

# VICISSITUDES OF WOMEN'S INHERITANCE RIGHT— ENGLAND, CANADA AND INDIA AT THE DAWN OF 21ST CENTURY

## Abstract

Women's economic status and social security is influenced by her ownership and control over immovable property. Since time immemorial framing of all property laws have been exclusively for the benefit of man. Devolution of property under family law is profoundly conditioned by historical legacies, statutory laws, personal laws as is evident in the development of succession laws of Canada and India. Though numerous notions of English succession law became part of both these countries due to prolonged colonial presence, with passage of time, these laws continued to evolve and differ from English law. This paper reflects the changes brought about by modern thought of equality and positive discrimination favoring women's right to property in England, Canada and India. It also analyses the implication of existing statutory provisions, their judicial interpretations and desirous changes that could be brought to improve the social and economic conditions of women.

## I Introduction

EFFECTIVE RIGHTS in property, especially land, are of critical importance for women's economic and social empowerment.<sup>1</sup> Women's economic status and social security is influenced by her ownership and control over immovable property. Since time immemorial, the framing of all property laws have been exclusively for the benefit of men and women have been treated as subservient to and dependent on male support.<sup>2</sup> The social impact of the property law must not be understood as a one-way transmission of ideals; rather what the law meant for women depended heavily on the existing social and economic relations of the societies upon which it was imposed.<sup>3</sup> Women's rights to inherit, own and control property are also determined by the values and norms which are socially acceptable, as well as the mechanisms

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- 1 Bina Agarwal, "Gender and Legal Rights in Agricultural Land in India" 30 (12) *Economic and Political Weekly* A39-A56 (1995).
  - 2 Law Commission of India, 174<sup>th</sup> Report on Property Rights of Women: Proposed Reforms under the Hindu Law (May 2000).
  - 3 Mytheli Sreenivas, "Conjugalities and Capital: Gender, Families and Property under Colonial Law in India" 63(4) *The Journal of Asian Studies* 941 (Nov. 2004).

of intra-household decision-making and distribution.<sup>4</sup> The United Nations Convention on Elimination of All Forms of Discrimination against Women's (CEDAW) commitment towards providing equal access to land and other property gave a push to women's rights but the expansion of women's right in property has been slow.

Though sex equality in family law is profoundly conditioned by historical legacies, these do not wholly determine outcomes.<sup>5</sup> It is affected by complex web of statutory laws, personal laws, social norms and customs as could be seen in the development of succession laws of Canada and India. Numerous notions of English succession law became part of both Indian and Canadian law due to prolonged colonial presence in both these countries. Owing to huge presence of Indians in Canada, both countries are more likely to be influenced by each other. Canada is governed by the common law of English origin. The British in 1925, much before India attained independence, framed the statutory code of succession for India based on common law principles. With passage of time, succession laws under Canadian system and laws under Indian Succession Act, 1925 (ISA, 1925) continued to evolve and differ from English law, be it the principle of primogeniture, rules for devolution of property, rights being recognized of same sex partners *etc.* The rule of intestate succession under English law that favoured horizontal flow of property to spouse over 'vertical' flow of property to descendants has been retained by both Canada and India, though the statutory share reserved for the widow/widower in England, Canada and India varies tremendously. This paper examines the evolution of succession laws particularly the devolution of property affecting the rights of females in England, Canada and India. It compares the administration of personal law of these countries and reflects the change that have been brought through modern thought of equality and positive discrimination favouring women's right to property. It also analyses the implication of existing statutory provisions, their judicial interpretations and desirable changes that could be effected in succession laws of both countries to improve the social and economic conditions of women.

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4 Kanakalatha Mukund, "Women's Property Rights in South India: A Review" 34(22) *Economic and Political Weekly* 1352-1358 (May 29 - Jun. 4, 1999).

5 Mala Htun and Laurel Weldon, "Sex Equality in Family Law: Historical Legacies, Feminist Activism and Religious Power in 70 Countries" World Development Report 2012.

## II Law of intestate succession in England

English common law methods of devolving intestate estates, including the customs of primogeniture, dower, or curtesy, were heavily influenced by an individual's gender and marital status.<sup>6</sup> Clarity in distribution of property upon intestacy in England was brought by Statute of Distribution, 1670<sup>7</sup> but misperception over succession to real and personal property upon intestacy continued until passing of Administration of Estates Act, 1925 (AEA, 1925). Real property or realty consisted of land and of things attached to land such as buildings, minerals and trees and also of rights over land such as easements and profits whereas leaseholds or 'terms of years' had been classified as personalty. The historical difference between the two was that realty could be restored to a dispossessed owner by means of 'real' action – the thing itself but there was no specific recovery of personalty.<sup>8</sup> Under the common law doctrines of marital unity and *coverture*, a woman's legal personality would undergo a dramatic transformation upon marriage. As a wife, a woman would be legally classified as a *feme covert*, or one who has her legal existence suspended, merged or "covered" by her husband.<sup>9</sup> The Intestates' Estates Act 1890 introduced the concept of 'statutory legacy'<sup>10</sup> to the surviving spouse.<sup>11</sup> Principal determinant factor now for distribution of asset upon intestacy was not the presence of issue but the presence of surviving spouse. The central or 'gravitational' pull of intestate succession shifted from the preservation of

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6 Louise M. Mimmagh, "A History of Preferential Share in Ontario: Intestacy Legislation and Conceptions of the Deserving or Undeserving Widow" 23 *Dal J Leg Stud* 1(2014).

7 The Statute of Distribution, 1670 was amended by: (i) Statute of Fraud, 1677 which made husband entitled to all of wife's personal property including her separate estate if she had not disposed it by will and (ii) Statute of Distribution, 1685 which provided brothers and sisters of the intestate to share equally with intestate's mother and (iii) Intestates' Estate Act, 1890 which gave a widow a larger portion if the estate was small and if the intestate left no issue she took the whole of the real and personal estate if the total value did not exceed £500; if it exceeded this sum, the estate was to stand charged with the payment to her of £500.

8 R. Kerridge, "Intestate Succession in England and Wales" in Kenneth G C Reid, Marius J De Waal, Reinhard Zimmermann (eds.), *Comparative Succession Law Intestate Succession* 323 (Oxford University Press, Oxford, 2015).

9 Joel T Rosenthal, "Fifteenth-Century Widow and Widowhood: Bereavement, Reintegration and Life Choices" in Sue Sheridan Walker (ed.), *Wife and Widow in Medieval England* 34 (University of Michigan Press, Ann Arbor, 1993).

10 Fixed net sum granted to spouse on intestacy.

11 Means husband or wife through legal marriage.

family assets to the care and financial security of the surviving spouse.<sup>12</sup>

AEA, 1925, which still applies today, revolutionized intestate succession for devolution for realty and personalty<sup>13</sup> by laying uniform rules of succession for both. The application of AEA, 1925, resulted in giving better interest to surviving widow than what she possessed earlier. It continued with the preference given to surviving spouse<sup>14</sup> including ‘statutory legacy’ as laid down by Intestates’ Estates Act, 1890 but increased the ‘statutory legacy’ from £500 to £1000 in the year 1925. Rule of primogeniture applicable to real property was also abolished by AEA, 1925, paving way for all children including daughters to have share in the property of the deceased.

