

Women’s Land Rights and the Law: The Legislative Framework Governing Women’s Land Rights in India

Sumbul Fatima

Ph.D (LAW), Faculty of Law, J.M.I, New Delhi, (India)

ABSTRACT

The principle of gender equality is enshrined in the Indian Constitution in its Preamble, Fundamental Rights, Fundamental Duties and Directive Principles. There is a direct relationship between women’s Right to land, economic empowerment, food security and poverty reduction. A gender approach to land rights can enable shifts in gender power Relations, and assure that all people, regardless of sex, benefit from, and are empowered by, Development policies and practices to improve People’s rights to land. Although women play a key role in agricultural work and food production, their land rights are most tenuous. Much like those of women of any other country, property rights of Indian women have evolved out a continuing struggle between the status quo and the progressive forces. And pretty much like the Property rights of women elsewhere, property rights of Indian women too are unequal and unfair under different personal laws. Land governance in India is at a crossroads. This paper gives in brief the different Legislative Framework including different personal laws governing Women’s Land Rights in India because giving land rights to women is like giving the opportunity to change the world.

Keywords: *land rights, land governance, legislative framework, personal laws.*

I. INTRODUCTION

Land is an important source of identity and a precious asset with significant emotional connection in India. It is also the main source of rural and feudal power structure for most of India’s history. Land is a symbol of social status, cultural identity and an expression of political power. The value of land is deeply ingrained in the consciousness and well-being of the poor farmers and indigenous communities who make up a substantial portion of India’s total population.

Nation is built on two wheels, namely, industrialization and agriculture, and land is a common factor running between them. With the changing climate in nation’s development agenda, starting with agricultural expansion and of late tending towards industrialization, urban expansion, irrigation and mining projects, demands for land have increased. At the same time, the welfare-mandate of the state has also worked towards fulfilling the land reforms agenda by distributing land to landless and home steadless. As Land-related disputes constitute more than half of disputes in civil and a significant number in criminal courts cases, which are often dragged for long duration

and drain private and public resources. That’s why federal and state governments have brought in many institutional innovations, adopted new technologies to improve land records management, promoted women land rights, facilitated alternate dispute resolution and are now contemplating tenancy reforms.

II. WOMEN AND LAND RIGHTS

Land is also a social asset that is crucial for cultural identity, political power and participation in decision making. Women’s ownership of property extends their capabilities, expands their negotiating power, and enhances their ability to address vulnerability. It is also serving as a critical factor of social protection against gender-based violence. Women’s equal right to land is also a human rights issue. Gender equality is achieved when women and men, girls and boys, have equal rights, life prospects and opportunities, and the power to shape their own lives and contribute to society.

There is a direct relationship between women’s right to land, economic empowerment, food security and poverty reduction. A gender approach to land rights can enable shifts in gender power relations, and assure that all people, regardless of sex, benefit from, and are empowered by, development policies and practices to improve people’s rights to land. This brief gives an overview on how to consider gender aspects in projects and programmes addressing land. Mr. Jayesh Bhatia rightly spoke about the importance of women’s secure and equitable land rights over agricultural lands in the context of increased feminization of agriculture in the workshop organized by the World Bank, New Delhi .Dr T Haque highlighted the importance of women’s equitable land rights in order to achieve Sustainable Development Goals (SDGs)... In absence of land rights, poor and marginalized women are becoming more vulnerable.

Women represent 43% of the agriculture labour force. Yet they rarely own the land they are working on, have tenure securities or control over the land. Women often have limited decision-making power and control over how to use the land or its outputs. The right to land is regulated either by the formal legal system or through customary law. There are many examples of how the two systems can both prevent and promote women’s right to land. The formal legal systems in many countries have constitutions or land laws that grant gender equality in access to land, and at the same time laws for marriage, divorce and inheritance that contradict these laws by discriminating against women and daughters. Women’s right to land and property is central to women’s economic empowerment, as land is a base for food production and income generation, as collateral for credit and as a means of holding savings for the future. Thus, the economic vulnerability of women especially regarding the question of women’s rights to land is seen as contributing to the ambiguous character of women’s class position.

III. LAND POLICY AND SECURING WOMEN’S LAND RIGHTS

Women’s participation in the process of developing a land policy is fundamental to increasing women’s right to land. A land policy needs to be based on the principle of gender equality in right to land and have clear objectives/ goals on equal right to land. Indicators and base line data are important in order to enable follow-up.

