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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

# **CONFLICT BETWEEN STATIC AND PROGRESSIVE SOCIETY IN INDIA WITH REFERENCE TO PROPERTY RIGHTS OF WOMEN**

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## Abstract

The struggle between contemporary society norms and traditional values is shown in the subject of property rights for women in India. This research explores the contradiction that exists between the dynamic dynamics of gender equality and a static adherence to patriarchal customs. By examining historical, legal, and sociological aspects, the study sheds light on the intricate issues related to women's property rights in India.

The study explores the historical development of property rights for women in India, tracing the shift from a predominately patriarchal system to legislative reforms aimed at empowering women economically and socially. It does this by drawing on a variety of sources, including legal statutes, case studies, and scholarly works. It examines the opposing ideas ingrained in Indian society, where rituals from the past frequently collide with the egalitarianism and justice.

In the end, this research advances our knowledge of the continuing fight for gender equality in India, especially in relation to property rights. It attempts to provide insight for policy debate and advocacy efforts aimed at promoting a more inclusive and equitable society by dissecting the nuances of the clash between static traditions and progressive aspirations.

## Introduction

Sir Henry Maine evolved the anthropological approach to the historical school of jurisprudence and propounded the theory by stating “the movement of the progressive societies has hitherto been a

movement from status to contract. Sir Henry Maine defined “Custom” as a natural predominant role in the formulation and advancement of law, justice, and procedure.

Maine’s deep knowledge of early society evolved his emphasis on man’s deep instincts, emotions, and habits in historical development. According to Maine, the law can be understood at a later stage in a slow-evolving pattern of growth. He believes that there are three stages in legal development in early societies – law as the personal commands and judgments of patriarchal ruler; law as a custom upheld by judgments; and law as code. The article vividly explains the anthropological school of jurisprudence and Henry Maine’s contribution toward the school of jurisprudence.

Maine began by fusing law with history and comparative studies, his sources and influences, as well as the disciplines he most contributed towards, extend beyond it. Thus, while his work is firmly rooted within comparative law and legal history, it conceptualises law as an evolutionary phenomenon and this allowed later generations to slowly move out of history and expand towards other disciplines such as sociology and anthropology.

The present paper, then, seeks to revive, to reclaim, and to represent Maine’s work in legal history as not a philosophy of law, but as a project in and for the philosophy of law. A project which managed to inspire, influence, and shape the concepts of custom and customary law. Its effort to explore how this led to shape the rights of women in modern Indian laws. The latter section will close with some observations on the practical value the operationalisation of Maine’s work can have today.

### Sir Henry Maine and his Comparative Historical School

Legal thinkers, subsequent to Savigny, devoted their attention to comparative legal science. The jurists made a comparative study of the legal institutions of various communities to trace the evolution and development of law. Sir Henry Maine is considered as the fore-runner and founder of this approach to law. He studied in the University of Cambridge and thereafter, joined as professor of civil law in that university in 1847. From 1862 to 1869, he was the legal member of the Viceroy’s Executive Council of India and the Vice-Chancellor of the Calcutta University. During that period, he acquired the knowledge of Indian law and institutions. On his return to England in 1869, he was appointed as the first Corpus Professor of Jurisprudence at Oxford. In 1877, he became the Master of Trinity Hall and in 1877, he became Professor of International Law at Cambridge. He died in 1888.



## **Maine's Contribution to Historical Jurisprudence**

Maine's contribution to historical jurisprudence has been as large as to call him as 'Social Darwinist'. He envisioned a social order free from feudalism and liberation of an individual from the feudalistic primitive bondage. While Savigny had limited his study only to Roman law applicable in Germany, Maine adopted a broader perspective at understanding the laws from different communities which was essential for making comparative research on evolution and development of law. He did not share Savigny's mystique of the *Volksgeist*, and he used the future course and standards. Instead of stressing the uniqueness of national institutions, he went on to unite, classify and generalize the evolution of different legal orders. Unlike Savigny, Maine recognized role of legal fictions, equity and codification in the evolution of law. He was learned in English, Roman and Hindu law and also had knowledge of the Celtic systems.

