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Inclusion of Women as an Excluded Identity: Role of Judiciary in Reasserting Women's Property Rights and Personal Law in India

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Abstract

The Indian Constitution and Democratic Ideals have always placed high value on gender equality; nevertheless, discrimination and gender inequality are still prevalent in Indian society and the legal system as a whole. Women have less room to claim land or property, especially when it comes to succession and inheritance. As most Indian land is inherited, very few Indian women own land outright. Gender bias is pervasive in the social structure and culture of patriarchal societies. Several studies have highlighted the link between women's security and property rights, contending that this exposes them to both structural and physical violence. The ability to assert claims to land and property, especially regarding succession and inheritance, has been denied to women. This study explores the application of family laws to religious communities that are still active in contemporary India but predate colonialism. Examining the role of the Judiciary, the third organ of government, is necessary to look into the many and varied issues about the property rights of spouses and female members that are brought up by the existence of communitarian "Religious Personal Laws." One of the mainstays of democracy should always be the inclusion of underprivileged or marginalized groups. Legislators must craft laws to strike a balance between removing redundant social customs and upholding democratic norms to create an equitable society. The use of law as a tool for social engineering is acknowledged, and as society evolves, so too should the application of the law, either through legislative action or judicial interpretation. Thankfully, the knowledgeable or learned men of the judiciary stepped in when the legislative bodies failed to carry out their mandate, and sometimes this resulted in the realization of the democratic setup of the inclusion process.

Keywords: Personal law, Equality, Constitution, Constitutional rights, Property laws, Judiciary, diplomacy, Taiwan, Ukraine

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1. Introduction

Colonialism and the national movement had a significant impact on India's public sphere, helping to raise awareness of social and individual rights, including women's rights to some extent. The complex national movement that arose from nationalist responses to colonial rule has shaped today's Indian public discourse. Gender inequality persists in Indian society and the legal system owing to local customs and individual laws, despite the country's constitution and guiding principles, which have always placed a high priority on the subject. Women are not allowed to fully claim any land or property, especially when it comes to succession and inheritance. Very few Indian women own land because the majority of the land in the country is inherited. This patriarchal society's social structure and culture are rife with gender prejudices. The origins, development, application, and implications of family law for precolonial religious communities shape India's current social structure. Examining the discrepancy between women's actual experiences with property rights—particularly those about inheritance—and the legal norms connected to "family" is the goal of this study. This work examines the significant and varied women's rights issues that have been raised in response to the collective "Religious Personal Laws." Not to mention raising significant issues regarding the definition of "equality" about rights and, more especially, gender inequality. It also examines the coexistence of court cases and personal laws with uniform codes, as well as day-to-day life, revealing serious differences in opinion regarding "legal pluralism."

People's and communities' perceptions of social exclusion can be absolute or relative. There might be distinctions between how exclusion is conceptualized and how it feels in the real world. However, this distinction does not lessen the importance of exclusionary experience. This study examines how family laws apply to religious groups that were established long before colonialism and are still in existence in modern-day India. Examining the role of the judiciary—the third branch of government—is essential to addressing the many important issues about spouses' property rights that are resolved by the existence of "Religious Personal Laws" in communities. Real-world interactions and the coexistence of Personal Laws and Uniform Codes reveal the major differences surrounding "legal pluralism." This study investigates the mistreatment of women in India, which contravenes customary government practices and national personal law provisions that discriminate against them. As a result, women's role as observers of social injustice is intentionally and significantly diminished, and, on occasion, they have even supported it to benefit from it. Enacting laws that provide social and individual remedies and relief from issues that affect society as a whole and each member, in particular, is probably the responsibility of the legislative and executive branches of the government. However, the first and second arms of government deliberately and dramatically reduced their responsibility to act as observers of social injustice; on occasion, they even encouraged it to gain an advantage. Studies that employ the social identity approach show that community members often work together to lessen social injustices and collectively support those who have been harmed. However, matters become more complicated when members of the community, in which the legislative and executive branches participate, participate in these injustices. While many deliberately shirk their responsibility to maintain justice, some communities are ignorant of the part they play in encouraging victimization. In this instance, the discussions and arguments of astute attorneys and judges in the third branch of government elevate the importance of certain decisions rendered by the highest court. Examining these rulings to see if they offer complicit relief for the problematic problem of granting property and other rights to the majority of the population, especially the female portion, is fascinating.

