Rights in Separate Property for Hindu Female – Autonomy, Relationality and the Law

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"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. It seems that this discrimination is so deep and systematic that it has placed women at the receiving end".  

The candid acceptance by the Law Commission of India truly reflects the state’s nexus with patriarchal psychology in not granting equal inheritance rights to Hindu women in India. Gender analyses of Hindu law relating to a woman’s access to property within the home reveal a consistent pattern of subordination of women’s economic interests. Women’s property rights are influenced by both legal and social structures and these structures are open to interpretation and change that often is influenced by gender norms and various demographic, economic and social pressures. Any form of societal discrimination on the grounds of sex, apart from being unconstitutional, is an antithesis to a society built on the tenets of democracy. In the Constitutional era, Articles 14, 15(2) and 15(3) and 16 of the Constitution frown upon the discrimination and provide the State with the authority to accord protective discrimination in favour of women and the Directive Principles ordain that the state shall strive to ensure equality between man and woman. The catalytic effect of the social goals envisaged in the Preamble to the Constitution, the guarantee of equality before law enshrined in Article 14 and the abolition of discrimination on the grounds of birth or sex assured in Article 15 called for an immediate overhaul of the rules of Hindu succession and Parliament’s response to this was the enactment of the Hindu Succession Act, 1956 (HSA, 1956).

HSA, 1956 marks a new era in the Indian history of social legislation by removing, to an extent, the pre-existing discrimination in inheritance on grounds of gender, guaranteeing the right to equality and dignity.

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4 Mojekwu v Mojekwu (1997)7 NWLR (pt 512) 228
of person enshrined in the Preamble of the Constitution and Fundamental Rights. For the first time, after the enforcement of HSA, 1956 a Hindu female became absolute owner from limited owner thus recognizing the equality of the sexes and elevating women from a subservient position in the field of economy to a higher pedestal. She could inherit equally with a male counter-part and a widow is also given importance regarding the succession of her husband’s property as also to her father’s property.

Although the Hindu Succession Act is a clear break with the classic Hindu law of succession, it is not free of discrimination. A formal evaluation of the Hindu Succession Act brings to light the inconsistencies within its provisions and the possible consequences of these upon its goal of protecting women's equal rights under succession. The hold of tradition, however, was so strong that even while introducing sweeping changes, the legislators compromised in some respects the inferior position of the women and by yielding to pressure, it sacrificed the uniformity which had been one of the major aims in introducing this law. Traditional systems were remoulded into linear, formal and stringent structures, which exercised greater patriarchal control over women and their right to property. Under Hindu law the right to property had always been exclusively for the benefit of the man with the woman being treated as subservient and dependent on male support. The inheritance laws for women in the Hindu Succession Act are weak.

HSA, 1956 lays down different rules of devolution of property of males dying intestate and females dying intestate which discrimination which was not looked into even in the Amendment Act, 2005. HSA, 1956 lays down different categories of heirs of females dying intestate as compared to heirs of males dying intestate. In case of Hindu women dying intestate with no children her husband and in his absence, instead of her parents, the heirs of her husband are treated preferentially and they inherit her property but in case of a male dying intestate, his blood relations including his parents inherit the property.

Further, the Act does not discriminate between a woman’s separate property and her self-acquired property. Apart from other kinds of property viz., received by way of gift, under will, share in coparcenary property etc., which comes under the separate property of woman, the self-acquired property

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6 Bai Vijaya v. Thakuribai Chela Bhai AIR 1979 SC 993
7 Kulwant Gill, Hindu Women's Right to Property in India, Deep & Deep, New Delhi, 1986, p. 494. He places the reason for inequality solely on the shoulders of man. According to him ‘man’s greed of power and fame, and his lust for property which is the source of a socially high status and power of influence in political’ sphere are the reasons for the unequal treatment of females regarding property.
10 Flavia Agnes, Family Laws and Constitutional Claims, Oxford University Press, 2011, p. 108
has been treated as the same by laying down uniform rules of succession for both, giving favoured treatment to the heirs of her husband than to her parents. This is noteworthy as negating rights to her blood relations i.e., parents in her self-acquired property and giving privileged rights to the heirs of her husband in that property is unfair and unwarranted. It must be remembered that provision was framed at a time when daughters did not enjoy coparcenary rights\textsuperscript{12} or were not economically independent. There has been a vast change in the social scene in the past few years and women have taken a stride in all spheres making them economically and socially strong. There is a growing demand for making laws free from gender bias and to provide legal equality to women in all spheres of life\textsuperscript{13}. Despite Constitution’s mandate of treating male and female equally the discriminatory provisions of HSA, 1956 continues to exist. The present study points to the court’s non-interference policy of entering the domain of personal laws, gender discrimination in the devolution of property of Hindu women dying intestate, lacunae in the statute with respect to the self-acquired property of Hindu woman and the suggestions of the Law Commission or India, National Commission for Women and also that of the author in removing the disparity between Hindu male and female in devolution of property.

\textbf{(I) \hspace{1pt} Constitutional Validity of Personal laws}

Any personal law which discriminates against women would by its very nature be unequal and discriminatory thus would be in void on the ground of violation of Articles 14 and 15 of the Constitution. One of the first constitutional challenges to personal laws after Constitution came into force came before Bombay High Court in \textit{State of Bombay v. Narasu Appa Mali\textsuperscript{14}} wherein the norm of monogamy imposed upon the petitioner under Bombay Prohibition of Bigamous Marriages Act, 1946 was challenged on the ground that it violated equality provisions under Articles 14 and 15 of the Constitution vis-à-vis Muslim men who could contract polygamous marriages. It held that principles enshrined in Part III of the Constitution cannot be applied to personal laws and personal laws are not ‘laws in force’ under Article 12 of the Constitution as they are based on religious precepts and customary practices. Only “laws’ or “laws in force” under Article 13 of the Constitution can be challenged on the touchstone of fundamental rights and such law can be declared void when it infringes fundamental right. The Supreme Court appears to be uncertain whether personal laws comes within “laws’ or “laws in force” under Article 13 of the

\textsuperscript{12} Coparcenary rights under traditional Hindu law were enjoyed only by son (called coparceners) who had right in the ancestral property by birth and property on death passed by rule of survivorship to other surviving coparceners. All coparceners which extended upto four generations from last holder of property had right of ownership and possession over entire ancestral or coparcenary property. Only daughters by Hindu Succession (Amendment) Act, 2005 have now been conferred coparcenary rights.


