

# Lack of substantial equality: Critical analysis of Hindu Succession (Amendment) Act, 2005

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## Deep Dive



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**By Siddhant Tokas**

The right to inherit under Hindu law has been structured to a somewhat concrete form by various legislations passed since the independence. The earliest attempts can be traced back to 1865, and the latest being the *Hindu Succession (Amendment) Act, 2005*. The task of remodelling the Hindu patriarchal philosophy was a herculean task which took a century to materialise definitively and is still a long way from being flawless. During the entire legislative saga, Hindu succession laws have had numerous changes made. The first major progressive step towards codification was made with the enactment of the *Hindu Succession Act, 1956* (hereinafter as HSA) which reformed women's rights to a certain extent but, denial of the daughter's right to be a part of the coparcenary was still something that was blatantly discriminatory as women were completely dependent on their male relatives as they were still devoid of their inheritance rights. The Act laid down a comprehensive system incorporating both succession and inheritance. Therefore, this Act combined all the aspects of Hindu succession and brought them under the ambit of one

code applicable uniformly to all Hindus. Almost half a century later, the *Hindu Succession (Amendment) Act, 2005* (hereinafter as HSA), was brought. The amendment was based on the amendment passed by states such as Tamil Nadu, Kerala, Karnataka, Andhra Pradesh along with 174<sup>th</sup> Law Commission report.<sup>1</sup> The amendment aims at ameliorating the long-standing lacunae in the legislation relating to women's right to inherit and also gives women the right to dispose-off their inherited property without any permission from her husband or father and at their own will. The changes were mainly made to Section 4, Section 23 and Section 24 of the Hindu Succession Act. In addition to that, the doctrine of survivorship was completely abolished.

The concept of substantive equality has special relevance while scrutinising formal laws whose objective is to ensure equal treatment of men and women because it becomes necessary to evaluate whether they will actually accelerate the achievement of gender equality in practice and eliminate existing discrimination or not. The aim of the research paper is to establish that while the 2005 amendment to gender unequal HSA, 1956 had a positive social and legal impact, it does not render the Act void of irregularities. In essence, the judicial discourse has been such that constitutional mandate for the fundamental rights is guaranteed to the citizens but the same contains diminished implication when placed parallelly to personal laws of India.

## **Positive impact of the amendment on rights of women**

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Hindu women have suffered disproportion in terms of rights related to inheritance and after the amendment have undeniably witnessed a paradigm shift in terms of their inheritance rights as they went from not having a share in ancestral property at all to holding a share in two households in certain situations after getting married. The amendment has also helped in improving the economic status of Hindu women, spanning over their rights in the coparcenary, having a right over the ancestral house, rights on agricultural lands, and widows being entitled to property after remarrying and being conferred the power of testamentary disposition.<sup>2</sup> These changes ensured social upliftment of women along with economic independence and equal rights.

However, various aspects relevant to the 2005 amendment can be scrutinised to accentuate the shortcomings given the patriarchal norms and background. The amendment in this sense despite catering a positive response regulates within the framework where rights of one section is always compromised.

## **Inconsistencies and irregularities in HSA, 2005**

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HSA, 2005 still retains certain irregularities because of which the act has been subjected to constant criticism. *Firstly*, the amendment created ambiguity with the deletion of section 4(2) which stated that state laws would be applicable in matters pertaining to agricultural holdings.<sup>3</sup> The removal of this section, created a confusion as to whether HSA would be applicable in presence of state laws or not. In such a situation, an implied presumption that HSA post the amendment applies to all kinds of properties would mean

diversity of laws governing agricultural property within a state creating uncertainty.<sup>4</sup> This issue even though has nothing to do with gender equality, it is still an important lacuna within the act which highlights the fact that it still needs to undergo changes.