2. Literature Review

Property rights are crucial because they affect inequality and economic performance. Property is all around us and is situated at the intersection of the state, legal system, politics, and economy. According to Carruthers Bruce and Laura (2004), the discussion centres on five dimensions of property: uses (what can be done with it), subjects (what can be owned), objects (what can be owned), enforcement of rights (how property rules are upheld), and transfer of property (how property moves between different owners). Given the court's increasing power as a result of well-publicized rulings and how those rulings impact India's parliamentary system of government, this paper examines the various stages of judicial activism.

Women's equal rights were not given the weight they deserved, and the ruling raised the prospect of future discriminatory actions in the personal law system, without offering a definitive remedy (Herklotz, 2017). The

majority of Muslim women want personal law to be changed and believe that they have not yet been granted the rights outlined in the Quran. Currently, Muslim family law is fragmented and inconsistent, and neither the government nor community has attempted to make it inclusive (Niaz and Zakia, 2015).

3. Methodology

The concept of this study was developed using sociological, legal, and analytical methods, which also identify the relationship between equality rights guaranteed by the constitution and personal law-based property rights. Using a sociological approach, historical facts, events, and phenomena are presented along with the positive and negative aspects of the present to provide insights into the future. The study looked at the most important Supreme Court decisions, and the analytical method offers a comprehensive grasp of how those decisions connect to the defence of fundamental rights, particularly the inheritance-based property rights of Indian women.

4. Why has economic development corresponded to the expansion of women's political and economic rights?

The theory underlying property rights, which are essential economic rights for women, is that men's competing interests as husbands and fathers were intensified by development, capital accumulation, and declining fertility, which ultimately settled the dispute in favor of the latter. Men profited from their privileged status as husbands in a patriarchal society, but they also suffered as fathers in a system that granted their daughters limited rights. When fertility declines, women's property rights would shift faster than initially under more pro-woman legal frameworks (Fernández, 2014).

Flavia (1999) examines the rights of older women to maintenance under various laws and case-specific rulings. These include property rights, dues, the rights of spouses of workers in the organized sector, and laws from antiquity to the present. India's history, population, and variety of personal laws make its legal system perfect for comparison with South Africa. Regardless of religion, all Indians are subject to the same set of generally applicable laws. People in India are subject to conflicting personal legal systems that vary depending on the community to which they belong (Rautenbach, 2006).

Gender equality has long been a sensitive issue in Indian law, particularly in the context of family law, and it has been the focus of numerous important rulings. Practical implications for the parties involved in these cases are rarely examined, and the effects on litigants' lives are often disregarded or reduced to a historical footnote if they are acknowledged at all (John, 2006). This study examines one such case, *Mary Roy Vs the State of Kerala*, to determine whether the plaintiffs, in that case, have received justice in the 20 years since the Supreme Court's ruling.

India's public sphere has changed significantly because of national movements and colonial rule, making it vulnerable to the recent rise in fascism. India's public discourse is still shaped by the ambiguities of the national movement, which in turn were shaped by nationalist responses to colonial rule. Because the definition and form of the public sphere are derived from this relationship, comprehending the public sphere requires consideration of its relationship with the private sphere. The relationship between the public and private sectors needs to be renegotiated to make multiculturalism an institutional feature of public life. Investigating methods for successfully creating a public sphere that represents the diversity of the nation is therefore essential (Raiguru, 2023). Gender inequality and discrimination persist in Indian society and the country's legal system overall, even though the Indian Constitution and democratic ideals have always placed a high value on them.