\textsuperscript{14} AIR 1952 Bom 84
Constitution of India. Supreme Court has once held, without giving reason, that Part III of the Constitution, which deals with fundamental rights, does not touch upon the personal laws of the parties\textsuperscript{15}, even codified personal law cannot be tested on the touchstone of fundamental rights\textsuperscript{16}. At times Supreme court also has shelved on giving its opinion with regard to constitutional validity of any personal law. In \textit{Mary Roy’s} case\textsuperscript{17} Supreme court struck down the discriminatory provisions of Travancore Christian Succession Act, 1910 and Cochin Christian Succession Act, 1922\textsuperscript{18} on technical ground that after independence the laws enacted by princely states, which were not expressly saved by Part B State (Laws) Act, 1951, have been repealed but it restrained from examining the provision under the constitutional mandate of equality and non-discrimination on the ground of sex under Articles 14 and 15. Going into the constitutional validity of the personal laws could have set the precedent for examining gender discrimination under other personal laws\textsuperscript{19}. In a challenge to constitutional validity of Chhota Nagpur Tenancy Act, 1908\textsuperscript{20} which disentitled tribal women from inheritance rights, the Apex Court did uphold the discriminatory provisions but gave women to assert their rights but did not declare that the custom of inheritance, which disinherit the daughter, offended Articles 14, 15 and 21. When Supreme Court took a progressive view by getting into uncodified laws of Muslim and allotting maintenance rights to destitute Muslim women even after Iddat period\textsuperscript{21}, it evoked communal backlash and exerted pressure on government to pass Muslim Women (Protection of Rights on Divorce) Act, 1986 which again relegated the position of Muslim women’s right to maintenance confined during iddat period. When constitutional validity of Muslim Women (Protection of Rights on Divorce) Act, 1986 was challenged\textsuperscript{22} this time Supreme court was skeptical in its approach and thereby upheld the validity of the Act by giving broad interpretations to the words used in the provision to include maintenance for whole life to be granted only during iddat period. On the other hand in \textit{Masilamani Mudaliar v. Idol of Sri Swaminathaswami Thirukoil}\textsuperscript{23} it has categorically observed “the personal laws conferring inferior status on women is anathema to equality. Personal laws are derived not from the Constitution but from the religious scriptures. The laws thus derived must be consistent with the Constitution lest they become void under..."
Article 13 if they violate fundamental rights.” In John Vallamattom v. Union of India it has struck down section 118 of Indian Succession Act, 1925, which was being applicable essentially to Christians and Parsis, on the basis that it violated Article 14 of the Constitution even when the law was a personal pre-Constitutional law. The High Courts have been rather more open in declaring certain provisions discriminatory on the basis of sex but the Supreme Court generally adopts a cautious approach and has responded more on case to case basis. Its clear intention is seen when it held that it was not necessary to go into the more difficult question whether the expression “all laws in force” in Article 13(1) of the Constitution includes personal law or not. Apex court is yet to give its definite ruling on this domain which considered to be ‘sacred and personal’ and declare that personal laws are ‘laws’ or ‘laws in force’ for it to get tested on the touchstone of fundamental rights. It seems Seervai is rightly of the view “We have seen that there is no difference between the expression 'existing law' and 'law in force' and consequently, personal law would be 'existing law' and 'law in force'. This consideration is strengthened by the consideration that custom, usage and statutory law are so inextricably mixed up in personal law that it would be difficult to ascertain the residue of personal law outside them.” It must be noted that Hindus, Muslims, Christians, Parsis and other communities are governed by personal laws which personal law may be codified or uncodified. These personal laws were essentially based on customs and usages and existed prior to the enactment of Constitution. Since all laws have to abide the mandate of Constitution after its enforcement, therefore the personal laws, even though based on custom, must be construed to be law in force and expressly be accepted to be placed under the ambit of Constitution.

(II) Source of Acquisition of Property by female under Hindu law – A Determining factor

On the basis of the source of the acquisition of the property, the Act discriminates in devolution between male and female property. With respect to devolution of male separate property, irrespective of whether he inherits from his parents or his wife, the Act lays down uniform rules of succession with regard to scheme of succession and determination of heirs but in case the of female dying intestate, the heirs are determined on the basis of the source from where she acquired the property. Thus the basis of inheritance of female’s property is the source from where the property has come in her hand. Accordingly for determining the scheme of succession and her heirs, property acquired by her could be classified into two types: (1) property in general and (2) property inherited from her parents or husband or father-in-law.

1. Property in General

24 2003 6 SCC 611
25 Srinivasa Aiyar v. Saraswathi Ammal AIR 1952 Mad 193
General rule of inheritance is in favour of consanguinity. Hindu and Parsi law to an extent also recognizes the relationship arising out of affinity. Under Hindu law the property of a male Hindu dying intestate devolves also on the widow of pre-ceased son or predeceased son’s son and under Parsi law the widower of predeceased daughter have right in his father-in-law’s property. But with respect to Hindu females the statutory provision goes much step ahead by making all relations of husband to be eligible to inherit from his wife.