The LANDESA Center for Women’s Land Rights is an initiative of LANDESA, a global land rights organization that has partnered with more than 50 countries to help strengthen land rights for more than 120 million families. The LANDESA Center for Women’s Land Rights works with governments and civil society to champion and advise on standards, policies, and tactics for strengthening women’s land rights; create tools and pursue innovative solutions; and nurture a global network of professionals and organizations collaborating to improve the conditions and status of women and girls by strengthening their access and control over land and resources. Most of the poorest people on the planet share three traits: they live in rural areas, rely on agricultural labor to survive, and don’t own the land they till. Landlessness remains one of the most accurate predictors of extreme poverty around the world.

Although women play a key role in agricultural work and food production, their land rights are most tenuous. Women may lose access to or control over land when they marry, divorce, or become widowed, or when their husbands take another wife. They may lack inheritance rights. Or they may have only limited say in how the family land is used or how the income it generates is allocated. Women may not know their rights, or they may lack the means or access to enforce the rights they do have. In many situations, laws, policies, and interventions fail to account for these gendered realities. Research has shown that when women have secure rights to land, their status improves, and they are better able to take care of themselves, their families, and their land. Strengthening women’s land rights and productive assets has been linked to women’s increased participation on household decision making, which has a powerful ripple effect, including better nutrition and food security for families, an improvement in family health, educational gains for children, and improved access to microcredit and formal loans.

Land, and in particular agricultural land, is central to livelihoods in rural India. The equal rights of women to access and control resources is fundamental to women’s empowerment. And recognizing the crucial role of women in relation to land, and legislating to ensure their land tenure security, are crucial in defending their rights in the face of land grabbing. But women’s rights to land are rarely protected in practice. Women face several barriers to securing their land rights while national legislation tends not to be implemented or is ignored in practice. This is despite the fact that women are the backbone of the local land economy, with the responsibility for household food security and family care.

There was Expert Group Meeting (EGM) on Securing Women's Land Rights in the context of the Sustainable Development Goals (SDGs) in New York 8-9 July 2017. The EGM preceded the United Nations High Level Political Forum held in New York from the 10 to 19 July 2017. The Forum focused on “Eradicating poverty and promoting prosperity in a changing world” and on the review of some SDGs, including goals with land-related indicators such as:

Goal 1 “End poverty in all its forms everywhere”.

Proportion of total adult population with secure tenure rights to land, with legally recognized documentation and who perceive their rights to land as secure, by sex and by type of tenure (disaggregated by sex and type of tenure).

Goal 5 “Achieve gender equality and empower all women and girls”.

(a) Proportion of total agricultural population with ownership or secure rights over agricultural land, by sex; and (b) share of women among owners or rights-bearers of agricultural land, by type of tenure. (c) Proportion of countries where the legal framework (including customary law) guarantees women’s equal rights to land ownership and/or

control. The inclusion of land indicators that explicitly recollect women’s land rights in the SDGs is a major achievement for the land community and a significant point of departure from the Millennium Development Goals, which did not have these provisions.

The importance of securing women's land rights to eradicate poverty has also been identified by the African Union Declaration on Land Issues and Challenges in Africa as one of the critical areas for advocacy and action of the African member states.

IV. LAWS DEALING WOMEN’S LAND RIGHTS

Land is a state subject in India. Through post-independence reform initiatives in the sixties states have carried out land reforms, largely based on principles of distributive justice, without adequately embedding gender justice, guaranteed through fundamental rights of equality enshrined by Indian constitution. Starting in the eighties, in response to international treaties and conventions as well as with influence of civil society, national (especially The Planning Commission) and state governments have been advocating following gender equity through joint titles to wife and husband in cases of transfer and/or distribution of agricultural land and house sites. Indian Agricultural Policy, 2000 mentions granting land rights to women wherever possible along with preferential allotment of ceiling surplus lands land to women. Land accumulated by imposing land ceiling on holdings, among eligible women and allotment of Government land in the form of joint titles with the woman’s name coming first. Another state, Andhra Pradesh practices distribution of Government land as well as transfer of purchased land in the name of women only. Karnataka grants Government land and transfer purchased lands through joint titles. In response to a decision taken at the Chief Ministers' Conference held in New Delhi, in 1992, West Bengal and Assam have been issuing 'Joint title' to both husband and wife in all land distribution schemes. Odisha, in 2002, issued a circular to earmark 40% of ceiling surplus land for distribution in the name of women, as a follow up to the State Revenue Secretaries' Conference held in New Delhi in October 2000,

