-that-thwarts-justice/article2137110.ece> accessed 22 July 2020.

of (again, with the aid of Young's writings) why the Section has been interpreted the way it has. The paper begins by laying down the crux of Section 15 and then introduces the reader to the concept of oppression as Young describes it, arguing that the Section fits her model of it. Following this is a proposal that the prejudicial scheme of the Section when compared to Section 8 of the Act is ultra vires the Indian Constitution. The concluding segment of the paper looks at whether Section 6 of the Act is completely void of the discrimination it sought to remove.

Section 15: An Explanation

Section 15[4] of the HSA advocates a uniform scheme of succession to the property (both moveable and immovable[5]) of a female Hindu who dies intestate. The gravamen of the Section is that the order of succession to the said property would depend on the source of its acquisition.[6] Sub-section (2), which is the exception to the Section, lays down the rule that in the absence of any child (or child of a pre-deceased child) of the intestate, her property if

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[4] **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.
(2) Notwithstanding anything contained in sub-section (1), -
(a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father; and
(b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband.

[5] *Balasaheb v. Jinwala* AIR 1978 Bom. 44.

[6] *Bhagat Singh v. Teja Singh* AIR 2002 SC 1.

inherited form her parents[7] would devolve upon the heirs of her father and if inherited from her husband or her father-in-law[8] would devolve upon the heirs of her husband.[9]

If, however, the property in the hands of the intestate was of any other nature – i.e., property not inherited from her parents, husband, or father-in-law – or if she had a child, sub-section (1) of the Section would dictate the mode of succession. According to this provision, the first in the order of succession are her children, children of a predeceased child, and her husband.[10] If none of these three are present, the property in question would go to the next in line: the heirs of her husband.[11] Standing behind them are her parents[12] and then the heirs of her father[13] followed by those of her mother.[14]

Thus, the effect of Section 15(1) of the HSA is to put the blood relations of a Hindu woman in an inferior position to her husband's heirs. This leads to a situation where her own relatives will never be able to inherit in case there is even a remote heir of the husband, which is akin to what happened to Narayani Devi's mother.[15] Section 15(2), meanwhile, clarifies that the source of the property would be the basis for determining inheritance rights.

Section 15's Vices

Iris Marion Young's paradigm of oppression incorporates not just the injustice that some people suffer because a despotic power coerces them, but also that which they suffer because of the daily

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[7] Section 15 (2)(a), HSA 1956.
[8] Section 15 (2)(b), HSA 1956.
[9] That Section 15(2)(b) does not contemplate the possibility of the intestate's *mother-in-law* passing down her property to her is a rather curious exemption, something that I will touch upon in the course of this paper.
[10] Section 15(1)(a), HSA 1956.
[11] Section 15(1)(b), HSA 1956.
[12] Section 15(1)(c), HSA 1956.
[13] Section 15(1)(d), HSA 1956.
[14] Section 15(1)(e), HSA 1956.
[15] *Omprakash* (n2).

practices of a "well-intentioned liberal society".[16] In sum and substance, oppression in her mind can also be structural rather than the result of a few people's choices, with its causes embedded in unquestioned norms and habits.

Taking cue from this, my argument in this segment is that Section 15 of the HSA too suffers from the vice of structural oppression, the structure here being reflective of the idea that a woman has no family of her own – it is either the husband's or the father's that she lives in. Thus, while the marriage of a man does not make a difference in the way his property devolves when he dies intestate,[17] the marriage of a woman changes the pattern of inheritance for her properties.[18] The woman is treated not as an autonomous individual capable of transferring her own property to her blood relatives, but as a quintessence of her husband.

One of Young's Five Faces of Oppression is *cultural imperialism*, which she describes as involving the universalization of a dominant group's culture and experience, and its establishment as the norm.[19] This transpires because some groups have exclusive access to the means of communication and interpretation in a society.[20] A parallel can be drawn here to Wendy Webster Williams' argument that women's equality as laid down by legislatures and delivered by courts can only be an integration into a pre-existing, predominantly male world.[21]

As far as Section 15 of the Act is concerned, the dominant patriarchal idea that a woman has no family of her own has been universalized to such an extent that the Section seems absolutely

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[16] Iris Marion Young, *Justice And The Politics Of Difference* (Princeton University Press 1990) 41.
[17] Section 8, HSA 1956.
[18] Section 15(1)(b), HSA 1956.
[19] Young (n16) 59.
[20] Nancy Fraser, 'Social Movements Vs. Disciplinary Bureaucracies: The Discourse Of Social Needs' (1987) 8 CHS Occasional Papers 1.
[21] Wendy Webster Williams, 'The Equality Crisis: Some Reflections On Culture, Courts, And Feminism' (1982) 7 Women's Rights Law Reporter 151.