In 1938, Inheritance (Family Provision) Act, 1938, was enacted which for the first time allowed claims of the surviving spouse, an unmarried or disabled daughter and a son either disabled or below 21 years if the deceased left a will without making provision for them. The Inheritance (Provision for Family and Dependents) Act, 1975 expanded the scope of Inheritance (Family Provision) Act, 1938, giving courts the power to make “reasonable provision” for other dependents as well. In matters of claim by surviving spouse the court is no longer to be guided by maintenance standard but may make an award of any reasonable sum arrived at after considering various factors as listed under the statute. Thus the Act of 1975 is a detailed attempt to make English inheritance law more responsive to the complexity of modern economic and social conditions.<sup>15</sup> Intestates’ Estates Act, 1952 gave the spouse the right to purchase the intestate’s interest in the matrimonial home in satisfaction or partial satisfaction of the statutory legacy.<sup>16</sup> Later the amount of statutory legacy was increased to £250,000 in presence of issue<sup>17</sup> and £450,000 in his/her absence.<sup>18</sup>

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12 Fiona Burns, “The changing patterns of total intestacy distribution between spouses and children in Australia and England” 36(2) *UNSW Law Journal* 470-513 (2013).

13 Administration of Estates Act, 1925 (15 & 16 Geo 5, c 23) s. 45(1)(a).

14 *Supra* note 11.

15 Richard Schaul-Yoder, “British Inheritance Legislation: Discretionary Distribution at Death” 8 *B.C. Int’l & Comp. L. Rev.* 205 (1985) available at :<http://law.digitalcommons.bc.edu/iclr/vol8/iss1/8> (last visited on Dec. 25, 2015).

16 Intestates’ Estates Act, 1952 (15 & 16 Geo 6, & 1 Eliz 2, c 64) schedule 2, s. 5.

17 Issue means direct descendants *i.e.*, children, grandchildren of the deceased.

18 Family Provision (Intestate Succession) Order 2009 (UK) c 135 in effect from Feb. 1, 2009.

By the end of 20<sup>th</sup> century the concept of family broadened to include persons beyond blood relationships and traditional marriage. Recently, Inheritance and Trustees' Powers, Act, 2014 (ITPA) based on the recommendations contained in the Law Commission Report 331 of 2011 has made number of amendments in AEA, 1925. Before the amendment brought by ITPA, 2014, in the absence of surviving issue or statutorily recognized next of kin of the deceased, the surviving spouse became entitled to whole of estate but in presence of issue she was absolutely entitled to intestate's personal chattels<sup>19</sup>, a statutory legacy with interest and life interest in one-half of the remaining property subject to statutory trust, with the other half of property under statutory trust being acquired by the children. In the absence of surviving issue but in presence of statutorily specified relatives, the surviving spouse was entitled to personal chattels, statutory legacy and also absolute rights to one half in the remaining estate. ITPA, 2014 came into effect on October 1, 2014 and is applicable on persons dying on or after that date. The following subsections discuss the law as it stands after ITPA, 2014.

**Where the deceased is survived by a spouse including a civil partner and issue**

The entire estate is divided only between them to the exclusion of any other relative. The Civil Partnership Act, 2004 has extended the rights of surviving spouse in succession to surviving civil partners, which includes same-sex married or registered partners.<sup>20</sup> To claim intestate succession, marriage or registered marriage-like relationship is still required under English law. Therefore, common law spouses or cohabitants are not entitled under the intestacy rules but they may bring application under Inheritance (Provision for Family Dependents) Act, 1975.<sup>21</sup> If the intestate died on or after January 1, 1996 then to claim the right as a spouse or civil partner he/she must

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19 Personal chattels had been defined under s. 55(1)(x) of the Administration of Estates Act, 1925 (15 & 16 Geo. 5. Ch. 23) as: "Carriages, horses, stable furniture and effects (not used for business purposes), motor cars and accessories (not used for business purposes), garden effects, domestic animals, plate, plated articles, linen, china, glass, books, pictures, prints, furniture, jewellery, articles of household or personal use or ornament, musical and scientific instruments and apparatus, wines, liquors and consumable stores, but do not include any chattels used at the death of the intestate for business purposes nor money or securities for money."

20 Civil Partnership Act 2004, s. 71; sch 4, paras 7-12.

21 Inheritance (Provision for Family Dependents) Act, 1975 (UK) c 63, s 1(1A).

survive the intestate by 28 days.<sup>22</sup> The spouse inherits personal chattels, and then takes statutory legacy and absolute interest in one-half of the balance of the residuary estate. The spouse first takes the personal chattels absolutely.

Meaning of personal chattels as substituted by ITPA, 2014 in AEA, 1925 means tangible movable property, other than any such property which—consists of money or securities for money, or was used at the death of the intestate solely or mainly for business purposes, or was held at the death of the intestate solely as an investment.<sup>23</sup> The spouse then takes the fixed net sum *i.e.*, the ‘statutory legacy’ with interest, the rate of interest to be the Bank of England rate effective on the day on the intestate’s death.<sup>24</sup> If the intestate died on or after February 1, 2009, the statutory legacy in the presence of issue is £250,000. Lastly, after the amendment of AEA, 1924 by ITPA, 2014 she gets absolute interest in one-half of the residuary estate. Before the amendment she took only life estate interest in half of the residuary estate.

#### **Where there is a surviving spouse and no issue**

After the amendment where the deceased is not survived by issue, the surviving spouse takes the entire residuary estate absolutely. The presence of other relatives of the deceased makes no difference. Thus, the amendment of 2014 attempts to further narrow down the concept of family, limiting it to only spouse and children and not to other blood relations.

#### **Where there is issue but no surviving spouse**

The domain of persons who may be regarded as child or issue of the intestate has expanded to include adopted,<sup>25</sup> legitimated,<sup>26</sup> ex-nuptial<sup>27</sup> and artificially conceived children.<sup>28</sup> New provisions ensure that children adopted after the death of their intestate parent do not lose their claim to inheritance from an intestate parent. Issue takes the estate on the ‘statutory trusts’. The

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22 Administration of Estates Act, 1925, s. 46(2A) inserted by Law Reform (Succession) Act 1995 s. 1(1) as amended by the Civil Partnership Act, 2004, sch 4, para 7.

23 Administration of Estates Act, 1925, s. 55(1)(x) as amended by s. 3 of ITPA, 2014.

24 *Id.* S.46 (1) The rate before the amendment of AEA, 1924 by ITPA, 2014 was fixed periodically.

25 Adoption and Children Act, 2002 (UK), ss. 67, 144.

26 Legitimacy Act, 1976 (UK), ss. 5(1)–5((4), 10(1).

27 Family Law Reform Act, 1987 (UK), s. 18(1).

estate is first divided per stripe for all the children of the deceased in equal share. The law also follows the principle of representation which entitles the grandchildren to claim the share of their pre-deceased father/mother in their grandparent's estate. No child/grandchild is entitled to vested interest in the estate until he or she attains the age of 18 or marries under that age. If the child marries before attaining age of 18 or dies before attaining that age his prospective share of estate passes on to his brother(s) and sister(s).