Land and other assets have traditionally been off limits to women, especially in terms of succession and inheritance. As land is inherited in most cases, very few Indian women own land outright. In this patriarchal society, the social structure and culture are rife with discrimination against women. Several scholarly works have underscored the correlation between women's safety and their entitlement to land and assets, contending that women are at risk of both structural and physical violence. The Indian government regularly modifies laws on inheritance and land ownership to safeguard women's rights to land and other resources. In 2005, the government made significant changes to the Hindu Succession Act of 1956 to ensure that women had the same rights to land and ancestral property as men. However, not much has been changed on the ground. The

proposed paper will analyze the effects of the Hindu Succession (Amendment) Act of 2005 on the land and property rights of women in India (Rai, 2023).

The background, development, application, and effects of family laws on religious communities that emerged during colonialism and persisted in modern-day India. There are differences between the legal definitions of “family” and women’s actual experiences of marriage and family. A multitude of significant and varied issues concerning marriage and spouse rights are brought to light by the existence of “Religious Personal Laws,” which are of a communal or collective nature. These laws not only provide important context for analyzing gender differences in marriage and family dynamics, but they also raise important questions about the definition of “personal” about rights granted to communities or groups.

Lawmakers have realized that laws should be framed and applied more justly and sensitively to gender issues rather than solely based on values. This realization has been shared by feminist lawyers, activists, legal scholars, judges, and attorneys, who support women in the community. This realization has been aided by these insights and significant disagreements over “legal pluralism,” which are demonstrated by the coexistence of Personal Laws and Uniform Codes as well as a common experience (Banerjee-Dube, 2023).

By bringing multiple cases before informal judicial institutions, Muslim and Hindu women in India are challenging Muslim and Hindu Personal Law in protesting the prejudice and oppression they face in their homes and communities. Minority women in India fought tenaciously for their rights and entitlements and carefully considered their course of action in response to discrimination in the socioeconomic private and public spheres caused by tradition, perception, and gender-biased state policies and laws (Devi, 2023).

5. Collective Victimization by Injustice

Social identity approach (SIA) research indicates that victims of collective victimization often work together to support one another. However, things become more difficult when community members participate in such injustices. Some communities are unaware of their role in promoting victimization, even as many wilfully neglect their duty to uphold the law. According to a study by Këllezi *et al.* (2023), some communities actively reject their responsibility to enforce the law, while others are aware of their part in encouraging victimisation.

The definition of social exclusion and its potential impact on social exclusion laws were considered. The concept is currently applied in a way that, according to the argument, tends to individualize the issue, obscure the discursive origins of exclusion, and concentrate on material definitions of exclusion. It is crucial to recognize that the material and discursive factors can have an impact on this process. Examples from the field of social identity provide credence to claims made about marginalization, identity, and discourse (Ward, 2009).

The national policy discourse offers reasonable and advantageous paths to increased equity and inclusivity for educators and other public sector workers. Critical race theory and radical feminists contend, however, that despite efforts to demolish those that disproportionately affect marginalized or minority groups, new systems are likely to be developed concurrently with the maintenance of existing ones (Lumby, 2009).

6. Property Right: An Indian View of Reality in Development - Golaknath Case and the Kesavananda Bharathi Case

It was once believed that the judiciary was the least powerful branch of government. The highest court in India has rendered multiple rulings on property rights offering the best evidence to refute this myth. Even at the time of their announcement, many of the rulings that had been discussed were acknowledged as ground-breaking judgements that would significantly affect our nation. Property rights were decided by the Supreme Court in the Golaknath and Kesavananda Bharathi cases. Although the term “property right” was not used specifically in these judgements and personal law was not particularly involved, the deprivation of property rights was the initial cause of these cases. Golaknath and his family filed an appeal with the Supreme Court after the Punjab Security of Land Tenure Act X of 1959 declared their 418 acres of land to be surplus. A legal battle between the Punjabi government and the Nath family that went all the way to the highest court resulted in the historic Golaknath case. In a petition filed under Article 32, they contested the 1953 Punjab Act, arguing that it infringed upon constitutional rights to equality, equal protection under the law, and the right to possess and acquire property (Austin, 2003). Despite their wishes, the authors argued that Article 13 of the Indian

Constitution applies to the proposed constitutional amendment. Though the person who stands to gain the most from the verdict and judgement is Golaknath, the Indian Supreme Court nevertheless adopted a novel theory known as prospective overruling.