unremarkable to legislators and judges, who are the people that matter. The fact that a High Court opined that a married woman is different from a "mere woman",[22] and the sad reality that even *distant* heirs of the husband are *still* preferred to succeed to the intestate's natal family, is testament to this. It is worthy to note that though the intention of sub-section (2) of the Section – which is to ensure that the property left behind does not lose the real source from where the intestate woman had inherited it –[23] might be well-meaning, it does not help that the same intention is non-existent in the case of succession to an intestate Hindu *male's* property. Moreover, legislations such as this, while purportedly aimed at ameliorating the conditions of women,[24] can only reflect the shared life experiences of individuals. With particular reference to Section 15, this takes the color of a largely male hue not only because there were hardly any women in the then Parliament, but also because society systemically supports male supremacy.

Young says that stereotypes that the culturally dominated are stamped with so permeate in society that they are not even noticed as contestable – the idea that Hindu women once married change their families is but such a stereotype. Consequently, this dominant view has been internalized by the dominated to such an extent that even those who are politically "woke" have held back from making claims to property because of a belief in women's lesser rights.[25] This creates, for Hindu women in India, the experience of 'double consciousness', which is the sense of always looking at one's self through the eyes of others.[26] Young further contends that while an encounter with another group could pose a challenge to the dominant group's prerogative to universality, it reinforces its position by bringing other groups within its ambit of

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[22] *Sonubai Yeshwant Jadhay v. Bala Govinda Yadav* AIR 1983 Bom 156.
[23] *Dhanistha Kalita v. Ramakanta Kalita* AIR 2003 Gau 92.
[24] Statement of Objects and Reasons, Section 6, HSA 2005.
[25] Srimati Basu, 'The Personal And The Political: Indian Women And Inheritance Law' in Gerald James Larson (ed), *Religion and Personal Law in India* (Indiana University Press 2001).
[26] W. E. B Du Bois, *The Souls Of Black Folk* (New American Library 1969).

dominant norms and has little space for the experience of others. An instance of such brushing-under-the-carpet of the lived experiences of the culturally dominated in the case of the HSA can be seen in the resistance that the Select Committee of 1948 faced when it suggested the abolition of the coparcenary.[27]

Thus, Section 15 of the HSA when viewed through the lens of Young would undoubtedly be an illustration of cultural imperialism, with the hegemonic male Hindu society imposing its beliefs and experiences on the rest of the population and projecting its views as representative of humanity as such.

Section 15: A Case for Unconstitutionality

In *Omprakash v. Radhacharan*,[28] the intestate's in-laws, who had not even enquired after her in the forty-two years after they had ousted her from the matrimonial home, succeeded to Narayani's self-acquired property vide Section 15(1)(b) of the Act. Though it is acceptable that the court could not have gone beyond the intention of the legislature, the enigma here is that it did not even give effect to its intention. Narayani's lawyer argued that because the *intent* of the Parliament while introducing Section 15 was to send the property back to the source and not to a stranger, the logical corollary in this case would be to let her parents succeed to the property as it was earned with the money they had spent on her. This argument was rejected by the court.

The judgment can be attacked on another front: that of ignorance of the principles of equity, justice, and good conscience. It seems like the court overlooked the general principle that succession laws are not only about those who are entitled to property, but also about those who should be disentitled. Though he has been criticized for projecting a myth that all disparities between men and women in the matters of succession had been

[27] Indian Council of Social Science Research, *Status Of Women In India: A Synopsis of the Report of the National Committee on the Status of Women* (ICSSR 1975).
[28] (n2).

alleviated with the advent of the HSA in 1956,[29] Mulla observes that Section 15(2) is based on the grounds that property should not pass to an individual "whom justice would require it should not pass". [30] Here, the court directed the property to the very people who behaved heartlessly with the deceased when it should ideally have denied them the *locus standi* of claiming the property. To back this line of argument, one could also impute the logic behind Section 25 of the Act, in which a murderer is disqualified from inheriting the property of the person they murdered.[31] While this might sound like a logical leap, the point to drive home is that a deceased person would not want a person who had wronged them to inherit their property. This is in line with what was held in *Riggs v. Palmer*[32] (albeit that too was a case involving murder) and Section 23(1)(a) of the Hindu Marriage Act, 1955 which prods the court to make sure that the person claiming relief is not taking advantage of his or her own wrong.