### **Where there is no surviving spouse or issue**

In the absence of surviving spouse and issue, the estate of the deceased passes as trust on to his specified relatives. Specified relatives are ones who have descended from grandparents. The estate passes on in hierarchical order: *firstly*, to both the parents in equal share and in presence of only one parent, entire estate of the deceased passes on to that parent absolutely, *secondly*, in the absence of both the parents to deceased's brothers and sisters of whole blood, *thirdly*, in the absence of brothers and sisters of whole blood to his brothers and sisters by half blood, *fourthly* to his grandparents, *fifthly*, in the absence of both the grandparents to his uncles and aunts of full blood related only by birth and not marriage and *lastly*, to uncles and aunts of the half blood. In absence of all these specified relatives, the estate of the deceased then passes on to the Crown as *bona vacantia*.<sup>29</sup>

The rules of intestate succession in England have evolved to give more rights to surviving spouse in the estate of the deceased. The ambit of personal chattel given only to surviving spouse has increased; the rate of interest to be considered now is the rate as effective on the day of the intestate's death, which before the amendment was fixed periodically. The amount of statutory legacy has increased with the passage of time from £500 to £250,000. The surviving spouse now, is entitled to absolute interest in the residuary interest. The rights of surviving spouse have further been strengthened after the amendment of 2014 by giving her entire residuary estate absolutely in absence of issue of the intestate - now even in presence of other blood relations of the intestate - parents, brothers and sisters, grandparents, uncle and aunt, spouse is entitled to entire estate of the deceased spouse. Further, inheritance right has been given to adopted children, extra-marital children, and children

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28 Human Fertilisation and Embryology Act, 2008 (UK) ss 27, 28.

29 Administration of Estates Act, 1925, s. 46(1)(vi).

conceived by artificial means. Despite progressive steps having been taken by England, the government is yet to recognize the cohabitant's entitlement on intestacy and that of step-children.

### **III Law of intestate succession under Canadian/Ontario legal system**

The Constitution of Canada is the supreme law of the land and all laws passed by federal, provincial or territorial government must be consistent with the Constitution. Federal government has exclusive jurisdiction over substance of marriage and divorce whereas the provinces have exclusive jurisdiction over procedures surrounding marriage, marital property, family maintenance and even inheritance. Therefore, inheritance laws in Canada are legislated by each individual province. Among ten provinces of Canada, Ontario is the most populous province comprising of nearly 40% of all Canadians and is the second largest province with property legislation being similar to other provinces. Ontario has made considerable advances for women's equality through strong legislative enactments by bringing in gender equality laws. Since Ontario constitutes the major Canadian populace, and the succession law of the province of Ontario, in general does not differ significantly from that of the other Canadian province, the paper discusses rules of intestate succession of Ontario.

Ontario's Family Law Act, R.S.O. 1990, c.F.3, regulates the rights of spouses and dependents regarding the division of property for legally married couples, support inheritance and other family law matters. The Succession Law Reform Act, R.S.O. 1990, c.S.26 governs Ontario in matter of intestate succession. Accordingly, the first person to be considered next of kin is the legally married spouse of the deceased.<sup>30</sup> If the parties are legally married and one spouse<sup>31</sup> dies without making a will, the surviving spouse may claim an equalization payment<sup>32</sup> under Family Law Act, or inherit her/his share according to 'intestacy'

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30 Succession Law Reform Act, R.S.O. 1990, c. S.26, s. 44.

31 Spouse under Succession Law Reform Act, R.S.O. 1990, means either of two persons who (a) are married to each other, or (b) have together entered into a marriage that is voidable or void, in good faith on the part of the person asserting a right under this Act.

32 On separation by divorce/death of married couple each spouse calculates his/her 'net family property' (NFP) by subtracting his/her property on the date of marriage from the value of his/her property on the date of separation (Family Law Act, R.S.O.1990, c.F.3, s. 4(1)) and the spouse with higher NFP then pays the other spouse half of the difference left after deducting the lesser NFP from the greater NFP, which is termed as equalization payment.



rules under Succession Law Reform Act. Family Law Act does not apply unless one is legally married. Consequently, common-law spouses<sup>33</sup> do not inherit the other partner's property unless it was left to her/him in a will. Family Law Act specifically recognizes common law spouses under the provision dealing with spousal support issues and includes those living together continuously for no less than three years or having a child in common and having "cohabited in a relationship of some permanence".<sup>34</sup>

But recently Supreme Court of Canada labeled common law relationships in which unjust enrichment arises as "joint family venture" and held that claiming spouse must show existence of joint family venture and the link between his/her contribution to the venture and accumulation of wealth.<sup>35</sup> Canada with the enactment of the Civil Marriage Act in 2005, has legalized same-sex marriage and has provided a gender-neutral marriage definition. Recently in *Hincks v. Gallardo*,<sup>36</sup> the Ontario Superior Court of Justice decided that same-sex partners who entered into British civil partnerships are to be treated as married for the purposes of Canadian law, otherwise it would violate the Canadian Charter of Rights and Freedoms. Issue includes a descendant conceived before and born alive after the person's death. Children born outside of marriage are included in the definition of dependants under Succession Law Reform Act<sup>37</sup> and, therefore, they are entitled to a priority claim on the estate for the purposes of support as dependants.

Preferential share<sup>38</sup> is first to be satisfied from net value of the property left by the deceased wherein net value amounts to the value of the property after payment of the charges thereon and the debts, funeral expenses and expenses of administration, including succession duty. Preferential share is the surviving spouse's entitlement to a base financial interest in the estate

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33 Refers to couples who live together as spouse but are not legally married to each other.

34 Family Law Act, R.S.O. 1990, c. F.3, s. 29: "spouse means a spouse as defined in subsection 1 (1), and in addition includes either of two persons who are not married to each other and have cohabited, (a) continuously for a period of not less than three years, or (b) in a relationship of some permanence, if they are the natural or adoptive parents of a child."

35 *Kerr v. Baranow*, 2011 SCC 10.

36 2013 CanLII 129 (Jan. 7, 2013).

37 *Supra* note 30, s. 57.

38 Term used in Canada for 'statutory legacy' as used in England.

which is assigned to her in 'preference' to the spouse above all other heirs.<sup>39</sup>

Some of the notable features of inheritance law in Ontario are:

- i) Under Succession Law Reform Act when a person dies intestate in respect of his property and is survived by his spouse but no issue, the spouse is entitled to the property absolutely.<sup>40</sup>
- ii) Preference in inheritance is given to the surviving spouse. If the only next of kin is the spouse, then the surviving spouse inherits everything but if there is other next of kin including issue, the surviving spouse is entitled to the 'preferential share' which is the first \$200,000 of the value of the estate.<sup>41</sup>
- iii) If the value to be inherited is less than the preferential share, the spouse inherits everything even in the presence of other next of kin of the deceased.<sup>42</sup>
- iv) If surviving spouse inherits something under a will, the value under the will be taken into account for the calculation of the preferential share.<sup>43</sup>
- v) After deduction of preferential share given to spouse, if there is one child, the child and spouse equally divide the remainder of the estate.<sup>44</sup>
- vi) If there is more than one child, the spouse gets one-third of the remainder left after allotting the preferential share and the rest two-third is divided among those children.<sup>45</sup>
- vii) In the absence of spouse and children, inheritance passes to both mother and father of the deceased in equal shares.<sup>46</sup>

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39 *Supra* note 6.

40 *Supra* note 30, s. 44.

41 Ontario Regulation 54/95, s. 1: "For the purpose of section 45 of the Act, \$200,000 is prescribed as the amount of the preferential share."

42 *Supra* note 30, s. 45(1).

43 *Id.*, s. 45(3)(a).

44 *Id.*, s. 46(1).

45 *Id.*, s. 46(2).

46 *Id.*, s. 47(3).

- viii) In the absence of spouse, children and parents, the inheritance passes to the deceased's siblings, and if the sibling dies then the sibling's share goes to his/her issue.<sup>47</sup>
- ix) Common law right of the widower to curtesy *i.e.*, his right to an interest in deceased wife's real property invented in England on behalf of poor man who married woman and had nothing to support him after wife's death has been abolished.

The law of succession of Ontario recognizes the importance of base level financial support required for widow. The gender neutral provisions of Succession Law Reform Act indicate the gradual progression toward equality between the sexes which India needs to learn from.