a. women’s land rights under the Constitution

The principle of gender equality is enshrined in the Indian Constitution in its Preamble, Fundamental Rights, Fundamental Duties and Directive Principles. The Constitution not only grants equality to women, but also empowers the State to adopt measures of positive discrimination in favour of women. Within the framework of a democratic polity, our laws, development policies, Plans and programmes have aimed at women’s advancement in different spheres. India has also ratified various international conventions and human rights instruments committing to secure equal rights of women. Key among them is the ratification of the Convention on Elimination of All Forms of Discrimination against Women (CEDAW) in 1993.

Indian Constitution has a substantially elaborate framework to ensure equality amongst its citizens. It not only guarantees equality to all persons, under Article 14 as a fundamental right, but also expands on this in the subsequent Articles, to make room for affirmative action and positive discrimination.

The latter dictates that only equals must be treated as equals and that unequal may not be treated as equals. This broad paradigm itself permits the creation of affirmative action by way of special laws creating rights and positive

discrimination by way of reservations in favour of weaker classes of society. This view is strengthened by **Article 15** of the Constitution, which goes on to specifically lay down prohibition of discrimination on any arbitrary ground, including the ground of sex, as also the parameters of affirmative action and positive discrimination:

As can be seen, firstly, women are one of the identified sections that are vulnerable to discrimination and hence expressly protected from any manifestation or form of discrimination. Secondly, going a step further, women are also entitled to special protection or special rights through legislations, if needed, towards making up for the historical and social disadvantage suffered by them on the ground of sex alone.

The Indian courts have also taken an immensely expansive definition of fundamental right to life under Article 21 of the Constitution as an umbrella provision and have included within it right to everything which would make life meaningful and which prevent it from making it a mere existence, including the right to food, clean air, water, roads, health, and importantly the right to shelter/ housing. Additionally, though they are not justiciable and hence cannot be invoked to demand any right thereunder, or to get them enforced in any court of law, the Directive Principles of State Policy in Chapter IV of the Indian Constitution lend support to the paradigm of equality, social justice and empowerment which runs through all the principles. Since one of the purposes of the directive principles is to guide the conscience of the state and they have been used to constructively interpret the scope and ambit of fundamental rights, they also hit any discrimination or unfairness towards women. However, as mentioned above, notwithstanding the repeated and strong Constitutional guarantees of equality to women, the property rights of Indian women are far from gender-just even today, though many inequalities have been ironed out in courts. Below are some of the highlights of the property rights of Indian women, interspersed with some landmark judgments which have contributed to making them less gender unjust.

Land reform initiatives carried out by Indian states post-independence were largely around distributive justice, without focusing on gender-equity, guaranteed by Indian constitution. Since 1980s, many Indian states have tried to ensure gender-equity in land grant programs through issue of joint titles. FAO’s Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (VGGT), intends to ensure that women and men participate equally in their relationships to land, through both formal institutions and informal arrangements for land administration and management. It has outlined the importance of equitable and good governance of land tenure for progressive realization of poverty eradication, food security, sustainable livelihoods, social security, housing security, rural development, sustainable social and environmental development. Importance of ‘Equal land rights of Women’ has been acknowledged in the recently adopted Sustainable Development Goals (SDG), where India is a signatory. The Indian constitution guarantees equality of women and men in the enjoyment of fundamental rights, which obliges the need of gender-sensitive legislation.

b. Provisions in Religious and Customary Laws

The subtext of all these personal laws, regardless of religion, is that women are not equal to men. They therefore discriminate against women in marriage, inheritance and guardianship of children. Individual women from different communities have been challenging the constitutional validity of the discriminatory aspects of the personal laws in courts. Their main concern is the threat of forced marriage, murderous attacks in cases of inter-caste, inter-class and inter-religious marriages and property disputes even while they have to deal with issues like adultery, bigamy,

polygamy, divorce, custody of child/children, property and incest in their marital homes. For example, Hindu daughters were deprived of joint heirship in parental property as per the codes of Mitakshara, a school of Hindu law governing succession. It was only after 20-year legal battle in the Supreme Court that Hindu daughters were given equal rights in the ancestral property.