In this respect, he parted stood out amongst the German historians. He brought to bear a scientific urge to unify, classify and generalize the evolution of different legal orders. Thus, he came up with both the comparative and anthropological approaches to study law, and history, in particular.

### **Maine's views on development of law**

Maine through his comparative research between various societies and their legal systems reached the conclusion that the development of law is dependent upon the development of society in its primitive stages and there is an identical pattern in which the socio legal institutions of the world evolve. Maine traces the evolution of socio-legal institutions of mankind through the paternal clan, the paternal kingdom, the tribal feudalism, feudalism and then the State.

#### Law of "Status"

Most of the early primitive communities were based on patriarchal system where the eldest male of the family was the figurehead, also called as the *pater familias* and dominated the entire family, property and slaves. The *pater familias* was the rule making member for the family. His word was the command applicable to all the family members and slaves.

In some societies, matriarchal pattern was followed wherein the eldest female of the family was authorized to make all decisions for the family and slaves. It is because of this kinship, namely blood relationship with the family that a person acquired a status. Thus, the rights of a person were to be

determined on the basis of his status. Thus slave, servant, ward, wife, citizen, etc. all symbolized statuses.

### **Evolution of family into nation**

Family constituted the smallest unit of primitive communities. The necessities and expediencies of time united the group which consisted of union and families. A few families taken together formed the family-group which constituted of union of families. An aggregation of family groups constituted Gen which in turned to the formation of tribes. A collection of tribes formed the community which Mainetermed as common wealth which is nothing but a nation. With the growth of society from the family, group, community, the evolution of law went through certain stages viz. the personal commands of head of the family for ruling the households to that of commands of the ruler/kings of the community believed to be acting under the inspirations. It was in this manner that early primitive societies evolved their relationship being regulated by the law of status which was also called as law of persons.

Stages of development of law in primitive societies:

Maine had traced the early development of law through 4 stages.

1. Divine Law: In the beginning law originated from *Themes*, which meant the Goddess of Justice. It was generally believed that while pronouncing judgements the king was acting under the divine inspiration of Goddess of justice. Themestes were the awards pronounced by Goddess of Justice to be executed by the king as a custodian of justice under divine inspiration. Thus, the king was merely the executor of judgment of God. The *dooms* of Anglo-Saxons pertain to this category of judgments or commands.
2. Customary law: Next, the recurring application of judgments led to the uniform practice which crystallized into customary law to be followed in the primitive societies. The importance of customs as a source of law has been underlined by Sir Henry Maine when he observed that 'custom' is to society what law is to 'State'.
3. Priestly class as a sole repository of customary law: In the next stage of development of law, the authority of the king to enforce an execute law was usurped by the priestly class who claimed themselves to be learned in law as well as religion. The priestly class memorised the rules of customary law because the art of writing had not developed then.

4. Codification: The era of codification marks the fourth and perhaps the last stage of development of law. With the discovery of the art of writing, a class of learned men and jurists came forward to denounce the authority of priests as lawgivers. They advocated codification of law to make it accessible and knowable.

#### Static v. Progressive Societies

When the primitive law has been once embodied in a code, according to Maine, here is an end to its spontaneous development. Now the static or stationary societies do not move forward beyond the era of Code. Henceforth, if certain changes are desired in the law, they have to be effected deliberately with the conscious desire of development. The societies which continue development of law in this manner are called “progressive societies” by Maine. Another difference between static and progressive society is conditional by their outlook and mode towards life. The static societies were theocratic, religious and conservative in their outlook whereas progressive societies were political, military and secular in character. According to Maine, the static condition of human race is the rule, the progress an exception.<sup>1</sup>

#### Three Legal Instrumentalities of Progressive Societies:

There are three legal instrumentalities by which progressive societies develop their laws. They are: (1) Legal fictions, (2) Equity and (3) Legislation. These instrumentalities are devised to bring law in harmony with society and are appeared in the historical sequence in the progressive societies only.