General rules of succession guide only when property is acquired by her in any mode other than by inheritance in parent’s or husband’s property. The provision groups the heirs into five categories comprising of sons, daughters, husband, children of deceased issues under the first entry, heirs of husband under the second entry, father and mother in the third entry, heirs of father in the fourth entry and heirs of mother in the last entry. A son or a daughter also includes adopted sons and children of any predeceased son or adopted son but not illegitimate children and step-children as stepchildren fall in the category of the heirs of the husband. The Act lays down that the heirs of husband would be preferred to parents of the deceased in her general property. If a Hindu woman dies issueless with husband being alive at the time of her death the husband takes all her property with no share reserved for her own father or mother as they fall in next order of hierarchy. On the contrary, in case of a male dying intestate, his separate property devolves on Class I heirs comprising of his wife, children and share is also reserved for his mother. Rules regarding devolution of her property has to be read in conjunction with other provision which uniform order of succession to her property and regulates the manner of its distribution.

27 Section 15 of HSA, 1956 - 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 the 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.

29 Under HSA, 1956 child not born from valid marriage i.e., illegitimate child can inherit from mother only; Gurbachan Singh v. Khichar Singh and Anr. AIR1971P&H240
30 Rajeshwari Devi v. Laxmi Devi and Ors. II(1996)DMC712
31 Debrata Mondal v. State of West Bengal AIR 2008 Cal 13
32 V. Dandapani Chettiar v. Balasubramanian Chettiar (Dead) by Lrs. and Ors. (2003)6SCC633
patriarchal attitude that the Hindu woman after marriage completely loses her identity and assimilates with the identity of her husband is reflected under the Act. The Hindu woman after marriage is considered to become completely part of her husband’s family uprooting herself from her parent’s family to the extent that in her property, in absence of her children and her husband, the heirs of her husband have preferential right over her own parents. It is ironical that heirs of the husband are preferred to intestate’s own parents. The moment the Hindu woman gets married the legislative obsession of her transportation from her natal family to matrimonial home and superiority of her in-laws over her blood relations is clearly reflected in making the entire clan of the husband her heir by relegating the parents to an inferior placement.

Further, for the purpose of ascertaining the heirs of husband, it is to be deemed as if her property immediately on her death devolves on her husband who also dies immediately after her leaving his heirs who would be inheriting the property once possessed by such wife. The list of heirs of males dying intestate is divided into four classes with 16 members in Class 1, many other members in class II and then his innumerable number of blood relations connected to him by any generation among agnates and cognates, thereby making the list so exhaustive that leaves a rare possibility for parents to inherit the property of their own daughter. The heirs of the husband have to be ascertained not at the time of the death of the husband but at the time of wife’s death. The parents get their daughter’s property only when there is no heir of husband capable of inheriting the property is present. Wife may never have seen her husband’s close or even a distant relative, but in the event of her death, her parents who bring her up are asked to take a backseat and the relatives of the husband who may never be on scene before her death can legally claim her property. Once again, concepts of gender equality give way to patriarchal considerations that treat women as extensions of their husbands by favoring their husbands’ heirs.

All the more, in absence of father and mother the property then passes to the heirs of her father and not to the heirs of mother neither is equally divided between heirs of father and heirs of mother.

When property is to be inherited by heirs of father it is presumed that her property now belonged to him and he died intestate leaving that property for his heirs to inherit the property. Again the rules of devolution of property of male dying intestate come into picture bringing in four different classes of innumerable heirs. It creates a fiction for ascertaining heirs by treating it as father’s or husband’s property

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33 Devinder Kaur v. Ajit Kumar Sandhu (1995) 1 HLR 147
35 Seethalakshmi Ammal v. Muthu Venkataramana Iyengar AIR 1998 SC 1692; Gangamma v. Maheswaraih AIR 2010 (NOC) 1116 (Karn); Chowtapalli Pratap Reddy v. Dasari Pullamma, AIR 2010 (NOC) 912(AP)
36 Supra 34
37 Supra 2

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but that cannot make property her father’s or husband’s property. This leaves utopia for next category of heirs i.e., heirs of the mother to take in the property. The male legislators’ psychology to consider themselves superior to women is further echoed when the property in absence of her parents goes preferentially to heirs of her father then to heirs of her mother. Granting heirs of the father favourable rights to inherit and granting secondary status to the heirs of the mother to get rights in the property demonstrates the superior status being given to male rather than female in inheriting property expressly discriminates on basis of sex.

But under other personal laws uniform scheme of succession is prescribed irrespective of sex of the person dying intestate. Thus woman under different statutory laws, except Hindu law, are allowed to maintain her identity irrespective of her marital status. No other personal law gives statutory preference to the relatives of husband over female’s own blood relatives. One of the reasons for not preferring parents of the deceased married Hindu female in comparison to heirs of her husband could be that during those days when HSA, 1956 was framed and enforced the psychology of Hindu father considered it great sin to take back anything from his daughter’s matrimonial home. After giving daughter to the son-in-law, he averted going to her house, never took his food even water in her house, so that the purity was maintained. When drinking water in his daughter’s matrimonial home was abhorred to, the question of taking her property on her death was out of question. But now the society and also the psychology has change thus accordingly the discriminatory law should change. This unique feature of Hindu law giving preference to relatives of husband in wife’s property appears to be devoid of any reason and wisdom. Laying down different rules of succession for unmarried and married daughter which laws are fundamentally different is clearly discriminatory and illogical. Sita Ram S. Jajoo expressed his anguish on Hindu Code Bill framed by the B.N. Rau Committee in the following words “the conservative members of the Parliament succeeded in ensuring the tyranny of the majority by slipping in Section 15(2) to the final form of the 1956 Act when no trace of it is found in the original Bill”.