#### IV Law of intestate succession in India

Indian society has refused to give up traditional ideologies and continues to emulate and perpetuate the age-old pattern of ownership in material assets. India's agrarian transition has been slow, uneven and highly gendered.<sup>48</sup> Deprivation of property rights is the root cause of the secondary status of women in India.<sup>49</sup> Across castes and religions, lack of economic independence leads to their suppression and subjugation.<sup>50</sup> Personal laws, however, often draw from regressive and patriarchal traditions and threaten another vital constitutional right - the right to equality before law, particularly for women.<sup>51</sup> Deep cultural bias often prevents women from asserting their right to inherit and women fear that asking for their share would cause conflict within the family. The fear is well founded as revealed in a study where majority of males and local officials surveyed opposed daughter's inheritance of family

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47 *Id.*, s. 47(5).

48 Bina Agarwal, "Gender and Land Rights Revisited: Exploring New prospects via the State, Family and Market" 3 (1 and 2) *Journal of Agrarian Change* 184-224 (2003).

49 Poonam Pradhan Saxena, "Succession Laws & Gender Justice" in Archana Parasar, Amit Dhanda *et.al.*(eds.), *Redefining Family Law in India* 304 (Routledge, New Delhi, 2008).

50 Leila Seth, *On balancing: An Autobiography* (Penguins Books India, New Delhi 2003).

51 Pragya Tiwari, "India's Civil Code: A Source for Ideological Disputes" *Kashmir Images* (Dec. 26, 2015), available at: <http://dailykashmirimages.com/Details/99267/indias-civil-code-a-source-for-ideological-disputes> (last visited on Dec. 26, 2015).

property.<sup>52</sup> Despite some progressive interpretations and innovative legal maxims, the path to justice has not progressed in a linear trajectory for property rights of Indian women. The correlation between religious control and discriminatory law is more a function of organizational hierarchies and sexism within the religion than innate doctrines or traditions.<sup>53</sup>

Patriarchal mindset allows unequal rights of Indian women in intestate succession. The candid acceptance by the Law Commission of India in the year 2000<sup>54</sup> that discrimination exists against women in laws governing the inheritance of property amongst the members of a joint Hindu family truly reflects the state's nexus with patriarchal ideology in not granting equal inheritance right to Hindu women in India.<sup>55</sup> This is equally true for women belonging to other religions. India follows legal pluralism allowing different religious communities to be governed by their personal laws in matters relating to marriage, divorce, maintenance, adoption, guardianship and even inheritance. Personal laws often legalize dominance of men over women in forms particular to each religion.<sup>56</sup> Considerable uncertainty prevailed over personal law applicable to persons other than Hindus and Muslims while India was still a British colony so much so that the second Law Commission<sup>57</sup> pointed out that personal law in India being religious in nature should not be interfered with by an outside agency. While colonial officials were slow to engage with the native populations in the lawmaking process, their cautious approach to the transplantation of the legal system and rules reflected their acknowledgement of the preexisting Hindu and Muslim codes of conduct.<sup>58</sup>

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52 Ashok Sircar and Diana Fletschner, "The Right to Inherit Isn't Working for Indian Women, Says U.N. Study" *The Wall Street Journal*, Mar. 2, 2014, available at: <http://blogs.wsj.com/indiarealtime/2014/03/02/the-right-to-inherit-isnt-working-for-indian-women-says-u-n-study/> (last visited on May 26, 2015).

53 *Supra* note 5.

54 *Supra* note 2.

55 Archana Mishra, "Devolution of Property of the Hindu Female: Autonomy, Relationality, and the Law" 29(2) *International Journal of Law, Policy and the Family* (2015).

56 Catharine A. MacKinnon, "Sex equality under the Constitution of India: Problems, Prospects, and Personal Laws" 4(2) *Int J Constitutional Law* (Apr. 2006).

57 Under the provisions of the Charter Act 1853, a Law Commission was appointed in England on Nov. 29, 1853.

58 Ronald J. Daniels, Michael J. Trebilcock and Lindsey D. Carson, "The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies" 59 (1) *The American Journal of Comparative Law* 111-178(2011).

Hindu Succession Act, 1956 (HSA, 1956) was passed to govern intestate succession of Hindus including Sikhs, Jains and Buddhists. Muslims are ruled by their uncodified personal laws. The different rules of intestate succession under various personal laws of India do not grant equal rights on devolution of property to females. General and specific provisions were incorporated in the Indian Constitution for protection and improvement of women as framers were aware of various discriminatory practices and suppression of women's rights. Numerous provisions under the Constitution of India ensure that there shall be no discrimination between sexes.<sup>59</sup> The Constitution recognises equality of the sexes and in fact, provides for certain special provisions for women under the chapter on fundamental rights<sup>60</sup> but in actual practice they are observed more in breach than in compliance.<sup>61</sup> The Constitution has not dealt with the problem of separate personal laws. Consequently, women are deprived of the constitutional protection of equality of status. Any form of societal discrimination on ground of sex, apart from being unconstitutional is antithesis to a society built on the tenets of democracy.<sup>62</sup>

#### **Law of intestate succession under the Indian Succession Act, 1925**

In matters of inheritance, Hindus and Muslims have always been governed by their respective personal laws but position of Indian Christians, Parsis, Europeans domiciled in India, Eurasians, Jews, Armenians and others, were obscure before 1865. Due to more rights being given to women in property under Indian Succession Act, 1925 (ISA, 1925), both Hindu and Muslim communities had revolted during the formulation of the Act which resulted in the exclusion of application of ISA, 1956 on Hindu's and Muslim's intestate succession. ISA, 1925 removed the confusion from the Indian legal system with respect to intestate succession of non-Hindus, including Muslims.

To bring clarity in devolution of property in different communities, except Hindus and Muslims of India, the British, based on English law, enacted the Indian Succession Act, 1865 (ISA, 1865) which was reenacted in 1925. The Act empowers the state government to exempt its application to any race,

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59 Constitution of India, arts. 14, 15, 21, 25.

60 Fundamental rights are basic human freedoms given under part III of the Constitution of India to every Indian citizen irrespective of race, religion, place of birth, caste and gender.

61 Justice S. Rajendra Babu, "Gender Justice — Indian Perspective" 5 *SCC (Jour)* 1(2002).

62 *Mojekwu v. Mojekwu* (1997) 7 NWLR (pt 512) 228.

sect or tribe.<sup>63</sup> ISA, 1925 is the most impartial law among all personal laws relating to succession in India. In the process of consolidating succession laws under ISA, 1925, two clear schemes in matter of intestate succession were adopted – one dealing with succession rights of Indian Christians, Jews and those married under Special Marriage Act, 1955 and one for succession rights exclusively for Parsis.<sup>64</sup> General provisions under ISA, 1925 relating to intestate succession are based on the law of England, the notable features of which are: (1) there is no discrimination based on sex among the heirs, (2) there is no discrimination between persons related by full blood and those related by half blood, and (3) relations by adoption are not recognized.<sup>65</sup> Both movable and immovable property could be inherited under ISA, 1925 by kindred. Kindred under the Act contemplates only relation by blood through lawful wedlock, therefore the terms ‘wife’, ‘husband’ or ‘lineal descendants’ refer to legitimate relationships.<sup>66</sup> It lays uniform rule for devolution of property for both male and female dying intestate. The shares inherited by the heirs, including female heirs, are absolute and freely alienable. This development was significant at that time as Hindu women only had limited rights<sup>67</sup> in property. Statutorily granting absolute rights to female in property by ISA, 1925 when the Indian society was strongly patriarchal indeed shows that the British advanced the cause of property rights for Indian women.

