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Gender Discrimination in the devolution of Property under Hindu Succession Act, 1956

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Introduction

The egalitarian bluestocking that the Hindu society may have become, in consonance with the constitutional mandate, it has still left untouched perhaps the last discriminatory corner of the Hindu Society which has otherwise come of age and which would have to be looked upon as wanting in an equal society.

- Justice Dalvi, in *Mamata Dinesh Vakil v. Bansi S. Wadhwa*

Ownership and control over immovable property are major factors that shape the economic independence and social security of women in any nation. It is essential for the Legislature to ensure that none of the legislations incorporate discriminatory provisions between men and women in matters related to devolution of property. As noted by the Law Commission of India in its 174th Report, “*Discrimination against women is so pervasive that it sometimes surfaces on a bare perusal of the law made by the legislature itself. This is particularly so in relation to laws governing the inheritance/succession of property amongst the members of a Joint Hindu family. It seems that this discrimination is so deep and systematic that it has placed women at the receiving end.*”² Women’s property rights are influenced by both legal structures and social bias, including a traditional patriarchal psychology prevalent in our society; it has shaped our

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² 174th Report on Property Rights of Women: Proposed Reforms under the Hindu Law, Law Commission of India (2000).

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legislations to incorporate provisions on succession and devolution of property which are inherently discriminatory against women.

The Right to Equality is enshrined under Article 14 of the Indian Constitution and Article 15 prohibits discrimination on the grounds of birth or sex. The abolition of discrimination called for an overhaul of the Hindu succession laws that were in place at that point of time, and the Parliament responded to this by the enactment of the Hindu Succession Act, 1956 (HSA 1956).³ The matters relating to inheritance of property and transmission of assets owned by Hindus, Buddhists, Sikhs and Jains in India are governed by the framework laid down under the Hindu Succession Act, 1956. However, the said Act, which aimed at the abolition of discriminatory practices, prevalent in the inheritance of property, on the grounds of gender, has failed to achieve its objective, as envisaged by the Parliament. Many of the inconsistencies found within the provisions of the Act directly contradict the goal of achieving gender equality in inheritance.

The project analyses the inherent gender based discrimination prevalent in provisions relating to devolution of property under the Hindu Succession Act, 1956 and analyses the jurisprudence developed by the Courts on the issue, along with reforms and the authors' suggestions for the future.

Comparative Analysis of Section 8 and Section 15(1) of the Hindu Succession Act, 1956 – Devolution of Property in general

Section 8 of the Hindu Succession Act provides an exhaustive list of the husband's heirs, onto whom his property devolves upon him dying intestate. The property belonging to a Hindu male dying intestate devolves firstly, upon the Class I heirs which include the wife, the mother, the children, and the children of pre-deceased children. If there is no heir of Class I, then the

³ Venkatraman, S. (1978) "Intestate and testamentary succession amongst Hindus" in K. D. Gangrade (ed), Social Legislation in India, Vol. II, New Delhi, India: Concept Publishing Company Pvt. Ltd. (Rep. 2011), 49–64.

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property devolves upon Class II heirs who are divided into nine sub-categories. The heirs at each level in this hierarchy exclude the heirs featuring below them from inheriting any property. The Class II heirs featuring at the top of the hierarchy include the father of the deceased, the deceased's siblings, the sibling's children, and the grandparents of the deceased. Thirdly, if there are no heirs of any of the two classes, then it devolves upon the agnates of the deceased and if there is no agnate, then upon the cognates of the deceased.⁴ If a man dies intestate and childless and with no surviving spouse, then his mother has highest priority for succession, followed by his father, siblings, and then other distant relatives. In contrast, property held by Hindu females dying intestate devolves first, upon the children and the husband of the deceased. If there is no surviving husband or children, then it devolves upon the heirs of the husband. And, if there are no heirs of the husband, then upon the parents of the woman dying intestate. If there are no parents, then upon the heirs of the deceased's father and if there are no heirs of the father, then upon the heirs of the deceased's mother.⁵ Thus when the devolution of property of a woman takes place, by virtue of the application of Section 15(1), the heirs of the husband, which includes his natal relatives, are given preference over the woman's own parents and siblings. The exhaustive list of the husband's heirs translates into the woman's parents and siblings rarely inheriting the property. Under the scheme of Section 8, the male's property cannot devolve on the wife's natal relatives. This property of the woman is inclusive of the property that was gifted to her during her lifetime and the property that she acquired through her own skill and labour. But when it comes to devolution of the said property, her husband's distant relatives would be given more preference than her natal relatives, if she dies childless.⁶ The discrimination inherent in this differential treatment under Sections 8 and 15(1) doesn't end at this juncture. Going a step further, if the woman's natal family does inherit her property after her death, then her father's heirs will further be given preference in the inheritance of the property over her mother's heirs. The reason behind this discriminatory