In fact, the Hindu Succession Bill, 1954, as originally introduced in the Rajya Sabha did not contain any clause corresponding to such an exception. The original Hindu Succession Bill (Bill No 13), 1954, provided for six separate categories with husband being placed under the second category but the amended bill (Bill No 13B) of 1954, placed the husband along with the children, in the first category. The scheme under the Hindu Succession Bill (Bill 13) of 1954 was as follows: (i) firstly upon the children, including the children of any predeceased son; (ii) secondly, upon the husband; (iii) thirdly, upon the mother and father; (iv) fourthly, upon the heirs of the husband; (v) fifthly, upon the heirs of the mother; and (vi) lastly, upon the heirs of the father. The scheme under the amended Hindu Succession

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38 Arunachalathammal v. Ranchandran Pillai AIR 1963 Mad 255
39 Hindu Code Bill referred to Select Committee dated 17th November 1947 - 9th April 1948
Bill (Bill 13B) of 1954 was as follows: (i) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband; (ii) secondly, upon the mother and the father; (iii) thirdly, upon heirs of the father; (iv) fourthly upon the heirs of the mother; and (v) lastly upon the heirs of the husband. Thus blood relations of the wife were considered to be closer than that arising because of affinity however the 1956 Act promoted the heirs of husband to category (b) and relegated the blood relations to an inferior placement. It appears that Hindu Succession Bill (Bill 13B) of 1954 was more justified and reasonable in giving due recognition to her own parents than to distant relatives of her husband from whom she in turn will never be inheriting and probably may never have met.

Experiences have showed that a Hindu male having complete power of testamentary disposition of his separate property generally made a will in favour of other male members of family thereby taking away or reducing the share of Hindu woman which otherwise would have devolved on her if he had died intestate. Under Muslim law, the propositus could make a will of maximum 1/3rd share of his property, rest share is kept for his heirs. Even after being aware of the prevailing problems the legislators did not lay down any provision with respect to imposing limitation on the Hindu’s testamentary power of disposition in separate property under HSA, 1956. On a question by MP Mr. Ravneet Singh to the Minister of Law and Justice that whether the government was contemplating to amend the Hindu Succession Act, 1956, to place limitation on testamentary disposition with respect to his self-acquired property so that women’s rights in property are not denied, the ministry answered that there was no proposal under consideration to further amend the Hindu Succession Act, 1956 in respect of devolution of property of male as well as female dying intestate as equal rights are given to both sons and daughters as class I heirs. Placing no limitation on the testamentary disposition of property thereby impliedly allowing Hindu male to bequeath his property to other male members of the family which otherwise would have devolved on female heirs on his death and at the same time making no attempt to remove the discriminatory rules of succession with respect to females results in further deteriorating the position of women vis-à-vis men in so called society striving to achieve equality between the sexes.

2. Property inherited from Father or Mother and husband or father-in-law

Source of inheritance by a deceased Hindu male intestate not being considered for devolution of male’s property but considered only for a deceased female Hindu dying intestate constitutes gender discrimination. HSA, 1956 lays down uniform rules of succession for males irrespective of the source of acquisition in his hand but lays down different scheme for devolution for female’s property depending upon her mode of acquisition of property - general and special. Special rules of succession carve an

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exception to the otherwise general rules of succession. Special rule comes into force only when the property is inherited by her from her parents or husband or father-in-law and dies intestate without leaving any child. The scheme of succession and the heirs change in such exceptional devolution. Generally once the property is inherited, it becomes the separate property of the person inheriting it and devolves on his heirs but under HSA, 1956 devolution of such property with respect to women which she inherits from her parents or husband and father-in-law, in absence of son or daughter, reverts on the heirs of the person whose property she has inherited i.e., to the heirs of the father, but not to the heirs of the mother and to the heirs of the husband respectively thereby making her only the temporary owner of the property during her lifetime. It is then assumed that the property belonged to the father/husband which then devolve on the heirs of the father/husband respectively and not to her heirs. If she inherits property from her father/mother and dies issueless leaving behind only husband, the property will still not pass to her husband but will revert to her father’s heirs. Husband of a woman get a share in her property, which she has inherited from her father/mother, only when she dies leaving behind any issue or children of her predeceased issue. One more notable point is that only property inherited from her parents or husband and father-in-law, in absence of her children, leads to different scheme of succession and does not include sources of succession from a brother, sister, uncles, aunts or grandparents. The exceptions to the general rule are motivated by a clear and traditional desire that the property shall not pass from family to family merely by a female's death intestate.

The statutory provision also provides for devolution of property of female, governed by marukattayam and aliyasthana law. Under this law if she inherits property from her husband or father-in-law, in absence of her child it devolves on the heirs of the husband. The property inherited by such female from her father or mother does not form an exception but devolves by general rule of succession wherein it devolves firstly on her sons, daughters including children of her predeceased child and mother, secondly upon her father and the husband, thirdly upon the heirs of the mother, fourthly upon the heirs of the father and lastly upon the heirs of the husband.

Exception with respect to devolution of female Hindu is confined only to property ’inherited’ by her that too one she inherits only from her father, mother, husband and father-in-law and do not affect the property acquired by her by gift or by device under a Will of any of them or by receipt of property from them during their lifetime. Thus, property received by a daughter from her mother through a Will or

41 Radhika v. Ahgna (1996) 2 HLR 244 (SC)
42 J. Duncan M. Derrett, Introduction to Modern Hindu law, Oxford University Press, Indian Branch,1963
43 V. Ethiraj v. S. Sridevi Since deceased by her L.Rs. , Prabhakar and B.K. Sundara Rajan 2014(1) KarLJ 273
44 Ayi Anmal v. Subramania Asari AIR 1996 Mad 369
45 Komalavalli Anmal v. TAN Krishnamachari (1990) 106 Mad LW 598
gift\textsuperscript{46} would be treated as her general property and not to be ‘inherited’ property which will pass by
general rules of devolution.