(1) Legal fictions: Legal fictions change the law according to the changing needs of the society without, however, making change in the letter of law. Maine defines 'legal fiction' as "any assumption which conceals or effects to conceal the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified". According to Julius Stone fictions are the 'Swadding Clothes' of legal change. They are used for over-coming the rigidity of law. The examples of fiction are, incorporated bodies are treated as legal persons in the eyes of law having rights and obligations like living persons, a Hindu idol is a legal person; the child taken in adoption is treated as if he was the natural born son or daughter. The English maxim, 'the King is dead, long live the King' furnishes one of the best illustrations of legal fiction.

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<sup>1</sup> RH Graveson, “The movement from status to contract” Modern Law Review (1941)

(2) Equity: Equity consists of those principles which appeal to the conscience of human being. They came at a later stage when law was clear and unambiguous. Equity came to remove the defects of Common law in England. The rigidity of Common law judges forced people to approach the king for justice. The King entrusted the task of administration of justice to Chancellor who was also the Head of the Exchequer. Though not learned in law, the Chancellor helped in administration of civil justice through the principles of justice, equity and good conscience. In Rome similar functions were performed by Praetor who tried to remedy the deficiencies of the existing civil law. Thus, Henry Maine defines equity as, "a body of rules existing side by side of the original Common law, founded on distinct principles and claiming incidentally to supersede the Common law by virtue of a superior sanctity inherent in those principles'. The origin of equity law may be traced back to late 13<sup>th</sup> Century when traditional Common Law was in operation in England from time immemorial. The Common law at the time suffered from three main defects, namely. (1) absence of remedy in certain cases (2) inadequacy of remedy; and (3) Excessive formalism. These defects were sought to be removed by three jurisdictions of equity law namely, (a) exclusive jurisdiction, (b) concurrent jurisdiction and (c) auxiliary jurisdiction of equity.

The origin of the concept of trust, appointment of receiver to administer the property of the deceased etc. fell under exclusive jurisdiction which provided relief to divorced women and protected the right of inheritance of the children of the deceased persons for which there was no remedy available under the Common law. The remedies of specific performance of the contract, injunction etc. came under the concurrent jurisdiction of the equity law which provided relief in matters where a relief though available under Common law, was inadequate. The examination of witnesses on commission, set off (i.e. settling different claims of same parties to litigation in a single suit) etc. are some of the instances of auxiliary jurisdiction of equity law which sought to mitigate the rigours and rigidity of Common law due to complexity of procedure. Thus, it is evidently clear that equity came to supplement the Common law and not to supersede it.

(3) Legislation: Legislation is the most effective method of law-making. It is considered to be the most systematic and direct method of introducing reforms through new laws. The power of the legislature to make laws has been widely accepted by the courts and the people all over the world.

#### Movement of Progressive Societies from Status to Contract

With the passage of time the institution of *pater familias* withered away and now rights and

obligations were dependent on individual contracts and free negotiations between persons. This led to disintegration of the family system and emergence of contractual relations between individuals. In other words, now the individual could take final decisions himself without depending on headman of the family. The Benthamite doctrine of individual's freedom freed slaves from the bondage of their master and now they could have rights and obligations like any other individual. Thus emerged a free society with freedom of individual in various spheres of life. The freedom of individual in economic field has been called as doctrine of laissez faire which struck a blow to the notion of status as the basis of law. These changes in the pattern of societies led Maine to conclude that 'movement of progressive societies has hitherto been from status to contract'.

In India also emancipation of women from the domination of males, freedom available to individuals in social, economic and political spheres of life, improvement in the condition of labour and workers etc. evidences that there has been a shift of emphasis from status to contract in modern times. The transformation of English as well as Indian society from feudalistic pattern to industrial one, has brought in its wake a radical change in the status of servant, agricultural workers etc. The incapacities of Hindus in matters of marriage, divorce, succession, adoption etc. have been removed by the codification of Hindu personal laws in 1955-56.