Neither ISA, 1865 nor ISA, 1925 was to apply to all Christians in the whole of India. It has expressly defined ‘Indian Christian,’<sup>68</sup> as certain rules

63 Indian Succession Act 1925, s. 3. government notification granted exemption to native Christians in the province of Coorg, tribals of North-East India, Bihar and Orissa, certain classes of the Roman Catholic Christians of the Latin Rite and certain Protestant Christians living in south India. Christians in Goa, Daman and Diu are governed by Portuguese Civil Code 1867.

64 Report of the Committee on the Status of Women in India, Ministry of Education & Social Welfare Department of Social Welfare, Government of India, “Towards Equality” (Dec. 1974).

65 B. Sivaramayya, “The Indian Succession Act, 1925” in K. D. Gangrade (ed.), II *Social Legislation in India* 89 (Concept Publishing Company Pvt. Ltd., New Delhi, rep. 2011).

66 *Emma Agnes Smith v. Thomal Massey* (1906) ILR 30 Bom 500; *Sarab Ezra In Re* , AIR 1931 Cal 560.

67 Limited rights mean that one could use the benefits arising out of property during the life time but could not alienate the property. On one’s death it passes on to the heirs of last owner of property.

68 Indian Succession Act, 1925, s.2 (d) defines “Indian Christian” to mean “a native of India who is, or in good faith claims to be, of unmixed Asiatic descent and who professes any form of the Christian religion.”

applicable to Christians coming from outside India were not to apply to Indian Christians defined under the Act.<sup>69</sup> Majority of Indian Christian stay in Kerala which comprises of Travancore, Cochin and other cities. In matters of intestate succession, Travancore was governed by Travancore Christian Succession Act, 1916 and Cochin Christian Succession Act, 1922, under which a widow or mother had only life interest terminable at death or on remarriage; a daughter was not entitled to succeed to the property of the intestate in the same share as the son but she was entitled to one-fourth the value of the share of the son or Rs. 5,000, whichever was less. She was not even entitled to this amount on intestacy, if *stridhana*<sup>70</sup> was provided or promised to her by the intestate or in the life time of the intestate. In *Mary Roy v. State of Kerala*,<sup>71</sup> the Supreme Court had the opportunity to consider the constitutional validity of Travancore Christian Succession Act, 1916. The Supreme Court determined that the provisions of the Travancore Christian Succession Act, 1916 were superseded by ISA, 1925 on the technical ground that, after independence, the laws enacted by princely states, which were not expressly saved by the Part B State (Laws) Act, 1951 (IND), had been repealed, and ISA, 1925 became applicable to the intestate succession of property of members of the Indian Christian community in the territories of the erstwhile state of Travancore. However, the court declined to examine the provisions which affected the property rights of women belonging to that state. This ruling brought 34% of India's Christian population from the existing 30% of India's Christian within the ambit of the ISA, 1925.<sup>72</sup>

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69 Law Commission of India, "110<sup>th</sup> Report on the Indian Succession Act, 1925" (Feb. 1985). The Law Commission was of the view that some link or association with India is of the essence of the concept of Indian Christians and in absence of better word it was not possible to change the definition in clause (d).

70 *Stridhana* literally means woman's property. Manu, the author of *Manusmriti* – the vedic text which is one of the sources of classical Hindu law, enumerates six kinds of *stridhana*: (i) gifts made before the nuptial fire (ii) gifts made at the bridal procession (iii) gifts made in token of love by the father-in-law or mother-in-law (iv) gifts made by the father (v) gifts made by the mother, and (vi) gifts made by a brother.

71 (1986) 2 SCC 209.

72 C.A. Sebastian, "Gender Discrimination in the Law of Divorce and Succession among Christians", *available at*: <http://dyuthi.cusat.ac.in/purl/3152> (last visited on Mar. 2, 2016).

### Inheritance right of spouse under ISA, 1925

On the lines of English law of intestate succession and unlike other Indian personal laws, main preference has been granted to surviving spouse under ISA, 1925. Share of surviving spouse is made to depend upon the presence or absence of lineal descendants of the deceased.<sup>73</sup>

(a) In the presence of lineal descendants of deceased:

Surviving spouse is entitled to one-third of the intestate property and the rest is distributed among the lineal descendants. As per the rules, even in the presence of single child, the widow is to be satisfied with lesser share of one-third. ISA, 1925 on the lines of some common law jurisdiction where such anomaly has been rectified by distributing the property equally, could be amended.<sup>74</sup> Law Commission neither in its 110<sup>th</sup> report<sup>75</sup> nor in the 247<sup>th</sup> report<sup>76</sup> has envisaged such a situation.

(b) In the absence of lineal descendants:

If the net value of the property does not exceed Rs 5,000 the whole of deceased's property goes to his widow but where the net value exceeds the sum of Rs 5,000 she is entitled to Rs 5,000 and charge upon the whole property for Rs 5,000, with interest at the rate of 4% per annum from the date of death of husband until payment.<sup>77</sup> After payment of this 'statutory legacy', the widow takes half of the property and the other half goes to his statutory designated kindred relations.

But this benefit of 'statutory legacy' is denied to Indian Christians and any Hindu, Buddhist, or Jain, married under Special Marriage Act since succession of such a person's property is governed by ISA, 1925.<sup>78</sup> The surviving spouse is entitled to statutory legacy only when the deceased died intestate with respect to all his property. Also the guaranteed amount of Rs 5,000 to the

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73 *Supra* note 63, s.33.

74 *Supra* note 65.

75 *Supra* note 69.

76 Law Commission of India, "247<sup>th</sup> Report on Proposed Reforms in Sections 41-48 of Indian Succession Act, 1925" (September 2014) submitted to the Government of India on Sep. 12, 2014.

77 *Supra* note 63 at ss. 33A(1) and (2).

78 *Id.*, s. 33A(5).



spouse in absence of lineal descendants mentioned in the year 1925 continues even after 90 years of the insertion of such provision.

When the Act was enforced in the year 1925, the object of excluding 'statutory legacy' to Indian Christian was to guarantee added property rights basically to Christian widows of Europeans domiciled in India. Continuance of such provision even after decades of independence when there are no such residents and negating those beneficial rights to Indian Christian women needs introspection by the legislature. With the fall of value of rupee, the Law Commission in its 110<sup>th</sup> report recommended that the amount of Rs 5,000 be increased to Rs 35,000 and rate of interest be increased from 4% to 9%. Consequently, the government introduced the Indian Succession (Amendment) Bill, 1994, but it is still to become a law. Since this proviso seeks to give better rights to a widow without lineal descendants, the denial of the benefit to the Indian Christian widow cannot be justified on the grounds of policy<sup>79</sup> and, therefore, the exceptions are illogical and should be deleted.<sup>80</sup>

In the absence of lineal descendants of the deceased, half of the property is reserved for the statutory designated kindred. It is only in absence of kindred that the whole property belongs to the widow. Designated kindred also include certain kindred whom the deceased may not have met during his lifetime. Dimensions of family are narrowing day by day. Variation in share of widow due to presence of such distant relative appears to be unreasonable and unjustifiable. The 110<sup>th</sup> Law Commission report stirred by Intestate's Estates Act, 1952 of England had suggested that where the intestate dies leaving his widow and kindred but no lineal descendants, the widow shall take the whole of the property. Consequently, the issue was brought by Indian Succession (Amendment) Bill, 1994, but the changes suggested by 110<sup>th</sup> Law Commission report have still not been incorporated by amendment in the Act. Reserving the share for distant kindred, thereby reducing the share of widow in intestate property of the deceased needs reconsideration.

