

**PROPERTY INHERITANCE LAWS OF WOMEN IN TRIBAL  
SOCIETIES: A CASE STUDY OF SIKKIM**

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In Partial Fulfilment of the Requirement for the  
**Degree of Doctor of Philosophy**

By

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October 2016

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Date: 28/10/2016

## **DECLARATION**

I declare that the thesis entitled “**Property Inheritance Laws of Women in Tribal Societies: A Case Study of Sikkim**” submitted to Sikkim University in partial fulfilment of the requirement for the degree of **Doctor of Philosophy**, is my original work. This thesis has not been submitted for any other degree of this University or any other university.

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**“PROPERTY INHERITANCE LAWS OF WOMEN IN TRIBAL SOCIETIES: A CASE STUDY OF SIKKIM”**

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## ACRONYMS

ACHPR	African Charter on Human and Peoples Rights
ACW	ASEAN Committee on Women
ACWC	ASEAN Commission for the Protection of the Rights of Women and Children
ADB	Asian Development Bank
AIDS	Acquired Immune Deficiency Syndrome or Acquired Immunodeficiency Syndrome
AIWC	All India women's Conference
ASEAN	Association for Southeast Asian Nations
ASHA	Accredited Social Health Activists
ASHI	Association of Social Health in India
ASW	ASEAN Sub-Committee on Women
AU	African Union
AUWC	African Union Women's Committee
AWCPD	African Women's Committee on Peace and Development
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CLEP	Commission on the Legal Empowerment of the Poor
CM	Chief Minister
COI	Certificate of Identification
CSW	Commission on Status of Women
CYSV	Chatra Yuva Sangha Vahini
FAO	Food and Agricultural Organisation
FCC	Family Counselling Centre
GDP	Gross Domestic Product
GEDI	Global Entrepreneurship and Development Index
GENDERNET	Network on Gender Equality

GEWE	Gender Equality & Women's Empowerment
GIESCR	Global Initiative for Economic, Social and Cultural Rights
GOI	Government of India
GOIMESW	Government of India, Ministry of Education & Social Welfare Department of Social Welfare
GOS	Government of Sikkim
HDR	Human Deployment Report
HIV	Human Immunodeficiency Virus
HRLN	Human Rights Law Network
HSA	Hindu Succession Act, 1956
IBRD	International Bank for Reconstruction and Development
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IFAD	International Fund for Agricultural Development
ILO	International Labour Organisation
NCIW	National Council of Indian Women
NERLP	North East Rural Livelihoods Projects
NGOs	Non-Governmental Organisations
NOW	National Organisation for Women
NWFP	North-West Frontier Province
NWPC	National Women's Political Caucus
OAU	Organisation of African Unity
OECD	Convention on the Organisation for Economic Co-operation and Development
PESA	Panchayat Extension to Schedule Areas
PIL	Property Inheritance Laws
SAARC	South Asian Association for Regional Cooperation

SDM	Sub Divisional Magistrate
SHGs	Self Help Groups
SIGI	Social Institutions and Gender Index
SPSS	Statistical Package for Social Sciences
SSWB	State Social Welfare Board
UCC	Uniform Civil Code
UDHR	Universal Declaration of Human Rights
UN MDGs	United Nations Millennium Development Goals
UNCSW	United Nation Commission on Status of Women
UNDP	United Nations Development Programme
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNESCAP	United Nations Economic and Social Commission for Asia and the Pacific
UNIFEM	United Nation Development Fund for Women
UNO	United Nations Organisation
UNWOMEN	United Nations Women
USAID	United States Agency for International Development
WCARRD	World Conferences on Agrarian Reform and Rural Development
WEAL	Women's Equity Action League
WIA	Women's Indian Association

## **CHAPTER I**

### **INTRODUCTION**

#### **INTRODUCTION**

When it comes to property inheritance rights, gender discrimination is now one of the most fundamental issues to deal with, in tribal societies where age-old practices govern the everyday lives of the tribal people. Women are denied inheritance owing to the patriarchal system and customary laws of the tribal societies, that family in Sikkim follow. Patriarchal system and customary law, thus, perpetuate structural violence in the society. The tribes of Sikkim- Bhutia, Lepcha, Limboo, Sherpa and many others, appear to give property, as a gift to their daughters. But legally, there are no laws that guarantee property inheritance rights to women in tribal societies. In a tribal society, customary law defines the social fabric of the society, which is gender discriminatory in nature. In the backdrop, this study attempts to focus on the nature of tribal societies governed by customary laws and a patriarchal system, in terms of gender discrimination, in getting (Property Inheritance Laws) PIL for women in Sikkim.

Property right refers to that right of the people over certain objects. It can be inherited from the family and can be either, movable and immovable. Property laws include a legal right to acquire, own, sell or transfer of property, from parents to their children, by the process of succession or inheritance laws. Liberal theory considers that property right enhances the liberty of an individual. Property in terms of land, is a primary source of production, in an agrarian society. John Locke locates his idea that right to life, liberty and property are the natural rights of a human being. Immanuel Kant, J.S Mill and Bentham are of the opinion that human beings should have equal property rights, in the eyes of law. From a socio-democratic perspective, a property right is based on the principle of social production and that it should be placed for social ownership, which serves a social purpose. It allows individual property ownership, only when it serves a social purpose. Though all the theories appear to support equal rights for both

men and women, yet in practicality, gender-discrimination has become a stumbling block for women, to achieve PIL.

Feminists consider property inheritance rights as a significant factor for women empowerment. Liberal feminists demand equal legal rights in political, social and economical realms, including property rights. They challenge customs, culture, norms and other conventional practices, which are superficially male-biased. Their famous slogan, 'the personal is political', criticises traditional practices and domestic dichotomy, that based on the patriarchal structure of the society. A patriarchal society perpetuates gender discrimination in respect to inheritance rights. Almost all property is in the name of the father of the-family. This results in, women playing a minor role in the decision-making process. Which is why, feminists demand an equal right in ownership of property, for they believe it can empower to enhance the lives of women. According to them, the lack of access to natural resources including land is the main cause of women's subordination in the society. Therefore, they demand equal property inheritance laws, for both men and women, in practice.

Women in general, particularly feminists and social activists, demand an encompassing uniform civil code, to eliminate the sufferings of women caused by conventional practices. Indian women have no single law for inheritance rights. They are guided by the- Hindu Law, Muslim Law, Christian Law and other such personal laws, which are governed by their respective communities. Though, such types of laws appear to guarantee-inheritance rights for both men and women equally, they are in fact only followed in theory. In reality, women are largely deprived, which further deteriorates the condition of women. In the original Indian Constitution, right to property is enshrined under article 19 (f) as a fundamental right. But, the Twenty-fifth Amendment Act 1971 puts further restriction upon right to property. There are other articles such as article 14 and 15 (3) which provide equal rights and states that 'all are equal in the eyes of laws' thus prohibits discrimination. Under the Fifth and Sixth Schedule, separate provisions have been made for the administration of tribal society. Such provisions ensures that, - their traditional practices, customs and culture, are preserved and even give them the authority to make their own laws for administration. Tribal societies of the Northeast are

widely known by their distinct identities own distinct language, culture, norms, etc. Customs and practices of tribal societies are mainly known as customary law. They consider customary laws to be intrinsic to their identities. However, such types of customary practices are fundamentally interpreted from the male perspectives, which often prevent women from inheritance rights.

Women in Sikkim are governed by customary laws and prevalence of such law curtails them from access to property inheritance rights. Historically, women were neglected from many areas and were limited only to a private sphere. In monarchical period, there was no such law enacted for women in Sikkim. But in the later stages, several initiatives were taken up by the government and various agencies, to empower women. In this context, Sikkim government recently introduced PIL to all women, except those married to non-Sikkimese. This exclusion of property inheritance laws, to women married to non-Sikkimese, poses both as a curtailment of opportunities to Sikkimese women as well as prevents the national and global integration of women. The focus of the study, in this backdrop, tries to analyse how patriarchal system and customary laws encompass gender discrimination, to the entitlement of PIL for women in Sikkim.

## **RATIONALE AND SCOPE OF THE STUDY**

The theory of property rights enhances the liberty of an individual and creates sovereignty over particular things or an object. Land is considered as a real property and plays a significant role for human sustenance. Property rights can be classified broadly into two categories: common and private property. The genesis of property rights can be traced back to primitive society, in which land was owned in a common manner. It was only after the growth of population that ownership of private property came into existence and different perspective and theories were developed, among the thinkers. Classical liberal are driven by the notion that self-ownership of property and the legitimacy of the state should be minimal. Locke developed property rights on the basis of natural rights and it shared the notion of inalienability. The principle of utilitarianism conditioned by the phrase ‘greatest happiness in greatest numbers’ could be achieved through secure property rights. In contradiction, Marxists stand for the abolishment of



private property where socialists' property can lay a foundation of a classless and states society. They believe that private property creates class antagonism among the haves and have-nots and therefore needs to be abolished with socialist revolution, under the leadership of class consciousness.

Gender equality and control over property has become very critical issue for women, because access to property is often interpreted through patriarchal with socio-cultural system of the society. Entitlement of property raises the position of women at home, as well as outside. It also makes a positive difference to her overall wellbeing, which in turn, bestows her family with good health. It gives her the power to bargain within her house and provides her with status, dignity and identity within the society. Various statutory laws been enacted in order to address gender inequality with respect to PIL, from international level to local level. United Nations Commission on Status of Women, UDHR, CEDAW and state level Women Commission are all addressing gender discrimination issues. Indian Constitution is one of the benchmarks in determining the scope of women's rights from post-independence period. Reservation for women, in local self-governing bodies such as panchayat system, municipalities and corporations are also protected under constitutional provisions. Under the constitutional amendment act of 73<sup>rd</sup> and 74<sup>th</sup> provision, one-third of the total number of seats should be filled by women.

After independence, the-Constitution of India guaranteed special status to the Northeast region, under the recognition of the Fifth and Sixth Schedule. The Sixth Schedule exclusively focused on the protection of tribals, under the provision of tribal areas and interests, culture, customs, through self-governing system. The state government has special constitutional provisions, which empowers certain rules and regulations, regarding the prohibition on transfer of land from tribal to non-tribal. Customary laws are paramount among the tribals. So much so, that, in-spite, of Indian Constitution's provision, many tribes continue to be governed by their customs and traditional laws. Customary laws are driven by gender-bias with respect to inheritance rights: most of the tribal women are not allowed to enjoy or access or inherit property.

Gender discrimination in PIL is still followed at large in the tribal societies, such as in Sikkim. Societies follow the patriarchal family system, where the father heads the family and is the sole decision-maker whereas the mother plays a very minimal role. Both men and women in rural areas engage themselves in the agriculture field and women play important role in household matters. The status of women and their contribution in socio-economic, political and cultural activities varies across the communities. Women do not have legal rights over property but at certain times parents give property as gifts to their daughters. Or, if daughters remain unmarried, their parents customarily transfer some property in their names.

Bhutia tribe in Sikkim are guided by their own customary law. For example, it follows a communistic government system, widely known as the Dzumsa system. This system can be compared to the village Panchayat, in Lachen and Lachung area of North Sikkim. Under this system *Pipon* is head of the village and enjoys all the rights. In such types of community, gender discrimination is still prevalent, as women do not have a role to play in the decision-making process. Women cannot become the *Pipon*, even if they have right to elect or become a member in the Parliament of India or the Sikkim state Assembly.

Similarly, the old laws of Sikkim are also gender discriminatory in nature regarding the issue of PIL to women. In 1962, the Married Women's Property Regulation Act was passed. Under this act, if a Bhutia-Lepcha woman was to marry to a non-Sikkimese man—one without a Sikkim subject—she'd automatically withdraw her rights from the acquisition of any immovable property and so would her children. Old laws like these, still govern the women in Sikkim which debar tribal women from property rights even if it appears to follow democracy.

The adoption of democratic cultural activities in post-merged period flourished the idea with the critical understanding of gender equality. Democratic principles disseminate gender equality, but gender disparity with respect to property rights, are incompatible with the democratic ideology in Sikkim. Article 371F clause (k) of the Constitution gives special provision to preserve the unique ethnic identity and

continuation of traditional laws of the state. In this context, Constitution itself contradicts notion of gender equality. On the one hand, it allows the practice of customary laws and on the other hand, it proclaims the principle of gender justice. The notion of gender justice in respect to inheritance rights and the dominance of customary law-revolves around the polemics of community identity.

There are several initiatives taken up by the state. Among them, the State Commission for Women is actively working towards the welfare of women. There are NGOs such as Human Rights Law Network (HRLN) that focus on Women's Justice mainly dealing with the women-related issue, along with property inheritance rights. Association for Social Health in India, Self Help Group (SHG) etc. try to ensure equal status and dignity, to eradicate social evils like prostitution, family maladjustment, etc. to promote the empowerment of women.

The problem of gender discrimination is known-to-all as well as is widespread. Therefore, the scope of the proposed study is confined only on the PIL issue to tribal women of Sikkim.

## **THEORETICAL UNDERSTANDING OF PROPERTY RIGHTS**

Historical understanding of property rights was developed by western political thinkers, such as Plato, Aristotle, John Locke, J.S Mill, Marx etc. Plato proposes a communistic view of property: that it cannot be owned by the ruler and luxuries class. He mentioned that Greece was a strict patriarchal system and women did not enjoy political and property rights in his ideal state (Berry, 2007, 1). Aristotle states that property rights are a natural asset and individuals cannot excessively use it for their own self interest. He proclaims that women are characterised with compassion, emotional, passivity and qualities that can easily move them to tears, which places-them in an inferior position in the society (Ryan, 2002b, 227). Plato and Aristotle didn't mention the ownership of property for women and also excludes them from the political domain. Aristotle was of the opinion that women are not supposed to taste liberty as they cannot fully participate in political activities and would rather be ruled by men at home (ibid).

Theories of property can be divided into many perspectives like liberal, libertarian, utilitarian socio-democratic and Marxist. Liberal theory of property rights states that private property is an essential element of individual freedom. John Locke relates property rights with labour theory and states that everyone has an equal right to use un-cleared land, but no right to use cleared land without the consent of the person who cleared it (Gibbard, 2002, 204). Socio-democratic perspectives states that property should be based on the principle of social ownership and not for private purpose. L.T Hobhouse argues that state's ultimate aim is to provide the protection of an individual rights and it is a guardian of an individual (Guaba, 2004, 375). They believe that property rights are instruments for common good. Similarly, Marxists also view communistic or socialist form of property rights. Their theory states that private property creates class division among two opposite classes like haves and haves-not, and private property is an instrument of exploitation of bourgeoisie class. Hence, they propose a classless and stateless society where all the property remains in the hands of society for common use.

Feminist theory is considered as an exponent of gender equality as they challenge all the conventional aspects that promote gender bias. Feminists claim that, gender-wise, they are of equal capability of knowledge constructions. The conventional separation of public and private sphere is to subordinate the women in social, political and economic realms. Even within the feminist theories, there are the liberal feminist, radical feminist, Marxist feminist and others. Liberal feminism stresses upon the equal rights for women in a legal system-like the right to vote and personal autonomy with right over property (Geetha, 2009, 22). They emphasis upon liberal ideas such as liberty, equal opportunities for women and propose individualism. They believe in the idea of non-interference of state in domestic realm (Kaur, 2006, 115). Liberal feminism carried a slogan that 'all people are created by God and deserve equal right' gaining ground and popularity in the 1950s and 1960s (Swain, 2006).

Radical feminists assert that state and other- institutions perpetuate patriarchy and therefore they try to replace it with matriarchy (ibid). Kate Millet, a radical feminist, argues that family is the chief institution of patriarchy which dominates people's minds and bodies. Therefore, the radical feminists believe, a revolution can reshuffle personal,

domestic and family life (ibid). Gender discrimination with respect to property rights is closely related to patriarchal society, in which the head of the family has the control over property. In such a scenario, women are sidelined from the property inheritance rights.

Enloe's work, *The Curious Feminist (2004)*, challenges the patriarchal system in the social structure. Based on the masculinitists' ideology, it reveals a woman's position in a marginalised category. In order to sustain gender hierarchies patriarchal laws need to be replaced by feminised laws which are composed of feminised secretaries, feminised associates and feminised paralegals. By locating her ideas within the new age of globalisation which not only encourage to masculinity but new world also need to be understood through feminist perspectives. Marxist feminists propagate that oppression of women is a direct outcome of an individual's intention rather than structure of the society. Marxist feminists mainly focus on the abolition of capitalism, as a way of liberating women and propose a communistic and socialistic property- ownership (Swain, 2011). They think that private property promotes dependency and political confusion in societies.

## **WOMEN'S PROPERTY INHERITANCE LAWS IN THE WORLD SCENARIO**

Equal rights have been guaranteed to women in theory, especially at national and international levels and there are several non-state actors who work for women empowerment. At the international level, various initiatives are under taken by the United Nations, which adopt Convention on Elimination of All forms of Discrimination against Women (CEDAW) in order to eradicate gender discrimination and guarantee equal treatment for women. At the state level, National Commission for Women has become a forerunner custodian of women. Men and women are entitled to have equality in every sphere, be it political, social, economic or cultural. The rights of a woman and rights of the girl-child are an inalienable, integral and indivisible part of universal human rights (Vienna Declaration 1983), (Ramaswamy, 2013). The Universal Declaration of Human Rights adopted by United Nations General Assembly in 1948, declares the fundamental consensus on human rights of all people. Yet the marginalisations of women in various fields continue to create gender inequality, which worsens the condition of women.

Women are characterised in the private sphere and, this segregating and bracketing of one gender in the private realm and the other in a public realm leads to the further gender discrimination.

Gender discrimination regarding PIL is a critical issue when we confront with women and their positions in the society, due to the prevalence of customary laws and practices. Women empowerment is a major question in the contemporary world especially in developing countries—like the Sub-Saharan African countries and the South-Asian countries—where women are the main victims of gender discrimination. Cooper examines the status of property inheritance of women in five Sub-Saharan African countries like Ghana, Kenya, Mozambique, Rwanda and Uganda. Ironically, in these countries, customary laws play significant role in getting PIL and their current statutory laws do not protect the rights of women in shared property (Cooper, 2010). Current statutory laws of land governance that are enshrined in the Constitution of Ghana, Mozambique and Uganda are male-dominated (ibid). The author suggests that in order to bring a reformation in the practice of inheritance, there needs to be a change at two levels a) the substantial level of policy content and b) the procedural level of policy implementation (ibid).

## **WOMEN'S PROPERTY INHERITANCE LAWS IN INDIA: A CRITICAL APPRAISAL**

In the Vedic period, the position of women was considered to be good. They enjoyed equal status with men and contributed in each and every sphere. However, with time the status of women gradually deteriorated, due to the changing nature of society. Emergence of various social evils like sati, dowry, polygamy system and others, led to the marginalisation of women, particularly in India. During the ancient period, a woman was considered a man's best friend and co-worker. She even took part in the social and cultural activities. Similarly, Bhattacharya (1999) also narrates that the position of women in ancient period was better and there was no prevalence of individual ownership of land. But gradually, the condition of women started to decline with the introduction of

social construction of gender, creating division between men and women. Women then were limited to the private sphere and men to the public sphere.

During the post-independent period, the status of women improved under the Constitution of India was drafted, granting equal rights to both men and women under Articles 14 and 15 (3). Gangoli (2007) considers that the feminist movement needs to challenge the patriarchal-based legal system in civil marriages and divorce laws, that are male chauvinistic in nature. The hegemonic notions of male in the Indian family need to be challenged by feminists to establish an egalitarian society. No doubt, legally women benefit from the rights which are guaranteed in the Indian Constitution. Practically though, such rights are deprived from women by norms, culture, customary practices and other structured societal factors that are intrinsic to the tribal society. It has been also highlighted that women's inferior position in India is due to their lack of control over arable land (Seth, 2007) right to property can provide overall empowerment to women, but limit them from inheriting rights through certain conventional practices, that need to be plugged from the society.

A majority of the tribes settled in Northeastern region and other parts of India have distinct language, culture, religion and identity that have shaped their historical and social factors. They don't have a codified law in order to control their social norms and the administrative system at village level. Under the Indian Constitution, these areas are governed by the Fifth and Sixth Schedule, and during the colonial period this area were also declared as 'exclude areas' or 'partially excluded areas' which expressed a polity of non-interference, under Montague-Chelmsford Reforms- 1919, Simon Commission and Government of India Act 1935.

Indian society is pluralistic in nature: here diverse communities are governed by their own personal and customary laws. Hindu Succession Act 1956 (amendment 2005) mainly governs the Hindus, Buddhists, Jains and Sikhs, providing equal rights to ancestral property for both men and women. Muslim Personal laws were made for Muslim women and Indian Succession Act 1925, for Christian and Parsi communities. Before Sharia laws, Muslim women in India were governed by their own customary laws

and it was highly gender discriminatory in nature. Qureshi's work *Status of Women in Islam*, exhibits that women have always enjoyed a respectable place and position, in Islamic society. However, Islamic teachings and philosophies preach contradictorily, thus hinder a woman's freedom and status.

Sivaramyya's work, *Women's Rights of Inheritance in India: A comparative Study of Hindu, Muslim, New York and Quebec Law*, considered as the pioneer work in the gender justice, with respect to inheritance rights. The study primarily focused on the impact of Hindu and Muslim laws of inheritance, on women's inheritance rights. Further, the author's meticulous study also explains the position of women under the umbrella of 'personal laws', which is consequently based on the religious and conventional practices of various communities in India. The author also examines the succession laws of other parts of the world, instead of limiting inheritance laws to only India.

Article 44 of the Indian Constitution gives provision for a uniform civil code (UCC). In this context, Ghosh raises a debatable political issue on whether India is a democratic and secular state, or if it should have a UCC or should continue to allow its various religious and ethnic minorities, to retain their personal and customary laws (Ghosh, 2007, 1). The discourse on the secularism versus communalism is raised in the context of South Asian countries. Among which, India is a multi-ethnic and multi-religious democratic country. Similarly, he also emphasises on the need to replace all personal laws or customary laws by UCC, which is yet to be achieved in India. The UCC as well as personal laws are entwined with the nation's political identity, minority rights, and women's rights as a whole for national integration (ibid).