⁴ Section 8, Hindu Succession Act, 1956.

⁵ Section 15(1), Hindu Succession Act, 1956.

⁶ Report of the Law Commission of India, 2018.

treatment is often believed to be the intention of the legislature to endure that the property rights of the joint Hindu family as a collective unit are given priority over the interests of particularly female individuals of the household.⁷ This amounts to regressive thinking of the past and requires the present legislature to amend the provisions to remove the inherent gender based discrimination predominant in them.

Devolution of Separate Property under Section 15(2) – Veiled Discrimination?

As discussed, the devolution of a male intestate's property is governed by Section 8 of the HSA, 1956 while the devolution of a female's intestate property is governed by Section 15 of the Act. A reading of the said provisions brings to light that there is a discrimination inherent between the devolution of male and female property on the basis of acquisition of property-special and general. Under Section 15(2), if a woman intestate has no surviving children:

1. In case of any property the woman inherited from her father or mother, the property devolves upon the heirs of her father.
2. In case of any property the woman inherited from her husband or father-in-law, the property devolves upon the heirs of the husband.⁸

The source of the property is of essence in the case of a female dying intestate. Exceptions under section 15(2), relating to special property, become applicable in the case where the female dies with no surviving children, or children of pre-deceased children, leaving behind property inherited from her parents, or her husband or father-in law. Here the property devolves onto the woman's husband's heirs or her father's heirs depending on the source from which she acquired the property. In the case of inheritance of the property from her husband or father-in-law, the property will devolve upon her husband's heirs. However, if she inherited the

⁷ Report of the Hindu Law Committee.

⁸ Section 15(2), Hindu Succession Act, 1956.

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property from her father or mother, then it would devolve upon her father's heirs. The property acquired by the woman through any other source devolves as per Section 15(1) of the HSA.

Author's Analysis and Comments

The exceptions to the general rule of succession in case of a female dying intestate, enshrined under Section 15(2), cleverly veil a motivation to ensure that property does not pass from one family to another, merely due to a woman dying intestate.

As a general rule, once property is inherited by a person, it becomes the separate property of the person and it devolves further on his heirs as per the laws of succession. However, under Section 15(2) of the Hindu Succession Act, 1956, when a woman inherits property from her husband, father-in-law or parents and dies intestate without a surviving child, then the property devolves on the heirs of the person from whom she inherited the property in the first place.⁹ Thus, under the HSA, the woman is only a temporary owner of the property during her lifetime and the property cannot be said to be her separate property in its true sense, since it cannot devolve on her heirs in such a situation. Instead, it devolves on the heirs of those she acquired the property from. If she inherits property from her father or mother and dies issueless leaving behind only the husband, the property will revert to her father's heirs.¹⁰ The woman is perceived as not having any identity of her own, as the heirs are not referred to as her brother, sister, and other relations but rather the heirs of her parents or her father-in-law. This does not hold true in the case of a male dying intestate. Section 8 does not make a distinction between general property and separate property and lays down uniform rules for the scheme of succession and determination of heirs in case of a male dying intestate.

No other succession law in India, except Hindu and Parsi succession law, gives statutory preference to the in-laws of a married woman over her own blood relatives.¹¹ In Mamta Dinesh

⁹ Ibid.