Such provisions depict that property continues to be inherited through the male line from which it came either back to her father’s family or back to her husband’s family\textsuperscript{47}. Basis for reverting the property back to the source was to prevent such property passing into the hands of persons to whom justice would require it should not pass. The source from which she inherits the property is always important and that would govern the situation otherwise persons who are not even remotely related to the person who originally held the property would acquire rights to inherit that property\textsuperscript{48}. Sustaining the unity of the family and for that the entitlement to the property carved out in favour of closer relations than remote is the principle behind the rationale\textsuperscript{49}. If such property is allowed to be drifted away from the source through which the deceased female has actually inherited the property, the object of placing exception would have been defeated\textsuperscript{50}. Placing such exceptions, were intended only to change the general order of succession and not to eliminate the other classes of heirs. But if this rationality with regard to the property inherited by a married female Hindu from either of these two sources is accepted the same rationality appears to be absent from properties inherited by a Hindu male whether from his wife, mother, father or otherwise which then appears to be arbitrary and discriminatory. There is discrimination apparent in the principle recognised in Section 15(2) of the Act in it attaching significance to the source of the estate of a Hindu woman dying intestate though elsewhere in the Act there is no corresponding provision for the Hindu man\textsuperscript{51}.

The constitutional validity of such a provisions when challenged in \textit{Sonubai Yeshwant Jadhav v. Bala Govinda Yadav and Ors.}\textsuperscript{52} on the ground that it discriminates between "the heirs of husband" and "heirs of wife" the court while ruling in its favour, held that recognition and reference to the heirs of the husband was just a logical necessary step to continue that unity in which the female had merged by marriage and where she was an integral part of such a family. It is a rule of devolution that begins to operate when "a wife" -- as distinct from mere female dies with regard to inherited property from husband, heirs being described as husband’s heirs that are made to succeed. Arguments given by the court that on marriage woman is regarded as a member of her husband’s family appears at first to be convincing but cannot be sustained when viewed in comparison with other personal laws. No other personal laws superimposes her relationship with her parental family with that of her matrimonial family in devolution of her property nor

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\textsuperscript{46} Ajit Singh v. State of Punjab, 1983 HLR 433 (P&H); Jai Singh v. Mughla (1967) ILR 2 Punj 658
\textsuperscript{47} Supra 1
\textsuperscript{48} Bhagat Ram (dead) by Lrs v. Teja Singh (dead) by Lrs. AIR 2002 SC 1
\textsuperscript{49} Sonubai Yeshwant Jadhav v. Bala Govinda Yadav and Ors. AIR 1983 Bom 156
\textsuperscript{50} Dhanistha Kalita v. Ramakanta Kalita AIR 2003 Gau 92
\textsuperscript{51} Jayasi Guha Nee Ghosh v. Smt. Shukla Ghosh and Anr. AIR2008 Cal 179
\textsuperscript{52} AIR 1983 Bom 156
classifies the heirs on the basis of the source of the acquisition of her property by way of inheritance from her parents or from her husband. Recently the Single bench of same high court in *Mamta Dinesh Vakil v. Bansi S. Wadhwa* (which is referred to Division bench) has held that the distinction in the rules of inheritance and succession governing simplicitor Hindu males and Hindu females is distinctly hit by the principle of equality embodied in Article 15(1) of the Constitution as being a discrimination only on the ground of sex.\(^{53}\)

Such provision came to be incorporated on the recommendations of the Joint Committee of the two Houses of Parliament\(^ {54}\) giving the reason in Clause 17 of the Bill, that “*While revising the order of succession among the heirs to a Hindu female, the Joint Committee have provided that properties inherited by her from her father reverts to the family of the father in the absence of issue and similarly property inherited from her husband or father-in-law reverts to the heirs of the husband in the absence of issue. In the opinion of the Joint Committee such a provision would prevent properties passing into the hands of persons to whom justice would demand they should not pass*”\(^ {55}\).

The intent of the legislature is clear that the property, if it originally belonged to the parents of the deceased female, should go to the legal heirs of the father and if it originally belonged to her husband/father-in-law should go to her husband’s heirs. She is perceived as having no identity of her own as the heirs are not described as brother, sister, her brother-in-law etc., but as heirs of her parents and heirs of her husband. This reversion of the once-inherited-property back to her father’s or her husband’s heirs shows a desperateness on the part of the legislature to treat her only as a temporary occupier.\(^ {56}\)

Neither Muslim law nor Indian Succession Act, 1925 differentiate, on the basis of source of acquisition, between rules of devolution of property of male or female dying intestate. When a Muslim male dies his widow along with his father, mother apart from others, inherit as sharer and when a female Muslim dies irrespective of her mode of acquisition of property, her husband along with her own father and mother inherits as sharers in her property. The basis of her procurement of property does not change the scheme of succession giving preference to relatives of the husband than to her own parents in property not inherited from her parents or her husband. Marriage under Indian Succession Act, 1925 does not give any interests or power in the property whom he or she marries.\(^ {57}\) The reason of inserting such a provision was

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\(^{53}\) *Mamta Dinesh Vakil v. Bansi S. Wadhwa* MANU/MH/1869/2012

\(^{54}\) The Report of Joint Committee of the Houses of Parliament on the Hindu Succession Bill, Published in the Gazette of India Extraordinary Part II, section 2, (September 21, 1955)


\(^{57}\) *Indian Succession Act, 1925. S 20 (1) Interests and powers not acquired not lost by marriage.- No person shall, by marriage, acquire any interest in the property of the person whom he or she marries or become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried.*
to get rid of the principle, so far as property is concerned, that the husband and wife are one person in law. Before passing of Indian Succession Act, 1865 Common law governed the people of India excluding Hindus, Muslims, Sikhs and Jains but applied to Europeans, Indian Christians, Jews Armenians and Parsis. Common law placed certain restrictions on women belonging to these religions regarding possession and alienation of property and with respect to “real estate” the husband acquired by marriage an interest in the property of the wife and during marriage wife could not alienate the property without the consent of her husband. This disability was removed by ISA which established the principle that by marriage the husband does not acquire any rights in the property of wife.