Women always have to compromise with their rights in a society because of the varied types of practices and customs imposed on them, in moral realms. Women bear the brunt of gender discrimination and also have to forfeit most of their rights (Agnes and Ghosh, 2012). On the other hand, the presence of multiple legal systems with customary and religious laws, governing the various communities is of great concern for women: for they create hindrances in property inheritance rights from their parents (ibid). The communities that follow the patriarchal system also play a crucial role in disinheriting the



property rights for women. The authors suggest that gender-sensitive legal reforms be brought, to protect women and their interests in the society (ibid). Agnes further states that economic rights and condition of women are mostly influenced by the domain of personal laws of various communities (Agnes, 1999a). Despite the existence enshrinement of gender equality in the Indian Constitution, personal laws perpetuate gender discrimination and she urges necessity of UCC, which can liberate women from gender discrimination (ibid).

The role of women in Northeastern societies—in social and domestic matter-is determined by their capacity to participate in the production process. Yet, in spite of it, they are denied property inheritance. There is still lack of an objective and scientific interpretation of culture from the women's perspectives (Zehol, 2010). Zehol defines tribes as, “politically or socially coherent and autonomous group occupying or claiming a particular territory”, and women in tribal society have a higher position as compared to their non-tribal counterparts elsewhere in India, but men in their own societies do not treat them as their equals (Zehol, 2010). Customary laws of various tribes favour men. Zehol mentions proverbs among the Mizos like-‘a crab’s meat is not counted as meat, so also a woman’s word cannot be counted as words’ speak volumes on the position of Mizo women (ibid). Further, women are lacking their rights in many areas like property inheritance, education, or in term of patriarchal values. In order to bridge this gap, women must actively take part in the decision-making process to bring changes in the society (ibid). A woman’s overall status can be improved when she owns, manages, sells and inherits property, as a natural right (ibid).

Sikkimese society consists of three cultural ethnic groups: Lepcha, Bhutia and Nepalese. Among them, the Nepalese community constitutes of the majority. During the monarchical period ruler declared Revenue Order no. 1, in 1917 (Gurung, 2011). Under this law, no Nepali could purchase Bhutia and Lepchas land unless special permission was granted by His Highness. This shows that community interests play a significant role in developing the laws in the society and such laws are always discriminatory in nature.

Sikkim also widely follows the patriarchal system in which the father is the supreme decision-maker in the family. Pattern of inheritance system is based on patrilineality and either movable or immovable property is traced through the male lineage. Intestate property is inherited by the eldest son, who takes charge, and if there are other sons then property is divided among all the sons equally (Bhattacharya, 2000). Normally, daughters are not allowed to inherit and if she remains unmarried, a portion of land is provided to her, as a gift.

So, it has become a research concern to know the perceptions of tribal women of Sikkim in relation with PIL, in the light of the new law meant to them. Whether these tribal women in Sikkim will be able to get their entitlements to property inheritance rights in a society that is governed by customary laws and patriarchal system, urged the researcher to take up this study.

Moreover, available literature suggests, so far there is no research done on the issue of PIL of tribal women in Sikkim. In this scenario, patriarchal ideology and customary laws perpetuate gender discrimination in property inheritance rights of women in tribal society. So, the study helps, to certain extent, to create awareness and empower women, through PIL. Further, findings would help to make some effective policy measures, to address the issue under examination.

## **OBJECTIVES OF THE STUDY**

- To analyse the patriarchal system that operates in tribal society by implicating women in getting their Property Inheritance Laws.
- To explore the perception of tribal women regarding their rights and sense of deprivation or empowerment in the context of Property Inheritance Laws.
- To understand the constitutional provisions of India that guarantee Property Inheritance Laws, and socio-political and economic rights to women.
- To study the customs and practices among the tribal society and its relation to Property Inheritance Laws and its implications on women.

## **RESEARCH QUESTIONS**

The study began with certain research questions which are placed below:

- How do various theoretical underpinnings on property rights urge the social, political, and economic empowerment of women?
- What are the various feminist discourses on Property Inheritance Laws and their relevance in the context of tribal society?
- What are the major obstacles to the implementation of a constitutionally-enshrined property inheritance rights to women in India?
- How customary laws along with patriarchal system function in a tribal society to act as critical hindrances to property inheritance rights to women in Sikkim?

## **HYPOTHESIS**

- Customary laws along with patriarchal system seem to pose as obstacles in achieving property inheritance rights for women in Sikkim.

## **RESEARCH METHODOLOGY**

The proposed study is analysed through descriptive and exploratory research, by applying both qualitative and quantitative mode of enquiry perspectives.

### **Sampling Technique**

This research was conducted in two levels: At the first stage, a field survey was carried out in selected areas from four districts of Sikkim with the help of cluster sampling. In the next stage, snowball sampling used for various NGOs and women activists of the society.

### **Sample Size**

The targeted population of the study was: women of various tribal communities. There were a total of 200 respondents from each district. Sample sizes of 50 were interviewed

in order to understand perspective on their rights. Four districts of Sikkim constituted the field where tribal people are densely inhabited.

### **Data Collection**

Primary sources are first-hand information collected through the questionnaires and interviews with the respondents. Questionnaires are divided into open-ended and close-ended question. In the open-ended, answers are not set out whereas the close-ended have options of answers: both type of questions are used under the proposed study. The study is based on in-depth interviews (face-to-face interviews with respondents) along with door-to-door methodology, applied in order to get a grass root level understanding of PIL and its implications on tribal women. Primary data was also collected through two sets of structured interviews (written list of questions in a face-to-face interaction) from various stakeholders of society –cutting across social activists, lawyers, scholars, NGOs -who are in one way or another related to the issue under study.

Secondary sources have been collected from various books, reports, national and international journal. Such type of sources has helped to understand the nature and scope of PIL from the various perspectives, both global to local. Further, such perspectives are endorsed in analysing the changing nature of customary laws in the modern patriarchal society, in terms of identity, culture and their implications on women, as a whole.

### **Data Analysis**

The two software packages were used SPSS (statistical package for social sciences) and Microsoft Excel. Firstly data was coded and variables, measured through nominal scale<sup>1</sup> and likert scale. SPSS is employed in displaying cross table, percentage and cumulative frequency in tabulation. While displaying data graphs, bar chart, area chart, pie chart and scatter-gram, Microsoft excel is used with the help of SPSS.

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<sup>1</sup> Classified the given respondent's response which based on common characteristic, for example economic empowerment of women can be achieved through selling, buying and mortgaging of the property.

## **Limitation of the Study**

The limitation of the study helps to understand the weakness of the study. It also helps in generalising the study in a proper manner, in terms of its reliability. As every research has not been untouched by the certain confines, so also, this research is not free from the limitations which are explained in the following lines:

- Limited sample size was one of the main limitations of the study.
- Primary data has been collected only from the female members of the community, so the data collected and used is not free from bias and inaccuracy, due to its homogenous sample size.

## **ORGANISATION OF THE STUDY**

### **Chapter I- Introduction**

The introductory chapter explains the rationale and scope of the study, objectives of the study, research questions, hypothesis, research methodology, limitations of the study and ends with organisation of the study.

### **Chapter-II- Property Rights and its Theoretical Underpinnings**

Property rights are one of the important elements of women empowerment. In order to substantiate this argument, this chapter attempts to delineate historical evolution and various theoretical perspectives of property rights, ranging from liberal, libertarian, utilitarian and Marxists. The practices of property inheritance system in different laws- Greek, Roman to Common- and the position of women have been examined. The pattern of inheritance system in patrilineal, matrilineal and multicultural society has also been discussed.

### **Chapter-III- Property Inheritance Laws from the Feminist Perspectives**

Gender justice in relating to PIL is considered as a prerequisite to women's empowerment. Women's rights have remained as a contentious issue within the domain

of patriarchal society, in which men and women do not share equal inheritance rights. Feminists' consciousness is skepticism about the gender discriminating society and advocates that the entitlement of property would enable the empowerment of women. The various feminists discourse revolved around gender equality, with the conception of an egalitarian society. In this context, this chapter tries to understand the relation between gender and property rights, especially in developing countries. It also analyses different approaches of feminists' perspective on PIL, whose skepticism lies in the dominant setting of a culture, in which women are always in marginalised position.

#### **Chapter-IV- Women's Property Inheritance Laws in India**

Indian Constitution is based on the principles of socialists, secular and democratic and is considered as a pillar of equal rights for both men and women. Moreover, Indian society is designated as multi-culture and pluralistic in nature, whereby different communities are governed by their own community-based laws. Personal laws mainly govern matters related to marriage, inheritance and, adoption of different communities and are guided by their own respective laws. These laws are tweaked in ways to makes a woman's position vulnerable and weak in her society. In such a situation, women always have to negotiate for their rights within the roof of traditional and personal laws of theory of justice. So this chapter expounds the Constitutional provision and debates over personal laws, in matters relating to inheritance rights of women.

#### **Chapter-V- Property Inheritance Laws of Women in Tribal Societies: A case study of Sikkim**

The sources of customary laws are derived from sets of traditional rules, customs and norms which are very intrinsic to tribal people. At the same time, PIL is very crucial in order to empower women. However, these communities are driven by their own customary laws. Under which women do not enjoy equal rights to inheritance. Under such circumstances, law has been interpreted through male perspective which leaves women out from benefiting rights. The denial of property inheritance rights to women in tribal society further deteriorates the condition of women. This chapter analyses the

various data which was collected from field-based study to understand property inheritance rights of tribal women in Sikkim.

### **Chapter-VI- Conclusion**

This chapter seeks to provide some concluding observations by drawing issues under examination and providing with suggestions and recommendations. Conclusion is drawn on the basis of summary of all the chapters.

## **CHAPTER II**

### **PROPERTY RIGHTS AND ITS THEORITICAL UNDERPINNINGS**

#### **INTRODUCTION**

The notion of theory of property rights has undergone myriad changes ranging from how it was in the hunter-gatherer period to the present modern technical system. With this evolution of human roles, the concept of property rights also has been affected on the ground of common and private. The concept of property rights is not immutable or fixed, its wide influence can be seen in the realm of socio-political, cultural and economic spheres. Western attitude towards the development of capitalism left a remarkable picture that can be experienced by the whole world, not only indigenous people. So, it has become a debatable issue regarding the changing concept of property rights between the western (who sees property as the financial security) and the indigenous people whose attitudes limited within the land alienation.

The discourse of property rights and its theoretical understanding has become very crucial in order to locate oneself within the domain of the changing system. This chapter tries to analyse the patriarchal system that operates in society and its effect on women's property rights. The research question that the study try to answer is—how do various theoretical underpinnings of property rights empower women in economic and socio-political areas. In this context, the research deals with the evolutionary theories of property rights that range from varied schools of thought liberal to Marxists—that have contributed in this landscape: which helps to locate the peculiarities of property rights.

#### **2.1 HISTORICAL EVOLUTION OF PROPERTY RIGHTS**

Simply put, property defines as a thing whereas in legal aspect, it means rights. Hence, property rights may be defined as claims upon certain objects, which refer to one's right to transfer or dispose or exclude other from occupancy. It enhances liberty of an individual, for instance, if A owns an apple, then A is generally entitled to prevent others from eating it. On the other hand, the second component of property is the right to



transfer the holder's property rights to others (Sprankling, 1999, 5). The subject of possession and ownership has different treatment and each receives separate treatment of law. Immovable property such as land, building, etc. has their own set of law and forests; trees have a separate set of law. Land is a natural resource and is impossible to expand: it has become very crucial for human being sustenance. Similarly, movable properties which include immaterial properties like actionable, mortgage, leases etc., have different sets of laws (Hidayatullah, 1983). Books, copy-rights, inventions and artistic creations come under the category of incorporeal or intangible property (Chandra, 2010).

In this context, the question can be revolved around the evolution of property rights, in early period. The material side of human civilisation was mainly engaged with the idea of property and ownership. Growth of civilisation turned towards legal ownership, and the concept of property became an important part of evolution of civilisation (Mahajan, 1988, 389). Originally, the world belonged to no one but was open for the first taking by anyone (Tully, 1979, 125), ownership was absent in the primitive society. Primitive society property rights were de facto, not de jure (Krier, 2009, 144). Human evolution can be traced in different stages such as Stone Age followed by, the Copper Age, Bronze and Iron Age. In early history, human beings were known as nomads along with the family that composed of man, woman and their children. They lived as hunters and gatherers without permanent settlement (Daimond, 2004). Their main occupation was to find food because they had not yet learnt how to plant tree, sows crops or domesticate animals (Hidayatullah, 1983, 16).

Property is instinctive in human nature as well as in animals, for instance, a dog finding a bone considers it as his own and fights another dog over it (ibid 12). If a primitive man hunted and gathered food for family without understanding the concept of property, that would be considered as private property, because he wouldn't share it with other families (ibid). Land resources were regarded as communal because the society was engaged in collecting food and tools. As time passed, society grew and land system also changed from communal to individual ownership, due to agricultural activities. The emergence and spread of agriculture led to the growth of population, and appropriation of land gradually became exclusive and permanent (Mahajan, 1988, 389). They

domesticated animals, and the construction of thatched cottages also came into existence for the settlement. Ownership and possession were guided by their own customs and norms, instead of fixed rules (Hidayatullah, 1983, 18). Things could be exchanged through barter system in order to fulfill requirements.

The possession and ownership of property took the form of rights of an individual and it became the responsibility of the state to take care of it. Gradually, the society realised the importance of the government for the protection of individual's rights, and in this context: Blackstone rightly declared that "Government existed for the protection of its citizens".

In order to understand the different phases of human civilisation, their earlier historical background appears to be very significant. Historians, archeologists, anthropologists, etc., have ample information on human evolution. Biblical interpretation describes Adam and Eve as the progenitors. Hinduism believes that three gods—Bhrama created the universe, Visnu sustains the creation and Shiva destroys the evil. Bhrama created human beings from his own soul<sup>1</sup> and for that, it is believed that humans are the strongest animals in the earth. The Chinese believed that the world originated only in the 3<sup>rd</sup> or 4<sup>th</sup> century A.D. and it began when two powers Yin and Yang that came out of Chaos and brought forth a man named P' and Ku, who made the universe out of Chaos and got absorbed in the earth, the heavens and the universe (Nourse, 1943).

Gradually, human civilisation gave birth to different clans and tribes. They emerged with simple social groups and formed nations, in which many tribes and clans came together and formed a single community. The division of class and caste was also came into existence and feudal system further encouraged the ownership of property in the fewer hands. Society embraced modernity with legal formulation in safe-guarding individual rights. Similarly, the notion of common property ownership was slowly overridden by private ownership, in terms of legal approach. In modern epoch, clans and tribes rarely practiced communal ownership of property. In tribal society, the customs of

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<sup>1</sup> The Hindu Sacred texts about Human Origins. Extracted online from <http://www.ancient-origin.net/hindu-sacred-t>. Accessed on 20<sup>th</sup> October 2016.

ownership also passed from one generation to another, for example, in Fiji, the natives have a communal title of inalienable land system (Lea, 2008, 164). The people of Fiji think that land belonged to God and that's why no one can own land as God. The clans who own the land and landowners supervise it. Bodyell and Shah have analysed that the reason behind the burgeoning of capitalism in west and failure in other parts, refer to individual ownership of land: title of the land in west can be used as an economic security against financial crises.

Similarly, in India, the joint family system comes under the Mitakshara and Dayabhaga laws of ownership of property that devolves into the family, especially male members (Mohsin, 2010, 109). In the matriarchal system, in some parts of South India, property belongs to the youngest-daughter (Agarwal, 1996a). These examples clearly show the evolution of property ownership from primitive society to modern civilised system. As well as, women's property ownership was also affected and in most of the societies they were deprived from the property rights<sup>2</sup>. Engels states that primitive society was egalitarian in nature and was based on communal ownership of property with collective production.

### **2.1.1. CONCEPTUAL ANALYSIS**

This section deals with concept and development of property laws in three major areas such as Greek, Romano-Germanic and Common Law. This part also outlines the practice of inheritance of property rights in different laws and its impact upon women.

#### **2.1.1.1. GREEK LAWS**

Greek inheritance law is regulated by the Greek civil code, under Article 1710-2035 (Kosmidis & Partner Law firm). Greek Civil Code is taken from the Roman law and it has also influences of the German Civil Code (the German Civil Code is also descends from Roman and ancient German law) (Mattheou). Before the introduction of Greek civil

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<sup>2</sup> For example, Hindu women in ancient and medieval period did not enjoy inheritance of property rights, only after the Hindu, Women's Right to Property Act, 1937, Hindu Succession Act, 1957 (Amendment 2005), they are enjoying equal rights with their male members in India.

code (i.e., until 1046), the science of law of the Pandects had also practiced property law (ibid).

In Greece, the institution of ownership was protected under the Constitution of 1957, and it was revised in the years of 1986 and 2001<sup>3</sup>. Under Article 17 of the Greek Constitution, that ownership of property is protected by the state, and the rights derived from it may not be used against public interest<sup>4</sup>. It is clear from the Article that nobody can be dispossessed of individual property except for public purpose which has been implemented by law. So, the Greek Constitution have limitations on the ground of ownership of rights, concerning public interest. If any case of limitation occurs, then the owner of a real estate will receive a reasonable indemnification which is imposed by court (Mattheou).

Deceased intestate property is inherited by the children and grandchildren who come under the first class category. If the deceased person has no any first class heir, then property can be inherited by a close relative, who comes under the second and third category. The early Greek society was patrilineal and patriarchal where the father was supreme in the household by customs and later by law (Pomeroy et al., 2004, 15). They did not recognise the right of the firstborn and children usually inherited equally, daughters often inherited land, but often received their share of movable property as a dowry (Caseau and Sabine, (2014). Widows were not allowed to inherit property from their husbands but were granted a lifelong usufruct rights in the family (ibid).

Ancient Greek ideology was built upon male dominance where women did not inherit or own property (Foxhall, 1989; Blundell, 1995; Johnstone, 2003; Pomeroy et al., 2004; Fleck and Hanssen, 2007). In most of the Greek societies, women accessed little education facilities, and faced restriction. For example, Athenian women were restricted by law from entering into a contract. By contrast, the Spartan women follow a different strategy, they have unique inheritance laws for women in which they could own and

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<sup>3</sup> . The Constitution of Greece, as Revised by the Parliamentary resolution of April 6<sup>th</sup> 2001 of the VII Revisionary Parliament. Published by Hellenic Parliament, Greece 2004. Retrieved from <http://www.wipo.int/edocs/lexdocs/laws/>. Accessed on 9<sup>th</sup> May 2016.

<sup>4</sup> . The Constitution of Greece, in the name of the Holy and Consubstantial and Individual Trinity. Retrieved from <http://www.hri.org/syntagma> . Accessed on 9<sup>th</sup> May 2016.

inherit the property. Spartan daughters could inherit all the property if they had no living brothers in the family: they were better educated and moved freely in the society (Fleck and Hanssen, 2007; Pomeroy et al., 2004). Spartans were totalitarian in nature and Athens' customs were based on a democratic governing system, though they shared common heritage (Rehmke, 1997).

### **2.1.1.2. ROMANO-GERMANIC LAWS**

Romano-Germanic law, also called civil law or Roman law, the law of continental Europe was based on an admixture of Roman, Germanic, ecclesiastical, feudal, commercial and customary laws (Carrozz). This law was adopted in Latin America, Asia and Africa. In the later part of the 20<sup>th</sup> and 21<sup>st</sup> century, civil laws systems underwent substantial modification in many areas for instance, transformation in family law which was based on patriarchal system (ibid). It was originated in Europe in 12<sup>th</sup> century. The concepts begin with the *Corpus Juris Civilis* (body of law) which was the compilation code of Emperor Justinian. Roman laws emerged as the systematised legal law and its importance is still -relevant in present phase. Nichols's work, *An Introduction to Roman Law*, states that Roman law spread in almost the whole of Europe, as a common stock of legal ideas.

Nicholas states that during the formation of law, there were no professional judges, the interpretation of law was expressed by the priestly 'college of *pontifices*' and *jurists*. It has been argued that when Justinian became emperor then only law was come into existence. The Twelve Tables (Couperus, 1990) was a written law and another main source of Roman law. On the other hand, *Juris Prudentes* were helped by Praetors who interpreted the Twelve Tables and other laws and such interpretation became the sources of law. India also shared the same experience where pundits and mulvis were considered as the main sources of laws.

Roman society at first was divided into two distinct bodies, the *populus* and the *plebs*, the former possessed political and better rights than the latter were settlers from outside (Hidayatullah, 1983, 59). Household head, known as the *paterfamilias* meaning

‘father of a family or household,’ possessed an authority in the family (Thompson, 2006, 2). This shows the power and responsibilities regarding rights over household property and other religious activities have been looked after by the head of the family.

In ancient period, Roman law gave no preference to primogeniture. If the father died, his intestate property was inherited equally among children, but later on, such laws were modified and preference of inheritance was given to the eldest son and the priority to male members (Treggiari, 1979, 68). Though, in Roman law, both sons and daughters inherited property, yet sons—enjoyed more than daughters. In fact, Roman women in ancient period did not own property, like the women of classical Athens and elsewhere in Greece (Sparta and Gortyn excepted) (Lemmer, 2006; Flick and Hanssen, 2007), did not enjoy political rights (Couperus, 1990, 15). Under ancient Roman law, women were generally under the wing of their husbands (Robinson, 1987 cited by Zaher, 2002, 460). Widow and unmarried women could own property, but only for a life-time.

Susan Treggiari expounds in her article, ‘*Sentiment and Property: Some Roman Attitudes*,’ that Romans had not seen land and slaves in a commercial ways, which would be sold and bought, because they were emotionally attached with them. In ancient Athens and Rome, slaves including men and women who had no legal rights, were merely considered as an item of property (Palmer, 2014, 6). They were treated as the property of the masters<sup>5</sup>.

### **2.1.1.3. ANGLO-SAXON AND COMMON LAWS**

Anglo- Saxon laws were very popular in Britain before the Norman’s Conquest in 1066. This system was crucial, especially in tribal society, in which magic and ritual played significant role than scientific reasons (D’Amato and Stephen). Later on, most of the rules and regulation of Common law of England were taken from Anglo-Saxon laws.