While Section 15 of the Act, as we have seen, stipulates that the order of succession in the case of a female Hindu would vary according to the source of acquisition of property, the source would not be a determinant of succession for a Hindu *male*.[33] This opens the Section to constitutional challenge under Article 15 of the Indian Constitution, which prohibits the state from discriminating against any citizen on a number of grounds, one of which is sex. The test here is whether the discrimination alleged is based *solely* on sex or has some other justification.[34] When the question of the constitutionality of Section 15 was put forth before the Bombay High Court in 1983,[35] it rejected the argument that

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[29] Madhu Kishwar, 'Codified Hindu Law: Myth And Reality' (1994) 29 Economic and Political Weekly 2145.
[30] Fardunji Mulla, *Principles Of Hindu Law* (21st edn, LexisNexis Butterworths 2013).
[31] Ayushi Singhal, 'Female Intestate Succession Under The Hindu Succession Act, 1956: An Epitome Of Inequality And Irrationality' (2015) 4 Christ University Law Journal 150.
[32] 115 NY 506 (1889).
[33] Section 8, HSA 1956.
[34] *Ammini E. J. v. Union of India* AIR 1995 Ker 252.
[35] *Sonubai Yeshwant* (n22).

the impugned Section was violative of Article 15 and held that the object of the Section was two-fold: "maintaining the unity involved in the family kinship and maintaining continuous succession to property in favor of the family when occasion to succession arises".[36] Thus, the discrimination so made was adjudged to be based not *solely* on sex, but also on family ties.

In 2012,[37] however, the same High Court altered its position. It observed that what was being envisaged by the Act could not plausibly be to keep the property within the family, as if that were so, Section 8 of the Act would not allow for the possibility of the property of a Hindu male being inherited by daughters, sister's daughters and sister's sons. This line of argument being shot down, it was concluded by Dalvi, J. that the *only* basis of discrimination present in the impugned Section was sex. That being the case, it was *ultra vires* of Article 15 and therefore invalid. However, this judgment was passed by a single bench and needs to be affirmed by a division bench before its holding is binding.

Keeping aside the fact that women are allowed to will their property to whomsoever they please (for testamentary succession is beyond the scope of this paper),[38] one could argue that Section 15(2) – by not treating a woman as an independent personality with the capacity to transfer property to her natal family – insinuates that a woman has a limited stake in the property. Indeed, this was argued by Justice A.M. Bhattacharjee in *Hindu Law and the Constitution* when he asked why the source of acquisition of property should be a determinant for its devolution in the case of a Hindu woman when it is not so in that of a Hindu man.[39] In an off-shoot to this contention, that clause (b) of sub-section (2) to the Section does not even contemplate the *possibility* of a *mother-in-law* being the source to the intestate's

[36] ibid [24] (Justice Masodkar).
[37] *Mamta Dinesh Vakil v. Bansi S. Wadhwa* T.S. 86/2000-T.P. 917/2000.
[38] Section 30, HSA 1956.
[39] A. M Bhattacharjee and Asok K. Ganguly, *Hindu Law And The Constitution* (3rd edn, Eastern Law House 2018).

property only buttresses my claim that the whole scheme of the Section contemplates that women have a limited hold over their property. While this might not be an air-tight argument, for even Hindu men in that sense do not have *complete* control over the order of succession of their property if they die intestate (the very nature of dying intestate precludes any control), the fact remains that the source of the property is irrelevant in the case of male Hindu intestates, and this, as was argued previously, only reinforces patriarchal notions of the family. If the "limited estate" rule could be done away with, there surely exists a case[40] to get rid of – or at least amend – those parts of Section 15 which I have argued are oppressive towards and prejudiced against the intestate and her natal family.

It is sad that despite the 174th and 207th Law Commission Reports (LCRs) noting that there exists a patrilineal assumption of dominant male ideology in the Section and recommending for its amendment, the Amendment Bill[41] which has placed the heirs of the husband and the intestate's natal family on equal footing has not yet been passed by the Parliament. Moreover, neither the LCRs nor the Amendment Bill felt the need to amend sub-section (2) of the Section, which was held unconstitutional in *Mamta Dinesh*.[42] At the risk of repetition, I assert again that this near refusal to recognize that Section 15(2) treats men and women unequally is reflective of the universalization of the idea that a woman has no family of her own.