**Recent Trend: Reversal from Contract to Status** It must, however, be stated that with the advance of time and due to the impact of industrialisation, urbanisation and modernisation, new problems of unemployment, hunger, ignorance, disease etc., have cropped up giving rise to inequality between individuals and groups within the society. Consequently, there came a counter-current or reversal from contract to status in the time of Maine himself. It was realised that idea of freedom of contract between powerful capitalist and starving labour class led to catastrophic consequences resulting into exploitation of workers. This resulted into the emergence of Trade Unionism. The workers now formed their associations and instead of individual freedom of bargaining their wages and facilities, their trade unions had the power of group-bargaining. That apart, several labour welfare legislations such as the Minimum Wages Act, Factories Act, Trade Union's Act, Workmen's Compensation Act, Employees Liability Act, Industrial Disputes Act, Bonus Act etc. were enacted to improve the service conditions and bargaining capacity of workers in order to free them from the unscrupulous industrialists and capitalists.

With the increasing role of the State in a welfare State, it has assumed the functions of a regulator to secure a social order based on justice, equality, liberty and fraternity. The Constitution of India seeks

to promote economic interest of weaker sections of society and ensure them social justice. These progressive welfare measures have forced upon the individual worker a new kind of status where he does not bargain individually but does so collectively through associations or unions. Commenting on this reversal from contract to status, the Chief Justice of the Bombay High Court in *Prakash Cotton Mill Ltd. v. State of Bombay*, inter-alia, remarked: "We must not forget that we are no longer living in the age of laissez faire and the relation between employer and employees are no longer solely governed by the principles of contract. Contractual rights and liabilities are now subject to the principles of industrial law and also principles of social justice."

With the changing role of the States, its functions have also radically changed. Now there is greater interference of the State in the individual's activities. Even the contracts, which an individual enters into in everyday life, have been standardised such as contract relating to electricity supply, water supply, carriage by railways etc., and individuals cannot alter the terms of these contracts. Progressive countries all over the world are in favour of nationalisation of services and industries thus reducing the scope for contract at individual level and encouraging it on collective basis through associations, firms, unions etc. Thus, it would be seen that there has been a shift of trend from contract to status in modern times.

#### Property rights of women in India

Property rights for women are amongst the most important socio legal matter to be looked upon. Oppressive practices widespread in the Indian society created hindrances for women's right to property. As in many other countries, it came out as a result of huge intellectual battle between conservatives and progressives of India.

#### **Historical legal framework regarding property rights of women in India**

In India, property law is not something new. It has been in prevalence since the Vedic period. Women were considered goddess during the Vedic period and respected. However, the only thing lacking was they did not have the right of inheritance. During Vedic period, only unmarried daughter and brotherless married daughter could inherit property. A widow could not inherit the property of her dead husband, however, a childless widow could inherit her dead husband's estate. There was a downfall in women's status during the medieval period due to social evils like Sati, ban on widow remarriage, child marriages, pardah system and Jauhar. Also, the Hindu Kshatriya rulers practised polygamy. Women had no property rights in the medieval period. This was the situation when there was no codified law. The Hindu Women's Right to Property Act, 1937 came out as a result of

frustration showed by the society against the discriminatory practices concerning rights of women. This act granted women a limited interest in her husband's property which was termed as Hindu widow's estate. However, in 1938, this act was amended and excluded agricultural lands from its purview.

### **Present Legal Framework regarding property rights of women in India**

India, being a diverse country fails to bring a uniform civil code in this respect. Therefore, every religion is governed by its respective personal laws in many matters and property rights are one of them. In fact, with various religious groups, there are sub-groups and local customs and norms with their respective property rights. The Hindus, Buddhists, Jains and the Sikhs are governed by one codified law, while the Muslims and Christians are governed by their respective personal laws which are not codified. The tribal women of various regions and religions continue to be governed by their own customs and norms. According to the Indian Constitution, both the Centre as well as the State can formulate respective laws on the matters of succession. Hence, some of the states have enacted their own property rights within each personal law. As such, there is no single body in India dealing with property rights for women. The property rights of women in India are determined by ascribed factors such as her religion, status, her place of origin, her tribe and so on.