Common law is also called Anglo-American law, the body of customary law (Glendon). Common law mainly belonged to the law of England which emerged during

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<sup>5</sup> Greek and Roman Slavery- Education. Retrieved from <http://www.educationscotland.gov.uk>images>. Accessed on 9<sup>th</sup> May 2016.

the Middle Ages and it can also apply to other countries, whose laws have been modeled on the bases of English law. In fact, the Common law is a legal system of most of the English-speaking countries. The origin of Common law refers to the royal power: it was mainly established in order to maintain peace instead of giving moral justification to social order (Mohsin, 2010, 195). It was basically un-codified, which means that there were no legal rules and statutes. The influence of Common law can be seen in many colonised countries, for instance, South Asian Countries like India and Bangladesh. The English common law provides substantive evidence in favour of property rights, for example, William Blackstone in his *Commentaries on the Laws of England*, included property rights as one of the absolute rights (Clark, 1982, 120).

England was retained by Common Law and these Common Laws were influenced by the principles of Roman Laws. Common law was regulated by real property in the inheritance system, deceased intestate property: that is passed on to the eldest son and in the absence of sons, goes to daughters who inherit jointly in the family (Erickson, 1993, 26). Practically, most of the fathers, favoured sons over daughters, in the distribution of land and daughters enjoyed only movable properties.

### **2.1.2 PROPERTY RIGHTS: NOTION**

The notion of property rights undergoes various socio-economic, political and cultural aspects. Generally, property is related with the access of natural resources including land and other materials, in order to fulfill the human needs. Individuals could own property through the means of inheritance, gift or self-acquisition by buying from others. In this context, philosophers have interestingly given justification of property rights. Modern philosophers are more inclined towards ownership of private property, contesting with the notion of common property, and are demanding more space within the domain of liberal world view (Chandra, 2010).

Renaissance period gave flame of individual's rights to property. The seed of property as natural rights can be found in Glories Revolution of 1688 in England (Phillips, 2008). During enlightenment period, many social conditions improved, the

struggle for the right to life, freedom of religion, opinion and property rights also emerged. Consequently, it broke the back of feudal regimes and transformed humankind's prospects in realising the human rights. The ideas of enlightenment played a significant role in inspiring French Revolution.

Enlightenment, also known as Age of Reason, became popular in late seventeenth and early eighteenth century, where many thinkers also contributed towards the concept of property. Thinkers like, Hobbes, Locke, Rousseau, Adam Smith, and Immanuel Kant were influenced by this period (Whitaker, 2014). For instance, Thomas Hobbes argued that private property was the creation of government power and says that there could be no property without government. State was created for the security of man's property. On the contrary, he committed himself to the view that in the state of nature there was no property, no distinction of mine and thine, so there is nothing to be said for explaining subordination, a species of transfer of ownership (Ryan, 2002b, 228). Paradoxically, in *Leviathan*, he identified the right to property solely with the power to take possession over things and protect them from being taken by others (Rubin and Klumpp, 2011, 5). On Hegalian approach, basic human interest owes property which contributes immensely to the ethical development of the individual (Waldron, 1988, 3).

French Revolutionaries recognised property rights under Article 17 of the Declaration of the Rights of Man and the Citizen, in which it was asserted that 'since property is an inviolable and sacred right, no individual may be deprived of it unless some public necessity, legally certified as such, clearly requires it; and subject always to a just and previously determined compensation'. If anyone violates, people can legally claim their right. But this rights excluded women from political participation, in this regard French philosopher the Marquis de Condorcet (1743-1794) and Etta Palm d'Alders, they wrote a Declaration of the Rights of Women in 1791, demanded equal natural rights (Ishay, 2008, 110).

Edmund Burke states that, the power of perpetuating our property in our families is one of the most valuable and interesting circumstances which tends to be the "perpetuation of society itself" (Harvard Classics, 1909). Similarly, Makintosh says that



“property is the sheet-anchor of the society”<sup>6</sup> which means, it plays a significant role in chaos situation. Jeremy Waldron’s article, *Property, Honesty, and Normative Resilience*, explores the relation between property and honesty. In order to be honest, an individual should respect the rule of property law (Waldron, 2001, 10). Further, to steal is opposed to honesty, which violates the rule of property, but in some of the legal systems it would be neither dishonest nor wrong.

C.B Macpherson’s article ‘*Property as means or End*’, meticulous elaboration has been done, regarding property rights on whether it is a means or an end, in order to achieve human happiness. He argues that most of the philosophers have stressed upon it is means to achieve the end itself, and conversely theorists, like Hobbes and Bentham, invoked accumulation of property as an end itself, which can help in achieving universal happiness (Macpherson, 1979).

According to Rousseau, the origin of property and family have four consequences – (i) competition (ii) self-comparison with other (iii) hatred, and (4) urge for power, great institution of inequality was private property (Vermani, 2012, 96). Paradoxically, property to Rousseau was considered as the most sacred right of all citizens and quite indispensable social right. Property right gave birth to the concept of materialist, self-interest and human ego among human beings. For Rousseau, only a limited right is justifiable.

The first justification of limited property right is to develop from the original means of producing property from a piece of land, and this possession must be taken by labour for cultivation (ibid, 101). Another justification for property as limited right was that it was consistent with the sovereignty of the general will where individuals needed to surrender life, liberty and the estate (MacAdam, 1979, 194). A truly democratic society is a society which would be governed by the general will. Property, in this sense, then becomes a legal right, given the identification of law, sovereignty and the general will.

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<sup>6</sup> The World’s Famous Orations. Great Britain: II (1780-1861). 1906. A Plea for Free Speech by Sir James Mackintosh. Great Britain: II. (1765-1832) 1803. Retrieved from [www.bartleby.com](http://www.bartleby.com). Accessed on 28<sup>th</sup> April 2016.

Under these conditions, changes become apparent that private belongings are protected by the common force of the state (ibid).

During the 19<sup>th</sup> century, the term ‘property rights’ is used to refer as “bundle of rights” in the work of John R. Common, *The Distribution of Wealth (1893)* and Ronald Coase (Schmdtz, 2012; Pound, 1939; Claeys, 2012; Alston and Mueller, 2015). Prior 1883, property was understood as entailing to absolute rights upon a thing owned, for instance, Roman laws and Blackstone (Klein and Robinson, 2011). Bundle of rights also refers to bundle of sticks where each stick represents the rights of benefits and some important sticks of landowners which include—right to sell, mortgage, lease, donate, etc. Bundle of rights between two or three parties is considered as a transaction process that also fascinated the idea of democracy and capitalism. So, land is also a part of bundle of rights: it can be accessed through inheritance, acquired from others or bequeath parents.

### **2.1.3. COMMON AND PRIVATE PROPERTY RIGHTS**

This part devolves into the basic concept of common versus private property rights.

#### **2.1.3.1. COMMON**

According to Harold Demsetz, common ownership means a “right which can be exercised by all members of the community” (Demsetz, 1967, 354). It denies interference of state or any other individual, upon the communally-owned property. For instance, grazing of public land or fishery in open seas is considered as common property. Richard Posner shows that, in some circumstances, common property could be optimal (Alston and Mueller, 2015, 2259) and that it gives some kind of unity in society, where each individual enjoys the same fruits of the common property.

Further, Terry Anderson and Peter J. Hill showed that the process through which resources are “turned into private property can often lead to rent dissipation” (cited by Lee Alston and Bernardo, 2015). The natural recourses need to face the cries of fragmentation, for instance, the process of land fragmentation among indigenous people. Martin Bailey provides anthropological evidence from aboriginal societies that “resource

scarcity does not inevitably lead to private property”. The common ownership of natural resources among the indigenous would generate social relations and individual needs will fulfill with the help from others.

The common property flourished in the work of Marx, “property” is the means of creation of human relations to his nature. If human owned private property, then would alienated one from social bondings and create conditions of individual isolation. Following Marx, Hunt claims that “private property estranges men from his true identity as social being” (Hunt, 1979, 182). Private appropriation would destroy social bases of production, which can be owned for a common purpose. Marx was the only theorist who critically examined those aspects of property relations which are general (i.e. common to all societies) and those which are specific to capitalism (ibid, 283).

The notion of property rights can be incomplete without un-touching the contribution of Plato, considered as classical thinkers. Plato preferred common ownership of property, in his ideal state land to-be owned by farmers privately, because they need to produce for guardians’ class<sup>7</sup>. As in guardian class, production can be consumed in a common manner. Plato’s expression towards guardian class is defined in terms of, ‘friends have all things in common’ (Okin, 1979a, 31). This shows that Plato’s concept of common-ownership, however, it only applies to guardian class, while artisans are allow to possession of their private property (Sabine and Thorson, 1973, 66). Plato’s main aim to produce the greatest degree of unity in the state, and private property is incompatible in his state of nature. The ownership of private property for guardian class would obscure them from reasoning and would hamper smooth functioning of the state (Vermani, 2012, 85). Communism of Plato consists of two elements: abolition of private property and abolition of family because it inculcates corruption and family enlarges nepotism in the society.

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<sup>7</sup> Plato’s ideal state, consisted with three classes: philosophers, soldiers and artisans, philosophers ascribed as the rulers who can govern the society, soldiers who will protect, and artisans or farmers are the producer. The guardian class consists with rulers and warriors however; ownership of property cannot be allowed them.

### 2.1.3.2. PRIVATE

Ownership of private property promotes virtues like “responsibility, prudence and self-reliance,” it gives place to stand in the world, and such rights define individual’s confident or freedom and would be recognised and respected by the world (Waldron, 1988, 22). Further, it gives freedom to access control over private natural resources on the bases of necessary conditions of human development. Hegel’s *Philosophy of Right*, also shared same experienced that individual control over natural resources is a necessary condition of human development. As Harold Demsetz noted, a property owner who owns property indefinitely will optically maximise its value over and in time, rather than exploit it for short-term gain (Demsetz, 1967). In contrast, individual rights, where each member of the community is entitled to a separate resource packet, to the exclusion of other members, concentrates costs and benefits and thus creates constructive incentives (Krier, 2009, 141). Private owners have the right to exclude non owners, but the right to exclude is a feature of property rights in general, rather than the defining feature of private ownership in particular (Merrill, 1998).

“Ownership has nothing in common with possession” (Daube, 1979, 44), it gives clear distinction that the notion of private ownership, incompatible in the world of common-ship. Individuals’ ownership incurred the idea of absolute power over objects or things and such rights should be respect in the moral and rational basis under the supervision of government legitimacy. The concept of legal absolute power of an individual was the main principle of Roman law (ibid, 37). Absolute ownership prefers prevention of waste, it ensure that property should be cared for properly, or at least not wasted (Aristotle, politics, Book II, Section 5-6). Private ownership enables the owner to sell the whole property or else transfer to any other, for necessary purpose (Mccffery, 2001).

Aristotle’s *Politics* Book Two, elaborates “proper system of property for citizens who are to live under an ideal constitution” (Barker, 2009), and the critical examination in the system of communism. By criticising “common ownership” of Plato (Mathie, 1979, 25), difficulties especially in land ownership, there would be a conflict situation

among the workers, regarding their reward because, those who work less and those who work hard also get the same recompense of their labour (Waldron, 1988, 6). When a resource is held in common, any commoner who exploits the resource gains all the benefits of doing so for himself, whereas the cost-spills over onto everybody (Krier, 2009, 141).

So, Aristotle suggests if each person has their own plot, then they would get their reward independently. He preferred the concept of private ownership of property where each individual owns a separate property, for there would be less possibility of quarrels. Private property is inextricably linked a defense to the separate (Mathie, 1979, 15). At the same time, he also favoured the communal use of resources, by imposing tax on rich people (Waldron, 1988, 7). The notion of private property is inextricably linked with the justification of separate spheres of interest or household in the society (Mathie, 1979; Waldron, 1988). The essence of private property is to exclude others on the bases of law of property, which belong to individuals, such as house, land, food, etc. (Cohen, 1927, 12). Private ownership of property is recognised a some kind of sovereignty: such issues can be traced to the original discoverer or occupant which is dominated from Roman jurists and modern philosophers, from Grotius to Kant (ibid 15).

Phoudhan thought that exclusive ownership of property is considered as theft in nature (Proudhon, 1840). In a sense, that property was a right of an alien and if an alien dies then his property would be owned by a ruler or state: this condition also applies to individual. When property takes the shape of profit, interest, rents, etc., which can be earned without any labour, it becomes theft. Marxists thinkers criticise private property on the ground of class conflict. Private ownership creates conflict situation among the working class as a proletariats and property owning classes, on the ground that it deprives workers from their labour (Rubin and Klumpp, 2011, 5). Further, its major obstacle is attainment of welfare, maximisation, thus, common ownership would be the optimal in this condition.

#### 2.1.4. COMMODIFICATION OF VALUE

The ancient view of property literally opposes the modern, because idea of modern property is associated with capitalism and also shared some elements of socialism (Pocock, 1979, 143). Primitive concept of property, recognised as barter system—exchanging the goods was replaced by the advent of economic structure (especially currency or money in exchanging things). On the other hand, this capitalism system put a fuel on individualisation. Professor Parel states that, “money had a constant tendency to substitute itself for beatitude” (ibid, 141). In ancient city state, nor commerce, nor agricultural activities were developed. It has been mentioned in western theory of four states of human history: that men were first hunters, then shepherds, formers and finally merchants (Meek, 1976).

As well as, the Financial Revolution witnessed the rise of commercial activities and financial services. On the later stage, The Industrial Revolution also changed the scenario of property, which gave rise to commercialisation. The eighteenth century perception about “commercial society” was not based in the first instance of the perception of trade (Pocock, 1979, 145). It was only after the late 18<sup>th</sup> and early 19<sup>th</sup> centuries that revolutionary changes took place because of the production capacity of many countries such as England, United States and other European countries that encouraged trade system.

Further, changing property rules “can resituate people in positions that allow them greater freedom” (P Law, 1993-1994)<sup>8</sup>, so, this freedom of choice also enhance the notion of individual ownership of property. So how did ownership of land rights emerge among the aboriginals? In this context, Harold Demsetz interestingly illustrated an example of the Native American tribes who inhabit Labrador Peninsula, Quebec (Demetz, 1967, 351). In ancient period among the tribes, hunting was primarily practiced for the purpose of food and few furs for the family. Private land rights was absent and hunting was

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<sup>8</sup> Note, “Distributive Liberty: A Relational Model of Freedom, Coercion, and property Law,” *Harvard Law Review*, 859 (1993-1994).

practiced in an open manner, but when commercial “fur trade” was developed by European settlers, it led to the demand of allocation of private hunting territory.

The demand for furs increased hunting practices and finally created the situation of scarcity, so tribes started private hunting territories that were allocated for individual families, so that no one could interfere into another’s territory (ibid, 352). Pocock has also cited from Gibbon’s *Decline and Fall*, in which he elaborates the primitive Germans. German tribes were “pre-agricultural and illiterate; consequently they lacked money and letters, the two principal means of communication by which goods and information are exchanged within more civilised societies” (Pocock, 1979, 156). He also indicated that agriculture in historical perspective called as “the useful parent of the arts,” is seen rather as a necessary pre-condition of commerce, than a stage of society existing in its own right (ibid).

During globalisation property took different shapes with the advent of multilateralism, in which commercialisation of land was encouraged for the purpose of industry. With the growing commercialisation in agricultural activities, state government initiated agrarian land reforms (Velayudhan, 2014, 88). Private property ownership for market exchange in developing countries also impacted upon customary system, along with forced removal of communities (Forsythe et al. 2015, 7). Hayek argues that “commoditisation of property to its maximum extent is a necessary for individuals to pursue their own ends and in so doing, to pursue individual liberty” (Chandra, 2010, 24).

Private property is significant in this era and human societies cannot be imagined without ownership of private property that satisfies basic needs and condition. On the other side, property brings powers: the power of masters over servants, the power of masters over themselves (Pocock, 1979, 144). Hence, large accumulation of property also leads to corruption (Ryan, 1984a, 49). It creates the situation of corruption, in a sense that market exploitation by rich people and poor would not get chance to flourish their skills and development.

## **2.2 PERSPECTIVES ON PROPERTY RIGHTS**

This section deals with perspectives of property rights from different approach such as liberal, libertarian, utilitarian and Marxian. Liberal perspective is represented classically by John Locke. A utilitarian perspective is—basically associated with the idea of Jeremy Bentham by defending property, is the source of happiness and Marxian incline towards communal ownership of property.

### **2.2.1. LIBERAL**

Classical liberalism was propounded by John Locke (1689-1755), Baron de Montesquieu (1689-1755), Adam Smith (1723-90), Thomas Pine (1739-1809), and others in 17<sup>th</sup> and 18<sup>th</sup> centuries. This theory holds that free society and private ownership of property rights goes hand-in-hand in the society. Such ideas focus on individual freedom and rights from the community traditions. Edmund Burke (1729-97) was also a classical liberalist thinker. Under classical liberalism, the legitimacy of the state is based on the claim that it has limited moral authority to defend or to protect life, liberty and property (Fox, 2012, 14). Rights, including property rights, are inalienable. People can exchange items of property in a classical liberal world, but a classical liberal cannot consistently talk about people exchanging rights (ibid). Private property defines the spatial boundaries within which an individual can legitimately exercise his right of action.

Classical liberals maintain that rights, including property rights, are pre-political, meaning that they exist prior to the independence of the state. They viewed; citizens form governments in order to protect their rights in the state of nature. Classical liberalism is intertwined with natural law and it derives its sources from theological aspects. The primary differentiating characteristic of classical liberalism, relative to modern libertarianism, is the role of theological reasoning that is generally employed by classical liberals (Fox, 2012).

Locke endeavours to locate his idea on the basis of natural rights, right to live, liberties and estate and among them right to property is most prominent one. Individual possessed such rights by nature and it is not merely based on the arbitrary ruler (Ryan,



1984a, 15). As Locke, known as individualist and in the state of nature non-interference policy would be applied from the other without the prior consent of the owner. Locke's *Second Treaties*, explains the theory of mixing one's labour with a piece of land and made fruitful. In state of nature, right to property was given by nature to mankind in common and it needs to be preserved for their purpose (ibid, 16). Such properties must be respected by the government for individual purpose (Waldron, 1988, 3-4). On the other hand, the role of the government is to protect individual's basic rights. Locke firmly says that men who have no property may be governed despotically; they have no rights and are to be governed arbitrarily and absolutely (Ryan, 1984a, 20).

Locke's theory was criticised by James Tully, who demonstrates that an individual has no right to individualise property, because it is given to mankind by nature, in common form. All men have the common right and use over all things which has been provided by nature, but at the same time they have been debarred from private property within that domain (Tully, 1979, 123). Robert Nozick played a large role in reviving interest in Locke's views on property (Munzer, 2001, 2). By criticising Locke's mixing one's labour with something and to be owner, he illustrated, "spill of tomato juice in the sea, by thinking to own whole sea". This meant that an individual cannot own the whole sea, so it is foolish to spill tomato juice into it (Nozick, 1974, 174-75).

Famous contemporary evidence of this liberal thinking is to be found in John Rawls' *Theory of Justice* in which, principle of justice is remarked as important in understanding property rights. The idea of 'basic liberties' which include 'the right to hold (personal) property' or emphasis that justice should be fair (Rawls, 1971, 61). Thus property is useful to the owner because it allows him freedom of choice; but it is equally useful to others because it creates a predictable situation within which they may plan (Flanagan, 1979, 341). Rawls holds that "difference principle", where inequalities are justified if they benefit the least advantaged. He also states that the right to own property is one of the basic liberties protected by the first principle of justice (Rawls, 1971).

For Rawls, no property exists prior to social institution; justifiable property rights and distribution of property must be tied with self-respect; and the products of national

talents are social assets (Munzer, 2001, 67). He identified that each one should have equal rights which expand the concept of justice, in which everyone should be arranged in such a manner so that no one would be deprived from benefiting opportunities. Further, he argues that marginal people should get equal rights including property rights and that justice should be termed 'fairness' in the society. The concept of liberal ideology gave birth to individualism, capitalism and stress upon market economy, which might benefit and transform human existence to better opportunities (Pocock, 1979, 142). On the other hand, Nozick's sole book on political philosophy contains not only a critique of Rawl's on justice, but also, and more importantly, a dazzling clever historical entitlement theory of justice (Nozick, 1974, 149-231).

### **2.2.2. LIBERTARIAN**

Modern libertarianism, which came into existence from the beginning of the 1970s and is associated with the writings of Rothbard (1978, 1982b), Robert Nozick (1974), Schmidt (1991), Narveson (1988), and others. They draw some of their ideas from classical liberalism, but not on all aspects. Libertarians regard a person's natural right to freedom of choice and such a choice should be free of interference from other (Duncan, 2010). Like classical liberalism, modern libertarianism emphasises self-ownership, homesteading, and consensual transfer of property and states that human rights, including property rights, are inalienable rights (Fox, 2012, 20).

Libertarians, in the present sense, are ones who affirms the principle of self-ownership, which occupies a prominent place in the ideology of capitalism (Cohen and Grahm, 1990, 1). This principle is based upon the thought that every person is morally entitled to a full private ownership of property rights within his own powers. This means that each person has an extensive set of moral rights (which the law of his land may or may not recognise) over the use and fruits of his body and capacities. According to libertarians, individual's ownership of rights would be violated when a government uses property for public purpose by building library or park, etc. (Duncan, 2010).

The idea of libertarian theory can also be traced back to the work of John Locke, who was the founder of liberalism in which he talked about natural rights of freedom of choice and favour of limited government policy. During the 20<sup>th</sup> century the idea of libertarian was developed in the work of Robert Nozick, *Anarchy, State, and Utopia* (1974), in which he developed his idea from John Locke and states that government is legitimate only to the degree that it promotes greater security for life, liberty, and property. However, he justifies that state should play minimal role in protecting the security of the people and the function of the state is just like a ‘night-watchman’ (Nozick, 1974, 25). “The state may not use its coercive apparatus for the purpose of getting some citizens to aid other, or in order to prohibit activities to people for their own good or protection” (ibid, Preface p. ix). Individual’s ownership of rights would be violated when a government uses property for public purpose by building library or park, etc.

Libertarians believe that the primary right is right to freedom and a right against coercion from others. The right to private ownership is seen as an essential element of freedom, consequently the right to property is implicitly related with right to liberty. The right to property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty (Gaus, 2002, 241). Scholars of liberals believe that property is a means of preserving liberty. Libertarians such as Robert Nozick emphasised upon property as one of the fundamental elements in a theory of respect for persons (Waldron, 1988, 15).