Rules of devolution of property, whatever be the mode of gaining of property, of both males and females dying intestate, are uniform for Christians under ISA, 1925. Part of the property first devolves on the spouse and then is divided among other relations of the deceased wherein preference is first given to the lineal descendants, then to the father, then to the mother, brother, sister. Even when a Christian female dies intestate, property acquired from whatever source, devolves by reserving a share to her husband which then passes to her children. In absence of her children it will devolve on her father in whose absence would further devolve on her own mother, brother and sister. Even the Portuguese Civil Code, 1867 does not discriminate on the basis of accumulation of property by male or female for scheme of devolution of property. The Portuguese Civil Code prescribes for community of property which consists of all movable property of both the spouses on date of marriage and all property acquired during marriage, gets divided equally between them on dissolution of marriage, be it by divorce or death. The Code does lay down that the property what one inherits does not automatically become the community property and on death of such person devolves on firstly on his/her descendants, secondly on ascendants, thirdly on brothers, fourthly on surviving spouse in the hierarchal order. The parties in contemplation of their marriage may contract to make a gift of all or part of their inheritances to the other spouse. By retaining the source of acquisition for determining the heirs of female Hindu the legislature perpetuates the old patriarchal view that the ownership rights to women cannot be granted full but must be somewhat controlled. Why should the source of acquisition be a determinant in the case of a Hindu woman when it is not so in the case of a Hindu man and when none of other statutory personal law differentiates on the basis of mode of acquisition of property between sexes?

(III) Self-acquired Property - A Grey Area

By the Act of 1956, a Hindu woman is considered to be capable of holding her separate property and owning it in her own right. She has ownership rights in such property by way of inheritance or by
acquisition. Inheritance may be by receiving a share in her father’s property or her husband’s property and acquisition may be by gift, will, purchase, prescription or her self-acquired property acquired by way of her own skill. All self-acquired property is the separate property but not vice-versa. Separate property apart from including self-acquired property also includes a share by way of inheritance, gift, by will or purchase. Yet the enactment of 1956 does not differentiate between separate property and self-acquired property. The Act lays down same general rules of succession for both separate and self-acquired property of female dying intestate wherein it first devolves on her children or children of her predeceased child and husband then to the second class i.e., to her husband's heirs. The relations or her husband are given preference to her own parents. The legislators did not contemplate that Hindu women would in later years to have self-acquired property. With the growing demands of time, it is generally parents who provide all facilities to girl child for making her capable of earning her own income but when it comes to devolution of such property preference is given to husband’s relatives rather than her own parents.

The self-acquired property of the female intestate cannot be traced back to either to the paternal or in-laws family. As the separate property devolves firstly on her children or children of her predeceased child and, husband, there being no difference between separate and self-acquired property, the self-acquired property of a Hindu married female dying intestate, also devolves on her children and husband. In absence of her heirs in the first category, the property would devolve totally upon her husband’s heirs who may be very remotely related as compared to her own father’s family i.e., her own near blood relations e.g., her father or mother do not inherit in presence of distant relations of her husband who inherit as his heirs. A Hindu female who would otherwise hope to succeed to an estate of another Hindu female as an heir would receive a setback from the distant relatives of the husband of the deceased not even known to her or contemplated by her to be her competitors except upon claiming precedence as class II heirs under Section 8 or as preferential heirs under section 15(1)\textsuperscript{58}. Giving preference to husband’s heirs may to an extent be justified in separate property on ground that after marriage she becomes part of her husband’s family but giving them preferential rights than to her parents in her self-acquired property is not justified particularly when she may not have acquired property with the support of her husband or his family member.

It may be noted that the general rule of succession goes in favour of blood relations only, with Hindu and Parsi being exceptions. No other succession law in India, gives statutory preference to the in-laws of a married woman over her own blood relatives\textsuperscript{59}. Even Muslim law lays down uniform rules of succession irrespective of sex of the intestate giving primacy the intestate’s blood relatives. Similarly even under

\textsuperscript{58} Supra 53

Christian and Parsi law blood relatives are preferred. Further the absurdity is that same rule applies to Hindu male i.e., when he dies, his blood relations are given preference and his wife’s relatives do not even figure in the order of succession despite the manner in which he may have acquired the property but when she dies, the property can be claimed by even distant relative of the husband and not by her own parents. A woman would prefer her blood relations to her husband’s relatives to be her heirs and this provision goes against the reciprocity of inheritance as the entire group of husband’s heirs howsoever remote have been made her heirs but she is not entitled to inherit from them. With more and more women becoming economically independent, socio-economic changes warrant corresponding changes in the law on the subject as well.

1. Legislative and Judicial advances recognizing self-acquired property of Hindu female

1) Law Commission of India 207th Report on self-acquired property of Hindu female dying intestate

In view of the vast changes in the social milieu over the past few years when women have taken strides in all spheres of life acquiring property earned by their own skill, (a situation did not seem to have been in the contemplation of legislators when the Act was initially enacted), the Law Commission of India in 2008 came up with three alternative options namely:

1. Self-acquired property of a female Hindu dying intestate should devolve first upon the heirs of her husband.
2. Self-acquired property of a female Hindu dying intestate should devolve first upon her heirs from the natal family.
3. Self-acquired property of a female Hindu dying intestate should devolve equally upon the heirs of her husband and the heirs from her natal family.

With respect to first option, it would mean to continue the status-quo but socio-economic changes deserve to be recognized and corresponding changes should be reflected in the law on the subject as well.