#### Property rights of women under Hindu Law

A comprehensive law was made by the parliament in 1956 to address gender inequalities in the matter of inheritance called as the Hindu Succession Act, 1956 which was applicable to all the Hindu, Sikhs, Jains and Buddhists. It applies to anyone who converts to Hinduism and their children. The Hindu Succession Act, 1956 is applicable only in case of intestate (one who dies without a will) succession and not in case of testamentary succession. It confers upon the intestate's children, married or unmarried daughter or son, mother and widow to get an equal share in the property of the deceased.

The Act confers absolute rights, including unfettered rights of disposal of property, on the female in any property—movable and immovable—acquired by inheritance, demise, partition, in lieu of maintenance, arrears of maintenance, gift, property acquired by her own skill, purchase, prescription or in any other manner, and also 'stridhana', which includes ornaments, apparel, gift received at the time of the wedding, property acquired out of her savings. In September 2005, the Supreme Court (SC) in a landmark judgment declared that Indian women would have an equal right to a share in property as men, granting daughters the right to inherit ancestral property along with male relatives. So, under

this Act, the difference between the female and male inheritor has been abolished. Now even a female inheritor (daughter) can claim partition of the ancestral property. Section 6 of this enactment provides for parity of rights in the coparcenary property among male and female members of a joint Hindu family. The daughter is entitled to a share in the ancestral property and is a coparcener as if she had been a son. However, Section 6 is not applicable under two circumstances: i) where the disposition or alienation including any partition which took place before 20-12-2004 and ii) where the testamentary disposition of the property was made before 20-12-2004.<sup>2</sup>

The two important laws in regard to property share are the Hindu Succession Act, 2005 and the Indian Succession Act, 1925. According to Section 6 of the Hindu Succession Act, equal status was granted only to daughters whose fathers were alive when the amendment came into force on September 9 2005. However, in the Vineeta Sharma vs Rakesh Sharma judgement (August 11 2020), the apex court held that daughters whose fathers died intestate before the amendment date also have equal rights over the property. The apex court had held that the daughter has an equal share of the father's property in her own right by birth. The judgement is welcomed by women across all quarters, as one of the biggest obstacles to the gender equality movement, is considered to have been thus cleared. In the case of V. Tulasamma & Others. vs V. Sessa Reddi, the Supreme Court of India clearly laid down the scope and ambit of Sections 14(1) and (2) of the Hindu Succession Act, in which a fine distinction was made by the court recognizing the woman's right to property through her pre-existing right to be maintained. The Court applied the exception only for the cases where an instrument created an independent and new title in favour of females for the first time and ruled it out where the instrument concerned merely confirmed, approved, declared or recognized pre-existing rights, like the right to maintenance.

#### Property rights of women under Muslim law

In India, Muslims are predominantly divided into two groups - Sunni and Shia. The Sunnis and Shias are further divided into subgroups, the most dominant ones being the Hanafis among the Sunnis and Ithna Asharis among the Shias. Hence, to be exact the law we take into consideration is the Hanafi law and the Ithna Ashari School. While the Sunni law recognizes only the relatives in relation to the male members of the family, which include the son's daughter, son's son, father's mother, the Shia law, does no such discrimination and the heirs which are related to the deceased through a female are also