Robert Nozick argues for the theory of justice which made the justice of individual, appropriation-centric rather than distribution central and placed a conception of self-owning individual right-holders at the centre of the argument (Reeve, 1991, 97). Nozick and Rothbard disagree very sharply over the legal imposition restriction of the state; both adamantly believe in the idea of individual self-ownership. Both argues for it effectively by dismissing alternatives; if we do not own ourselves, others must have part-ownership of us, and we are the partially slaves of others people (Ryan, 2002b, 235). The state whose only purposes is to protect citizens against acts of coercion which includes

murder, assault, theft and so on, as a result, libertarians regard the modern welfare state to be illegitimate (Duncan, 2010).

The central attraction of libertarian theory advocates justice in terms of moral aspects. Robert Nozick's famous version of theory of justice can be found in 'entitlement theory', in which distributive justice primarily consists of three principles- (i) the principle of justice is the original acquisition of holdings, (ii) the principle of justice in transfer of holdings and (iii) the principle of rectification for violations of (i) and (ii). According to Nozick, "the complete principle of distributive justice would be simply that a distribution is just if everyone is entitled to hold what they possess under the distribution" (Nozick, 1974, 151). Therefore, property rights would be one of the important aspects of distributive justice of an individual.

### **2.2.3. UTILITARIAN**

The main exponents of the utilitarian theory are Jeremy Bentham, John Stuart Mill, Wilfredo Pareto and others. Utilitarian theory is basically individualistic in nature and assumes –rationality in the modern sense that individuals maximises utility or happiness (Solimano, 1998). Bentham defines property it as the "basis of expectation," from which individuals can derive happiness from possessions.

Ironically, Bentham is dismissive about property rights as a natural right. In order to secure property, law and government must play significant role, in fact the "law creates expectation is a source of happiness, and also a potential source of unhappiness" (Ryan, 1984a, 98). As Jeremy Bentham famously stated, "property and law are born together, and die together. Before laws were made, there was no property, take away laws and property was ceases" (Bentham, 1975). He sees property from the point of legal bases and secondly, this right should be protected and preserved by law of any state.

According to Bentham, the right to property is the main way to achieve 'greatest happiness in greatest numbers'. The possession of property by one man should not be interfered with the possession of property by another man, when this condition is not fulfilled property becomes the theft (Mahajan, 1988, 390). Property rights are justified in

general by the need for security, for making the consequences of action calculable, and for avoiding the frustrations that follow uncertainty and disappointment, certainly a limited conception of social security (Sabine and Thorson, 1973, 618). Utilitarians not only embrace the legal analyses of property rights but are also influenced by the economic analysis of law. Utilitarian argument for private property concerns the role of markets in promoting productive efficiency and social prosperity (Waldron, 1988, 9).

#### **2.2.4. MARXIAN**

Marxists theory views 'private property' not as a right of the individual, but as a condition which determines relations of production according to the stage of historical development (Gaubu, 1981, 363). This theory was propounded by Karl Marx, Engels and other Marxist thinkers. Marxian proposed that private property has not existed from eternity like the state and it is not a natural right. The state was created by a class of property-owners in order to protect their private property. Therefore, it is an instrument of exploitation of the dependent class which does not own property.

Private property divided the society into two parts i.e. haves and have-nots, who assumed the positions of dominant and dependent classes, respectively. In ancient society, the division took between masters and slaves, and in the—medieval society, it was between the lords and serfs and in modern capitalist society, the bourgeoisie and the proletariat. The division was made under the capitalist. The proletariats are the property-less class and are completely dependent upon wage-labour. As a Marx and Engels, in their Communist Manifesto (1848), observed- "*Property, in its present form, is based on the antagonism of capital and wage labour*" (cited by Gauba, 1981, 364).

Private property is a divisive force, it is a source of conflict, not of harmony, it is a mode of exploitation and not cooperation. It denotes the means of production, because it is the mode of ownership of the means of production, which determines how the 'have-nots' will earn their livelihood. Marxism therefore, advocated the abolition of private property in this sense, not personal property.

Marxist thought that with the abolition of private property would lead to the end of exploitation. The abolition of private property does not imply abolition of property as such, it involves changing the pattern of ownership of property, from bourgeois ownership to proletariat ownership, from class ownership to common ownership.

## **2.3 PROPERTY INHERITANCE PRACTICES**

Every society is guided by their own system of inheritance after the death of the owner. Each community has their own system of rules and regulation which is derived from a numerous norms and practices, as well as values. The law of inheritance is a body of rules and regulations which govern the transferring of assets and liabilities, after the death of heir. In this section, pattern of inheritance practices has been examined in different realms such as in religion, patrilineal, matrilineal and bilateral society. Lastly, the practice of property rights in customary and statutory laws is also fleshed out.

### **2.3.1. RELIGIONS**

The religious laws are not the laws of a particular state, but it is based on the communities' belief which can be universally applied among these communities (Mohsin, 2010, 196). These laws are mainly concerned with communities' life-style which include succession, marriage, adoption, divorce, etc. and such laws independently operate from each other, such as, Hindu Law, Muslim, Christian law, etc. These religious laws are different from each other and do not constitute a family law, it can be grouped as family only because they are based on their religious faith (ibid). In regard to inheritance, many aspects of the ancient Indian, Japanese, Roman, Greek and Iranian laws also were objectionable and discriminating in nature<sup>9</sup>.

In primitive days, religion played a significant role in the development of legal property rights. Communities are guided by their own religious aspect with regard to property rights. Under Islamic law of inheritance, females have also right to inherit property with absolute power under the Holy Quran after the reformation. Such a right

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<sup>9</sup> Inheritance and Women's Rights. Retrieved from <http://www.muslimpersonallaw.co.za>inherita...> Accessed on 9<sup>th</sup> May 2016.

was provided to women at the same time when women in the rest of the countries were not even entitled to hold the property. Islamic law does not recognise the concept of community or joint family property as in Hindu laws, and it recognises absolute ownership (Mohsin, 2010, 62). It provides equal property rights between men and women, though it does not have the concept of stridhana or women's estate.

Under ancient Hindu law, property can be divided into two kinds: joint family and separate property. Joint family property is one, which is ancestrally inherited by an heir or acquired without the aid of ancestral property (Sivaramya, 1970a, vii). The very nature of joint family property gives contentious preference to male members in the family. On the other hand, separate property or self acquired property is earned by individual's skill and labour and owners have absolute control over it. Christian law is very fragmentary and essentially the public law of a particular society is made up by the Roman Catholic Church (Moshin, 2010, 199). The sources of Christian law can be found in Napoleon code and classical Roman law, in which individuals could have the right to ownership, to absolute and exclusive property. The concept of ownership of property was absent in the Christian world. Only in the 19<sup>th</sup> century, laws were made and females also enjoyed individual property rights, for example Married Women's Property Act 1882 (ibid).

### **2.3. 2. PATRILINEAL**

Women's access to inheritance rights is often mediated through the patrilineal system in the patri-local societies. Under patrilineal system inheritance rights devolve from the male lineage to the male heir. In patriarchal societies, women do not own or have access to land and other forms of property. Land inheritance is through the male lineage and women can only have access to land through their husbands and sons (Munthali et al. 2003). In many traditional societies, in Sub-Saharan Africa, land use, housing, and the transfer of land and housing between generations is regulated by customary law, which largely excludes women from property ownership and inheritance (Richardson, 2004, 19).

Most of the African countries are influenced by patrilineal system of inheritance rights. For instance, Tswana in Botswana, where bloodlines and ancestry are traced through male relatives, a woman's rights are more secure if she has an older son who is the heir to his father's estate (ibid). Asiimwe's article, *Statutory Law, Patriarchy and Inheritance: Home ownership among Widows in Uganda*, argues that Ugandan inheritance practices are patrilineal and under this, widows are denied property rights of her husband by the customary and statutory laws.

In some of the Latin American countries, patrilineal land inheritance system is common among the indigenous people, especially in Mexico (Deere and Magdalena, 2001a, 28). The main patrilineal societies in Ghana are the Ga tribe in Greater Accra region. Most of the South Asian countries (Dube, 1996) also practice patrilineal system of inheritance, such as parts of India and Bangladesh, Nepal and others.

The changing notion of property rights from communal ownership to private ownership is widely popular in most of the developing countries due to influx of population and their income-generation (Quisumbing et al. 2001; Otsuka, 2001). Further, its impact can be reflected in most of the South Asian countries' pattern of land inheritance system, from matrilineal to patrilineal (Agarwal, 1996a). It also gave rise towards bilateral system of inheritance which can be found in Southeast Asia, e.g. in the Philippines (Estudillo et al. 2001). This can also lead the society to be more "egalitarian" in terms of inheritance system, because both sons and daughters inherit property from their parents (Otsuka, 2001). Hence, widows have no interest in both patrilineal and matrilineal system of inheritance, they are often left out without no assets because of a traditional presumption that they acquired during marriage with husband (Kutsoati and Randall, 2012, 2-3).

### **2.3.3. MATRILINEAL**

Matrilineal is the system that defines lineages through female bloodlines, whilst "man's children do not belong to his kin group and are not entitled to inherit his property" (Ferrara and Annamaria, 2012, 5). Morgan states that, matrilineal system was prevalent



before the origin of patriliney. Engel's also describes that in the early primitive society, matrilineal system of inheritance was practiced on a common basis.

Gradually, the notion of private property came into existence with male dominance and matrilineal system faded under the shadow of the patrilineal system. It is still in practice by a few tribal communities, such as tribes of Northern Ghana (Akans), Bemba in Zambia, in India only small pockets of south and the northeast regions i.e., Nayers and Mappilies in Kerala, Garo and Khasis of Meghalaya (Das).

#### **2.3.4. BILATERAL**

Bilateral inheritance of property rights interestingly allows both sons and daughters to inherit parental property. The strongest evidence of bilateral inheritances practices can be illustrated from the Andean region of South America, Ecuador, Peru and Bolivia (Deere and Magdalena, 2001a, 20). Nangudi Vellares of Tamil Nadu State in South India also practice the bilateral inheritance system (Agarwal, 1996a, 83). Though, both sons and daughters inherit property, the preference would be given to son with respect to land inheritance system and the youngest son and daughter is favoured with the largest portion, with the expectation becoming the custodians of parent's old age (Deere and Magdalena, 2001a, 21).

Inheritance rights always favoured men, even in the areas where bilateral system was supposed to be predominant: such pattern was supported by norm and practices of patrilocal and virilocal marital residence. In spite of carrying such loopholes, it has been argued that the system of matrilineal and bilateral inheritance of property rights advantaged many women in granting economic and social security (Agarwal, 1996a, 153).

#### **2.3.5. CUSTOMARY PRACTICES VERSUS STATUTORY LAWS**

Customs can be defined as the adoption of common practices and habits conveyed from one generation to the next and has becomes the rule of the particular community. When rules and regulation evolve with the community, such usages and customs are enmeshed

with communities identities. Customary property rights regimes are often referred to as non-formal or *de facto* systems, which have evolved in societies with the notion of local legitimacy (USAID, 2006, 9). It may be argued that customary laws is a mixture of various practices that have been inherited, observed, transmuted, learned and adopted (Knight, 2010, 3).

On the other hand, customary laws exhibit the characteristic of “flexibility”, in a sense that it developed with the changing behavior of economic, social and political environment (USAID, 2006, 17). The flexibility and local legitimacy features make it difficult to replace certain element, which is based on gender discrimination. Customary laws are challenged and it has weak point in many areas, including inheritance land system. It does not recognise a woman’s ability to own, inherit land and property ownership (Mennen, 2012; Benbih and Katz). In most of the developing nation, “90 % of land transactions are still governed by customary legal” (Knight, 2010), the decisions and techniques of interpretation of rules and regulations are legally binded under the customary practices. Legal initiatives are taken in order to eradicate gender-discrimination that often states fail to achieve.

The statutory system is defined in written laws (*de jure*) or formal laws enacted and enforced by a central or regional government (USAID, 2009, 9). Ownership of property and other natural resources are not only guaranteed in statutory laws, but also it’s a part of the customary laws of the indigenous communities. Knight argues that, the adoption of new administrative system of statutory laws which overrided the management process of customary laws, consequently, gave birth towards the implementation of customary rights and statutory laws (Knight, 2010, 4).

The continuous application of customary laws is incompatible with the legitimacy of statutory laws in the areas like inheritance, marriages, divorce, etc., for example, Hindu Succession Act 1956 (Amendment 2005) In India, women are allowed to become equal coparcener in the joint family, However, it also affronts the practices of customary laws of many communities. The Constitution of Kenya 2010 was modeled on the ground of gender equity, thus it “provides a platform for reconciling conflicts between customary

law and statutory law” (Kamau, 2005, 3). The Succession Act (Amendment) Decree No.22/1972 of Uganda, which guaranteed widow’s right to ownership in the matrimonial property (Assiimwe).

## **2.4 PROPERTY RIGHTS AND WOMEN EMPOWERMENT**

The concept of property rights theories lies within the domain of socio-economic, political and legal, underpinnings. An individual can demarcate his or her property within the social system which is made up of families and communities. Then society plays a significant role in demarcating each role for safe-guarding the basic rights of an individual. The interdependence among the social, political, economic and legal is considered as fruitful in securing property rights.

### **2.4.1 ECONOMIC**

In terms of economic perspective, property rights helps in two important levels: one in income-generation from agricultural production and another to combat financial instability and poverty crisis in the family. Ownership of property rights would empower women in economic strategy, possession itself would likely take credit from financial institutions. Further, with the help of financial security they would be engaged in political activities and even take part in decision-making process (Domingo, 2013, 8-9). Property right is the main ingredient in flourishing economic growth and development, which is an important model of The Golden Thread Narrative of the United Kingdom government. Similarly, secure property right is considered as pre-requisite in the growth of economic (Phillips, 2008, 2).

Ownership of land rights also empower women economically, for example, Gouthami and Rajgor’s (2008), study about women of Gujarat analysed that land entitlement in their own name would likely give them a sense of economic empowerment in terms of self-worth and sense of respect in the family and villages. It has been identified that women’s economic empowerment can be achieved through property rights. It confers direct economic benefits as key input into agricultural production, source of income from rental or sale, it enhances women’s livelihood options and can be

used as a collateral for credit: it is the heart of national and gender policies and address direct entailment to social security benefits, child care in terms of divorce settlement (UNDP, 1995; USAID, 2006; UNESCAP, 2013; Kelker and Maithreyi, 2013; Forsythe et al, 2015; Kenney and Ana Paula, 2016).

#### **2.4.2 SOCIAL**

According to the social point of view, property rights enhance women's status in household as well as in community and can be helped in greater bargaining power within the family (Scalise, 2011). Hence, property rights not only empower women economically, but also empowers socially, in the family as well as in the society. The entitlement of property helps to improve women's role at home and outside and also helps to improve the decision-making processes and powers.

The lack of decision-making authority and representation in property distribution deteriorates the position of women (Bezabih and Holden, 2010; Sircar and Pal, 2014). Women's ownership of property is assumed to be the—means to bring changes in ideology and the structures of patriarchy, within the family and in social relations (Kelker, 2013, 3). Moreover, it enables women's independent exercise against gender discrimination and it also helps to improve social relations with the communities.

Land ownership strengthens women's bargaining power in the market place, especially the control over arable land and bestows upon her greater intra-household bargaining power, along with allocation of household subsistence as compared to landless women (Agarwal, 1996a; 1997b). The social norms or patrilineal or virilocal society restrict women from ownership of independent land. Amartya Sen's essay titled, *Many Faces of Gender Inequality*, also highlights that in many societies ownership of property is unequal and such type of inequality for women further make it harder to enter in economic and social activities (Sen, 2001, 5).

However, women's unpaid labour in the family cannot be counted as labour and their family agricultural production is also managed by their husband or male members. Allendorf's study shows that those women who have control over land are likely decisive

in household matters and their children are assumed to be healthy and less malnourished (Allendorf, 2000). Land as a property not only improves women's wellbeing but also impact the health of child, for it provides availability of nutritious food. Similarly, property rights over housing, provide shelter, dignity, and means for accumulation both for urban and rural poor people (Meinzen-Dick, 2009). Further, "Land is a crucial resource for poverty reduction, food security and rural development (FAO, 2016).

Property right appears to be a critical issue for women when the household breaks down, for example, in the case of male migration, war, abandonment, divorce, polygamous relationships, illness or death (USAID, 2006). It can also impact upon intra-household decision-making, income-generating and acquisition, and women's overall role and position in the household and society (ibid).

### **2.4.3 POLITICAL**

The holder of property ownership is effectively engaged in political environment (Domingo, 2013, 6). Property can be used in terms of credit that actually enhances the capacity to participate or compete for the positions of political power and representation (ibid, 8-9). When women are engaged in political process or activities, they can also contribute in the decision-making process. "Effective political support through the means of political leadership is necessary for economic development, on the other hand, secure property rights is a prerequisite for economic growth" (Phillips, 2008, 2). Politically, ownership of property rights used as means securing and exercising political patronage and economically, it was considered as the medium of wealth-generation from land-based resources (ActionAid, 2013).

### **2.4.3 LEGAL**

Legal positivist's theory of property rights would argue that a person's rights to property are determined and protected by the law (Fox, 2012). The idea of legal positivists was developed in 18<sup>th</sup> and 19<sup>th</sup> centuries by Jeremy Bentham and John Austin and later phase was contributed by the H.L.A. Hart. Obviously, legal property right is managed within the domain of the state legislative system. Ownership of property rights would bind

individuals through the network of legal rights, and under this, judicial mechanism can be performed on the basis of equal and transparent approach (Mercatus Center, 2008). Social practices and law should protect the rights of an individual in equal basis, the minority perceive state's legitimate obligation as an instrument of justice. Law and economics scholars assume that "law is a manifestation of social policy" (Landes and Richard, 1987).

The UN Commission on the Legal Empowerment of the Poor, which looks at property rights on the legal bases, and states that it is one of the means of empowerment of an individual. They state that, "*property rights help to establish clear ties of rights, obligations, responsibilities and recognition in a community*" (UNDP, CLEP). Legal ownership of property would be identified as the recognition of women's position and their sense of empowerment in the communities, or in the society. Further, the Report of Commission on the Legal Empowerment of Poor (CLEP-UN, 2008) reported that in most of the developing countries, rule of law with respect to equal property rights has not been functioning in smoothly and such situation is the root cause of poverty. In these countries women are still "disadvantaged in many statutory and customary land tenure systems" (GENDERNET, 2011; 2012).

## **CONCLUSION**

The theory of property rights inculcates the liberty of an individual upon certain things. If an individual owns any property, he or she will have sovereign power upon the particular property. Land is a real property, which play significant roles in agriculture, shelter and denoting one's identification. The genesis of property rights can be traced back to primitive society in which land was communally owned in a common manner. Gradually, the growth of human population encouraged agricultural activities and people started fencing their particular land which they had cultivated in the past.

The possession and ownership took the form of rights and it became necessary for the state to look after it. Various rules and regulation came into existence for the protection of communities' rights. For instance, Greek, Roman, Common laws, Hindu

law, etc. was created on the bases of communities. Though, some of the laws are modified, but dominant numbers of communities are still guided by the same laws in spite of reformation.

The theory of property rights took evolution changes from ancient to modern era. Property rights changed its feature from common to private, and in the modern stage private property exhibits its prominent role. The notion of common ownership of property came with the idea of Plato. He was widely known as—functionalist specialist, in his ideal state which was divided into three classes i.e. guardian who serves the state, soldiers protects from the external aggressions and artisans who produce. Guardians, called as philosopher or rulers class were denied the ownership of property. If guardianship involved the ownership of private property it would not be a dedication of life to the state. They only meant for serving the state. However, communism applies only to the guardian class that is, to the soldiers and rulers, while the artisans are to be left in possession of their private families, both property and wives.

This theory of Plato was discarded by Aristotle, according to him, the institution of family, marriage and property are time-tested institution. They are all part of civilisation. Ending the institution of family, marriage and property will not be a progressive step; it will be going back to a stage when man was living a barbaric life. Thus family provides emotional security and it is within the means of primary socialisation. Aristotle was aware of the problem of concentration of wealth in the hands of few with the system of individual ownership. Here, he suggests a common use of such property. It means rich people can be taxed and their property can be used for a common purpose. Paradoxically, according to Aristotle, common property is the main element of conflict, in a sense that, those who work harder get less credit and those do not work harder get more money than they deserve. He suggests that private property endorsed the happiness and generosity by enabling people to do services for their friends and companions.

The notion of private property was developed among the Enlightenment thinkers, such as Hobbes, Rousseau, Locke and Kant. According to Rousseau, private property

creates inequality in the institution. With the development of property, self-interest and human ego emerged among the people. Man who possesses property harbours a superior feeling, over others who do not. In order to solve the problem, law and state should provide enough property for every individual so that even the poorest will become independent. Further, among them Locke's theory of property stands in building the pillar of private property on the ground of natural rights.

The classical liberal's states that property rights are pre-political which means that it exists prior to the formation of state, and therefore citizens form government and law in order to protect their rights. Liberal theory gives the concept of self-ownership of property. Private ownership of property rights and free society, goes hand-in-with-hand in the society. Similarly, under classical liberalism, the legitimacy of the state should be based on minimal. John Locke was individualist and ascribed to less interference from the other. An individual can become the owner of a property by mixing his labour with the particular property. So, the mixing of labour theory such as tilling and cultivating can be used as the product determines individual's full ownership over a particular property.

Further, this liberal theory came into the form of libertarian in the work of Robert Nozick. He argues that primary right is right to freedom and a right against coercion from the other. He advocates justice in terms of moral aspects which can be found in his 'entitlement theory', which consists of three principles i.e. original acquisition of holdings, transfer of holdings and rectification for violations of acquisition and transfer of holdings.

In this context, according to Robert Nozick, the complete principle of distributive justice would be achieved when everyone is entitled to the holdings of what they possess. On the other hand, utilitarianism theory is based on the ethical aspects of modern welfare, economics and cost-benefits analysis. The principles of utilitarianism are often expressed by the phrase, 'the greatest happiness of the greatest number.' Bentham says that security of property right is a major condition in achieving the greatest happiness. He states that the main aim of law should be based on the equal distribution of property.



Marxist theory stands for the abolition of private property with the socialist property, which will lay the foundation of classless, stateless society. Private property creates class division among the have and have-nots. So, it needs to be abolished with a socialist revolution under the leadership of class-conscious workers. Proudhon also supported the condemnation of the institution of property, his view was 'property is theft'. Property is theft in the sense that labour's profit is enjoyed by the capitalist class, because the labour will not get—real profit. He states that property is a tool of exploitation of the weak by the stronger class.