#### **Inheritance right of mother under ISA, 1925**

The entitlement of share of other females also needs reconsideration. In the presence of widow but in the absence of lineal descendants, the half

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79 *Supra* note 64.

80 *Supra* note 65.

share of the property passes on to the immediate ascendant which includes only father and not mother. After the death of father, mother inherits with brothers/sisters of the deceased. Mother and brothers/sisters of the deceased have been equally placed. Her share is made to depend upon the number of siblings – more the number of siblings, lesser share is allotted to the mother as the share is equally divided between the siblings and the mother. Excluding mother in the presence of the father ignores the role that the mother plays in the upbringing and settlement of the child from the beginning to the attainment of maturity.<sup>81</sup> Generally, father is economically better placed than the mother. Accordingly, law should have been framed to take care of financial needs of the disadvantaged. No other personal law in India places mother after father. Rather, Hindu law gives preference to mother over father whereas under Muslim law her share is fixed as a sharer.

In England both father and mother are treated equally<sup>82</sup> and if one survives the other, the surviving parent takes the entire share. The Indian law discriminating against women needs to be reformed. The Indian Succession Amendment Bill, 2004, had suggested equal division of shares between father and mother but the bill lapsed. Recently, the Law Commission has submitted<sup>83</sup> its recommendation for uplifting the position of Christian mothers by granting them equal inheritance right along with the father in the property of the deceased and on death of either parents of the deceased, granting entire other half of the property to the surviving parent. The suggestions are still to be taken note of by the legislature in amending the law.

#### **Law of intestate succession under Hindu Succession Act, 1956**

Hindu Succession Act, 1956, passed after coming into force of the Constitution, marks a new era in the Indian history of social legislation for granting Hindu women equal inheritance right with absolute ownership. HSA, 1956 deals with intestate succession of separate property<sup>84</sup> of Hindu. Due to strong opposition during the discussion on Hindu Code Bill among the

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81 *Supra* note 49 at 289.

82 Administration of Estates Act, 1925, s. 46.

83 *Supra* note 76.

84 Separate property means any other property owned by a Hindu not being coparcenary property, which devolves on his death in absence of will on his heirs.

Congress members for conferring rights to females in coparcenary property,<sup>85</sup> the system of coparcenary was left untouched under HSA, 1956. Consequently, discrimination against women by denying her rights in coparcenary property continued. In 2005, after five decades, HSA 1956 was amended by Hindu Succession (Amendment) Act, 2005 to grant daughters coparcenary rights but with restrictions.

A formal evaluation of the HSA, 1956 brings to light the inconsistencies within its provisions and the possible impact of these on the goal of protecting women's equal rights under succession.<sup>86</sup> The Act clearly specifies that words indicating the masculine gender does not include females, reflects, the differential treatment on the basis of gender. Some of the gender discriminatory provisions under the Act are as follows:

- i) Devolution of property on the principle of consanguinity - nearness to blood is recognized for only males and not for females. Based on nearness to blood, heirs of male dying intestate are categorized into four classes<sup>87</sup> – class I, class II, agnates<sup>88</sup> and cognates,<sup>89</sup> whereas the heirs of female dying intestate are recognized on the basis of affinity and are categorized into five categories.<sup>90</sup> Relatives of husband are preferred over her own parents. The distinction in the rules of inheritance on the basis of sex is distinctly hit by the principle of equality embodied in article 15(1) of the Constitution.<sup>91</sup>

85 Coparcenary property means property where only certain person, they being the sons, grandsons, and great-grandsons of the holders of the property acquire by birth an interest in the property, for the time being. These persons termed to be 'coparceners' enjoy coparcenary right *i.e.*, right by birth in the coparcenary property, right of ownership and possession over entire coparcenary property. Ancestral property is a specie of coparcenary property.

86 Reena Patel, "Hindu Women's Property Rights in India: A Critical Appraisal" 27 (7) *Dilemmas for Feminist Praxis Third World Quarterly* 1255-1268 (2006).

87 Hindu Succession Act, 1956, s. 8. schedule I and II enumerates near blood relationships as heirs of male dying intestate.

88 *Id.*, s. 3(a) defines 'agnate' as – "one person is said to be an "agnate" of another if the two are related by blood or adoption wholly through males."

89 *Id.*, s. 3(c) defines 'cognate' as – "one person is said to be a cognate of another if the two are related by blood or adoption but not wholly through males."

90 *Id.*, s. 15(1).

91 *Mamta Dinesh Vakil v. Bansi S. Wadhwa* MANU/MH/1869/2012.

- ii) Further, source of acquisition of property by male is of no consequence but the source of acquisition of property by female plays a major role in deciding her heirs. If she inherits property from her father/mother or husband/ father-in-law, in absence of her children, the property reverts to heirs of the father or heirs of husband respectively<sup>92</sup> *i.e.*, back to the source from where she had inherited the property. This reversion of the once-inherited-property back to her father's or her husband's heirs shows the desperateness of the legislature to treat her only as a temporary owner.<sup>93</sup>
- iii) Moreover, when she inherits property from her mother, property instead of passing to her mother's heirs reverts to father's heirs. The exceptions to the general rule are motivated by a clear and traditional desire that the property shall not pass from one family to other family merely by a female's death.<sup>94</sup>
- iv) Agnatic relation *i.e.*, one related through males are preferred over cognates *i.e.*, ones related through females<sup>95</sup> in property of a deceased male.
- v) Similarly, heirs of father are preferred over heirs of mother in the property of deceased female <sup>96</sup> for no justifiable reason.
- vi) Even for women's self-acquired property, in the absence of her children or husband, blood relations of her husband are preferred over her own parents. Women may have been made financially independent by her own parents but when she dies intestate, husband's kindred take preference over her own parents.<sup>97</sup> Once again, concepts of gender equality give way to patriarchal considerations that treat women as extensions of their husbands.<sup>98</sup>

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92 *Supra* note 87, ss. 15 (2) and 16 (Rule 3).

93 *Supra* note 49 at 289.

94 J. Duncan M. Derrett, *Introduction to Modern Hindu Law* (Oxford University Press, 1963).

95 *Supra* note 87, s. 8.

96 *Supra* note 89.

97 *Om Prakash v. Radha Charan* (2009) 15 SCC 66.

98 Dr. Gita Gopal, "Gender and Economic Inequality in India: The Legal Connection" 13 *B. C. Third World L. J.* 86 (1993).

- vii) Illegitimate child can inherit only from mother and not from father though statutorily legitimate child *i.e.*, one born from void and voidable marriage has right in separate property of both parents. Limiting father's duty only to maintenance of his illegitimate child but giving him share in mother's property implies mother's major duty towards him making her more responsible for his illegitimacy.
- viii) Daughters have been made coparceners<sup>99</sup> but her right to claim partition is restricted to only those property that has not been partitioned before December 20, 2004.<sup>100</sup> No such limitation as to date has been fixed for males to claim their rights in coparcenary property. Claim for partition being restricted from certain dates only for daughters is a clear discrimination on the basis of sex, which goes against the rules of equality under the Constitution.<sup>101</sup>

Though Hindu Succession (Amendment) Act, 2005, grants right of inheritance of agricultural land to all Hindu women, a study has shown that there appears to be significant gap between women's legal rights and their actual inheritance of land as only 34% percent of women in the Andhra Pradesh sample had inherited parental land, even when women gained equal inheritance right more than 20 years ago in that state.<sup>102</sup> Despite positive steps having been taken by legislature under HSA, 1956 in arming daughters with coparcenary rights, recognizing the ownership rights of females in property, laying down her heirs for devolution of her property and even granting her partition rights in dwelling house, the enactment is still infected with various voids perpetuating inequality on the basis of sex against the mandate of Constitution.