*Secondly*, the present act discriminates between the female members of the family. One of the major changes brought by HSAA, 2005 was conferring the right by birth in the coparcenary property in favour of daughters which before the amendment, was the exclusive prerogative of the male members of the family.<sup>5</sup> However, the position of mother along with all other female members who are introduced into the family by marriage remains unchanged largely due classical assumption of the family and blood being central to the Hindu Society. In addition to that, it was a difficult task for the courts to determine whether the Act would be applicable retrospectively or prospectively. The courts have had different opinions regarding its applicability, in *Ms. Vaishali Satish Ganorkar & Anr. v. Mr. Satish Kesharao Ganorkar & Ors.*,<sup>6</sup> the court held that the provisions of the act would be applicable only to daughters born on or after 9 September 2005.<sup>7</sup> This interpretation was overruled in *Shri Badrinarayan Shankar Bhandari & Ors. v. Omprakash Shankar*,<sup>8</sup> the court held that the said amendment is applicable to all living coparceners irrespective of their time of birth and further stated that clause (a) of the said legislation would be applicable prospectively while clauses (b) and (c) would apply retrospectively.<sup>9</sup> Most recently, this question regarding the applicability of section 6 was settled in *Vineeta Sharma v Rakesh Sharma*,<sup>10</sup> where the court stated that the Hindu Succession (Amendment) Act, 2005 will have a retrospective effect.<sup>11</sup>

Another debate with respect to section 6 is due to confusion created by sub-section 2 which states that a female would hold property with incidents of coparcenary ownership but has not explained what these incidents are.<sup>12</sup> Doctrine of survivorship being one such incident, has created a confusion as to whether it will be applicable in case of a female intestate or not. Furthermore, the abolition of the doctrine of survivorship for male coparceners under section 6(3), has created unequal rights between the surviving coparceners vis-à-vis each other.<sup>13</sup> For example, in a Hindu Family comprising of Father and two sons, on death of a son, the father would inherit 2/3<sup>rd</sup> of the property while the surviving son inherits the remaining 1/3<sup>rd</sup>. This seems contrary to the basic principle of coparcenary and hence, it has been argued that the abolition of the doctrine serves no real purpose.<sup>14</sup>

*Thirdly*, the scheme of succession under section 8 prefers agnates over cognates, even when agnates are more remotely related, in addition to that, uterine brothers and sisters are completely excluded.<sup>15</sup> The provisions of section 8 highlight how male relations are preferred over female relations. Another issue with section 8 is that it excludes certain analogous heirs from the class-I category. The addition of 4 class-I heirs renders section 8 relatively more gender friendly.<sup>16</sup> However, as suggested by the 204<sup>th</sup> law commission report, the non-inclusion of the two analogous heirs namely, son of predeceased son of a predeceased daughter and the son of a predeceased daughter of a predeceased son causes discrimination without any reasonable justification.<sup>17</sup>

*Fourthly*, there are other instances where two members who are equal in terms of nearness of blood are still discriminated. For example, father being a class-II heir would be totally excluded in presence of his female counterpart. Law commission in its 204<sup>th</sup> report, while addressing this issue in light of the Senior Citizens (Maintenance, Protection and Welfare) Act of 2007, argues for the addition of father to the list of class-I heirs.<sup>18</sup>

*Fifthly*, section 15 has created two separate schemes of succession for men and women dying intestate. This has created an unjustifiable tilt towards the male members as in case of female intestates, different schemes are followed based on the source of a woman's property and presence of children. Similar provisions do not exist for the property of male intestate.<sup>19</sup> This section compromises the individual identity of a woman as female members are here being recognised only on the biases of their relationship with a man.<sup>20</sup> Such provisions within HSA that generally treat women as second-class citizens largely due to fact that the current act attempts to retain property within the joint family.<sup>21</sup> This has resulted in unfair discrimination against the woman's natal family, whose rights are subservient to that of the Husband's family.

These shortcomings of the act are largely antagonistic to female interests and by looking at the general pattern within the act, it can be noted that the act tries to preserve the joint family property. This trend is largely based on the ancient Hindu ideology that joint family is the central unit of the society and that women lack the ability to manage their property. But are these assumptions relevant in the current times?