Every society is guided by their own system of inheritance, for instance in patrilineal system, property is inherited by the sons, whereas in matrilineal, daughters are the sole heir. In the bilateral, interestingly, both son and daughters have equal inheritance system. In most of the bilateral society, ironically son preference is very common. Widows do not enjoy ownership of property in all these system, which shows the discrimination against women with respect to property. However, customary laws of different communities also discriminate women from benefiting their inheritance rights. Statutory laws are also there to protect the rights of women and various reforms are also implemented from state level to global level. The position of women is still unaffected in most of the areas especially in inheritance of property rights. In this context, effective initiatives need to be brought by state governments, civil society, non-governmental organisation, etc. from grass-root to global level.

The concept of property rights lie within the domain of socio-economic, political and legal underpinnings. The position of women would be identified with her ownership of property within the families and communities. However, the interdependence among the social, political, and legal aspects play significant roles in securing women's property rights. Command over property rights give women their sense of empowerment in the society. Economically, it is considered as the medium of source of income from the land-based resources because property rights immensely help in the income-generation from the agricultural production. It can be also used as a collateral credit from the various financial institutions or governments, during financial and poverty crises in the family.

From the social perspective, property rights enhance women's status in household, as well as, in the community. The entitlement of property would help improve women's roles at home and in the community level which also encourages bargaining power and control over arable land. Those women who possess ownership of property would be recognised and respected by the society and it also enables women's independent exercise. Similarly, property plays a significant role during the breaking of household, or male migration, divorce, polygamous relationship, illness, etc., in the family.

Politically, ownership of property rights is used as a means to engage in the political sphere. Property helps to take credit that actually enhances the capacity to engage in the political power and representation. When women participate in political representation, they would likely contribute in decision-making process, as well as, they can also involve in different land reform movements. Legal entitlement empowers more independence on the ground of discrimination. Legal positivists argue that a person's property rights needs to be protected by the law on an equal basis. A property right from the legal basis is one of the means of empowerment of women, and legal ownership would be identified as the recognition of women's position in the society.

## **CHAPTER III**

### **PROPERTY INHERITANCE LAWS FROM FEMINIST PERSPECTIVES**

#### **INTRODUCTION**

Gender justice, in respect to PIL is considered as a key to women's empowerment. It has been a contentious issue in the domain of a patriarchal structure, in which men and women do not have equal inheritance of property. Different tribal communities are governed by their own customary law or religious settings which are assumed to be gender-biased in nature where women have to compromise with their rights. The notion of patriarchal/patrilocal system carries comprehensive gender-bias especially in regard to inheritance, marriage, divorce and others. In order to address such issues, the contribution of feminist thinkers is considered incommensurable. The main aim of the feminists' theory is to accomplish gender equality, with the conception of an egalitarian society, even though, they adopt diverse paths to achieve the same goal. Several initiatives such as international laws, conventions and conferences have been also taken from a local to global level. These ensure the development and empowerment of women in matters to property inheritance rights. However, the many grey areas are conspicuous as well. Women's rights—especially property rights—are mediated through male-domination, which is why, they have to be adaptative within the given structure of the society.

The objective of this chapter is to understand the tribal women's perception in regards to their rights: and also their sense of deprivation or empowerment, in the context of PIL. The chapter is an attempt to examine the research question: what are the various feminists discourse on PIL and their relevance in a tribal society? With this objective and research question, it tries to find the precise positions of women from the feminists' perspectives and approaches, on property inheritance. An understanding the dominant mindset and setting of a culture that places women in marginalised category.

### **3.1 GENDER DIMENSION OF PROPERTY RIGHTS**

Gender and its relation with property rights determine women's position in the family, as well as in the society. Gender and property affects economic development, by allocating income generation from natural resources, especially from land. But in many areas, gender inequality with respect to property rights, has been critical issue, because of certain gender-biased programmes and policies. Gender inequality also affects the access of resource, products, and services. Gender stereotypes, assumptions and expectation-affect the participation of women (Narciso and Pedro, 2010, 50). The term gender refers isn't so much about biological differences as it is social construction or social factors (Okin, 1989b, 6). Women's access to property rights also revolves around the rhetoric of gender inequality, in many developing countries where customary norms and practices remain as the guiding principle. Especially, in areas like inheritance, marriage and divorce. Gender inequality with respect to property rights is socially accepted norm that has become the mechanism of land distribution in every household (Mukund, 1999). The complexities of gender theories have shaken the firm-footing of gender stereotypes and conventional theories (Squires, 2000). Further, both the practices and the study of politics have for long been notoriously masculine endeavors and women have been excluded from traditional political activities (ibid).

The initiatives have been taken from international conventions, like the three world United Nations International Conferences on Women (Mexico, 1975, Nairobi, 1985 and Beijing 1995) that was remarked for work on gender equality in the world. Besides that there is the international women's movement along with international convention. For example: the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) and international non-governmental organisations, are also working towards policy formulation. But the question that arises is: why have women always been interpreted from the male-relative with respect to control over property rights? (Mukhopadhyaya, 1998a). And why do women need to sacrifice their rights within the fulcrum of conventional practices? "Women's land rights emerged as a source of gender inequality in many areas, of the developing countries" (Narciso and Pedro, 2010, 52). Men were considered as the sole controller of productive

natural resources in most of the societies. Further, land was considered as a crucial resource and the command over a productive resource enabled poverty reduction, promotes autonomy, food security and rural development (FAO, 2016; Mukhopadhyaya, 2001b). As already cited, men and women do not always enjoy the same right to land (FAO, 2016). Especially, in Sub-Saharan African and South Asian countries where women's rights are mediated through men on the basis of marital status or derived from male lineage (Berge et al., 2014).

Gender inequality with respect to ownership of property is often interpreted through a patriarchal socio-cultural system in both customary and statutory laws (FAO, 2003; Adelman and Peterman, 2014). Global Entrepreneurship and Development Index, reported that women do not enjoy access to property rights as men and that, they are restricted either of legal provisions or discriminatory practices of the country (UNDP, 2015, 112). Customary laws can be assumed to be hindrances in the inheritance of property rights, where patriarchal social norms prefer male members in the community: this can result in inadequate independent access of ownership of land (Giovarelli et al., 2013; Berge et al., 2014). On the other hand, exclusion of women from land 'formalisation process or commercialisation', due to the biased land administration system, also affects women's control over productive natural resources (Lastarria-Cornhiel, 1997; Whitehead and Tsikata, 2003; Bezabih and Holdon, 2010). The denial of property rights suggests that women are part of families and may not demand a share in land distribution, in this context, Okin in her work, *Justice, Gender, and the Family* (1989b) rightly stressed on the fact that "women are centrally affected by the structure and practices of family life", and in order to achieve gender justice, family is an essential institution.

Further, when a woman acquires property in her own name, it reduces her dependency on a male partner and relatives as well as increases bargaining power within the household and also improves her chances of accessing extension (Agarwal, 1996a; Kenney and Ana Paula, 2016). Various reports show that women's inheritance and succession rights remains precarious in most of the countries (SIDA, 2015). Despite improvement in many areas, women empowerment is still affected by social beliefs,

norms and cultural values. That fact of the matter is that women still face discrimination in economic, political and social structures as well as in policies, institution and strategies (UNDP, 2015, 69). In a few countries, customary and religious laws prevail over civil laws and such laws discriminate against women in areas like family, marriage, economic rights and inheritance of property rights (women need to seek consent from their husbands) (UNDP, 2014, 74). To achieve universal realisation of gender and empowerment of women, it is critical to address the key areas of gender inequality, including gender-based discriminatory laws and practice with respect of women's inheritance of property rights (UN-MDGs, 2015, 31).

### **3.1.1. GREEK AND ROMAN**

Ancient Greek and Roman societies were patrilineal or patriarchal. In these societies women rarely inherited or owned property. In classical Athens, women could not enjoy the rights of citizenship: they were barred from attending or addressing the assembly and from holding public office, and service from military and political activities (Cohen, 2003). Although, daughters did not inherit directly they received a share of their parents' wealth as a dowry (Pomeroy et al., 2004, 46). According to Aristotle, female are characterised as passive, inferior and disabled by nature and it is the male who performs the active role. Further, he asserts that women are not considered as citizens because they do not possess virtues of worthy citizens. Women, in these societies, were thoroughly disadvantaged and oppressed and dominated by men. In fact, their roles were also dictated from the male perspectives (Okin, 1979a, 79). In the areas where Roman laws governed, women were under the guardianship of men, in matters relating to ownership and property laws.

### **3.1.2. SOUTH ASIA AND SOUTH EAST ASIAN COUNTRIES**

In developing countries like South Asia, where a majority of the population from rural areas with agrarian occupations women are denied the right to ownership and control of land (Velayudhan, 2014, 86). Women with land rights are not only symbols of economic status but also of social prestige and political power (Agarwal, 1996a). "Land is valued

not only for material reason and productive reason, but also for symbolic reasons in terms of identity, status and hierarchy within a given social context” (Rao, 2005, 4701). Further, Roy argues that control over property and productive natural resources also reduce poverty in rural areas, especially in South Asian regions. However, these countries have fewer number of women controlling over land, which is considered as significant for sustenance. South Asian countries basically rely upon agricultural activities for livelihood approach. Agarwal argues, that arable land is the most valuable form of property, for its economic as well as political and symbolic importance, and it not only helps in wealth creation but also, provides a sense of identity and roots within the village (Agarwal, 1996a, 17).

Most of the South Asian countries live in a patrilineal and patriarchal society, in which the father plays the role of the mediator with respect to property inheritance rights. However, there are a few exceptions: there are in fact a –few pockets of states where matrilineal and bilateral customary practices still governed the communities. For example, the Garos and Khasis of Meghalaya, Nayars of Kerala and Moors of Sri Lanka follow the matrilineal system in which property is inherited through the mother’s lineage. Legally, there is also the recognition of equal rights in the statutory laws of all the states in India. For instance, the Hindu Succession Act 1956 (Amendment 2005), in which, gender equality is in respect to property inheritance rights, for Hindu women. However, among the South Asian countries, legal ownership is accompanied with legal restrictions in the case of disposal of any property. For instance, “among the Jaffna Tamils in Sri Lanka, a married woman needs her husband’s consent to alienate land which she legally owns” (Agarwal, 1996a, 19).

Another common practice in the South Asian-region, is that women are barred from ploughing land because of customary norms. This invariable leads woman to depend on a man (Rao, 2005a, 4701). Even if they own land, then would likely depend upon man for agricultural activities, and hence, puts restraint from independent ownership of property rights. In 2002 ‘Women’s Bill’ was passed under 11<sup>th</sup> Amendment of the Civil Code in Nepal, on the ground of equal inheritance rights, to unmarried daughters (Bhadra and Shah, 2007). Undoubtedly, daughters are granted equal rights in

ancestral property, it has been generally agreed that in reality, it has not been implemented (UNWOMEN, 2014, 47).

In Pakistan, women organisation known as the Women's Action Forum in 1981 was formed, espoused by discriminatory laws against women (Mumtaz et al.). Women do not inherit property and widows lose their customary rights to inheritance if they remarry outside the deceased husband's family in four province of Pakistan (Sind, Punjab, Baluchistan, NWFP provinces) (Velayudhan, 2014, 92). In most of the cases, technically women's names are enclosed in transfer paper on inheritance. However, in practice her brother possesses the land and she may receive only share in production as a gift (ibid 93). In the case of Nepal, women are the main producers and providers of food but they always looked down upon, as a minor and men are considered 'superior'. Women enjoy landed property in customary laws in Sri Lanka, but they were always provided poor quality unproductive and lesser quantity of land (ibid106). Such kind of discrimination leads towards gender inequality, and it has been noted that the lack of enabling land administration, lack of awareness including legal awareness, need to be addressed in a community level. Similarly, Bhutanese women also rarely own property, because land is under the name of male members (UNESCAP, 2013, 11). On the other hand, land fragmentation is also a reason for women not being recognised as legal landowners (Dave, 2013, 289).

Saxena's study of rural India-identifies social norms as a barrier to women's control over the land, they she may have legally inherited in her natal village (Saxena, 2013, 228). Taking loans from government and different institutions help. However, even the loan-taking scenario is a tricky one. For, in most of the South Asian countries such as India, Pakistan and Nepal, a large number of men migrate to greener pastures, leaving women as guardians of the land and agriculture. However, in times of crises, the woman cannot avail loans, because the land remains in the name of the male member (Kelker, 2013, 72). "Nepal found that children whose mothers owned land were 33% less likely to be malnourished" (Mor, 2015). Women only enjoy usufructory-rights in the land rights,



which also hampers for the purpose of collateral system, *de facto*<sup>1</sup>-land rights also affect the life security of most women in South Asia. So, the demand of effective *de jure* rights, are very crucial for women in rural areas. “Sub-Saharan Africa and Asia, men own a larger proportion of the land area than women” (Campos et al., 2015, 14). Property rights in South Asian countries are mediated through kinship or men-interpretation and a strict focus on legal rights, which can jeopardise women’s rights to land, often unrecorded (Rao, 2005a, 4703). Further, ownership of land, is concentrated mostly in male hands in a patriarchal society (Saxena, 2013, 234).

In India, Nayars of Kerala and Garos and Khasi of Meghalaya are predominantly matrilineal societies, which define the unique position of women. But studies show that there is growing masculine domination in economic affairs, household income and property, even in matrilineal and matrilocal societies (Mukund, 1999; Kelker, 2013). The process of privatisation among the rural and indigenous people also impact the women’s land rights system. In this context, Kelker’s study on widows of Jharkhand reveals that women come under the attack of traditional practices, where they were treated as ‘witches’ so that they cannot own the land of husbands and male relatives (Kelker and Maithreyi, 2013, 8). Rosemary Dzyvichu’s article, *Gender and Livestock in Nagaland*, expounds that women cannot inherit property due to a strong patriarchal system and all the decisions are taken by the male member with respect to property rights (Dzyvichu, 2013, 177). Sejal Dave studies on Gujarati women, also justifies that patriarchal mindset and social biases debar women’s inheritance rights, because of son-preferences and male-member-owned-traditional-land practice (Dave, 2013, 288).

In most of the Southeast Asian family systems are generally liberal towards women, where they are rarely excluded from economic opportunities and there is less-son-preferences (World Bank, 2001). Women play significant roles in economic activities and manage their family system. These countries have their own system of customary laws with respect of inheritance rights. For instance, in Laos, bilateral inheritance practices are common among ethnic Lao communities. It is customary to give property to

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<sup>1</sup> Women can own land only for particular period, because the titling of the land in most of the developing countries and whereas *de jure* rights to legal ownership of property or other assets.

the youngest daughter who takes care of the aging parents. “Women in Lao have greater access to and control over land, since more than 50% of women live in areas with strong matrifocal and matrilineal traditions” (World Bank, 2014). Among the matriarchal communities of the districts of Kuala Pilah, Rembau, Jekebu and Tampin of Negeri Sembilan in Malaysia, property vests in female community members and all ancestral property is strictly entailed in woman (Ariff, 2009). A woman, with independent property rights, can clearly show her position in handling their family and economic empowerment which further entails her to an independent life.

Ownership of property is closely related to the power and empowerment process. It represents an important cultural resource, a productive factor and capital assets: and those who have control over it are likely to have a certain amount of power, especially in rural areas (Lastarria-Cornhiel, 2005b, 1). Similarly, land rights for women are very crucial, in a sense that, they have to look after the survival of a household. Land is considered as a significant natural resource for human sustenance, where the household income completely depends upon the agricultural activities, especially in rural areas. In this context, denial of property rights result into the continuous subjugation of women in socio-economic and political spheres. For instance, Narciso and Pedro’s studies on women of Timor-Leste, expounds that Timor-Leste society mainly followed a “patriarchal, patrilineal and patrilocal clan system,” in which women are not allowed to own or inherit property (Narciso and Pedro, 2010, 53). They further stress that the existing customary rules and practices are the greatest obstacles in attaining and enjoying equality rights in its totality, in this society.

Customary law prevents women from accessing title to land in Cambodia. In Cambodia, women are considered to hold a subordinate status, and men exercise the decision-making power in the household. Land rights are usually in the names of male head of household (USAID, 2006). Customary practice and intra-household dynamics assert that women receive their husband’s permission, to include their names on the land title (ibid).

Philippines has undertaken initiatives to promote gender equality and women's empowerment, for instance, the Comprehensive Agrarian Reform Law (RA 6657), which guarantees equal ownership rights especially for rural women (USAID, 2006, 79). Customary and religious law in the Philippines has a major impact on how vigorously the civil law is followed or enforced. For instance, according to the Muslim personal law in the Philippines, a woman must require her husband's consent in acquiring property by gift (Judd and Dulnua, 2001).

**Table: 3.1**

**Diversity and Inequality in Selected Asian Countries**

<b>Governance System/Zone</b>	<b>Examples of Countries</b>	<b>% land owned by women</b>	<b>% of female participation in economic activity and agricultural work</b>		<b>Sex Ratio (M/F)</b>	<b>Ownership rights (value)</b>	<b>SIGI Index Rank</b>
<b>Communist/socialist (state control of land allocation)</b>	China	-	45.6	64	1.06	0 (1)	83
	Vietnam	8.8	48.5	64	0.98	0 (1)	31
<b>Constitutional Democracies (South Asia) (patrilineal inheritance systems)</b>	India	10.9	28.6	61.8	1.08	.52(79)	96
	Pakistan	-	20.3	56.9	1.09	.52(79)	94
	Nepal	8.1	45.7	97.8	0.96	.52(79)	65
	Bangladesh	-	40.3	57.4	0.93	.52(79)	90
<b>Neo-patrimonial (South east Asia) (Bilateral/matrilineal inheritance system)</b>	Indonesia	8.8	36.9	44.2	1	0(1)	55
	Philippines	10.8	38.8	20.9	1	0.17(53)	7

Source: Social Institutions and Gender Index (SIGI) (includes family code, civil liberties, physical integrity, son preference and ownership) and ownership values (land, bank loans and other property) across 122 countries online available at <http://stats.oecd.org/Index.aspx?DatasetCode=GID2>; Sex ratio data retrieved from <http://www.cia.gov/library/publications/the-world-facbook/fields/2018.html>. Accessed on 29th August 2015; female share of agricultural holders and land ownership (FAO, 2011). Agriculture share in GDP (WDR, 2008) (Rao, 2011c, 12).

According to table 1, most women from South Asian countries owned only 10 % land in average except in China, Bangladesh and Nepal, in which data has not been mentioned by Social Institutions and Gender Index. This means women's land rights are interpreted from the male perspectives. Gender inequality with respect to property rights is clearly depicted by this table. In spite, this woman plays greater role in agricultural work and economic activities. On the other hand, East Asian countries' bilateral and matrilineal system of inheritance is very common, in which women appear to have gender equality with respect to sex, and ownership of property. Gender equality here, is also higher when compared to South Asian countries.

### **3.1.3. AFRICAN COUNTRIES**

Most of the African countries are patrilineal/patrilocal societies, in which women always have to compromise with the existing customary practices and norms of the particular community. Major modes of land acquisition in African countries are through inheritance practices with land being recognised as a source of wealth, livelihood, economic activities and power. Which is why, land is very crucial, especially for women (Cooper, 2010). Women have to depend on men and their relationship with property as owners or as users making men the real benefiter of the material side (Owen, 1996, 52). Similarly, in several African countries, married women do not own land but instead obtain usufruct rights through marriage (Kevane and Gray, 2008). For example the societies in Burkino Faso, Kenya and Uganda mediate ownership of property through the consent of men. For, there is a notion that men are bread winners and women are bread makers. The situation is very "grim in Western and Central Africa as well as the Near East and North Africa where generally less than 10% of landholders are women" (FAO, 2010). In order to fill the gender gap in respect to property inheritance rights, many formal laws have been enacted in all the states of Sub-Saharan countries. But studies show that women are still lagging behind from such land (FAO). This brings about a conflict situation between customary and statutory laws, with regard to inheritance of property rights, in most of the Sub-Saharan countries.

Owning and controlling of property rights would allow women to improve their health system and enable them to mitigate the consequence of HIV/AIDS (Strickland, 2004). Women's right to land are generally guaranteed through contemporary statutory laws, but norms and practices prevent titling to the land (King and Mason, 2001, 121). Further, King and Mason argue that, if customary laws prevail over statutory laws, then land rights for women get worse. Women derive ownership through their relationship with men (father, or husband) under customary laws because men only have right to access (Harrington, 2008, 14).

Cooper (2011) argues that a pattern of inheritance right is very critical in most of the African countries. Both customary as well as statutory laws regulate with regard to inheritance rights, but widowed women have been sidelined from access to property rights. Property usually registered in the husband's name, a regime of separate ownership- exposes women to the risk of losing their home in case of divorce or death of the husband. All in all, oppressive laws, customs and tradition do not allow women to benefit (Kenney and Ana Paula, 2016; Strickland, 2004). The customary laws place African women a subordinate position in the patriarchal family system where women are defined as permanently, under the guardianship of a male relative and are denied the inheritance of property (Burman, 1984, 122).

In countries like Botswana, Chili, Lesotho, Namibia, and Swaziland, women are under the permanent guardianship of their husband and have no independent right to manage property (UNDP, 1995, 43). Tzili Mor's article shows that, in Tanzania, gender discrimination with regard to property rights is still a critical issue, due to customary laws which give male relatives a greater claim to the deceased's intestate rights (Mor, 2015). The different legal framework also codified social norms and customs, such as land registration are associated with head of the household, who is usually identified with a male member in the society, in which women's claims over property may be overlooked (King and Mason, 2001, 113).

Kenya is a patrilineal society, in which ancestral land is kept within the family, in order to ensure the continuation and security of the lineage (Harrington and Chopra,

2010, 6). They also argue that in many Kenyan societies, women are not allowed to inherit or own property because inheritance is meant to secure the son's inheritance, with the objective to continue patrilineage in the family. Malawi women also share the same experience: here widows are not allowed to inherit property in their natal family and if there is a dispute over inheritance of land, then it is decided according to customary laws (Owen, 1996). For instance, Naomi Ngwira's study on women of Malawi shows that in order to bring secure women's land ownership and entitlement, reforms need to be brought into the institution. The denial of property inheritance rights further makes vulnerable the life of women. Though formal laws do provide some access to justice yet it has not been safeguarding the gender justice, with regard to property rights. Formal laws carry ambiguity in elimination of cultural activities, information or institutional barriers, which actually prevent women's claim over property rights (Harrington, 2008, 4). This shows that women are highly discriminated by customary laws and practices, with respect to inheritance of property rights.