As Justice Prabha Sridevan aptly put it, the law in this case views a male's and a female's estate through different spectacles: her autonomy over her property is less complete than his.[43] In light of this, parity is sought in cases of intestate succession.

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[40] J.M. Duncan Derrett, 'The Hindu Succession Act, 1956: An Experiment In Social Legislation' (1959) 8 The American Journal of Comparative Law 485.
[41] The Hindu Succession (Amendment) Bill, 2015.
[42] *Mamta Dinesh* (n37).
[43] Sridevan (n3).

The Two Faces of Section 6

In the second segment of the paper, I had briefly mentioned that the proposal of the Select Committee of 1948 of doing away with the concept of the coparcenary was met with stiff opposition. The idea of making daughters coparceners was likewise rejected. More than fifty years later, the Parliament in 2005 finally granted a right by birth to daughters,[44] but the provision was still not shorn of problems. In this segment, I examine one such problem.

While the cases *Prakash v. Phulvati*[45] and *Danamma v. Amar*[46] revolved around the conundrum of whether the Amendment Act of 2005 would have prospective or retrospective application, in neither was there any deliberation on who exactly the "coparcener" in the words "daughter of a coparcener" in sub-section (1) of Section 6 was.[47] In the former, it was held what was required for the application of Section 6 (1) was that the daughter and her father coparcener be alive on the date of the amendment. In *Danamma*, the court granted coparcenary rights to the daughter therein despite the fact that her father had died prior to the date of commencement of the Amendment Act. Neither *Phulvati* nor *Danamma*, however, would come to one's aid in the

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[44] Section 6, Hindu Succession (Amendment) Act, 2005.

[45] (2016) 2 SCC 36.

[46] 2018 (1) SCALE 657.

[47] **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;

(c) be subject to the same liabilities in respect of the said coparcenary property as that of a son,

and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener:

Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.

scenario that a daughter of a *female* coparcener comes to court claiming coparcenary rights along with her mother.

A literal interpretation of Section 6 would undoubtedly warrant such a child to claim a right by birth in her mother's interest in the coparcenary,[48] since the Section also provides that "*any reference to a coparcener*" would be "*deemed to include a reference to a daughter of a coparcener*". However, it has been argued that a right by birth exists primarily with regards to ancestral property – which is property inherited by a Hindu from his father, grandfather and great-grandfather – and that Section 6 only enables a daughter to claim a birth right in such property.[49] The extension of this argument is that since the property in the hands of the daughter would not be ancestral as against her children, they would not have a right by birth in it. Another contention put forth in support of the stand that the children of a female coparcener are not entitled to a share in their mother's coparcenary interest is that a combined reading of the LCRs, the Parliamentary Debates, and the Statement of Objects and Reasons provided after Section 6 on the point would show that it is primarily the daughter's interest that is being protected and not her child's. Their interests would already be protected in their father's family, and besides, since her children would already be coparceners in their father's family, they cannot *also* be coparceners in her family (coparcenary in two families is not provided for by classical Hindu law). Though there has hardly been any litigation over this issue, it would not be too far-fetched to assume that in the event such a dispute arises before it, the court will apply the mischief rule[50] of statutory interpretation and argue that the scope of Section 6 should be confined to making daughters coparceners – not their children as well.[51]

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[48] Poonam Pradhan Saxena, *Family Law Lectures* (2nd edn, LexisNexis Butterworths 2004).
[49] Mulla (n30) 315.
[50] *Heydon's* case 3 Co Rep 7a.
[51] Shivani Singhal, 'Women As Coparceners: Ramifications Of The Amended Section 6 Of The Hindu Succession Act, 1956' (2007) 19 Student Bar Review 50.

CONCLUSION

While this line of reasoning in sound in logic, it is open to criticism since it continues to perpetrate the idea that a man's coparcenary in a sense trumps that of a woman's, which, again, is reflective of the effect that cultural imperialism can have. In establishing the man's coparcenary as the norm, children are automatically taken under the wing of their father's coparcenary and not their mother's. That there has been no debate over why the children of a female coparcener do not have a right by birth to a share in their *mother's* coparcenary interest rather than their *father's* can be linked to Young's contention that cultural imperialism involves the imposition and universalization of stereotypes on the dominated in such a manner that they become unremarkable and uncontestable. Thus, while Hindu law has been criticized even before the coming of the Constitution for the obtrusive inequalities that it perpetuated, one does not have to look too closely to notice that gender inequalities lurk even in subsequent enactments.