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<sup>2</sup> NV Paranjape , Studies in Jurisprudence and Legal Theory (8<sup>th</sup> edition, Eastern Book Company 2007)



entitled to the inheritance. The son gets double share than the daughter. In case there is no brother, she gets half the share. The share the daughter gets is absolute in nature that means that she can legally manage, control and alienate with it. There is no limit on the gifts she can receive from the male deceased. In case of an unmarried woman, she has the right to stay in her father's house and get maintenance. After the sensational Shah Bano case , in case of divorce the husband has to maintain the wife in a fair and reasonable manner, even after separation and this period extends even after Iddat. In case of the death of the husband, the widow gets 1/4th share (in case are no children) and 1/8th share in case there are children. If the deceased husband had more than one wife, the 1/4th or the 1/8th share will be divided equally among them. In case of a deceased son, the mother is entitled to inherit 1/6th of the property, if there is a grandson and in cases there are no grandchildren, she will get 1/3<sup>rd</sup>.<sup>3</sup>

#### Property rights of Christian women

The most important judgment concerning Christian women's right to property is *Mary Roy v. State of Kerala and others*. In this case, the provisions of the Travancore Christian Succession Act were challenged as discriminatory to women and were claimed to restrict the rights of a woman on the property belonging to the Indian Christian community in the southern state of Travancore. According to the act, as far as the succession of immovable property of the interstate is concerned, the mother or widow is only allowed to have a life interest which was terminable at death or on the occasion of remarriage. Daughter was entitled to just one fourth of the value of the share the son was entitled to, or Rs. 5000 whichever was lesser. These provisions were seen as unconstitutional and void as they were discriminatory against women and violated the right to equality enshrined in the Indian Constitution as a fundamental right. The petition was allowed by the Supreme Court and the Act of Travancore was declared to be invalid as after the enactment of the Indian Succession Act<sup>12</sup> of 1925, all Indian Christians were to be governed by that. But the provisions of the Travancore Act were not declared to be unconstitutional, as the court felt that they were anyway inoperable due to the overriding effect of the Indian Succession Act.

#### **Property rights of Parsi women**

The Parsi community is a small migrant community in India and the majority of it resides in

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<sup>3</sup> BM Mani Tripathi, Jurisprudence and Legal Theory (7<sup>th</sup> Edition, Allahabad Law Agency 2005)

Maharashtra and Gujarat. Their property distribution is prima facie gender just and exemplifies equality. The widow of the deceased person, the children- both daughter and son get an equal share in the property of the deceased and each parent of the deceased get half of the share of each child. Although, some anomalies do exist like the widow of the predeceased son who does not have any children is not entitled to any share in the property.

### Analysis

The scenario of development in the concept of property rights of women in India in a progressive way satisfies to some extent the propositions laid down by Sir Henry Maine. This is because if we take consideration on the sequence of development of such concept, we can find a chain of progression. The static society which lasted for a long time under the influence of ruler and later the religion did not permit women to be the heir of their parental property is found to have been flexible in different timeframes. And up to date, the legal framework in India has been such that both male and female have been entitled a constitutional right for being entitled to their parental property in an equal manner. Similarly, women can easily sell and use their property as their will. In that sense, the society has been progressive one in terms of gender equality. As very rightly mentioned by Maine that the movement of society from status to contract is accomplished through legal fiction, the application of equity principles and by the passage of legislation, Indian legal system in this aspect has come across these circumstances.

### Conclusion

Henry Maine's conception regarding static and progressive societies can be tested in terms of sequence of changes in the conception of the property rights of women under Indian Laws. The present scenario of the legal framework under Indian Laws, property rights of daughter has been ensured as equal as that of sons. The Amendment made in the Hindu Succession Act, 1956 in 2005 in order to maintain gender equality and the judgment given by the Supreme court in *Vineeta Sharma v. Rakesh Sharma* case in 2020 has brought substantial changes in the conception of right to parental property of women. The Indian Legal System which favored patriarchy and that did not used to consider women to any of the stakeholder upon the property slowly turned flexible and started considering the gifts to the women as their property. Later, the conception of inherited property was accepted but the parental property was not shared among the daughters. However, the changes in the political system followed

by development and awareness in people's minds in India, the elimination of gender based discriminations and human rights made it possible that the women were entitled to equal property rights.

