

## HER RIGHTS, CLEARLY SO

Relevant for: Developmental Issues | Topic: Rights & Welfare of Women - Schemes & their Performance, Mechanisms, Laws Institutions and Bodies

**By Anita Tagore**

Property is the fulcrum for patriarchal bargains and negotiations within the private and public domains for women. It is ubiquitous. It empowers women in exclusive ways — allows them to make choices about livelihood, provides security against poverty and advocates autonomy.

Property rights lie at the intersection of law, economy, culture and the state. They are shaped by both gender and legal considerations. Though the Hindu Succession Act 2005 was a watershed legislation on many counts to adduce women's rights, it had largely remained engrained in gender orthodoxy.

The robust control of customary traditions in influencing claims to property rights of women has been prejudicial and discriminatory. Consequently, property rights of women have emerged as a contested terrain wherein lived ideas of tradition and modernity have been revisited and dissected frequently in the public sphere.

In the effort to upkeep virtues of Indian womanhood, women's sacrifice of rights in property has been prominently applauded. This sacrifice is political. The opportunity cost of such sacrifice is imbalanced and high. Dowry is equalised as a share in the property. Women forgo their property rights in ancestral homes so that they can have comfortable access to their paternal relationships, primarily with male members like their brothers. The brother-sister relationship is often at stake if the sister claims her share in ancestral property.

It is an unspoken understanding that in case of a marital dispute, the brothers will become shields of protection and come to the rescue of the sister. But women don't have many exit options in their marriages and if they did, they are not financially independent to take care of themselves. Clearly, not many women reach the doors of the court to fight legal battles for property rights.

Despite the strong foothold of such misogynist practices, the women's movement fought for the Amendment to the 1956 Hindu Succession Act in 2005. It's been a decade-and-a-half since then. The Constituent Assembly debate on the Hindu Code Bill, in general, is an important point of contextual reference here. The question of a share for the daughter from the patrimony was the epicentre of the succession debates.

Most of the women's organisations like the AIWC and the NCWI rallied around equal inheritance for sons and daughters. B R Ambedkar himself advocated equal citizenship rights for men and women in post-independence India. Women leaders like Sucheta Kriplani and Padmaja Naidu strongly invoked women's contribution to the freedom movement and argued, "if today....they are to be denied their just rights, then hard-earned freedom is no more than a handful of dust".

The survival of the joint family was the concern for opposing male legislators. There was a juxtaposition of "stridhan" with coparcenary share. [Rajendra Prasad](#) also expressed his fear about the fragmentation of family property, family tensions and litigations that can ensue from the conferment of property rights to women. The project of legal codification placed the progressive national imaginary as before the achievement of gender equality.

However, the Hindu Succession Act 1956 as it emerged was a classic case of “fractional justice”. It was, at best, a half-hearted measure to improve the position of women. It retained the Mitakshara coparcenary whose membership was confined only to males. Sons would not only get a share of their father’s property but also their own interest as coparceners in joint family property. Daughters would only get an equal share in paternal property. This was the main point of contention that called for legal reform in 2005.

Forty years of the enactment of the Hindu Succession Act 1956 witnessed different approaches to the understanding of gender equality on different cases related to property rights. Initially, there was an oscillation between protectionist and corrective approaches to the question of gender justice.

The substance of judicial decisions championed shared cultural assumptions about the conventional roles of women as inferior and dependent on other relationships. The dominant conception of Hindu family and familial ideology was interpolated in complex ways in the practice of law. Essentialist ideas of womanhood, gender stereotyping and role conflict culminated in the judicial discourse of naturalising disinheritance of daughters.

Post the amendment of the Hindu Succession Act, there has been a perceptible shift towards substantive justice in the last few years. In the emerging judicial discourse, a significant point of contestation has been whether the debate around retrospectivity can be contextualised in Section 6(1)(a) in the Act that said coparcenary benefit will apply “on and from the commencement of the Amendment Act of 2005 with effect from September 9, 2005.”

The courts have not been prolific in the interpretation of the provision in creating new rights of women when such substantive possibilities could have been explored in the preceding decade itself. As early as 2008, in *Pravat Chandra Patnaik and Others v. Sarat Chandra Patnaik and another*, the Orissa High Court held that a daughter, whenever born, is to be treated as a coparcener from the year 2005. It cannot be said that daughters who are born only after 2005 will be treated as coparceners. The Amendment Act is prospective in nature as much as partition prior to the amendment cannot be reopened. It was emphasised that the law is well settled and there was no scope of adding any meaning to it.

In *Smt. Bagirathi & Ors v. S. Manivanan & Anr*, it was held that even though the intention of the amended provision is to confer better rights on the daughters, it cannot be emphasised to the extent of holding that succession which had opened prior to coming into force of the amended 2005 Amendment could have a retroactive effect in conferring rights on daughters who were alive at the time of the amendment, even if they were born prior to it. Section 6 amended by The Hindu Succession (Amendment) Act, 2005 cannot be given retrospective effect.

Ten years later, three contrasting judgments that were considered authoritative precedents failed to provide an expansive interpretation of Section 6 of the Hindu Succession Act, 2005. In *Prakash v. Phulavati*, the Court held that the rights under the amendment apply to living daughters of living coparceners as on September 9, 2005, irrespective of when such daughters are born.

And in February 2018, in *Danama v. Amar*, it provided some relief but remained opaque on many counts. The apex court held that a daughter, living or dead, as on the date of the amendment, shall be entitled to a share in her father’s property. The implication was that even if the daughter was not alive on the date of the amendment, her children could claim their rightful share. The court approved that as coparceners, both sons and daughters had the same rights. The judgment was ambiguous on whether a father should also be living on the date of the amendment for the daughters to be eligible for their inheritance rights. In April 2018, in

Mangalaam v T B Raju, the Supreme Court held that the living daughters of living coparceners would be entitled to claim a share of the ancestral property.

So, gendered hierarchy and conditionalities were being read into the intention of the legislation to surrender daughters' rights as coparceners. Coparcenary as a bundle of rights was contingent on various inconclusive factors instead of being universally attainable. Such restrictive interpretation failed to deconstruct gender stereotypes and liberalise the gender regimes of unfreedom in India.

The underlying discrimination between male coparceners and the female coparceners was put to rest by this judgment. The Supreme Court settled the issue of retrospectivity and declared that a daughter would have the same rights as the son and would be irrespective of whether she was born before or after the amendment. Further, it ruled that she could not be denied her share on the ground that her father died before the law came into effect.

An expanding rights consciousness coupled with the democratisation of the law will enable an inclusive re-imagining of the everyday experience of law. The rules of social transaction can be negotiated by the Court to promote women's bargaining power to access and control property. The multiple axes of intersecting discrimination have to be overcome by a strategic judicial decision making model that makes justice more broad and capacious. The Constitution's commitment to the right to equality should be the talisman for courts to follow in all circumstances.

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