## **Relevance of the assumptions**

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The Hindu Code Bills committee in 1994 took an abolitionist stance against the institution of Hindu Joint Family and argued that very concept of a joint family is losing its relevance.<sup>22</sup> This view can be further supported by the findings of the 2011 census which shows that average family size of Hindu households has considerably reduced.<sup>23</sup> The second assumption regarding competency of women to manage property that seems to govern the provisions of HSA was also refuted by the Hindu Code Bills committee. The report argues that low literacy is not a reasonable justification to assume that women are less competent and it also points out that this is a misleading argument because literacy rates among Hindu men were not significantly higher either.<sup>24</sup> These assumptions have thus become outdated with time but the fact that they haven't been completely ruled out from the provisions of the act is troublesome. Even though women are now often earning more than their male counterparts, the lack of ability to provide for their natal family as compared to the men, due to the rules of succession impacts how women's overall role is perceived in society. A study done in 2014 which examined the implementation of HSAA, 2005 revealed lacunae within the system and the prevailing social practices based on these deep-rooted patriarchal assumptions that obstruct the effective implementation of the act.

## **Failures with Implementation and possible suggestions**

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One of the key observations made during the study was the nexus between dowry and daughter's inheritance.<sup>25</sup> It is considered to be a moral obligation of the father at the time when his daughter is getting married, to pay dowry. The daughter's share in land or other properties is substituted by dowry which becomes her share in the family property instead. However, this is mostly in the form of cash, jewellery etc., and are controlled by the husband or other members of his family while the daughter is denied any control over her share.<sup>26</sup> As a daughter, even when women inherit some property, their shares are considerably less than her brothers even though the act states that they should get an equal share. The study also points out that women are often forced to relinquish their rights over the ancestral property by the brothers. For example, in states like Haryana and Punjab, daughters are often asked to sign a release deed (*haq tyag*) renouncing their right over the family property in favour of her brothers. Theoretically, law provides that the validity of such a deed can be disputed on the grounds of coercion, but practically dealing with the entire quasi-legal process to claim their right becomes a burden. This complicated process combined with social backlash becomes a huge formal barrier for most women in these areas to claim their rights.<sup>27</sup> The study reveals that the key land administrative officials like patwaris and tehsildars, lack training on gender sensitivity largely because neither the state nor the community expects such officials to be gender sensitive.

The patwaris on being interviewed vaguely recall that women have equal rights as men but, were quite ignorant of the HSAA as they never had any formal training on the subject or on how these provisions are supposed to be enforced.<sup>28</sup> As opposed to this, tehsildars were found to be a lot more aware of the provisions of the act but they do not play a proactive role in its implementation and cannot not use their administrative power to effectively ensure that women get their share. Thus, one major challenge with effective implementation lies within the administrative system which is obstructing women to seek their share. In addition to that, there are social backlashes which prevent woman from coming forward to claim their share for the sake of the family even though, the survey points out that women on being interviewed, expressed the desire to own and possess land and understand its value for their well-being. However, their lack of action to claim is partly out of their ignorance of law and more importantly because of lack of social and administrative support for them to feel the need to come forward and claim their share.

Based on the findings and conclusions of various studies, it becomes clear that, in order to ensure that women are actually deriving benefits out of the provisions that exist for their empowerment, the staff and officials that play a key role in the process of succession should undergo a dedicated training with respect to HSAA and how to implement its provisions with a clear motive protecting and ensuring women's right to inherit land.<sup>29</sup> Instituting a paralegal program to proactively assist women to claim and pursue their rights could also be very beneficial as it would help in providing legal literacy to women and also provide help in going through the complicated administrative and legal procedures.<sup>30</sup> Thirdly it is essential to make some changes in the existing provisions of the

act to rule out the existing ancient assumptions and patriarchal norms that are retained within the act which serve as major source of gender based discrimination within the existing provisions.

## Conclusion

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It cannot be denied that HSAA,2005 has been a constructive step towards empowerment of Hindu females by providing them with somewhat equal standing with Hindu men in terms of inheriting the coparcenary property and even dispose of the property at will. Thus, HSAA,2005 has been perceived as a progressive step towards attaining equality. While the impact has been largely positive, the act has failed to achieve its goal of substantive equality as enshrined under the constitution and there are major issues with the implementation of the act which prevents Hindus from fully enjoying all rights and freedoms on an equal footing. The act still requires that the aspect of equality is interpreted free from all ancient assumptions and take into account, the ground level reality of the Hindu society and also make an attempt to overcome the issues with the implementation of the law by addressing the social and administrative barriers to ensure that real benefits are drawn at the ground level from these changes.

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