#### **Law of intestate succession under Muslim law**

Muslim Personal Law (Shariat) Application Act, 1937 clearly states that all questions (save questions relating to agricultural land) regarding intestate

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99 *Supra* note 87, s. 6 as amended by Hindu Succession (Amendment) Act, 2005.

100 *Prakash v. Phulavati* (2016) 2 SCC 36.

101 *Miss R. Kantha v. Union of India*, AIR 2010 Kant 27.

102 Dr. Ashok K. Sircar and Sohini Pal, "What is Preventing Women from Inheriting Land?: A Study of the Implementation of the Hindu Succession (Amendment) Act, 2005 in Three States in India" Paper prepared for presentation at 2014 World Bank Conference on Land and Poverty, Washington D.C. (Mar. 24-27, 2014).

succession, special property of females, including personal property inherited or obtained where the parties are Muslims shall be decided according to the Muslim Personal law (Shariat). There are four sources of Islamic laws: the Holy *Quran*, the *sunna* of Prophet Mohammad, *qiyas* and *ijma*. Holy *Quran* is the word of God revealed to Prophet Mohammad. *Sunna* comprises of the sayings of the Prophet, his deeds, his silent or tacit approval of certain acts which he had acknowledged. *Qiyas* is based on analogical deductions. *Ijma* is judgment reached by jurists on any particular issue. One of the major areas which these sources focused upon was giving new rights to women in property. Heirs under Muslim law may be a) *quranic* heirs or sharers - whose share is fixed in *Quran* or b) residuaries – who get remaining share after the *quranic* sharers have been allocated their shares. Some of the gender biased inheritance rules are:

- i) Male and female of equal degree and class inherit in the ratio of 2:1 respectively *i.e.*, son inherits double of what each daughter inherits, a full brother inherits double of full sister, a son's son inherits twice as much as a son's daughter *etc.*
- ii) In the presence of child/agnatic grandchild, widower inherits one-fourth whereas widow inherits one-eighth as sharer in the property of deceased. In the absence of child/agnatic grandchild, widower inherits half as sharer, whereas widow inherits one-fourth as sharer.
- iii) Presence or absence of son affects the status of a daughter. In the presence of son, she gets demoted from sharer to residuary and inherits as residuary along with son.
- iv) Mother inherits one-sixth as sharer in the presence of child/agnatic grandchild or two or more siblings and one-third in the absence of them. However, if the wife or husband and the father, is also present, she inherits only one-third of the residue. Father's shares varies only in the presence or absence of child and is unaffected by the presence or absence of siblings.
- v) After allocation of fixed share among all sharers, if residue is left but no residuary present the residue passes back to sharers in proportion to their original shares. However, husband/wife under *sunni* law and mother, uterine brother/sister along with husband/wife do not take property on return *i.e.*, forms an exception among sharers to receive the residue. Cognates, ones related through females called distant kindred are recognized as third category of heirs under *sunni* school. They inherit property only when there are no residuaries and the

available sharers fall within the exception to receive share on return. Agnates fall under residuaries who inherit property after sharers but cognates inherit only in the absence of sharers and residuaries. Agnatic heirs are preferred over cognatic heirs.

- vi) Daughter's children are included within the category of distant kindred whereas descendants of son or agnatic grandchild have preferential rights in the property.
- vii) A person under Muslim law, who is related to the deceased through another is excluded by the presence of the latter *e.g.*, presence of father excludes brother but this rule is inapplicable if the relation is traced through female *e.g.*, presence of mother does not exclude brother or sister.
- viii) Another principle of Muslim law lays down that nearer in degree excludes more remote relation *i.e.*, presence of son would exclude grandson or granddaughter but presence of only daughter does not exclude the right of granddaughter but only reduces her share as sharer from half to one-sixth in the absence of son or son's son. Son's daughter is not a sharer under *Shia* law. Similarly, a son's daughter's son will succeed in preference over a daughter's son.

The explanation given to allotting lesser share to woman is that she inherits in different capacity of being daughter, widow and mother, is entitled to dower (*mehr*) and maintenance and does not have to shoulder the economic burden as being done by males. These grounds cannot justify treating males and females unequally. Recently the High Court of Kerala in *Kburan Sannath Society v. Union of India*<sup>103</sup> dismissed a public interest litigation seeking a declaration that the Muslim Personal Law (Shariat) Application Act, 1937, applicable in regard to the inheritance of Muslim women, violates articles 14, 15, 19, 21 and 25 of the Constitution of India. The high court dismissed the petition on the ground that the issues raised in the writ petition were for the legislature to frame laws and they could not be adjudicated in the proceedings under writ petition *i.e.*, article 226 of the Constitution of India. The inferior position of women's inheritance in traditional Islamic law does not appear to

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103 WP(C).NO. 31299 of 2008 decided on July 2, 2015.

be justified. A gradualist and subjective application of the Islamic principles of inheritance would result in equitable distribution between heirs.<sup>104</sup>

### V Conclusion

Though rules of devolution of property under ISA, 1925 and that under Succession Law Reform Act, 1990 appear to be same due to colonial past, the Succession Law Reform Act fulfills all gaps left unfulfilled under ISA, 1925. On the outlines of Succession Law Reform Act, ISA, 1925 could be further amended in following ways:

- i) Rights in entire property to spouse could be limited to only presence of issues as against extending to the presence of distant relatives of the deceased. The law of intestate succession of England has also changed in 2014 to grant right only to surviving spouse in the absence of the issue of the deceased.
- ii) In the presence of only one child in Canada, the spouse gets a preferential share plus one-half of the residue, the other half goes to the child. Where there are two or more children the spouse gets preferential share plus one-third of the residue and rest two-third is being shared by children. Similarly ISA, 1925 could be amended to give statutory legacy to spouse and then equal share in property to both spouse and single child of the deceased. In the presence of more than one child, the spouse could be given 'statutory legacy' along with one-third share, leaving two-third for the children of the deceased.
- iii) In the absence of issue, both father and mother could inherit equally as against only father given preferential right over mother. The law of intestate succession of England also does not discriminate on ground of sex in giving rights to father and mother and they both inherit equally in the absence of spouse and the issue of the deceased.
- iv) Amount of preferential share could be increased. Under Succession Law Reform Act preferential share of \$200,000 amounts to 4.5 times of the income of the deceased whereas preferential share of Rs 5,000,

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104 Faye Walker, "How Gender Biased is Islamic law?" *The Student Law Journal* (2009), available at: <http://studentlawjournal.co.uk/articles/2009/ugrad/genislaw.pdf> (last visited on Dec. 12, 2015).



equivalent to \$75, is 0.01 times the income of the deceased spouse.<sup>105</sup> ‘Statutory legacy’ of England, a term equivalent to ‘preferential share’ of Ontario is £2,50,000.