¹⁰ Radhika v Ahgnu (1996) 2 HLR 244 (SC).

¹¹ V. Kumara Swamy, Unfair deal, The Telegraph, 20 May 2009, http://www.telegraphindia.com/1090520/jsp/opinion/story_10993177.jsp.

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Vakil v Bansi S. Wadhwa¹², it was held that the distinction in the rules of inheritance and succession governing Hindu males and females is distinctly hit by the principle of equality embodied in Article 15(1) of the Constitution as being a discrimination on the grounds of sex. To address the inherent inequality on grounds of gender in the said provisions, the National Commission for Women has pushed for a repeal of the rules applicable to females dying intestate and to amend the rules for males dying intestate to incorporate females too, in order to achieve uniformity¹³ and the same should be pursued on a priority basis if we are to rid the Hindu Succession Act of its inherent gender based discrimination.

Case Laws pertaining to Gender Discrimination under HSA

The arguments pertaining to discrimination in the HSA can be broadly categorized in three ways;

- (1) That the discrimination is violative of Article 15(1) of the Constitution,
- (2) That the discrimination results in unfair and undesirable outcomes, and lastly,
- (3) that it violates India's commitments under international treaties, in particular the CEDAW.¹⁴

The argument about the constitutionality of the gender discriminatory provisions under HSA has featured in two landmark cases — Mamta Dinesh Vakil v. Bansi S. Wadhwa¹⁵ and Sonubhai Yeshwant Jadhav v. Bala Govinda Yadav.¹⁶ The judicial opinion on this point is divided and the position is not yet settled.¹⁷ The unequal treatment of men and women leading

¹² MANU/MH/1869/2012.

¹³ National Commission of India, Review of Laws and Legislative Measures Affecting Women, No. 19 on The Hindu Succession Act 1956 (30 of 1956), <http://ncw.nic.in/frmReportLaws19.aspx>.

¹⁴ Damle, Devendra & Srivastava, Siddharth & Anand, Tushar & Joshi, Viraj, 2020. "*Gender discrimination in devolution of property under Hindu Succession Act, 1956*," Working Papers 20/305, National Institute of Public Finance and Policy.

¹⁵ LNIND 2012 BOM 748.

¹⁶ AIR 1983 Bom 156.

¹⁷ Poonam Pradhan Saxena, Family Law lectures Family law II 156(Lexis Nexis 2016).

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to unfair outcomes has been examined in many cases, of which the case of Om Prakash v. Radhacharan¹⁸ is of extreme importance as it depicts the worst case scenario that can result from the existing formulation of Sections 8 and 15 of the HSA.

On the other hand, the contention about the enforceability of international treaties has arisen in multiple Supreme Court cases, and the Court has ruled that the State is obliged to meet the commitments of the treaties.¹⁹

We shall now proceed to examine these three arguments in detail one by one.

Constitutionality of differing schemes of devolution for men and women

In the case of Sonubhai Yeshwant Jadhav v. Bala Govinda Yadav²⁰, the constitutionality of source-based succession as provided in Section 15(2) of the HSA was challenged. In response to the constitutional challenge, it was held by the court that the object of the HSA was to further the institutional integrity of the family and maintain continuous succession of property in favour of the family.

It was observed by the court that the object of the legislation was to retain property with the joint family upon marriage thus when the wife's succession opened, the class known as heirs of the husband were permitted to succeed as a result of initial unity in marriage.²¹ To this effect, the heirs of the husband were permitted to succeed to a woman's property as a result of the merging of the female with her husband's family upon marriage.²²

However, a different view was taken in the case of Mamta Dinesh Vakil v. Bansi S. Wadhwa.²³

In this case, there were thus two questions before the court:

¹⁸ 2009 15 SCC 66.

¹⁹ Poonam Pradhan Saxena, "Reinforcing Patrilineal Dictates Through Judicial Mechanism: Need to Reform Law of Succession to Hindu Female intestates," 51(2) JILI 221-236 (2009).

²⁰ AIR 1983 Bom 156.