In the *Kesavananda Bharati* case, the petitioner claimed that the Kerala Land Reforms Acts of 1963; the 24th, 25th, and 29th Constitutional Amendment Acts of 1971, 1972; and other laws had infringed upon and negatively impacted his property rights. Asserting that these changes violated the core principles of the Constitution, Sri Kesavananda Bharati questioned the validity of the amendments. Sri Kesavananda Bharati contested the legality of these changes, arguing that they went against the fundamental tenets of the Constitution. The result was the landmark *Kesavananda Bharati* ruling, which limited the power of the Parliament to amend the Constitution and established the basic structure doctrine, albeit without directly addressing property rights ([Indian Supreme Court, 1973's The Basic Structure Judgement](#)).

In *R.C. Cooper v. Union of India*, AIR 1970 SC 564, the Supreme Court observed that the term "property" includes both corporeal objects like land and furniture as well as incorporeal ones like copyrights and patents. Property rights govern the use and transfer of resources to future generations as well as their legal and theoretical entitlement. Prominent intellectuals believe that property rights are essential to the proper functioning of the state and civil society. According to Machiavelli, when it came to property, people would forget their inheritance more quickly than their father's passing. He added that most men are happy when neither their honor nor their property is jeopardized. Hobbes believed that the defence of people's rights to life and property was the primary goal of nationhood. By contrast, Hobbes seems to hold that some property rights are established before the state is formed; as a result, private property relations may exist in civil society, and if the sovereign infringes upon these rights, revolution may be justifiable ([Lopata, 1973](#)).

Properties can be classified as either man-made items that were acquired or passed down by accident, force, or custom (such as landed property), or as the product of multiple individuals contributing various labor volumes and skill sets to create something (such as capital assets, machinery, buildings, and vehicles). Jeremy Bentham and Adam Smith believed that the institution of property was crucial to the development of society. Adam Smith was among the theorists who held that the institution of property was essential to the advancement of society. T.H. Green gave the right to own property the weight it deserved in the pursuit of moral freedom.

7. The Supreme Court's Interpretation of Constitutional Remedies for Women's Inclusion with their Property Rights as Excluded Identities

In society, women have certain rights to inheritance and property. Property rights are claims to possessions recognized by the legal system, society, and authorities with external legitimacy. Owning land and other properties provides women with financial security and empowerment. Poor women are unable to access assets in an estate and have less influence on decisions made at home. Gender empowerment is becoming increasingly popular worldwide, and India is no exception. The story of how women, a marginalized group, gained acceptance through the seal of empowerment has been embraced by the Indian judiciary, and numerous reforms have been implemented to give women's rights an equal opportunity to compete with men's rights in society. For this reason, a woman must maintain sole ownership of her property, whether it comes from her parents or her marriage; no one else should be able to claim ownership.

Because women have historically been oppressed and seen as merely agents of their property, with male family members – such as husbands and fathers – holding the ultimate authority, legislators have historically disregarded the aforementioned idea. Even in this post-independence Indian scenario, the various laws that currently govern women's property and property rights in India are still evident: the Hindu Succession Act of 1956, Hindu Women's Right to Property Act of 1937, Indian Succession Act of 1925, and Muslim Personal Law (Shariat) Application Act of 1937.