Speaking about the second option, the Commission was of the view that most married women would prefer that their parents should be the more preferred heirs to inherit her property if her children and husband are not alive. When a man dies intestate, his wife’s relatives do not even figure in the order of succession, so parity should be made by applying the same rules as applicable to male’s property. Accordingly S. 15(1) would have to be amended to specify the general rules of devolution, which would apply not only to self-acquired property by a women but also to other property acquired through her family, gifts, etc. and only proviso which would then be needed would be to property that a woman

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60 *Supra 83*

61 Law Commission of India, 207th Report on Proposal to amend Section 15 of the Hindu Succession Act, 1956 in case a female dies intestate leaving her self-acquired property with no heirs (June 2008)
acquires from her husband’s family. As regards the third option of equally dividing her self-acquired property between her natal family and spouse’s family, the Commission observed that the truth is that in spite of her closeness to, and dependence on, her natal family, her relations with her husband’s family are not separated and uprooted in entirety but she continues to be a member of her husband’s family.

The social ethos and the mores of our patriarchal system demand that the existing system should not be totally reversed lest there may be social and family tensions which may not be in the overall interest of the family as a whole and, as such, ought to be avoided. Taking note of the amendments made to the effect that women have been entitled to inherit property from her paternal side as well as from husband’s side, the Commission finally suggested bringing in balance by giving equal rights to her parental heirs along with her husband’s heirs to inherit her property. It has proposed that in case a Hindu woman dies intestate leaving her self-acquired property with no heirs, as mentioned in clause (a) of Section 15, the property should devolve on her husband’s heirs and also on the heirs of her paternal side. Accordingly it has suggested the addition of S. 15(2)(c) in HSA, 1956 to include:

“(c) if a female Hindu leaves any self-acquired property, in the absence of husband and any son or daughter of the deceased (including the children of any pre-deceased son or daughter), the said property would devolve not upon heirs as mentioned in sub Section (1) in the chronology, but the heirs in category (b)+(c) would inherit simultaneously. If she has no heirs in category (c), then heirs in category (b) +(d) would inherit simultaneously.”

2. Supreme Court on Self acquired property of Hindu female

Even though the Law Commission in 2008 in its 207th Report had suggested the devolution of self-acquired property of women dying intestate granting rights to both her natal and matrimonial family, the Supreme Court did not take the recommendation earnestly when the issue of devolution of self-acquired property of Hindu female for the first time came before the Supreme Court in 2009 in Omprakash v. Radhacharan62. The husband of the woman died just after three months of their marriage so the woman was driven out of her matrimonial home immediately after the death of her husband. She never stayed in her matrimonial home after that and came to her parental home where she was given education. She was not lent any support from her husband's family and all support had come from her parents. She got employment and died intestate leaving behind various bank accounts with also huge sum in her provident fund account. On her death, her mother claimed for the property and later deceased’s brother joined the mother which was opposed by the respondents who were the sons of sister of deceased’s husband.

The issue was whether sub-Section (1) of Section 15 of the Hindu Succession Act, 1956 or sub-Section (2) thereof would be applicable in the facts and circumstances of this case. The court accepted that the

62 (2009)15SCC66
law is silent with regard to self-acquired property of a woman; sub-section (1) of Section 15 does not make any distinction between a self-acquired property and the property which she had inherited. It refers to a property which has vested in the deceased absolutely or which is her own. Even after accepting that her in-laws had no contribution in its making and is a hard case, the court did not invoke a different interpretation of a statutory provision. It vehemently held “it is now a well-settled principle of law that sentiment or sympathy alone would not be a guiding factor in determining the rights of the parties which are otherwise clear and unambiguous”. Settling all the controversy regarding the devolution of interest in the self-acquired property of the woman, it opined that the self-acquired property of a female would be her absolute property and not the property which she had inherited from her parents therefore Sub-section (1) of Section 15 of the Act would apply and not the Sub-section (2) thereof.

The judgement going by strict interpretation of a statutory provision views the man’s estate and the woman’s estate through different spectacles giving less autonomy to her over her property in comparison to her male counterpart. The Supreme Court based on justice, equity and good conscience could have taken a more progressive and sympathetic view, could have addressed the issue of gender discrimination as is very clear in the statute rather than just terming it to be a hard case. Supreme Court under Article 142 of the Constitution is empowered to go beyond the laid rules for doing complete justice and examples abound when courts have deviated from rigid provision. Here also the Supreme Court ought to have laid down precedent recognizing women’s power, autonomy and devolution of her self-acquired property. Justice demands that the blood relations of the woman be given preference. The changing socio economic scenarios and differing ground realities call for delivering justice with open eyes as it is not enough if justice is done, justice should also appear to have been done. The gender difference ought not corrupt the ideal of equality and the law should not stand in the way of giving justice to woman which has been denied to her.

3. Report of National Commission for Women (NCW)\(^63\)

NCW has suggested for deletion of rules of succession of female dying intestate and for amending the existing rules for devolution of male dying intestate to make it general and uniform to be applicable to any person irrespective of his sex. It has suggested the inclusion of following: “General rules of succession - The property of a Hindu dying intestate shall devolve according to the provision of this chapter - a) Firstly, upon the heirs, being the relatives specified in Class I of the schedule; b) Secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in Class II of the schedule; c)

Thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and d) Lastly, if there is no agnate, then upon the cognates of the deceased”.


Despite the fact that the Law Commission had suggested for devolution of self-acquired property of Hindu female to devolve equally on her parental heirs along with her husband’s heirs in absence of her children and husband, the legislators did not go ahead by incorporating the suggestion by way of amendment in the Hindu Succession Act, 1956. The Supreme Court also did not take note of the aforesaid suggestion of the Law Commission and gave a strict interpretation to the words of the statute in Omprakash case. After 5 years of Law Commission’s suggestion the legislators have finally awakened to look into the devolution of self-acquired property of Hindu female and recently proposed Hindu Succession (Amendment) Bill, 2013 for amendments with regard to self-acquired property of women in the parent Act. Instead of abiding by the 207th Report of Law Commission of granting equal rights in her property to both her parental heirs and husband’s heirs in absence of her children and her husband, it proposed to give first preference to her parental heirs over her husband’s heirs. It also proposes to define ‘self-acquired property’ expressly to include both movable and immovable property acquired by her by her own skill and labour which is to be incorporated in the s. 3 of the Act dealing with ‘definition’ of different terms as used in the Act. The Bill proposes to add clause (k) after clause (j) in section 3 of the Hindu Succession Act, 1956, namely:

“(k) ‘self-acquired property’ means any property including both movable and immovable property acquired by a female Hindu by her own skill or exertion.”