**Table 3.2****Inheritance of Property Rights and Gender Inequality from the World Scenario**

Number of countries with gender inequality with regard to inheritance rights and entitlements to ownership of land and other property, by region			
	Inheritance rights	Rights to acquire and own land	Right to own property other than land
Africa (48)	45	43	35
Northern Africa (5)	5	3	1
Sub-Saharan Africa (43)	40	40	34
Eastern Africa (15)	13	13	12
Middle Africa (8)	7	8	8
Southern Africa (5)	5	5	4
Western Africa (15)	15	14	10
Asia (42)	25	21	19
Central Asia (5)	2	2	2
Eastern Asia (4)	0	1	0
Southern-Eastern Asia (10)	4	2	1
Southern Asia (15)	12	9	9
Latin America and the Caribbean (22)	2	5	2
Caribbean (6)	2	1	1
Central America (6)	0	3	0
South America (10)	0	1	1
Oceania (2)	0	2	2
Eastern Europe (9)	2	2	1

Sources: Computed by the United Nations Statistics Division based on data from OECD, Gender, Institutions and Development Database online (as of December 2009). Accessed on 24<sup>th</sup> August 2015.

Note: The numbers in brackets indicate the number of countries reviewed. The quality of women's ownership rights was graded from 0 meaning "no restrictions" to 1 signifying complete discrimination against women.

The above table 3.2 shows that in most African and few Asian countries, women lack access to land ownership and property. For this, discriminatory customary laws or norms are to be blamed. On the other hand, formal laws might not be able to protect women's rights. 45 out of 48 African countries and 25 out of 42 Asian countries are

recognised for gender inequality with respect to inheritance of property rights. The 43 African and 21 Asian countries, in which there is entailment to ownership of land, gender inequality can be identified from the given table. Similarly, Latin America and Caribbean Islands, Eastern Europe and Oceania are in better position in comparison to other countries.

### **3.1.4. LATIN AMERICAN COUNTRIES**

Latin American countries are also characterised by a system that is patrilineal, patrilocal<sup>2</sup> or virilocal<sup>3</sup> (Deere and Leon, 2001a). Further their article, *The Gender Asset Gap: Land in Latin America* (2003) states that gender bias with respect to land rights exists because of male preference in inheritance; male privilege in marriage; gender-bias in land and market. In many Latin American countries, gender division of labour occupies a significant position, in which agriculture falls into men's department and family work, in the women's. There is a clear demarcation of duties in household matters. The Andean region of South America from Peru, Ecuador and some parts of Bolivia follow a strong bilateral system of inheritance practices. Customary norms and practices show strong bias against women owning land. Inheritance passes from father to sons while daughter may inherit a small portion of the land. Usually land is registered in the name of men (USAID, 2006, 9). Bilateral inheritance system is one in when children inherit property from both parents. Other countries such as Mexico, Chili and Brazil are come under the category of a strong patrilineal system of inheritance patterns (Deere and Leon, 2001a). Further, Deere and Leon argue that daughters rarely inherit ancestral property by default. They can only enjoy such rights and preferences, if the male heir is absent. On the top of that preference would be given to youngest son in the family in the inheritance system.

The main reason which limit women from inheriting their ancestral property is the fabric of the society with patriarchal and virilocality patterns, where property rights, go in the hand of male members in the society (Owen, 1996, 53). Deere and Leon also argue that society is bit-by-bit moving towards a bilateral system, among the families in which

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<sup>2</sup> Which means that the residence of a young couple in the paternal home of the groom.

<sup>3</sup> In such society residence on lands provided from the male line.



agriculture is not the primary concerns as well as out-migration also results into more equitable inheritance practices among children. Many countries have enacted their laws with regard to property inheritance rights, for example, Peru's 1984 Civil Code recognises gender equality in terms of property inheritance and was reconfirmed in the 1993 Constitution (USAID, 2006, 73).

In Chile, children inherit from parents, but preference will be given to son in the family. Women with brothers find it difficult to claim property in a family. On the other hand, female heirs will not exercise their entitlement after their marriage (Deere and Leon, 2001a). Similarly, in Brazil, the youngest son is the heirs to the parental property, shouldering an obligation to look after his parents in old age. Daughters are excluded from inheriting land because of the influence of patri-locality or virilocality (ibid). Land rights can be associated with male family members and women also lose their rights when divorced, widowed or in case of migration of the husbands (FAO, 2010). The 1995 World Conference on Women in Beijing was also influenced-women in Latin American countries which led them to demand for the elimination of gender discrimination, with respect to property rights.

### **3.2 FEMINISTS PERSPECTIVES ON PROPERTY RIGHTS**

Feminist movement came into existence in academics, only after the movement of 1960s and 1970s. It began with the aim of achieving gender equality in the field of social, political and economic, cultural and other male-dominated activities (Tickner, 1997). Feminism is an interdisciplinary body of knowledge and is based on the experiences and life of women, who dare to break the conspiracy of science: about the oppressive and unequal relation between man and woman. "The most important goal of feminist theory is to explain women's subordination, which exists to varying degrees in all societies, and seek ways to end it" (ibid). The goal of feminism was to throw off the shackles of "difference" and establish equality, bringing men and women under a common measure (Squires, 2000, 117). Feminists sought to end women's continuous exclusion from gender stereotyped paradigm and argued that the theoretical bases on which these institutions are

established are flawed for example, family and personal relationships (Freedman, 2001, 23).

Political thinkers and philosophers, from Plato to Aristotle, and Hobbes, Locke to Rousseau, identified the natural differences between men and women; men being naturally more rational and women being more inclined towards the emotional, passivity, irrationality, and other characteristics unsuitable for politics and public life (ibid 26). Such kind of notions made women more vulnerable and dependent on men for security and social protection, thus leading to the birth of masculinity in the society. Traditionally, women were stereotyped as passive and dependent, while men were regarded as active and independent. Conventional notions suggested that men were bread winner also perpetuating an inferior treatment of women (Bhagwat, 2004, 2).

Feminism encompasses various theoretical approaches: these include the liberalists, radicals, socialist/Marxist and post modernist/poststructuralists. All these approaches seek to understand the sources of women's oppression and with prescriptions for solutions. The term feminism also refers to political and social movements, working to end women's subordination (Lee, 2010, 231). The present discourse of gender revolves around only one question that feminist epistemology is capable of transforming: the dominant concept of knowledge-making that has traditionally excluded women as subject of knowledge. Moreover, different feminists have diverse social groups with their own social and political experiences and their conceptual frameworks also distinctively differ from each other but they are all akin to empowerment of women and egalitarian society.

### **3.2.1. LIBERALISTS**

The desideratum of liberal feminism is to bring equal legal rights where privileged men enjoy privileges in the liberal societies. "Liberal feminists echo their voices against many practices of liberal societies owing to bias, discrimination, and gender unrepresentativeness among philosophers and liberal legislators" (Sylvester, 1994, 37). They traditionally appeal to legal intervention and display great faith in the ability of laws, to bring changes about in the lives of women, on a legal basis (Brody, 2009).

Women are denied of their rights: which is why, arguments of equal laws and capabilities that lead to the ideas of justice, equality and freedom that govern public sphere, should also govern equally in the private sphere. Such philosophy is based on the division between the idea of public and private spheres. In order to redress women's suffering and subordination in the society, laws that provide special provision for women, have to be made.

The notion of private and public, assumed from the seventeenth century feminists (Menon, 2004b, 10), alludes the distinction between a) state and society (as in public and private ownership), and b) domestic and non-domestic. In both dichotomies, the state is categorised as public and family as private (Okin, 1991c, 68). Men are assumed to be the responsible for the state of public affairs and women of domestic affairs. Further, Okin argues that in natural instincts, women have been regarded as 'by nature' unsuited for public affairs, therefore dependent upon men.

The idea of liberal feminism can be found in eighteenth century. Marry Wollstonecraft (1759-1797), Frances Wright (1795-1852) and Sarah Grimke (1792-1873) known as Enlightenment liberal feminists believed that "rationality and individual's reason is the divine spark within; it is one's conscience" (Donovan, 2012, 7). They also argued that women and men are ontologically identical, believed in education and subscribed to the natural rights doctrine (ibid). In the age of Enlightenment, the notion of 'inalienable' natural rights of human beings developed with the idea of less interference from the governments, especially in the Locke's *Two Treaties of Government* (1689) as well as in the American Declaration of Independence (1776) and French Declaration of Rights of Man (1789) (Bhagwat, 2004). Marry Wollstonecraft's work, *A Vindication of the Rights of Woman* (1792) is considered as a remarkable landmark in feminists' ideology in Britain. Later in the nineteenth century John Stuart Mill's *Subjection of Women* (1869) occupies significant studies, which bring out the seed of feminists thought. Wollstonecraft and Mill argued that each human being has an equal capacity of reasoning which distinguishes humans-from other animals.

In most of the countries, laws are biased in nature, especially discriminatory against women in respect of inheritance, wage-earning, marriage and divorce, liberal feminists engage themselves in the demand of equality in legal rights. Widely known as liberalists, this form of feminism emerged with the contribution of Marry Wollstonecraft and J S. Mill. Liberal feminists developed during the Enlightenment or Age of Reason, in which the idea of “inalienable natural rights” emerged referring to less interference from the government (Donavon, 2012, 1). They argued that equality for women can be achieved through legal means and social reforms. The policies of any state must adopt theory of equality, while distributing goods and resources. For, the rights to possess, dispose or transfer of any property are shaped by the rules of the state and such rules sometime provide limited justice to marginal groups (Christman, 1994, 6).

Mill insisted that women should have equal opportunities, economic and civil rights, as well as property rights with men. Mill’s statement of liberalist ideology was enormously influential in the first-wave of feminist movement. He analysed that from the initial premise, men and women have essentially the same capacity of reason. He argues that women should not be excluded from exercising that capacity in professional work and political life, and should not be confined to the domestic sphere, under the direction of their husbands. They should have equal rights with men in education and access to training and work, to the representation of their political interests by means of the vote, and to personal autonomy with rights over property, divorce and so on (Lee, 2010, 292). It is his liberal idea that permits individuals to pursue whatever they desire. The only way for women to maximise their pleasure is to have the same rights as men in a civil society (Caha, 2013, 15).

Liberal feminists have argued that forms of discrimination against women have decreased in many societies, by the legal aspect, including voting and participation in the labour force, civil and property rights. However, since forms of gender discrimination remain even after legal barriers are eliminated, feminists believe that gender discrimination still sustains because of the existence of patriarchal mindset. They goes against the discriminatory laws. Equal legal laws can play an important role in advancing women’s equality and participation in all spheres.

By the mid-1960s, most liberal feminists had joined an emerging women's rights group, such as the National Organization for Women (NOW), the National Women's Political Caucus (NWPC), or the Women's Equity Action League (WEAL) (Tong, 2009, 24). The main purpose of these groups was to improve women's status by applying legal, social and other pressures upon institutions and major political parties. NOW's fundamental agenda was liberal and included radical and conservative feminists, for example, Bill of Rights for women 1967, which claim to secure equal rights for both men and women. Betty Friedan, the first president of the NOW, pointed out that formation of NOW-first explicit feminist group in the United States in the twentieth century –would challenge sex discrimination in all spheres of life: social, political, and personal (Tong, 2009, 25). An equal right for women was the paramount goal of these organisation and they needed reform in the existing system.

However, in the 1970s, feminist legal scholarship began to challenge the traditional premises of liberal feminist jurisprudence, because such laws become the instrument of patriarchal oppression (Gupta, 2001:46). Law is the autonomous body which operates in society for the protection of people and their rights. A legal system is different from political or economic system: it based on abstract rationality and is universally applicable with the capacity to achieve neutrality and objective. Equality can be achieved legally by removing identifiable barriers in the upliftment of women and providing equal status within social and legal structures (Charlesworth, Chinkin and Wright, 1991, 632). Law was seen to be based on male norms, male experience, and male domination and continues to shape and sustain unequal power relations (Gupta, 2001, 46).

### **3.2. 2. MARXISTS/SOCIALISTS**

Classical Marxists feminist was developed by Marx, Lenin and Engels: they regard classism is the fundamental cause of women oppression. Socialist feminism goes beyond and says that class is not, as the sole category of understanding of women's subordination to men. They tried 'to understand women's subordination in a coherent and systematic way that integrates class and sex, as well as in other aspects of identity such as

race/ethnicity or sexual orientation' (Tong, 2009, 96). Marx alienation theory is clearly related with the modern industrial capitalism, in which labour are cut off and alienated from their final product (Donovan, 2012, 66).

Marxist feminists state that there is a direct causal connection between capitalism and the subordination of women. Marx shows how the working class is exploited from their profit by capitalists, who gain wealth by paying workers the bare minimum of the value they produced. The introduction of the concept of private property laid the women's oppression and proposed collective ownership of property (Caha, 2013, 24). Capitalism is the root cause of subordination of women. In order to achieve women liberation, capitalist system must be replaced by a socialist system, in which no one would be economically dependent on anyone else. Margaret Benston, a contemporary Marxist feminist, draws attention to the economic situation of men and women in an industrialist capitalist society, in which women are primarily associated with producers for home and family and men are associated with essential products for factory and public. Therefore she claims that unless a woman is freed from her domestic duties, including childcare, she not be able to enter in public work with men. Women need to be free from all the domestic labour.

Fredrick Engel's study, *The Origin of the Family, Private Property and the State* (1884), states that primitive society exhibited egalitarian social. It was based on collective production and communal ownership of property and women also had equal status. With the development of domestication of animals and stock breeding, it paved way to the accumulation of wealth and led the social relations (Engels, 1884). The ownership of property began to shift from the hands of clan to private ownership. Other forms of property also accumulated — metal utensils, luxury items and the demand for human labor increased. Subordination of women arose with the development of private property. Women as a child bearer — a source for new human beings began to be exchanged as valued property and other human beings began to be used as slaves (Brewer, 2004, 11). The increase in wealth gave more status to the man in the family and provided the stimulus to overthrow the traditional order of matrilineal inheritance to establish the institution of patrilineal (ibid). The unique capacity of women's childbearing and

nurturing character gave rise to the natural division of labour in the primitive society due to the advent of class society.

Gradually, men engaged in food and raw-materials-activities and women were left out with household work. The accumulation of wealth established the position of man and also changed overthrew the mother's rights, which constituted "the world historical defeat of the female sex" (Engels, 1884, 50). Women need to be engaged in public work force laid to the solution of oppression in the family (Engels, 1884).

Socialist feminists attempt to link the radical feminists' concept of "patriarchy". While Marxist feminists' try to link with "production" by paying attention to the material base of patriarchy, which brings men's control over women's labour (Caha, 2013, 24). Juliet Mitchell's *Woman's Estate* (1971) is one of the prominent studies in the socialist feminists. She argues that women's condition is over-determined by the structures of production, reproduction, sexuality, and the socialisation of children. In order to achieve full liberation, women's status and functions need to change in the public life. Socialist feminists argue that unlike radical feminist, patriarchy is not a universal and unchanging element. They contend that patriarchy interacts with the given economic system and in conjunction with other important factors, like ideology and culture, creates new and changing patriarchal ethos and practices (Priyam et al. 2009, 104).

Socialist feminists try to locate women's subordination in the economic, social and cultural processes (Gupta, 2001, 43). It argues that the main source of women oppression can be found in the structure of capitalism and major structural changes is necessary in order to remove oppression. Capitalist economic and social relationship perpetuates gender discrimination in this regard: they challenged such practices for the liberation of women. They believe in the extricable links between race, class and gender oppressions and therefore focus upon uniting with other oppressed groups, in fighting all forms of oppression, rather than organising or, struggling separately for women's rights (ibid). State is the sole protector of property inheritance rights for women and believes in collective ownership.

Socialist feminists locate the sources of women's oppression in the structure of capitalism and regard major structural changes as necessary. They challenge the capitalist economic and social relations as these perpetuate gender oppression (Gupta, 2001, 43). Mackinnon (1987) advocated consciousness raising as a method for challenging oppression, and women would collectively and critically redefine their experiences and produce a critical form of knowledge.

### **3.2.3. RADICAL**

Radical feminism emerged in the 1960s, which was completely different from the previous forms of feminism, and came to be known as the 'women's liberation movement' (Donovan, 2012, 139). They are radical, left-wing and post-modern feminists, who reject the idea of equality with men: instead they advocate the emancipation of women from the aggression of a patriarchal society (Caha, 2013, 12). Their quests are guided by the emancipation of women, by rejecting all the traditional aspects of women. The main activities of the women's liberation movement consist of consciousness-raising activities, creation of a counter-culture and feminist literature (feminist theatre, music bands, women's festivals, and so on) (ibid). Radical feminist theory goes against theories, organisational structures which basically have greater inclination towards men.

Shulamith Firestone in *The Dialectic of Sex: The Case for Feminist Revolution* (1970), explores the area of sex/gender system as the fundamental cause of women's oppression, not between classes as what Engels identified. Firestone, for instance, argues that women are oppressed because of their capability to reproduce. Further, this system makes women seem remote, powerful and in possession of qualities that the men do not have. With the advancements in the sphere of fertility and reproductive medicine, Firestone sees liberation for women from the job of reproduction and, thus, the possibility of the end of patriarchy (Priyam et al. 2009, 104). Another radical feminist Catherine Mackinnon (1989) identifies that contemporary societies are based on male domination, and women are objectified by men and consciousness-raising is the key to feminists



theory. Alison Jagger, argues that women's oppression is the longest existing, most widespread, deepest, or worst form of human oppression.

Radical feminists identified men as an oppressor, stressing on the point that men and women have conflicting interests, believing that elimination of patriarchy will achieve the aims of feminism. Ideology of patriarchy ensures that men curtail women from the public worlds and are left behind in the private spheres. They criticise the dichotomy between the liberal public/domestic with slogan, "the personal is political" (Caha, 2013, 23). Women's personal activities need to be addressed politically or publically, in which they remain as a subordinate category, such as in social, political and economic activities.

Radical feminism tries to argue for the dismantling of all barriers against women in the world of work and politics, while at the same time endorsing women's special responsibilities in the family. They argue that since the family is the root cause of women's oppression, it must be 'smashed' (Okin, 1991c, 75). Further she stressed that women would have share as equal nurturing and other domestic tasks that is based on the male conventional practices, in which women remain sidelined from the mainstream.

The word *patriarchy* is derived from the word '*patriarch*', which means the head of a specific type of male-dominated family (Geetha, 2009, 4). The literal and historical meaning of 'patriarchy' is 'the rule of father'. Feminists claim that men dominate women through a variety of political, economic and social structures. They believe that since patriarchy is a social-construction that can be overcome. Radical feminists view that women's oppression referring to the patriarchy as a basic system of power upon which human relationships in society are arranged (Mohanty, 2006, 240-41). It seeks to challenge this arrangement by rejecting standard gender roles and male oppression. Radical feminists argue that patriarchy is the root cause of women's oppression.

Patriarchal system is based on the social construction of gender dichotomies, such as reason/emotion, culture/nature independent/dependent and public/private (Lee, 2010, 301). The first term refers to the men, and second term typically is associated with

women. When feminists define patriarchy, they see –the public/private distinction as an integral part of the discrimination. The concept of public and private began in the 17<sup>th</sup> century, when the modern states and capitalism started to dominate. Modern state-formation marked a shift to relatively independent household units, legally headed by men; women became vulnerable and dependent on fathers and husbands (Lee, 2010, 301). As a result of this, workplace became separated from the household, women were consigned to the role of housewife, and men assumed the role of breadwinner. The most enduring contribution of the theorising of feminism challenged the boundaries between the public and private. The separation of public and private sphere is presented in liberal theory. Feminist theorists challenged that the dominant understanding of public sphere which was built upon the absence of women. They assert that both the spheres are most important for the development of women.

#### **3.2.4. POST MODERNISTS**

The concept of post-modern feminists was built by Foucault, Simone de Beauvoir, as well as Jacques Derrida and Jacques Lacan. They accept the male and female binary as the main categorising force in the society and reject the structure of patriarchal system, which society is based upon. It rejects the primacy of epistemological discourse and it also refuses to depict the ‘object’ of knowledge as some independent, real order of being (McLennan, 1995, 394).

Postmodernists are known to “resist or deconstruct common assumptions of culture” (Jencks, 1989 cited by Sylvester, 1994). Men and women are the examples of ‘common assumptions of culture’, in which knowledge are socially and historically constructed and their roles are not bestowed by nature (Walker, 1992, 192). Under such traditional epistemologies, women were systematically excluded and history, always written from a man’s point of view (Harding, 1987, 3). Traditional knowledge always considered man’s interpretations while women were not assumed as agents of knowledge. Feminist postmodernism was influenced by French poststructuralist philosophy and emphasised on the deconstruction of authority, including the authority of a coherent self that is often posed as sovereign man (e.g. Foucault, 1982; Derrida, 1981).

Poststructuralist feminists often look to language as a force in the construction and reconstruction of male-dominance symbolic orders (Sylvester, 1994).

Postmodernist feminists are skeptical –about gender, knowledge, social relations, culture, hierarchical –and attempt to deconstruct all the existing knowledge (Flax, 1987, 622). This theory was criticised on the ground that, it “encourages identity slippages” and “hyphenating identity” (Sylvester, 1994, 56). This theory was however criticised mainly because it posed the threat of deconstruction on an individual. Jane Flax, (1990), argued that feminist theory is necessarily postmodern, in that it challenges the natural, fixed and universal definitions of gender relations. With skepticism on the notion of “fixed definitions of femininity and an undermining to the categories of woman and man, masculine and feminine” it argued the deconstruction of the fixed category of women (Freedman, 2001, 90).

Simon De Beauvoir’s (1949) famous argument that, “one is not born a woman: but becomes one”, can be analysed in a sense that women are not naturally or biologically inferior, but assigned a lower status by the society. The ontology of the existing society is guided by the notion of patriarchal system, in which women are overlooked in the construction of knowledge.