Inheritance is largely determined by religious laws (applicable throughout the country). The Hindu Succession Act (HSA), hence, has a large influence on gender equity in land rights of dominant hindu community in India. The HSA (1956), (amended in 2005), brought through a strong advocacy by civil society organizations, provides that unmarried daughters like sons, are coparceners and entitles them to receive a share of the undivided joint family property (including land) at birth. Coparceners acquire notional share in joint family property, which includes land to be realized upon inheritance. Coparcenary was limited to males in 1956 Act. Muslim inheritance is governed by Muslim Personal Law (Shariat) Application Act of 1937, which has limited provisions for women land rights. The Christian widows and daughters under the provision of Indian Succession Act, 1925 are believed to be more likely to inherit land than Hindu or Muslim women. Despite these provisions, the above three important Religious Acts suffer from criticisms on the issue of gender equity in inheritance of land. Deininger et al, found that though the 2005 amendment of HSA has led to an increase in girl’s educational attainment in India, a substantial bias still persists in land inheritance. Further, women as “wives married into the family are still deprived of any share in the coparcenary property as a matter of right”. However, coparcenary rights envisaged by HAS (amendment), 2005 are yet to be realized, largely due to poor monitoring and facilitation by Government as well very poor awareness and continued patriarchy at the demand side. HSA (Amendment), 2005 also has the limitation of being applicable prospectively.

Muslim Personal Law (Shariat) Application Act of 1937 does not extend to agricultural land. Agricultural land is left for devolution by state law or, if state law is silent, by custom. Only some states, such as Tamil Nadu, Andhra Pradesh and Kerala, extend Muslim Personal Law to agricultural land. Under Indian Succession Act, 1925, the wife does not have any right over husband's property as long as her husband is alive (UNDP, 2008).

Questions are asked as to why Parsi daughters who married non-Parsi men lost their property rights and non-Parsi wives of Parsi husbands were entitled to only half of the husband’s property as per the Parsi personal law. At the moment, the Parsi community is debating this issue in its conventions. For that matter tribal women in Maharashtra and Bihar have led petitions demanding land rights in the Supreme Court. Several women’s groups and human rights lawyers’ teams have prepared drafts containing technical details of gender-just and secular family laws. Therefore, the subtext of all these personal laws, regardless of religion, is that women are not equal to men.

c. The Response of the Judiciary

It is clear from the foregoing that though the property rights of Indian women have grown better with advance of time, they are far from totally equal and fair. There is much that remains in Indian women’s property rights, that can be struck down as unconstitutional.

The response of the judiciary has been ambivalent. On one hand, the Supreme Court of India has in a number of cases held that personal laws of parties are not susceptible to fundamental rights under the Constitution and therefore they cannot be challenged on the ground that they are in violation of fundamental rights especially those guaranteed

under Articles 14, 15 and 21 of the Constitution of India. On the other hand, in a number of other cases the Supreme Court has tested personal laws on the touchstone of fundamental rights and read down the laws or interpreted them so as to make them consistent with fundamental rights. Though in these decisions the personal laws under challenge may not have been struck down, but the fact that the decisions were on merits go to show that though enactment of a uniform civil code may require legislative intervention but the discriminatory aspects of personal laws can definitely be challenged as being violative of the fundamental rights of women under Articles 14 and 15 and can be struck down. Infact in one case the Supreme Court has held that that personal laws, to the extent that they are in violation of the fundamental rights, are void. In some judgments the Supreme Court has expressly recommended to the State to carry out its obligation under Article 44 of the Constitution and formulate a uniform civil code. There is a definite swing is towards a uniform civil code and one can see that the courts are going to play a significant role to usher it in.

Another heartening trend is that the Indian courts are increasingly relying on international standards, derived from various international declarations and conventions. Specifically CEDAW has been referred to and relied upon by the Supreme Court of India in some judgments These line of judgments give a firm basis for the women of India to demand gender justice and equal rights on par with international standards.