Further, it sought to make changes in Section 15 of the Hindu Succession Act, 1956 so that first preference is given to the parental heirs of the wife over the husband’s heirs in devolution of her self-acquired property in absence of her children or her husband. It proposed the addition of clause (c) in sub-Section (2) of Section 15 namely:

“(c) if a female Hindu dies intestate, her self-acquired property, in the absence of husband and any son or daughter of the deceased including the children of any predeceased son or daughter, shall devolve, not upon the heirs as referred to in subsection (1) in the order specified therein, but in the following manner:

(i) firstly, upon the mother and the father of the female;
(ii) secondly, upon the heirs of the father of the female;

64 Bill No. 17 of 2013
65 Law Commission of India, 207th Report on Proposal to amend Section 15 of the Hindu Succession Act, 1956 in case a female dies intestate leaving her self-acquired property with no heirs (June 2008)
66 (2009)15SCC66
(iii) thirdly, upon the heirs of the mother of the female; and
(iv) lastly, upon the heirs of the husband of the female.”.

By this proposal the Bill to an extent tries to bring in similarity between devolution of property of Hindu men and Hindu women. As in case of men the property passes to Class I heirs comprising of his children, widow, children of predeceased children, mother and widows of predeceased son or grandson and in their absence to Class II comprising of his father, brothers and sisters, his grandfather and grandmothers and others with no shares reserved for her wife’s relatives in any order of succession, the proposed amendment gives first preference to the parental heirs of the wife over the husband’s heirs to inherit the self-acquired property of a women dying intestate.

**Conclusion – A case for change**

Certain rights having been denied to women on the basis of gender are now slowly been granted to them by the legislative and judicial machinery of the state. Landmark legislation\(^\text{67}\) has been brought in wherein daughters have now been granted coparcenary rights as also the liabilities, more female heirs have been promoted from Class II to Class I, thereby making them primary heirs, provisions granting partition right restricting only to males in the dwelling house which reiterated traditional patriarchal concepts towards women have now been deleted thus giving rights also to females to ask for partition in the dwelling house and provisions exempting agricultural holdings from HSA, 1956 has been deleted thus removing the gender inequalities in the inheritance of agriculture land. Bombay High Court while discussing the constitutional validity of provisions dealing with the devolution of male and female dying intestate under HSA, has rightly held that such provisions show discrimination between Hindu men and women, therefore they are unreasonable thus, unconstitutional and ultra vires as being violative of Article 15(1) of the Constitution of India\(^\text{68}\). Law as it is applied in India today shows a positive reform with regard to the position of females and clearly shows that rules of personal law based on religion are not above reform in order to bring them into conformity with social and legal change\(^\text{69}\). The National Common Minimum Programme of the then Government (2004-2009) enunciated that complete legal equality for women in all spheres of life will be made a practical reality, especially by removing discriminatory legislation and by

\(^{67}\) Hindu Succession (Amendment) Act, 2005

\(^{68}\) Supra 53

enacting new legislation that gives women, for instance, equal rights of ownership of assets like houses and land\textsuperscript{70}.

\textbf{Suggestions:}

1) Today more and more women are having their own earned income and property. Socio-economic changes warrant corresponding legislative changes by differentiating between Hindu female’s self-acquired property and separate property and laying down different rules of devolution of such property.

2) But the ultimate aim should be to lay down uniform rules of succession for both Hindu males and females dying intestate. There is no justification for laying down and still continuing the different schemes of succession for males and females dying intestate. As the Personal Laws (Amendment) Act, 2010 amends Hindu Adoption and Maintenance Act, 1956 by making uniform rules for both male and female Hindu with respect to their capacity for adoption, similarly amendment could be brought to lay down uniform rules of succession for both male and female thereby complying with the mandate of the Constitution.

3) Women often are unaware of their statutory rights to property or their knowledge is incomplete so the need is to conduct more and more legal literacy programs to create general awareness among women about their property rights and on the benefits of their access to property rights.

4) The Apex court in going by the strict interpretation of law in \textit{Om Prakash case} must have resulted in shaking the confidence of average women therefore where need be the court should stand on the principle of equity, justice and good conscience and interpret laws which may be beneficial to women and goes in tune with the directive of Constitution.

Women’s equality as delivered by the courts can only be an integration into a pre-existing, predominantly male world\textsuperscript{71}. The High Courts have at times taken firm stand of holding certain provisions to be discriminatory on basis of sex and declared to constitutionally ultravires\textsuperscript{72} but still lot needs to be done. Though the courts may be well meaning and earnestly intend to uphold equal rights for women, they can only reflect the shared life experience of individuals; this takes a largely male hue, not only because the judgment-deliverers are predominantly male, but also because society systemically supports male


\textsuperscript{72}Miss R. Kantha v. Union of India AIR2010Kant27; Mamta Dinesh Vakil v. Bansi S. Wadhwa MANU/MH/1869/2012
supremacy and this systemic slant shades the thought processes that lie behind laws too, and the courts apply the laws in their judgments. The law of the public world must be reconstructed to reflect the needs and values of both sexes, change must be sought from legislatures rather than the courts. The codification of the old Hindu law has not kept pace with the constitutional mandate of gender equality and in removing gender disparity completely. With the increase in social integration, economic independence, reform movements, there needs a further call for the improvement of the woman's position in the Hindu society. As independent India relies heavily on legislation to bring in social reform and ensure removal of inequality and discrimination, the necessity is to review the present succession laws and to bring the position of women at par with men.

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75 Supra 53
76 Supra 56