Law of England has been amended to grant inheritance rights to adopted, legitimated, ex-nuptial and artificially conceived children but ISA, 1925 still grants inheritance right only to child born out of a valid marriage. It does not recognize rights of even adopted child. Recently, a progressive change has been brought in India by Juvenile Justice (Care and Protection of Children) Act, 2015<sup>106</sup> (JJ Act, 2015) which has granted the adopted child under this Act, all the rights including the intestacy rights, privileges and responsibilities that are attached to a biological child.<sup>107</sup> If a child is adopted under JJ Act, 2015 by a non-Hindu or non-Muslim, then he will inherit under ISA, 1925. In order to statutorily recognize the inheritance right of an adopted child under all religions, including adoption by Christians, it is suggested that sections 32 and 37 of the ISA, 1925 should be amended.<sup>108</sup>

Continuing with certain unjust and discriminatory archaic provisions under ISA, 1925 goes against the tenets of the Constitution. Amendment of ISA, 1925 by removal of gender discriminatory provisions *e.g.*, equal distribution between widow and single child, increasing the amount of ‘statutory legacy’ to widow along with interest, extending statutory legacy also to widow and providing equal status to mother compared to father *etc.* would go a long way in positively affecting women’s status. ISA, 1925 needs toning up to be in tune with the mores of the community placed at the threshold 21<sup>st</sup> century.<sup>109</sup>

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105 According to World Bank (2014) GDP per capita of Canada is \$ 44,057 and India is \$5701, *available at*: [http://data.worldbank.org/indicator/NY.GDP.PCAP.PP.CD?order=wbapi\\_data\\_value\\_2013+wbapi\\_data\\_value+wbapi\\_data\\_value-last&sort=desc](http://data.worldbank.org/indicator/NY.GDP.PCAP.PP.CD?order=wbapi_data_value_2013+wbapi_data_value+wbapi_data_value-last&sort=desc) (last visited on Mar. 9, 2016).

106 Juvenile Justice (Care and Protection of Children) Act, 2015 came into force on Jan. 15, 2016.

107 *Id.*, s. 63.

108 Archana Mishra, “Bridging the Gap between Juvenile Justice Act 2000 and Christian Personal Law : Inheritance Right of Illegitimate and Adopted Children in India” 29 *AJFL* 43(2015).

109 C.A. Sebastian, “Gender Discrimination in the Law of Divorce and Succession among Christians”, *available at*: <http://dyuthi.cusat.ac.in/purl/3152> (last visited on Mar. 2, 2016).

Descent of land to the oldest male heir by the principle of primogeniture under English law was abolished in upper Canada in 1851,<sup>110</sup> much before England, which abolished primogeniture by Administration of Estate Act, 1925.<sup>111</sup> None of the personal laws governing succession laws in India rules in favour of primogeniture right, rather they expressly grant inheritable right to all children, irrespective of gender. Common law spouses in England are not conferred any of the rights or obligations enjoyed by spouses or civil partners, whereas common law relationships are recognized for certain purposes across Canada. In Ontario, the Ontario Family Law Act specifically recognizes common law spouses for spousal support issues but they do not have a statutory right to divide property in a breakup. Common law relationship granting rights to female in property is yet to be statutorily recognized in India. Same-sex partners who register their partnership get the same rights in succession matters as married persons under English Law. Canadian cohabiting same-sex couples are entitled to many financial benefits as married opposite-sex couples. But cohabiting same-sex couples have still not been statutorily recognized to claim as heirs under Indian succession laws. Judicial trend in India is to grant women much denied rights in property. Daughter, after she has been made coparcener by Hindu Succession Amendment Act, 2005, has been declared to be eligible to be the *karta*<sup>112</sup> of Hindu undivided family.<sup>113</sup> Protection of Women and Domestic Violence Act, 2005, grants economic rights to female live-in partners in India. Supreme Court of India has recently ruled that if an unmarried couple is living together as husband and wife, similar to common-law spouse of Canada, then they would be presumed to be legally married and the woman would be eligible to inherit the property after death of her partner.<sup>114</sup>

Women's ownership or rights of use (usufruct) can be guaranteed only through land and property rights that relate to an enforceable claim and

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110 Statutes (Province of Canada) 14 & 15 Vict, c. 6 (1851).

111 Administration of Estates Act, 1925, c. 23, Part IV.

112 *Karta* is the head of the Hindu joint family and the senior-most coparcener is considered as *karta*. Before Hindu Succession Amendment Act, 2005 only males were considered coparceners so *karta* was the senior-most male coparcener.

113 *Sujata Sharma v. Manu Gupta*, Delhi High Court, 226 (2016) DLT 647.

114 *Dhannulal v. Ganesbaram*, Supreme Court, AIR 2005 SC 2382.

ensure women's freedom to rent, bequeath, or sell the property<sup>115</sup>. The absence of claims to property can not only reduce the voice of women, but also make it harder for women to enter and flourish in commercial, economic and even some social activities.<sup>116</sup> While the underlying social and cultural dynamics are complex, legal reform to improve women's inheritance right could potentially provide a low-cost way to reduce gender discrimination and improve a range of socio-economic outcomes for women.<sup>117</sup>

Land ownership enhances women's bargaining strength and decision making power and allows her to challenge the rules that discriminate against her in the use and transformation of land and productive assets,<sup>118</sup> apart from amplifying her status and respect within the family and the community.<sup>119</sup> There is a need to take a plural view of gender inequality, which can have different faces, can vary from one region to another, and also from one period to the next.<sup>120</sup> Discriminatory trend fueled by ignorance, tradition and religion serves as a bar to the economic and financial empowerment of women and their right to self-actualization. Effective and independent land rights for women are important for their welfare, efficiency, equality, and

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115 UN Millennium Project 2005- Task Force on Education and Gender Equality, *Taking Action: Achieving Gender Equality and Empowering Women*, available at: <http://www.unmillenniumproject.org/documents/Gender-complete.pdf> (last visited on Mar. 18, 2016).

116 Bina Agarwal, *A Field of One's Own: Gender and Land Rights in South Asia* (Cambridge University Press, Cambridge, 1994).

117 Klaus Deininger, Aparajita Goyal, and Hari Nagarajan, "Inheritance Law Reform and Women's Access to Capital: Evidence from India's Hindu Succession Act", Policy Research Working Paper 5338 (World Bank, Washington, D.C.).

118 Dr. Govind Kelkar, "The Fog of Entitlement: Women and Land in India", paper prepared for presentation at the Annual World Bank Conference on Land and Poverty, Washington DC 5 (April 8-11, 2013), available at: <http://www.landes.org/wp-content/uploads/The-Fog-of-Entitlement-Women-and-Land-in-India-261-Kelkar.pdf> (last visited on Mar. 9, 2016).

119 International Center for Research on Women, Property Ownership and Inheritance Rights of Women for Social Protection – The South Asia Experience, Synthesis Report of Three Studies (2006).

120 Amartya Sen, "Many faces of Gender inequality" 22(18) *Frontline* (Oct. 27 - Nov. 09, 2001).

empowerment.<sup>121</sup> The rhetoric of contribution of women in agriculture and disparity in the land ownership and unequal status will continue without being taken seriously, both by law makers as well as the society, unless women themselves rise and fight for their right to own land and property, and for an equal status for themselves.<sup>122</sup> Ensuring female property and inheritance rights would help to empower women and rectify a fundamental injustice.<sup>123</sup> Inheritance rights securing property to women being one among many other rights being denied or violated, should be protected and promoted by law through a robust legal framework and an effective enforcement system.

*Archana Mishra\**

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121 Bina Agarwal, "Are we not peasants too? Land rights and women's claims in India", pamphlet, No. 21 SEEDS, (2002), *available at*: <http://ccc.uchicago.edu/docs/AreWeNotPeasantsToo.pdf> (last visited on Feb. 2, 2015).

122 Aliya Tabasum, "Land, Property and Women's Economic Empowerment" *Greater Kashmir*, Srinagar, dated Feb. 20, 2015, *available at*: <http://www.greaterkashmir.com/news/2015/Feb/20/land-property-and-women-s-economic-empowerment-17.asp> (last visited on Feb. 2, 2016).

123 *Supra* note 115.

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