

THE HINDU

Date:25/09/2005 URL:

<http://www.thehindu.com/thehindu/mag/2005/09/25/stories/2005092500050100.htm>

[Magazine](#)

Landmark step to gender equality

BINA AGARWAL

While the Hindu Succession (Amendment) Act, 2005 is a milestone, will it give women the security they seek?



A MYTH: There is a popular misconception that gender-equal inheritance laws can only benefit a few women. PHOTO: PARTH SANYAL

THE Hindu Succession (Amendment) Act, 2005 is a landmark. After 50 years, the Government finally addressed some persisting gender inequalities in the 1956 Hindu Succession Act (1956 HSA), which itself was path-breaking. The 2005 Act covers inequalities on several fronts: agricultural land; *Mitakshara* joint family property; parental dwelling house; and certain widow's rights (**see box**). Some anomalies persist, but first, consider the achievements.

Achievements

Agricultural land: One of the most significant amendments in the 2005 Act is deleting the gender discriminatory Section 4 (2) of the 1956 HSA. Ironically, this amendment almost went unnoted, with Members of Parliament demanding during the Lok Sabha debate, what had already been done. Section 4(2) exempted from the purview of the HSA significant interests in agricultural land, the inheritance of which was subject to the devolution rules specified in State-level tenurial laws. In States where these laws are silent on inheritance, the HSA applied by default, as also where the tenurial laws explicitly mention the HSA. But, in Delhi, Haryana, Himachal Pradesh, Punjab, Jammu and Kashmir, and Uttar Pradesh, the tenurial laws specify inheritance rules that are highly gender unequal. Here, primacy is given to male lineal descendants in the male line of descent and women come very low in the order of heirs. Also, women get only a limited estate, and lose the land on remarriage. Moreover, in U.P. and Delhi, a "tenant" is defined so broadly that these inequalities effectively covered all agricultural land. U.P. alone has 1/6 of India's population. This clause thus negatively affected innumerable women farmers.

The 2005 Act brings all agricultural land on par with other property and makes Hindu women's inheritance rights in land legally equal to men's across States, overriding any inconsistent State laws. This can benefit millions of women dependent on agriculture for survival, as elaborated further below.

Mitakshara coparcenary property: The second major achievement lies in including all daughters, especially married daughters, as coparceners in joint family property.

The 1956 HSA distinguished between separate property and joint family property. The separate property of a (non-matrilinal) Hindu male dying intestate (that is without leaving a will) devolves, in the first instance, equally on his class I heirs, namely, son, daughter, widow and mother (plus specified heirs of predeceased children). If previously governed by *Dayabhaga*, this rule applied also to joint family property. But, if previously governed by *Mitakshara* (which covers most of India), a different rule applied. In the deceased man's "notional" share in *Mitaksara* joint family property, the class I heirs were entitled to equal shares. But sons, as coparceners in the joint family property *additionally* had a direct birth right to an independent share; while female heirs (e.g. daughter, widow, mother) had claims only in the deceased's "notional" portion. Also, sons could demand partition; daughters could not.

The 2005 Act does not touch separate property (except broadening the class I heirs). But it includes daughters as coparceners in the *Mitaksara* joint family property, with the same birthrights as sons to shares, to claim partition, and (by presumption) to become *karta* (manager), while also sharing the liabilities. In addition, the Act makes the heirs of predeceased sons and daughters more equal, by including as class I heirs two generations of children of predeceased daughters, as was already the case for sons.

Dwelling house, widow's claims: Third, the Act deletes Section 23 of the 1956 HSA.

thereby giving all daughters (married or not) the same rights as sons to reside in or seek partition of the family dwelling house. Section 23 did not allow married daughters (unless separated, deserted or widowed) even residence rights in the parental home. Unmarried daughters had residence rights but could not demand partition.

Fourth, the Act deletes Section 24 of the 1956 HSA, which barred certain widows, such as those of predeceased sons, from inheriting the deceased's property if they had remarried. Now they can so inherit.