For people everywhere in the world, property offers a foundation for security, a place to live, a way to become independent, and an opportunity to pursue economic opportunities. However, not everyone has the same rights regarding property and access. Despite the laws and policies protecting their rights, women still face obstacles to their property and land rights in half of the world's nations. For millions of women to benefit from the security of these rights, the World Bank strives to close the continuous gap between international law

and practise, as the “Stand for Her Land” (IISD, 2019) campaign makes clear. The United States and the United Kingdom’s Married Women’s Property Acts of 1882 expanded the capacity of married women to function as independent agents. The English common law concept of “coverture,” which denotes a married woman’s legal subordination to her husband, governed both the United States and the United Kingdom until the mid-1800s. Thanks to the Married Women’s Property Act, married women can now demand that both parents provide for their children, inherit small or large amounts of property, own property that they either inherit or rent from close relatives, and keep their assets and income separate from their spouses (Shana, 2019). Thus, more women have become real estate owners in the first world.

8. The Conundrum of Equality before the Law, the Constitution’s Protection of Equality, and the Hindu Succession Act

The Indian Constitution guarantees that women and men have equal rights. Article 14 guarantees equal treatment before the law and equal protection under law. Property ownership frequently causes controversies regarding women’s rights. In India, women’s property rights are violated regularly. As a result, the government has put in place several progressive laws to support women’s property ownership, but the outcomes have not been significant. Discriminatory provisions for women’s property rights were present in the Hindu Succession Act of 1956 and remained in effect until 2006.

This Act deals with property succession and inheritance. Under this Act, succession and inheritance are considered in a single, all-encompassing system. According to Ishaan and Monesh (2022), this act also addresses intestate or unwilled (testamentary) succession. Here, a male ancestor and his linear descendants are essential components of the Hindu-Joint family. Sons and their fathers shared a portion of the land belonging to their ancestors as co-parceners. The sons and their fathers shared an equal share of their ancestors’ land as coparceners. Until 2006, women living in Hindu joint families denied all of these rights. According to Dharma Shastra, Hindu women’s status was always subservient to male family members. A woman must live her entire life under the supervision of her father, husband, or son because she is a perpetual minor (Majumdar, 2004). She was considered a perpetual minor. When the Hindu Succession Act was passed in 1956, lawmakers did not see the need to give a daughter any rights over her father’s property because they believed the daughter would marry a different family and not be entitled to anything from his estate. The 2005 amendment brought back the equality that the constitution guaranteed after 50 years. The provisions in the Hindu Succession Act of 1956 discriminated against women. After fifty years, the equality guaranteed by the constitution was restored with the passage of the 2005 amendment. There were provisions in the Hindu Succession Act of 1956 that discriminated against women. Under the Hindu Succession (Amendment) Act of 2005 (39 of 2005), these were eliminated.

As per the amendment, the daughter of a coparcener will naturally become one by birth, just like a son does (Global Database on Violence Against Women, 2015). The question of whether women have the same rights to property as men as co-parceners remains unresolved even after the amendment. Following this, the Supreme Court heard Vineetha Sharma v. Rakesh Sharma case, which resulted in a resolution. Women’s rights were upheld, the Supreme Court noted, and efforts were being made to eliminate anomalies and dishonest practices. The codified law was periodically amended in response to the ongoing need for status equality after independence (Vineeta Sharma V/s Rakesh Sharma & Others, reported in (2020) 9 SCC 1).

The Indian Parliament recently amended the Hindu Succession Act to give daughters the same rights as coparceners in the Mitakshara co-parcenary. The latest decisions regarding the property rights of Hindu daughters by the Supreme Court have addressed a notable disparity in the application of the 2005 amendment to the Hindu Succession Act of 1956. The ruling resolves the debate over whether daughters’ coparcenary rights are limited to the period of their fathers’ lives on the day the amendment was ratified. Now that a daughter’s right is established at birth and is unaffected by anything, not even her father’s presence, the highest court has made this clear.