Road ahead:

Apart from the ongoing struggle for a uniform civil code in accordance with the Constitutional framework, today the Indian women are fighting for rights in marital property, denied uniformly to them across all religious boundaries. There is also a significant movement in some of the hill states, towards community ownership of land by women by creating group titles and promoting group production and management of land and natural resources by landless women for joint cultivation or related farm activity. Land rights would be linked directly to residence and working on land under this approach being lobbied for under the Beijing Platform for Action.

However, the challenges are many: social acceptance of women’s rights in property leads them. In a country where women continue to be property themselves the road ahead promises to be long and bumpy.

4.1 International conventions related to gender and right to land

There are several international conventions related to gender and right to land. Some of them are as follows:-

- Universal Declaration of Human Rights (1948)
- Beijing Platform for Action
- UN Convention on the Elimination of All Forms of Discrimination against Women, Article 16
- Economic and Social Council Commission on the Status of Women Resolution 42/1, Human Rights and land rights discrimination
- Convention on Economic, Social and Cultural Rights Art.11 (1966)
- Habitat II Conference, Istanbul 1996 Preamble
- Istanbul Declaration on Human Settlements (esp. Par.7) III Commitments D
- Rome Declaration on World Food Security (1996)

- World Food Summit. “African Charter on Human and Peoples’ Rights” (1986). The United Nations Commission on Human Rights Resolution 2002/49

2. Recommendations and Suggestions

- a. Awareness on Inheritance and Succession Provisions in Hindu Succession Act
- b. Land Rights of Transgender
- c. Grounding of Lok Adalats in rural areas
- d. Capacity Building Needs
- e. Women in local governance institutions
- f. Need of protection for women’s right to land under the Constitution.

V. CONCLUSION

Much like those of women of any other country, property rights of Indian women have evolved out a continuing struggle between the status quo and the progressive forces. And pretty much like the property rights of women elsewhere, property rights of Indian women too are unequal and unfair: while they have come a long way ahead in the last century, Indian women still continue to get less rights in property than the men, both in terms of quality and quantity. What may be slightly different about the property rights of Indian women is that, along with many other personal rights, in the matter of property rights too the Indian women are highly divided within themselves. Home to diverse religions, till date, India has failed to bring in a uniform civil code. To complicate it further, under the Indian Constitution, both the central and the state governments are competent to enact laws on matters of succession and hence the states can, and some have, enacted their own variations of property laws within each personal law. There is therefore no single body of property rights of Indian women. The property rights of the Indian woman get determined depending on which religion and religious school she follows, if she is married or unmarried, which part of the country she comes from, if she is a tribal or non-tribal and so on.

Ironically, what unifies them is the fact that cutting across all those divisions, the property rights of the Indian women are immune from Constitutional protection; the various property rights could be, as they indeed are in several ways, discriminatory and arbitrary, notwithstanding the Constitutional guarantee of equality and fairness. For by and large, with a few exceptions, the Indian courts have refused to test the personal laws on the touchstone of Constitution to strike down those that are clearly unconstitutional and have left it to the wisdom of legislature to choose the time to frame the uniform civil code as per the mandate of a Directive Principle in Article 44 of the Constitution.

In this way, The land-laws, having inherited multiple and diverse legacies, remain complex, voluminous, often with conflicting statues and confusing interpretations. They have not been very effective in adapting to newly emerging challenges and changing situations and also in taking benefit of technological developments. At the same time, land being a state subject and being dealt differently by states in response to changing needs have resulted experiences, innovations and good practices, with potential of cross learning and sharing. There remain also, enormous unrealized potential to improve land governance. Many stakeholders erroneously assume that land policy is a zero sum game, that is, any gain for one group will cause equal losses to another, which is not true. Clear and

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authoritative recognition of land rights can increase investment, sustainable land use, and welfare by women, tribal or informal occupants who previously lacked such rights and reduce conflict. New technology provides options to use land governance challenges as an opportunity. The evolving and expanding discipline and sector of land, requires assimilation and intense engagements of disciplines across social, cultural, legal, natural and applied sciences. Making land governance inclusive is critical to India’s accelerate developments. Land is globally seen as a potential tool to create conditions and opportunities for realizing social and economic equality and maintain cultural identity. Good land governance is vital to shared prosperity, accelerate, inclusive and sustainable development. Secured land tenure, especially for women and indigenous communities, now considered as the key to to achieving the global commitments like UN’s SDGs and VGGT of FAO