Implications

These amendments can have far-reaching implications for women. First, as elaborated in the book, **A Field of One's Own** (Bina Agarwal), and subsequent papers, gender equality in agricultural land can reduce not just a woman's but her whole family's risk of poverty, increase her livelihood options, enhance prospects of child survival, education and health, reduce domestic violence, and empower women. My research on Kerala recently, with a colleague, shows that women's risk of physical violence from husbands is dramatically less if they own land or a house: the incidence is 49 per cent among women without property, but 18 per cent among landowning women, and seven per cent if they own both land and house. Land in women's hands can also increase agricultural productivity, given male outmigration and growing female-headedness.

There is a popular misconception that gender-equal inheritance laws can only benefit a few women. In fact, millions of women — as widows and daughters — stand to gain. Calculations based on NSS data for all-India indicate that at least 78 per cent of rural families own some agricultural land; and if we include homestead plots, 89 per cent own land. Although most own very small fields, rights even in these can provide supplementary subsistence.

The risk of fragmentation is another oft-repeated argument. This argument is misleading and cannot justify selectively disinheriting women. Fragmentation can occur even when sons inherit. In practice, many rural families continue to cultivate jointly even when parcels are owned individually. The same can hold for daughters. Fragments per holding for all-India actually declined from 5.7 in 1961 to 2.7 in 1991.

Another opposition argument is that women migrate on marriage. But one might ask: if men retain their claims despite job-related migration, why shouldn't women on marriage-related migration? They could lease out the land to their family or someone else, or cultivate it cooperatively with other women. This would give women some economic security, however small. In Sri Lanka, I met women who owned only coconut trees in their birth village, but who received their share of coconuts every harvest with pride.

The second significant change — making all daughters (including married ones) coparceners in joint family property — is also of great importance for women, both economically and symbolically. Economically, it can enhance women's security, by

giving them birthrights in property that cannot be willed away by men. In a male-biased society where wills often disinherit women, this is a substantial gain. Also, as noted, women can become *kartas* of the property. Symbolically, all this signals that daughters and sons are equally important members of the parental family. It undermines the notion that after marriage the daughter belongs only to her husband's family. If her marriage breaks down, she can now return to her birth home by right, and not on the sufferance of relatives. This will enhance her self-confidence and social worth and give her greater bargaining power for herself and her children, in both parental and marital families.

Giving married daughters coparcenary rights from the start is unusual. Except Kerala which abolished joint family property altogether, in other State-level amendments of the 1956 HSA — *viz.* Tamil Nadu, Andhra Pradesh, Karnataka and Maharashtra — only daughters unmarried when the amendments were passed got coparcenary rights. Notably, however, they retained this right on subsequent marriage, and fears of extensive litigation by such married daughters have proved false.

Under the 2005 Act, married daughters will also benefit by the deletion of Section 23, since now they will have residence and partition rights in the parental dwelling house. In particular, women facing spousal violence will have somewhere to go. The only negative aspect is that allowing partition could increase the vulnerability of elderly parents. A preferred alternative would have been to bar *both* sons and daughters from seeking partition during their parents' lifetimes, if the family had only one dwelling.

Remaining anomalies

Some other anomalies also persist. One stems from retaining the *Mitaksara* joint property system. Making daughters coparceners will decrease the shares of other Class I female heirs, such as the deceased's widow and mother, since the coparcenary share of the deceased male from whom they inherit will decline. In States where the wife takes a share on partition, as in Maharashtra, the widow's potential share will now equal the son's and daughter's. But where the wife takes no share on partition, as in Tamil Nadu or Andhra Pradesh, the widow's potential share will fall below the daughter's. Abolishing the *Mitakshara* system altogether would have been more egalitarian, as some of us had suggested.

But such abolition needed to be dovetailed with partially restricting the right to will (say to 1/3 of the property). Such restrictions are common in several European countries. Otherwise women may inherit little, as wills often disinherit them. However, since the 2005 Act does not touch testamentary freedom, retaining the *Mitaksara* system and making daughters coparceners, while not the ideal solution, at least provides women assured shares in joint family property (if we include landholdings, the numbers benefiting could be large).