9. Personal Laws and the Conflict of Equality-Marry Roy Case

Gender equality in Indian law has long been a contentious issue, particularly in the context of family law, and has been the focus of numerous significant rulings by higher courts. John (2006). The Supreme Court’s 1986

decision in the *Marry Roy* case established the inheritance rights of Christian women over their ancestral property. The primary issue of appeal to the Supreme Court in this case was whether the Indian Success Act of 1925 or the Travancore Christian Succession Act covered intestate succession to property owned by members of the Indian Christian Community in areas that had previously been part of the former Travancore state. The Travancore Christian Succession Act of 1916 made it impossible for women belonging to the Syrian Christian community to inherit land. The Travancore Christian Succession Act of 1916 provided male heirs with the entirety of an intestate estate (someone who passed away without leaving a will). The daughters' claims can be rejected once the "sthreedhanam" (dowry) has been paid. Ayyappan (2022). Mary Roy claimed that the Travancore Succession Act violated Article 14 of the Indian Constitution in a petition to the Apex Court. Following the Travancore Succession Act of the 1916 overturn by the Indian Supreme Court in 1986, the Indian Succession Act of 1925 remained supreme law. The decision ended the widespread practice in Syrian households, which did not give women their full inheritance share. Since the discriminatory act was repealed, and it was proclaimed that the right to own property is a fundamental human right, men and women can inherit property through intestate succession laws (Roshan, 2022).

10. Recognition of the Democratic Establishment of the Inclusionary Process by the Courts

The Supreme Court decided on the maintenance to which a Muslim woman was entitled after her divorce in *Mohammed Ahmed Khan v. Shah Banu Begum*. The *Shah Bano* case, a landmark legal case, significantly affected Muslim women's maintenance rights. Important questions have been raised regarding the support and rights of women. *Shah Bano's* insistence that her husband provided financial support was a crucial factor in this case. Mohammed Ahmed Khan in this instance sought a divorce from his spouse and refused to pay spousal maintenance, citing the Muslim Personal Law (Shariat) Application Act, 1937 as legal protection. Muslim personal law states that divorced Muslim women are only eligible for maintenance during the *iddat* period (Mody, 1987). According to Section 127(3)(b) of the Code of Criminal Procedure, Khan first claimed that he could not be subject to another maintenance order because he had already given *Shah Bano* mahr money, which he claimed was the amount due to divorce. This was Khan's main point of contention. The primary inquiry in this case is whether a divorced Muslim woman may request maintenance under section 125 of the Code of Criminal Procedure. According to Section 125 of the Code of Criminal Procedure 1973, a Muslim husband is required to provide for his defenceless divorced wife after an *iddat*, as per the Supreme Court's decision in the *Shah Bano* case (Rao, 1985). The Criminal Procedure Code's Section 125, which covered all communities irrespective of their unique personal laws, was made available to Muslim women who were unable to support themselves, according to the Supreme Court's ruling. The court concentrated on the issue of whether Muslim personal law requires the husband to support the divorced party. The court decided that a Muslim woman who was unable to support herself could apply to the Criminal Procedure Code, Section 125, which applied to all communities irrespective of their unique personal laws. If the Criminal Procedure Code and the Muslim Personal Law conflict in any way, the Criminal Procedure Code will take precedence (Hasan, 1989). The Court determined that she would be eligible to seek maintenance under Section 125 of the CRPC whether the spouses were Parsis, Christians, Muslims, Hindus, or heathens. The Court also decided that there is no conflict between Section 125 and Muslim personal law on this issue, citing Ayats (verses) 241 and 242 of the Second Sura (chapter) of the Quran, which commands Muslim husbands to provide for their divorced wives. Thus, the court skilfully used interpretive tools to harmonise Section 125 with Muslim personal law. The court stated that since the government has been reluctant to enact changes to Personal Law, the courts must act as change agents (Mody, 1987).

11. Conclusion

Democratic inclusion of marginalised or disadvantaged groups ought to be its guiding principle at all times. Legislative bodies must draft laws that strike a balance between democratic norms and laws that eliminate superfluous social customs to establish an equitable society. Since the law is known to be a tool of social engineering, it should be modified in practice to reflect changes in society. This adjustment can be made through legislative action or judicial interpretation. The knowledgeable or learned men who make up the judiciary stepped in when the legislative bodies failed to carry out their mandate, and happily, this occasionally resulted in the realisation of the democratic setup of the inclusion process.

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