²¹ AIR 1983 Bom 156.

²² Archana Parashar, "Women and Family Law Reform in India" (Sage Publication New Delhi, 1992).

²³ LNIND 2012 BOM 748.

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1. Is the priority given to the male's relatives, for devolution of a male intestate's property under Section 8, in line with Article 15 of the Constitution, and
2. Is the priority given to the husband's heirs over a female intestate's property under Section 15(1), in line with Article 15 of the Constitution?

With respect to the first question, the Court observed that there is no gender-discrimination in the list of Class I heirs, since sons, daughters and their heirs have equal rights. However, the court notes that in sub-classes V to IX under Class II, gender discrimination does persist. For instance, the mother's parents feature lower than the father's parents, lower even than the father's siblings.²⁴

On the second question, the court observed that the rules relating to the succession of Hindu females for the items specified in Section 15 are substantially different from those relating to succession of Hindu males in class I of the Schedule. **This clearly shows that the codification of the old Hindu law has not kept pace with the constitutional mandate of gender equality.**²⁵

Further, the judgment in *Sonubhai Yeshwant Jadhav v. Bala Govinda Yadav* as discussed above reasoned that the objective of the discriminatory schemes of devolution was to ensure unity of the family which requires closer blood relations to be preferred to distant blood relations. The court in the present case disagreed with this reasoning by pointing out that many of the classes of persons who fall under the category of husband's heirs would not even be related by blood to a deceased Hindu female. Even so, these distant relations are preferred over her parents and siblings. Therefore, the court concluded that the classification is not based on family ties at all, and is wholly based on gender.

The Bombay High Court, therefore, in the instant case, held that the discrimination between males and females does not satisfy the test of equality under Article 15 of the Constitution, and

²⁴ Ibid.

²⁵ Ibid.

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consequently declared Sections 8 and 15 to be violative of the Constitution. However, since this was a single-judge bench — the same as the bench which passed the contrasting judgment in *Sonubhai Yeshwant Jadhav v. Bala Govinda Yadav*²⁶ — the court referred the matter to a division bench of the Bombay High Court, which has not come out with its decision yet.

To conclude, even though courts have expressed their discomfort with the constitutionality of differing schemes of devolution, no authoritative pronouncement has been made on this point yet.²⁷

While there are conflicting judgments on whether the different treatment of men and women constitutes discrimination violative of Article 15, the law as it stands has led to undesirable outcomes in several cases.²⁸

Undesirable outcomes resulting from Section 15

The scheme of devolution for women laid down under Section 15, privileging the husband's heirs over her own, can lead to some undesirable outcomes, a case in point in this regard is *Om Prakash v. Radhacharan*²⁹ where the Supreme Court of India heard a challenge to the scheme of devolution for a woman's self-acquired property under the HSA.

The main issue under consideration in this case was whether Section 15(1) or Section 15(2) would be applicable given that the property was the self-acquired property of the Hindu female?

It was held by the court that Section 15(1) makes rules for devolution of all property of a female Hindu barring property inherited intestate from her parents or in-laws. As such, there is no

²⁶ AIR 1983 Bom 156

²⁷ Archana Mishra. "Devolution of Property of the Hindu Female: Autonomy, Relationality, and the Law", *International Journal of Law, Policy and the Family* (2015).

²⁸ Shodhganga, "Women's Right to Succession and Inheritance in Hindu Law", http://eggp.inflibnet.ac.in/eggpdata/uploads/eggp_content/S000456WS/P000857/M019481/ET/1488437361_QUAD-1-Womens_Right_to_succession_and_Inheritance_in_Hindu_Law.pdf.

²⁹ (2009) 15 SCC 66.

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distinction between the female's self-acquired property, and the property that she inherits or receives from elsewhere.