Mary Joe Frug (1992) was a postmodernist legal feminist who claimed that laws should play a significant role in construction of identities of women. The common argument was that the most important goal of women is gender equality. Postmodern feminists embrace a skepticism regarding general and universal claims of any sort, and seek to uncover the way in which ‘reality’ is constituted by language and investigate the legal, cultural and political discourses of which woman is constituted (Gupta, 2001, 44).

### **3.3. INTERNATIONAL MOVEMENTS, LAW AND ORGANISATIONS**

This section highlights women movements and provision of international laws, conferences, conventions, etc. with respect to property rights in the global level. International law has framed gender equality as part of a larger global concern that deals with the basic human rights in terms of the legal, the political and the economic. Several

international conferences, conventions, statutory laws have thoroughly analysed the factors affecting gender discrimination around the world. For instance, the various United Nations initiatives including the Universal Declaration of Human Rights (1948), The International Covenant on Civil and Political Rights (1966) The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979), Millennium Development Goals, international donor (World Bank, Asian Development Bank, Food and Agricultural Organisation), etc. have their principles and objectives that deal with gender equality and women empowerment.

### **3.3.1. WOMEN MOVEMENTS FOR PROPERTY RIGHTS**

Under Roman Laws, the position of women was determined by their male relativity. They did not enjoy equal rights with men with respect to property rights. Under the Roman law, wives were treated like purchased properties and slaves of the husbands (Mountjoy, 2008, 16). It was only after the rule of Christian emperors, especially between the reigning periods of Emperor Constantine to Justinian (A.D 313 to 565) that the condition of women noticed slight improvement (ibid18).

Locke's *Second Treaties of Government* (1689) was based on the theory of natural rights (life, liberty and estate) and became the main source of American Declaration. He talked about private property that only favoured men while women remained disadvantaged from such rights (Donovan, 2012, 4). The American Declaration of Independence (1776) and French Declaration of the Rights of Man (1789), were built on the notion of equality, however, women remained at a discriminatory position. It was also unable to reach women's liberation completely.

In 1791, during the early phases of the French Revolution, Olympe de Gouges had issued, *The Rights of Women*, fighting for the rights promised by French Revolution, which was based on equality (Freedman, 2001, 2). Similarly, women's rights movement started to emerge in United States, with the Seneca Falls Convention of 1848 (Bhadra, 2006, 47). The main aim of this movement was based on the demand of principles and

liberty and equality for women, that was promised in the American Declaration of Independence (1776).

Sir William Blackstone's *Commentaries on the Laws of England* (1765-1769), inherited many of the provision for gender discrimination, where women were not allowed to enjoy legal rights (Mountjoy, 2008, 19). Napoleon believed that women were inferior to men, and that they should not be allowed to have much influence in a society (Knapp). As a result, the Napoleonic Code (1804) included laws restricting women and children (ibid). For example, women could not vote, husbands had complete control over their wives and private property, etc. Though, it was based on the key concept of legal equality for everyone.

In England, married women had no right to inherit the property, because it belonged to husband. Carta or Great charter of 1215 also declared certain individual liberties, but it failed to achieve justice with respect to women. It only was meant for men and the nobles. Such law was also later adopted by the American colonies that additionally discriminated against married women (Zaher, 2002, 559). During 19<sup>th</sup> century women's property rights were mostly dependent, upon their marital status<sup>4</sup>. Once she married, their property right was governed by the English Common Law and once she married her property was legally absorbed by her husband. Daughters inherited real property only in the absence of sons in the family. Erickson explains that "primogeniture was applied more harshly in England" than elsewhere in Europe and was "objected to more frequently by younger sons rather than daughters" (Erickson, 1993, 17).

The law was discriminatory in nature and women had to depend upon their husbands. Such situation compelled the British Parliament to bring reform against injustice, after the famous case of Caroline Norton<sup>5</sup>. She is remembered as a successful reformer against the unjust Victorian laws. She challenged the patriarchal and male hegemony in marriage or separate property retained for women (Diniejkko). Thus, Married

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<sup>4</sup> Property Rights of Women in Nineteenth-Century England. Retrieved from <http://www.123HelpMe.com?vow.asp?d=18566>. Accessed on 18<sup>th</sup> May 2016.

<sup>5</sup> She was a social reformer and fought for legal rights of women's property rights.

Women's Right to Property Law was passed in 1882 which enabled women to own and inherit property.

United States: In nineteenth century, married women were bounded by a Common law, under the rules of 'Coverture', which was vested in the legal rights of her husband: he controlled his wife's property she acquired before or after marriage (Khan, 1996, 357). When Married, Women's Property Laws were to be passed by the US Constitution: only then would they own, control, and be engaged in trade and businesses (ibid). Zorina Khan analysed in her article, the implication of Married Women's Property Laws for the women of United States in nineteenth centuries. She argues that it brought changes in women's engagement in trade and business, by controlling and owning separate rights. The enactment of Married Women's Property Acts in the mid-nineteenth century changed women's will-making status. First, in some states, statutes allowed married women to own property, typically that which they brought into the marriage or acquired as gifts while married (Knaplund, 2008, 4).

By the beginning of the 1960s, a series of movements for the development of women occurred, such as radical feminists, post modernists/post structuralism feminists that all addressed gender inequality. National Organisation for Women (NOW) was formed in 1966, under the president-ship of Betty Friedan. The Redstocking's manifesto (1969) declared that women wanted to achieve liberation from male supremacy and identified male supremacy as the oldest and most basic form of domination; it was founded by Wllen Willis and Shulamith Firestone in February 1969 (Echols). The Seattle Radical Women group was also formed, which stated that women's emancipation was the first priority for a radical change in the political, legal and economic structure of the society (Bhagwat, 2004, 25).

### **3.3.2. UNITED NATIONS**

Several initiatives have been developed by the United Nations in order to address gender inequality. One such example is the Commission on Status of Women, that was established in 1946, by the United Nations with the aim of to promote equality and

women's rights (CSW, 2006). The Universal Declaration of Human Rights: under article 17: (1) everyone has the right to own property alone as well as in association with others, (2) no one shall be arbitrarily deprived of his property. Such provision comprehensively guaranteed women's interests and rights on the ground of discrimination. It has been argued that majority of women, especially in rural areas, are unaware or unknown seemingly unimplemented properly (Owen, 1996, 54).

The series of World Conference was organised by the UN General Assembly and declared as International Women's Year in 1975, which was held in Mexico City. It offered the guidelines for the development of women up to 1985 and the continuous effort to achieve women's equal rights in all spheres. The Second World Conference on Women was held in Copenhagen in 1980 five years after the Mexico City Conference. The main objective of this conference was called for stronger national measures, to ensure women's ownership and control of property, as well as improvements in women's rights, with respect to inheritance, child custody and loss of nationality (World Conferences on Women, 1980).

In 1985, third World Conference of Women was convened in Nairobi. The focus of the Conference was to review and appraise the achievements of the United Nations Decade for Women: Equality, Development and Peace. This conference urged members to take constitutional and legal steps to eliminate gender discrimination including property rights.

The fourth World Conference on Women was held in Beijing in 1995. Under article 14, women's rights was asserted as a human right and was committed to specific actions, to ensure respect for those rights. Gender inequality, despite several progress remains as a challenging issue even in the present context. United Nation Women as a world champion of gender equality and women's empowerment has been trying to reduce the consequences of gender inequality. It also stressed upon equal access and control of resources and women's economic and social development. Article 35 restates the determination of governments to ensure women's equal access to economic resources, including land and credit.

### **3.3.2.1. Convention on Elimination of all forms of Discrimination against Women (CEDAW)**

The idea of gender equality and non-discrimination has been supported by the principles of CEDAW, which was adopted in 1979, by the United Nations General Assembly (CEDAW 1979). It seeks to end all forms of discrimination against women and guarantees equal enjoyment of human rights and fundamental freedoms, enshrined under article 3 of the CEDAW (Daley et al. 2011). Gender inequality with respect to land rights is a critical issue, where structural patterns are guided by the gender discrimination. Women rely on land, not only for production, but also for other aspects of income generating, therefore supporting health, educational and nutritional needs for families (GIESCR, 2014, 1).

Secure land right is inextricably linked with the welfare and livelihoods of an individual, as compare to landless women, who are likely prone to a more vulnerable position in the family. In order to address women and secure rights of property rights, CEDAW have to play a critical role in the acceleration of gender justice. Gender equability with respect to land rights, has been clearly the main principle of CEDAW (FAO, 2013). The main article which deals with women's property inheritance rights is given below.

*“Articles 13 to 15: Women to have equal rights with men to conclude contracts and in the administration of property, including equal access to mortgages and equality in procedures before courts and tribunals, with restrictions to the legal capacity of women deemed to be null and void.*

*Article 14: Women to receive equal treatment in land and agrarian reforms, and in land resettlement schemes and housing.*

*Article 16: Women to have the same rights in marriage as their spouses with respect to ownership, management, enjoyment and disposal of property, including on divorce.”*



Under such articles women could enjoy equal access to mortgage or sale of their land property, land settlement schemes and housing. Additionally, CEDAW also urges State Parties to implement the provisions of the Convention, especially for rural women on the basis of non-discrimination (Daley et al. 2011). The CEDAW and its provision play significant roles in case of violation, relating to land and property inheritance rights of women, and encourage good state practices, holding the states accountable when violations occur (GIESCR, 2014, 3). It is considered as an important tool for women-empowerment in relation with women's inheritance of property and land rights in the world.

### **3.3.2.2. The International Covenant on Civil and Political Rights (1966)**

- *“Articles 2, 3 and 27 provide for rights to be enjoyed without discrimination according to gender.*
- *Article 23.4 specifies that the property rights of women in marriage and at its dissolution should be protected as well as those of men”.*

### **3.3.2.3. The International Covenant on Economic, Social and Cultural Rights (1966)**

*Article 3 provides for men and women to have equal rights and equal enjoyment of their rights.*

### **3.3.2.4. Millennium Development Goals (MDGs)**

UN also came out with the Millennium Development Goals (MDGs) in 2000. Under its Goal No.3, it “promotes gender equality and empowerment of women”, emphasising that women's empowerment be met through access to natural resources especially land rights (UN-MDG, 2015, 5). In many of the developing regions including Africa and South Asia agriculture and natural resource management are generally gender-blind and professionally male-dominated. In the post-2015 Sustainable Development Goal 1 which aims to “end poverty in all its forms everywhere”, and ensures gender equality in economic resources, as well as access ownership, control over land and other forms of

property, inheritance, natural resources, etc. It also covers socio-economic resources (Landesa, 2015).

In order to achieve MDGs, economic empowerment of women is pertinent for overall development. Secure land rights play a critical role in “sustainable economic growth, improving agricultural productivity and accelerating women’s economic empowerment” (USAID. (2013). Women invest more effort in the earning for their family, as well as communities, but their effort holds zero value. Women play an important role in the economy during the financial and economic crises. For example, women’s economic rights can be strengthened by improving national administrative and legal frameworks relating to land, inheritance and property rights (Women’s Economic Empowerment, DAC Network on Gender Equality (GENDERNET, 2012, 11).

### **3.3.3. REGIONAL ORGANISATION AND STATUS OF WOMEN**

This part delineates three important regional organisations which include SAARC, African Union and ASEAN, and their objective in accelerating women’s rights and their position with respective countries.

#### **3.3.3.1. SOUTH ASIAN ASSOCIATION FOR REGIONAL COOPERATION- (SAARC)**

Formed in 1985, it comprises of eight South Asian Countries, such as India, Pakistan, Nepal, Bhutan, Bangladesh, Sri Lanka, Maldives and Afghanistan. The objective of this organisation was to promote economic cooperation and welfare of the people (UNEP, 2009, 7). Gender equality is also one of the main objectives of this organisation. In the year 2014, SAARC and UN Women signed a Memorandum of Understanding in order to promote gender equality, gender justice and women empowerment (SAARC, 2014). South Asian women are engaged in many fields in the national as well as international level. Yet, they are considered as the least developed because, most of the women are surrounded by varied discriminatory factors such as, poverty and hunger, health, property rights, etc. in fact most of the South Asian countries share similar kind of gender discrimination with respect to property rights. This is because inheritance of property is

mediated through the male line and women are especially sidelined from enjoying such rights.

The patriarchal system is one of the foremost factors that restricts women from inheriting property rights, for it fails to address women's rights and provides opportunities, predominantly for men (SAARC and UNIFEM, 2007). The eleventh meeting of the SAARC technical Committee on women in Development, held in New Delhi (1996) discussed the SAARC plan. Among them, the legislation of women's property rights was also analysed (ibid). In order to ameliorate the condition of women, SAARC ratified various International Conventions and Protocols. For instance, CEDAW, which play a significant role in maintaining gender equality.

On the Eleventh Summit which was held in Kathmandu in January 2002, women's autonomous advocacy group was formed in order to address gender-related issues (SAARC, 2002). Twelfth Summit held in Islamabad in January 2004 also adopted a SAARC Social Charter, with the aim of achieving women-empowerment through non-discrimination against women, derived from customary practices and norms (SAARC, 2004). The Fourteenth Summit held in New Delhi in April 2007, mainly focused on the participation of women in all the spheres of society and gender equality, and development as well as inclusion in decision-making process (SAARC, 2007). Further, this meeting also stressed that the empowerment of women be the major objective of regional cooperation.

### **3.3.3.2. AFRICAN UNION (AU)**

The African Union (AU) was established in 2001. It was formerly known as the Organisation of African Unity (OAU) which was formed in 1963. The main objective of OAU was to promote unity, sovereignty, peace and cooperation in the African countries. African Charter on Human and Peoples Rights (ACHPR) mainly deals with gender equality with women empowerment as the main goal of the African Union (African Union, 2009). ACHPR was adopted in 1981 and ratified by 53 countries –it sets standards for the promotion and protection of human rights in the African continent (Kenney and

Ana Paula, 2016, 3). In order to address women-related issues, AU developed a Gender Policy with the focus of closing gender inequalities in all the spheres (Martin, 2013). The framework of Policy will ensure gender equality, non-discrimination and fundamental rights in the African countries. It will also promote equitable access and control over resources as well as other empowerment opportunities (African Union, 2009, 10).

Similarly, the African Union Women's Committee (AUWC), was inaugurated in April 2006, and it mainly dealt with gender and development issues, but it was replaced by the African Women's Committee on Peace and Development (AWCPD) (African Union, 2014, `65). Recently, African Union has adopted 2015 as a "Year of Women Empowerment and Development towards Africa Agenda 2063". Through this agenda, women will be the key drivers of development (African Union, 2015). As mentioned, in most of the African countries, women are disadvantaged in various realms, in this context African Union is playing a significant role in empowering women.

### **African Charter on Human Rights**

*Under article 14: "the right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws".*

### **Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Article 21: right to inheritance**

- 1. "A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it.*
- 2. Women and men shall have the right to inherit, in equitable shares, their parents' properties".*

**3.3.3.3. ASSOCIATION FOR SOUTHEAST ASIAN NATIONS-(ASEAN)** is a regional inter-governmental organisation that comprises of ten-members states: Brunei

Darussalam, Myanmar, Cambodia, Indonesia, Lao People's Democratic Republic, Malaysia, Philippines, Singapore, Thailand and Vietnam (ASEAN/ ONE VISION ONE IDENTITY ONE COMMUNITY). It was formed in 1967, with the goal to achieve human right, freedoms, democracy and good governance (Prasertsri et al., 2013.). In the early years of ASEAN, women's right was not the main concern. It was only when the ASEAN Women Leaders Conference was held in 1975 and ASEAN Sub-Committee on Women (ASW) was formed in 1976 and renamed the ASEAN Women's Programme (AWP) in 1981, ASEAN Committee on Women (ACW), that it emerged to be a landmark in women's issues (Mohamed, 2011). ASEAN Committee on Women (ACW) promotes participation of women in all the fields and various levels of political, social and economic life (Prasertsri et al., 2013, 31). ASEAN member states are also signatories with the CEDAW regarding the women's rights.

The ASEAN Commission for the Protection of the Rights of Women and Children (ACWC) is a consultative and inter-governmental body, which was formed in 2010, in order to address women's rights and protection (ASEAN, 2014). It also included women's right to land and property in the five-year work plan (2012-2016). ACWC expert meeting to develop a study framework on Economic and rights of women to land and property in ASEAN countries, was held in 2013. The main aim of this meeting was to analyse the situation of women's property rights and to address discrimination customary laws (ASEAN secretariat news, 2013). In most of the Southeast Asian countries, land ownership and tilting of land is predominantly owned by men. This leads women to face difficulties, in acquiring credit for collateral purpose, in case of absence of owner of the property (ASEAN, 2007, 32). In such situations, independent land right is significant for women in rural region.

## **CONCLUSION**

Gender and control over property rights is very critical issue for women, as they own only one percent of all land, but most of them are engaged in subsistence agriculture. Thus their labour is often not considered as productive outputs in agriculture sector (Rosa and Aquino-Fike, 2010, 165). Studies reported that their contribution in the agricultural

sector appears to be relatively high in the rural areas, due to male-out migration. Women are bound by household and agricultural activities, in most of developing countries such as Nepal, India and Pakistan. Land as a property can be accessed through inheritance and transfer from stakeholder. Generally women access land with the help of inheritance laws. Land is a very important asset, especially for rural women. However, women and men do not have equal rights in most settings. In most of the South-Asian and African countries, there are problems in land ownership because of the existence of various customary laws. Customary laws and patriarchal setting seems to be discriminatory in nature, in the sense that it does not provide equal rights to men and women. Most of the tribal regions of these countries have their own customary laws instead of various legal rights and women do not inherit land in the patrilineal system. Pattern of inheritance is interpreted through the male members on the household and community and women are left out in such circumstances.

Access to land is the heart of all rural societies and agricultural economics. Land is not a simple economic resource and, is an important factor for the formation of social identity. It is also an enormous political resource in defining power relations between and among individuals, families and communities. In rural areas, women who do not possess land often constitute the most vulnerable groups. Inheritance of property rights prevents from the risk of domestic violence because women mostly are the victim of domestic violence. Women who own land are less likely to have underweight children for land also enhances food security. It gives power to women in order to tackle various problems such as livelihood and wellbeing, access to credit in collateral forms, poverty alleviation, etc., and is considered as the means of women empowerment.

The concept of feminism exploded in the political consciousness of western democracies in the 1970, but most influential arguments for women's equality emerged from the political discourse from Mary Wollstonecraft's in eighteenth century. During the 19<sup>th</sup> century, the concept of liberal was prominently started with the work of J.S Mill. They stated that men and women have essentially the same capacity for reasoning and women should not be excluded from exercising it in the existing system. They should have equal rights with men to education, representation in political, interests by means of

vote and personal autonomy rights over property. They proclaim that centrality of the value of individual-independence. Education right is very important for the development of women as well as to combat other social evil practices in the society. Liberal feminist see the source of female subordination in legal constraints, that block women's advancement.

Radical feminism approach claim and maintains that the sex/gender system is the fundamental cause of women's oppression. They radically attack the structure of patriarchal system of society, believing a repressive social arrangement is based on male domination. They argue that the traditional political theory has been exclusively derived from the public world of law and state. Women are arbitrarily confined in the private world of family, domestic and personal relationships. However, women also need a chance to be engaged in public sphere. The word patriarchy refers to 'the rule of father'. Radical feminist, especially advocate that men dominate women through a variety of political, economic and social structures that vary across time and place. Phallogocentric thinking is not natural but socially-constructed within the family. Radical feminists clearly argue the abolition of family and patriarchal system. According to them, family and patriarchal system is root cause of women's oppression. Similarly, socialist feminists proclaim that capitalism is the fundamental element of women subordination. They argue that liberation can only be achieved by working to end both the economic and cultural sources of women's oppression. Marxist and socialist feminists have identical thought about the oppression of women i.e. private property. Socialists argue that private property should be governed by state and state should be sole proprietor.

Marxist perspective sees women as an exploited class in the capitalist mode of production. They state that private property is laid on women's oppression, because those who possess property rights become exploiters in the existing society. It creates a class division between the haves and have-nots. Within, this system, the seed of capitalism emerged. In order to achieve women liberation, capitalist system must be replaced by a socialist system, in which no one will be economically dependent on anyone else. Socialist feminists argue that patriarchy is not a universal and unchanging element. But

Marxist theory has failed in their goal of communism because old Soviet Union has been dismantled with all types of Marxist and Socialist feminism.

Feminists sought to reclaim the hidden voices and expose the multiple roles of women in global economic forces and state interactions. Post modernist feminists have been directed to deconstruct major discipline-defining and uncovering gender-biases in the paradigmatic debates, that have dominated in the past. This type of feminist scholarship argues for the construction of knowledge-based material conditions of women's experiences. All feminist comments on some kind of ethics, which based on gender inequality between men and women. But their work sometimes has been criticised on the ground of ignoring men in their zeal to promote the emancipation of women.

In the international level, various legal initiatives have been taken on the ground of PIL, for women. International initiatives were also framed on the basis of gender equality. UDHR, CEDAW and many other organisations address gender discrimination. However, international human rights law has not been applied effectively to address the paradigm of equalities for women. It has failed as a 'universal' right of human beings, including women's property inheritance rights. The reason for the failure of enhancement of gender equality revolves around the variability of PIL from country-to-country. Also, most of the countries are governed by customary laws when it comes to property rights. States are often unable to tackle the discriminatory inheritance law which governs women. Millennium Development Goals was adopted by United Nations in order to address the reduction of poverty, gender inequality and women-discrimination in all spheres. It focuses on the overall development of women including property rights. No matter how variable women's status and power, male domination prevails in all spheres of the political, social cultural, educational and religious. Women's subordination is the oldest most pervasive and universal form of oppression from the history.



## **CHAPTER IV**

### **WOMEN'S PROPERTY INHERITANCE LAWS IN INDIA**

#### **INTRODUCTION**

The laws considered as one of the main pillars in granting equal rights in the democratic state like India. Gender justice in respect to property rights is keys in empowering women. Democracies embraced justice, liberty, equality: the ingredients that enable every human being to achieve their aspiration. After independence, India was declared a sovereign, socialist, secular, democratic republic, that enumerated power and responsibilities of an individual. Although, the Indian Constitution professed equal rights and a harmonious relation among its citizens, there are also many murky areas where a large swath of women, are denied their rights. They have to negotiate for their rights under the roof of traditional customs, practices and the conventional theory of justice. Indian society is known to be built upon a deep-rooted structure of patriarchal settings and a widely-accepted notion of male domination and which further degrades a woman's position.