The process

It has been a long journey since the 2004 Bill was tabled in the Rajya Sabha last December. Based on the Law Commission's 174th Report, the Bill reproduced its shortcomings. Rather than the Kerala route, the Report and Bill followed the other State-level amendments, and ignored agricultural land, married daughters, etc. At the same time, the 2004 Bill reflected the Government's commitment to reform. This commitment was tapped by civil society over eight months to seek comprehensive amendment. Concerted efforts made by individuals and groups committed to women's rights, land rights, and human rights, through memorandums, depositions, and lobbying; the openness of the Standing Committee on Law and Justice to civil society inputs; the support of some lawyers and MPs, all contributed to the shift from the limited 2004 Bill to the wide-ranging 2005 Act.

The history of this process will no doubt be written sometime. But our experience does suggest that initiatives taken even by a relatively small number of committed individuals and groups, endorsed and supported by grassroots organisations and people from across the country, with a government and Parliament that have the will to reform, can go a long way.

The difficult question of implementing the 2005 Act remains. Campaigns for legal literacy; efforts to enhance social awareness of the advantages to the whole family if women own property; and legal and social aid for women seeking to assert their rights, are only a few of the many steps needed to fulfil the promise of this long-due legislation.

Bina Agarwal is Professor of Economics, Institute of Economic Growth, Delhi. In December 2004, she spearheaded an initiative for the comprehensive amendment of the Hindu Succession Act.

**BOX: WOMEN'S INHERITANCE RIGHTS:
UNAMENDED HSA, 1956 AND AMENDED HSA, 2005**

HINDU SUCCESSION ACT 1956	HINDU SUCCESSION (AMENDMENT) ACT 2005
THE DECEASED MAN'S SEPARATE PROPERTY	
Equal shares for class I heirs, viz. son, daughter, widow, mother and specified heirs of predeceased sons and daughters	No change, except for expanding the list of class I heirs for gender equality (see further below)
The heirs of both sexes have full rights to alienate inherited property	No change
THE MITAKSARA JOINT FAMILY PROPERTY (Section 6)	
Class I heirs (male and female) as specified above have equal claims in a man's "notional" share of the undivided joint family property. A man can, however, will away his "notional" share	No change, except in the specification of class I heirs (see further below).
Son has <i>additional</i> independent birth right in joint family property, as a coparcener. Daughters cannot be coparceners.	Modified Section 6: Sons and daughters both have independent birth rights (and liabilities) as coparceners in joint family property. [These shares cannot be willed away by the father.]
AGRICULTURAL LAND (Section 4 (2))	
Inheritance of agricultural land is subject to state-level tenurial laws, and not to the HSA. Many of the tenurial laws specify inheritance rules that are highly gender unequal.	Inheritance rights in all agricultural land are subject to the HSA (overriding state laws inconsistent with the Act), and so effectively are now gender equal
FAMILY DWELLING HOUSE (Section 23)	
In a dwelling house wholly occupied by members of the deceased's family, no female heir can claim partition, "until the male heirs choose to divide their respective shares". Daughters only have rights of residence, and only if unmarried, or deserted, separated or widowed.	Section 23 deleted: Now daughters (unmarried or married) have the same rights as sons to reside in and to claim partition of the parental dwelling house.
CERTAIN CATEGORIES OF WIDOWS (Section 24)	
The widow of a pre-deceased son, or of a predeceased son of a predeceased son, or of a brother, is not entitled to inherit the intestate's property as a widow, if on the date the succession opens she has remarried.	Section 24 deleted: The mentioned categories of widows can inherit even if they have remarried.
DEFINITION OF CLASS I HEIRS (Schedule: reference to Section 8)	
The class I heirs of a Hindu male include the children of predeceased children, but these are recognized upto two generations for predeceased sons, and only upto one generation for predeceased daughters.	Schedule modified to include as class I heirs the children of predeceased children, going down to two generations for <i>both</i> sons and daughters.
TESTAMENTARY RIGHTS (Section 30)	
Both men and women have full rights to will away their property, including their shares in joint family property	No change

Source: Table constructed by Bina Agarwal