Accordingly, it was held that Section 15(1) of the HSA would apply and the heirs of the husband would get preference over her own parents in obtaining a share of her self-acquired property. The fact that the marital family had made no contribution to the acquisition of the property by the deceased would have no adverse consequences for their claim.³⁰

Although the Supreme Court was justified in aligning its opinion with the legislative intent intrinsic to Section 15 of the HSA, in our opinion, this decision sets a poor judicial precedent for two reasons:

1. **Equity and good conscience:**

The ambit of the HSA is not only restricted to the heirs who are entitled to any property, but also to those who should be disqualified from inheriting it.³¹ An example of this is Section 25 of the HSA, wherein a murderer is barred from inheriting any property from the individual they have murdered.³² This is premised on the assumption that the deceased would never want their murderer to inherit any of their property.

Section 15(2) of the HSA is also premised on the understanding that property should not devolve upon an individual to whom justice demands it should not pass.³³

2. **Failure to invoke powers under Article 142:**

Under Article 142(1) of the Constitution, the Supreme Court has the power to “pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it”.³⁴

³⁰ Supra Note 13.

³¹ Ayushi Singhal. “Female Intestate Succession under the Hindu Succession Act, 1956: An Epitome of Inequality and Irrationality”, Christ University Law Journal 4.2 (2015), pp. 147–157. doi: <https://doi.org/10.12728/culj.7.9>.

³² Section 25 of the Hindu Succession Act.

³³ Dinshaw Fardunji Mulla. Principles of Hindu Law. Ed. by Satyajeet A Desai. 23rd ed. 2018.

³⁴ Article 142(1) of Constitution.

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In the present case, by not invoking its powers under the Article to do “complete justice”, and instead relying on a literal reading of the law there is violation of constitutional values of justice, equity and good conscience.³⁵

Stating that the Court ought to have taken a more progressive and sympathetic stance, **Prof. Poonam Pradhan Saxena** has expressed her opinion that “It is not whether a person deserved the property of the deceased or not, but justice demanded that the blood relations of the woman be given preference. And there have been precedents of the courts deviating from rigid provisions”.³⁶

International obligations under CEDAW

Removing gender discrimination in property-related legislation is one of the core requirements under the CEDAW. India became a signatory to this convention in 1980, and the Parliament ratified it in 1993.³⁷

Article 16 of the convention states that – “States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women, the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.”³⁸

In each of the cases discussed above, even where a justification was provided, the fact that the law discriminates against women is not contested. Therefore, the HSA is in contravention with the aforementioned article of the CEDAW to which India is a signatory.

³⁵ Upasana P. “Devolution of the self-acquired property of an intestate Hindu female – A grey area that needs immediate legislative attention”, *Journal On Contemporary Issues of Law* 2 (8 2016).

³⁶ V. Kumara Swami, *Unfair Deal*, *The telegraph*, 20th May, 2009.

³⁷ Bina Aggarwal “*Bargaining and Legal Change: Toward Gender Equality in India’s Inheritance laws*”. IDS working paper Institute of Development studies England (2002).

³⁸ Article 16 of CEDAW.

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The Supreme Court has in multiple cases such as *Vishaka & Ors. v. State of Rajasthan & Ors.*³⁹ *Apparel Export Promotion Council vs. A.K. Chopra*⁴⁰ ruled that the legislature, administration and judiciary have an obligation to give due regard to India's international commitments under treaties such as the CEDAW.

In *Madhu Kishwar & Ors. v. State of Bihar & Ors.*⁴¹, the Supreme Court states that the conventions such as CEDAW add urgency and teeth for immediate implementation of gender equality and by operation of Article 2(f) of CEDAW, the State should by, appropriate measures including legislation, modify law and abolish gender based discrimination in the existing laws, regulations, customs and practices which constitute discrimination against women.

Reforms – Attempts in the Past and Suggestions

The contention that the judiciary should not interfere in personal laws is misguided and urgent reforms are required to eliminate the inherent gender based discrimination in the Hindu Succession Act. Legislations that discriminate have been questioned by the Judiciary before. Sections 10 and 34 of the Indian Divorce Act, 1869 were challenged before the Court in the cases of *Ammini E J and etc v Union of India and Others*⁴² and *N Sarada Mani v G Alexander and Anr.*⁴³ Moreover, there have been progressive changes in the Hindu law itself, for example, the amendment⁴⁴ in Section 6 giving women equal coparcenary rights⁴⁵ and deletion of Section 23, which deprived women of sharing the dwelling house. It was recognised that although there

³⁹ (1997) 6 SCC 241.

⁴⁰ MANU/SC/0014/1999.

⁴¹ (1996) 5 SCC 125.

⁴² AIR 1995 Ker 252

⁴³ AIR 1998 AP 157.

⁴⁴ The Hindu Succession (Amendment) Act, 2005, available at http://www.hrln.org/admin/issue/subpdf/HSA_Amendment_2005.pdf.

⁴⁵ See *Prakash and Others v Phulavati and Others* (2016), holding that the amendment is also retrospectively applicable; and *Sujata Sharma v Manu Gupta* (2015), reaffirming the amendment's spirit and ruling that the provision of equal coparcenary rights to women in the Hindu Undivided Family results in allowing them to become the karta (manager) of the Hindu Undivided Family as well.

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can be different laws for different religions, there cannot be different laws for different sexes and, thus, the judiciary has a right to interfere in the latter case.

The National Commission for Women (NCW) proposed a fully gender-neutral formulation of schemes of devolution.⁴⁶ The NCW recommended that:

1. Section 8 be amended as follows⁴⁷:

The property of a Hindu dying intestate shall devolve according to the provision of this chapter

- a) Firstly, upon the heirs, being the relatives specified in Class I of the schedule;
- b) Secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in Class II of the schedule;
- c) Thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased;
- d) Lastly, if there is no agnate, then upon the cognates of the deceased

2. Section 15 must be omitted.⁴⁸

This suggestion by the NCW appears to be appealing at first instance but a closer examination reveals a different picture.

Firstly, it retains the Schedule to the Act, as is, therefore, it retains the discrimination against persons related to the deceased through female relatives, and privileges persons related through male relatives, as pointed out in *Mamta Dinesh Vakil v. Bansi S. Wadhwa*⁴⁹.

Secondly, this amendment also gives preference to agnates over cognates, thus prioritizing male lines over female lines.⁵⁰

⁴⁶ Supra Note 12.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ LNIND 2012 BOM 748.

⁵⁰ Ibid.

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Thirdly, it does not recommend the repeal of sections such as Sections 10, 11, and 16 of the HSA which would be rendered redundant by the amendment.

Thus we must look beyond the recommendations of the NCW in order to reform the HSA because of the above shortcomings.⁵¹

It is our suggestion the HSA needs to be amended in the following manner –

To ensure that the scheme of devolution for male and female intestates is identical, Sections 8 and 15 have to contain similar language or alternatively Section 8 should be applied to both men and women.⁵² We propose the latter so that there is less scope for confusion.

The specific change required then is to change the language of Section 8 from “**The property of a male Hindu dying intestate shall devolve ...**” to “**The property of a Hindu person dying intestate shall devolve**”. This change would also simultaneously require repealing Sections 15 and 16, which currently specify the schemes of devolution for the property of a female intestate.

Conclusion

In this paper, we have analysed the provisions of the Hindu Succession Act, 1956, which deal with devolution of property and how the schemes of devolution are different for men and women. The same is done with a close scrutiny of the relevant provisions and a comparative analysis and dissection of the respective provisions relating to devolution of property of men and women. We then proceeded to examine case laws on this issue. We also examined what efforts have already been put into reforming the HSA and the reason why they are not sufficient. We also provide a proposal for a draft amendment which would remedy gender discrimination inherent in the provisions governing devolution of property.

⁵¹ Archana Sridhar “*The Conflict Between Communal Religious Freedom and Women Equality: A Proposal for Reform of Hindu Succession Act 1956*”, 50 Berkeley Journal of International Law 558 (2002).

⁵² Supra note 13

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We would like to conclude this paper by stressing on the fact that there is an urgent need to amend the HSA in light of Article 15, India's CEDAW commitment and the reasoning provided in various cases, as mentioned in the course of our analysis.