In this context, this chapter contextualised the discourse between the different existing laws and the status of women in India. Indian society designated as multi-cultural and pluralistic in nature, has communities that are governed by their own laws and regulations, in spite of Constitutional provision. The ideology of multi-ethnic society represents the diversity of culture, customs and faith in religious matters, where individuals determine their identities or demand rights according to their respective communities: this is known as personal laws. The first objective of this chapter is to understand the provision of the Constitution of India that guarantees equal rights to Sikkimese people. Further, it tries to analyse the research question: what are the major obstacles in the implementation of the constitutionally-enshrined PIL to women?

## **4.1. WOMEN IN INDIA**

This section deals with women's status in different phases: a) ancient period (Vedic and pre-colonial period) b) colonial c) independent period.

### **4.1.1. ANCIENT PERIOD (VEDIC OR PRE-COLONIAL PERIOD)**

The early Rig Vedic period society appears to be the almost egalitarian—gender-wise. In this period, there was no individual ownership, but only community ownership of property and wealth, among the tribals (Bhattacharyya, 1999, 116-7). Women then, would enjoy equal position in the fields of education and were free to choose their life partners too (Nandal and Rajnish, 2014; Nair, 2011). Women observed a high standard of morality and they were permitted to own jewelery and clothing. Also, after the death of a mother, property was passed on to daughters (Aggarwal, 2016). Many women made a mark as renowned scholars and philosophers like Visvavara, Ghosala and Apala (Chavan and Kidawai, 2006, 46). A patriarchal system was followed in ancient India where, male domination was prevalent. Here, women were respected, revered and, participated in religious ceremonies. They were free to select their conjugal partner and exercised free-will in entering into the matrimonial bondage; in fact they even married at a mature age (Kant, 1997, 16). Women enjoyed sense of justice in the sphere in public and private spheres.

On the other hand, studies exhibit that a debate revolves around the status and position of women in the Vedic period. What is revealed is that, though women participated in the hymns, they were deprived from political rights and property inheritance rights. Their status was counted at the level of Shudra (Kant, 1997; Chavan and Kidwais, 2006). Despite the other privileges they enjoyed, women in the Vedic period, could not own or inherit property. Only those who had the power to defend themselves from the enemies from the enemies could hold land as property. Obviously, women were lacking in such areas, which further deprived them of ownership. In Vedic society the birth of a son would be followed by rituals and prayers: even the pantheons

consisted of only men. So, patriarchal was the society then that the birth of male child was believed to bring nirvana in the family (Mohanty, 2006, 252).

Agricultural practices were absent in the early Vedic period and land was not considered as an important asset. What was counted valuable was mostly pastoral: like cattle (Bhattacharyya, 1999, 116-7). It has been argued that if inter-tribal conflict for cattle, then the king would supposedly be the protector of cattle and not the land (Thapar, 1978, 109). The seed of private ownership of property emerged only in the post-Vedic period, with pattern of patrilineal inheritance system. Vedas a sacred Hindu text in the Vedic period, later became the main source of Hindu law, along with customs and traditions of the tribal people. This Hindu ideology carries the ethos of patriarchal system. It likely exhibits women as a subservient and a dependent. This gives her very little scope for inheritance of property rights, in male-dominated society (Thapar, 1978; Patel, 2007; Nair, 2010).

Women were not entitled to inheritance and their position also got deteriorated due to the injunctions of religious texts such as Dharmasastras, Manusmriti and other work of law-givers such as Jimutavahana along with Vijnanesvara. The introduction of Dharmasutras and Sastras explicitly favoured male inheritance. If there was an absence of a son in the family, then property would be given to the male descendants. While dealing with Dharmasastra, Manu identified, two contradictory principles with regard to women's property rights i.e. stridhana, because on the one hand, women's exclusive ownership of the property was obtained as gifts from relatives and on the other side, only men were sole inheritor and women had no right to inherit parental property (Bhattacharyya, 1999, 116-7). The tradition of men as sole inheritors further sidelined women's property rights. stridhana refers to property that women obtained from her relations, gifted to her at the time of marriage, by both sides of the family. It also, known as a bridal price (Malik, 2009, 295). Sometimes unmarried daughters were given maternal property as stridhana, but they were not granted a direct inheritance share in the family.

Under Dharmasutra or the smritis tradition, sisters were entitled to only one-fourth of their brother's share, on the account of their marriage (Bhattacharyya, 1999;

Patel, 2007). Even in the absence of a brother, Manusmriti was not recognised: daughters did not have the right to inheritance or a share of the parental property. Wives or widows were also not allowed to be entitled to husband's property during his life-time or after his death (ibid 88). Moreover, introduction of inheritance laws for women under Hindu law undoubtedly challenged the deep-rooted patriarchal structure of the society (Sinha, 2012, 14).

Similarly, the injunction of Manu's *Manusmriti* recommended a rigorous discipline and strict seclusion for women. Manu also permitted child marriage and polygamy which further worsened the lives of women (Kant, 1997, 27). According to Manu, the legal positions of women were based on the notion of dependency—the belief that women always needed protection. The dictum, “a woman is not entitled to independence; her father protects her in her childhood, her husband in her youth, and her son in her old age” (The Laws of Manu, verse 3), reiterated the philosophy that a woman should always remain under the guidance of a male member in the family. That she should never be free and should strengthen the hold of patriarchy. That, she must be kept busy in drudgery, to keep her mind from wandering. And in the matter of inheritance, after the death of the father and mother, her brothers—would inherit parental property equally. With that, the eldest brothers would be entitled to the whole estate and rest of the brothers would remain under his consideration.

The concept of *dana*<sup>1</sup> also changed in the later Vedic period. Earlier, animals especially cattle, was considered to be significant as a *dana*. But, in later era, land as well as gold replaced animals (Thapar, 1978, 112). The donation of land emerged as a new concept in giving *dana*. Gradually, the emergence of market economy gave the flow of currency exchange, which also impacted gift-exchange activities. Agriculturally speaking, the importance of land over cattle could not be denied because of its lucrative value (ibid 116-117). Land is an immovable property: it can be owned either by gift or inherited on the basis of the legal system.

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<sup>1</sup> This means to offer something as a charity or gift or donation to someone, for example, money, cloths, etc.

As mentioned above, the Vedas were treated as the root of Hindu law, and was also known as sastric/smiriti (Hindu Canonical) laws. Prior to Hindu Succession laws 1956, Hindu Canonical and customary laws governed Hindus, varying from region to region (Jaising and Sakhrani, 2007, 193). The law of sastras imposed many disabilities and the position of women was pathetic. Child-marriage was enforced, the female child was thrown in the junction of the Ganges and the sea, there was the practice of sati pratha and widows were known by kulinism, etc. (Shastri, 1959; Sivaramyya 1970a). Women were identified at the level of slaves, or were subordinated and left out, confined only to domestic activities (Singh, 1989, 103). Only after the appearance of Buddhist heterodox, women witnessed a series of upliftment in areas like education, inheritance of property rights, etc. They were also welcomed as nuns in monasteries (Nair, 2010, 35). Buddhism believed in the concept of equal human being, and equality before law. Their preaching and practices, however, failed to tackle the historical orthodoxy of Hindu tradition.

Further, the concept of inheritance rights was basically associated with Hindu laws, in ancient period. In this context there existed two schools of thought in Hindu tradition i.e. Mitakshara of Vijñaneshwar (eleventh century) and Dhayabgha (twelfth century). Hindu law divides property into two classes –a), joint family property also known as ‘coparcenary’ property and b) separate property or self acquired property. Under the joint/coparcenary property, all the members have a common interest and common possession, with rights in property partition. Whereas, in separate property, the owner has exclusive possession of property, and on his death intestate it is succeeded by his heirs.

The property of a Hindu male may devolve jointly through survivorship, upon four generations of male heirs by birth in Mitaksara law system (Sivaramyya, 1970a; Agnes, 1999a; 2011b). In joint-family a legal institution consisting of male heirs by birth that is known as coparcenary. Joint or coparcenary property cannot be easily disposed by way of sale, gift, or will: such property is managed by the head of the family i.e. *karta* (eldest among the coparceners), for the benefit of the entire family including female members (Sivaramyya, 1970a, vii). The doctrine of Mitaksara purported ownership of ancestral property in favour of son by birth held by his father, by rule. Here, females have

no rights of succession. Therefore, property is known as unobstructed property and son can demand for partition during his father's lifetime. Hindu women never become *karta* or members of the coparcenary, of the Hindu joint family. Daughters were completely excluded from property right by birth.

So much so, that they did not even have notional right of joint ownership. Her right was reduced only to maintenance (Gonsalves, 1993; Sarkar, 1999; Nair, 2000; Jaising and Sakhrani, 2007; Saxena; 2008; Agnes, 2011b). The right to becoming a member of the joint Hindu family by birth, was extremely restricted to male members of the family. Women could not demand partition, but they had maintenance facility from the joint property, including right to residence. An attempt to modify the law in 1937 was made, by granting rights to coparcener's widow in the property, that he owned prior to his death. Thus, law itself perpetuated gender discrimination and secured a patriarchal structure, in which women were deliberately reduced to a dependent category (Gonsalves, 1993; Saxena, 2008).

The Mitakshara joint Hindu family did not have right to be coparcenary or inheritance as the son: but in the concept of stridhana, women could enjoy property. This law laid down, that woman could acquire property through the means of inheritance, purchase, partition, seizure and finding. They were granted absolute ownership over stridhana under this law (Agnes, 1999a, 14). Under the scope of stridhana, unmarried daughters and childless widows could also succeed husbands' and fathers' property respectively (Bhattacharyya, 1999, 121).

The Dayabhaga School neither accords a right by birth, nor by survivorship, through a joint male ownership of coparcenary and joint property. It lays down only one mode of succession and the same rules of inheritance apply irrespective of whether the family is divided or undivided, and whether the property is ancestral or self-acquired. Neither sons nor daughters succeed property in the family, and they do not become coparceners at birth. They also do not have rights in the family, during their father's life time (ibid). Coparcenary is unknown: the father is the absolute owner of the property so long as he is alive; his sons cannot claim share by birth, and on his death, his property

devolves by succession amongst his heirs (Chavan and Kidawai, 2006, 67). In Mitakshara, the son has a right to control and interdict unauthorised alienations of ancestral property. Whereas in Dayabhaga, the son has no right to demand partition because father controls all the family property.

The Dayabhaga school of thought shared liberal view toward female members: they could enjoy equal inheritance of property rights in the family. Daughters, widow and mothers could also succeed the deceased's property, just as the male member (Agnes, 1999a, 17). However, the modern Hindu law of inheritance, marriage and divorce, is based on the ancient Hindu dharmasastras or bhraminical smiriti law, which recognised customs and traditions, as an important source of law.

Kautilya's Arthashastra: Book III, "*Concerning Law*", property means subsistence or jewelries constitute a woman's property, which can be used as household investment and can also be used by her husband, during emergencies such as famine, disease, or scarcity, etc. If a widow with son remarries then the property would revert to the son (Kautilya, Chapter II). He was obscured about inheritance rights, on the one hand, yet allowed property rights for women. On the other hand, daughters could inherit parental property, only in the case of absence of male heirs in the family (Kautilya, Chapter V). So, Kautilya himself was confused or reluctant to grant equal property rights to women. However, Kautilya allowed equal rights for women, in the field of widow remarriage, which was restricted in the laws of Manu (Kant, 1997, 48-49). This shows that woman in *Arthashastra* had limited interest of property rights and suffered seclusion in many areas. Further, Nair's (2010) thesis *Indian Women Down the Ages*, exhibits that Alexander's invasion also affected the Aryan society, and they started to impose strict moral laws for the custodian of Hindu religion.

In medieval period, position of women declined due to the invasion of Muslims which led to further deterioration of women's status. Women were treated as property of her father, husband and their son to the invaders (Chakraborty, 2006: Nair, 2010). Women were categorised in subordination. They were dependent upon men and were treated like as objects for male service. Women relied on men in economic, political and

social fields. Their position was counted as inferior and even limited to their own family property rights (Aggarwal, 2016). The caste system became very rigid; women were deprived in the decision-making process (Nair, 2010). Several social evil practices came into existence such as child marriage, sati, female infanticide, purdha, etc. Purdha or veiling system was famous among the Muslim women. Education was absent, girls married at an early age and widow remarriage was non-existent, both the Hindu and Muslim communities. Divorce was uncommon among Hindu women (Kant, 1997, 52). This period saw the position of women deteriorate to the lower strata in the family and society (NATRSS).

#### **4.1.2. WOMEN'S MOVEMENT IN COLONIAL PERIOD**

In the Colonial period, women's position appears to be status-quo as in the medieval period, with notion of male domination, structural in early period of British rule. It has been argued that the Britishers were not concerned about the discriminatory personal laws of the different communities with regard to property rights (Nair, 2000; Bano, 2003; Jaising, 2005a). While, their efforts to transform a barbaric society into civilised one, could be considered as the creation of some freedom among the oppressed women. One such example could be the introduction of English education: its liberal ideologies inspired many Indian, to breakdown some of the evil customs and practices (Biswal and Mohanty, 2007, 351).

The 19<sup>th</sup> century social reformers-like Raja Ram Mohan Roy, K.C. Sen, Ishwarchandra Vidyasagar, Swami Vivekananda, Swami Dayananda and other prominent social activists-took keen interest in ameliorating the condition of women. They were against the existing social evils like sati pratha, child marriage, infanticide, oppression of widows and tried to apply rational and humanitarian criteria to these problems (Gupta, 2001, 53). British made some legal reforms regarding the abolition of sati in 1827, the suppression of infanticides in 1725 and 1804, and the removal of restriction on remarriage of the widow in 1856 (Kant, 1997, 61). Raja Ram Mohan Roy opposed the custom of sati system and polygamy and encouraged widow-remarriage. This reform



somehow brought certain changes, albeit women faced subordination position in the family and society.

The second phase observed as a large number of women participation in freedom struggle, under the guidance of Mahatma Gandhi, because he believed in freedom and equality between men and women. This phase of Indian feminism attempted to unfettered the caste and class hierarchies and demanded gender equality (Gupta, 2001, 54). The Indian National Congress was formed in the year 1931, in which gender equality, was accepted as one of its main objectives. Similarly, various women's movements emerged in the first half of the 20<sup>th</sup> century, such as the Women's Indian Association (WIA) in 1917 in madras, the National Council of Indian Women (NCIW) in 1925, and the All India women's Conference in (AIWC) 1927. The main aim of these organisations was women empowerment through education, socio-political and legal reforms (Aggarwal).

Several laws were passed in the colonial period such as Women's Right to Property Act in 1856, Hindu law of Inheritance Act, 1928 (Amendment act, 1929). The development of women with regard to property rights could be seen when Woman's Right to property Act of 1937 was passed. This Act provided a widow an equal share as her husband and her son in the intestate's separate property (Bano, 2003; Anita, 2007: Kumari, 2013). Though, this Act conferred limited interest in the property rights for Hindu women, it was considered as the first legal legislation in the landscape of Hindu law of joint family in areas of partition, inheritance/succession. The Hindu Married Women's Rights to Separate Residence and Maintenance Act was enacted in 1946. Under this Act Hindu married woman could claim separate residence and maintenance from her husband<sup>2</sup>. So, such kind of laws somehow brought changes in the position and status of Hindu women, it only applied to Hindu women.

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<sup>2</sup> Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946. Retrieved from [www.bdlaws.minlaw.gov.bd](http://www.bdlaws.minlaw.gov.bd)>pdf\_part. Accessed on 31<sup>st</sup> May 2016.

### **4.1.3. POST-INDEPENDENT WOMEN'S MOVEMENT**

After independence, the Constitution of India guaranteed equal rights for men and women, under articles 14<sup>3</sup>, 15<sup>4</sup>, 15 (3)<sup>5</sup>, 16<sup>6</sup>, etc. A series of legal legislation emerged such as Woman's Legal Right, 1952, the Special Marriage and Divorce Act, 1954, the Hindu Minority and Guardianship Act, 1956, and Intestate Succession Act, 1956. Post independence witnessed several women's movements which include Telengana Movement, Bodhgaya Math movement (1978), Chipko Movement, etc. Among them, the Bodhgaya Math movement specifically dealt with property a right which was initiated in 1978. This movement also addressed women's issues such as domestic violence, access to political rights, access upon natural resources and many more, which was carried by Chatra Yuva Sangha Vahini (CYSV). It is considered to be first land rights movement in Bodhgaya district, in Bihar (Biswal and Mohanty, 2007, 355). It was a struggle of the Dalit landless peasants who demanded the legal right to their land, which they had cultivated over a long period, with a low wages (Rao and Rana, 1997, 1307). Women were active participants of this movement: they basically wanted to destroy the rules which was imposed by math, and demanded access to land rights.

### **4.2 PROPERTY RIGHTS AND PERSONAL LAWS**

Personal law refers to those rights which an individual can enjoy by virtue of being a member of a religious or ethnic group or community (Ghosh, 2007; Jaising, 2005b). It is a "range of religion-based family laws governing marriage, separation, inheritance, maintenance and adoption, which vitally affected the status of all Indian women, even as they were wholly instituted and implemented by men" (Nair, 2000, 180). Agnes argues (2011) that the personal develops from the religious, in aspects, ideologies and is considered as pre-ordained, static and infallible. Such unfeasible character defines the communities' attire (Agnes, 2011b, 2). The interpretation can be made from this

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<sup>3</sup> Constitution of India guarantees equality before law and equal protection of laws.

<sup>4</sup> Prohibits act of discrimination on the ground of religion, race, caste, sex or place of birth of any Indian citizens.

<sup>5</sup> Make special provision for women and children in protecting their rights from any kind of discrimination and ameliorate women's social, political and economic status and accords for gender justice.

<sup>6</sup> Provides for equality of opportunity in the matters relating to public and employment.

definition that personal laws draw its legitimacy from an individual's religious background and it is not possible to challenge the domain of such laws for its, attachment with a particular community. Individuals can claim their rights on the basis of being a member of that particular community. Pre-independent as well as independent India proved to be biased in women ownership and inheritance of property, set strongly in a patriarchal domain (Sivaramayya, 1991b, 90).

Personal law evolved during the colonial period, through the Regulation Act of 1776, which declared that in matters relating to marriage, inheritance, adoption, etc. communities were governed by their respective laws (Jaising, 2005b, 324). Personal laws have no Constitutional validity, in fact, it derived its sources from religious scriptures, and whatever laws come from personal laws need to be consistent with the Constitution. Otherwise they become annulled under Article 13, if they violate fundamental rights (Bhattacharya, 2006, 73). It was basically the colonial legacy's way to address pluralistic society with their various religious identities (Agnes, 2011b, 4). However, as mentioned subsequently, the colonial legitimacy spread in different parts of the country and changes took places in many areas. However, personal laws remained stagnant. In fact, colonial legacy had very little concerns about religious, personal laws (Parashar, 2008b).

Indian society is multi-cultural and multi-ethnic: different communities are governed by their own customs and religious aspects. Different communities such as Hindu, Muslim, Christian and Parsi have their own personal laws and plausibly women's rights are more vulnerable than men's, in all the religious argument (Parashar, 2005a; Hasan, 2005). The notion of cultural pluralism contradicts with the notion of gender equality, despite the fact that constitutional provision promises gender equality in all areas (Parahsar, 2008b). The personal law in India is based on different religions which reinforce the concept of lineal descent and inheritance from the male one. These laws reinforce the hegemonic structure that places a man's control over a women's body as well as economic resources, where women have been treated in real life as subject of man (Gonsalves, 1993; Bhattacharya, 2006).

Hence, amendment of personal laws enmeshed with the violation of religious faith. For instance, Muslim orthodoxy was hostility towards amendment of the Muslim Personal law in Shah Bano case (Hasan, 2005, 357). Archana Parasar (2008b) argues that women have less amount of rights as compared to men. The historical reforms elucidate that the goal of gender equality have always been look down on, even in independent era. Even in the formal legal equality, women's rights have been denied or limited on the ground of religious personal set of laws, within and outside the families (Parashar, 2008b; Nair, 2000). Under Article 13 of the Constitution, all the contrary or inconsistent laws with the fundamental rights are void. Still, personal laws are able to maintain its supremacy, anchoring female suppression (Bhattacharya, 2006, 79).

#### **4.2.1. HINDUISM, BUDDHISM, SIKHISM AND JAINISM**

As mentioned, the ancient Hindu law was gender-biased in nature with respect to property rights. Women substantially could not claim property inheritance rights and in cases where they could, they would inherit only a small portion of land. Hindu Succession Act (HSA), 1956 was enacted on the basis of equality of inheritance rights for both daughters and sons. However, it considerably does not guarantee full rights in the joint family property, in which sons have coparcenary rights by birth but daughters have no such rights. This, because they are not considered as a part of coparcenary (Bates, 2004; Parashar, 2005a; Roy, 2011). The joint family system purported joint ownership and such practices still govern the rural areas.

The concept of joint family is biased, further cripple down the inheritance rights for women in India. Under classical Hindu law, women were denied entitlement of independent share in property rights. HSA 1956, under section 6, the fathers' one third interest in the family property, will be divided among the children (Sivaramyya, 1970a; 1991b). Denial of ownership of property inheritance rights of Hindu women basically rely within the provision of Hindu law. "It has been argued that Hindu law are rooted upon the dominance of religion principle as well as largely based on the false assumptions of the cultural and social reality which are not necessarily given due recognition within official legal frameworks and processes" (Patel, 2007, 116-118).

Independent state witnessed some changes in the position of Hindu women with the enactment of HSA, 1956. The Hindu includes, Hindus by religion, Buddhists, Jains or Sikhs by religion, HSA of 1956, governs these four religious communities, i.e. Hindus, Buddhists, Jains and Sikhs. Section 6 of HSA, 1956, provide equal intestate property where sons not only inherit the share of the father's property but also have a direct right by birth to an independent share of the joint family (Roy, 2011, 8). Under this Act, sons could demand partition of joint Hindu family property. For example, if the dwelling house is the family property, then sons were allowed to claim it, but daughters were only allowed for residence, not ownership or possession of rights.

Section 14 of HSA 1956, provides female with absolute property. Before this Act, a woman's ownership of property was limited with regard to disposal, and right—was dependent upon her status as maiden, married or widow (Patel, 2007, 47). For example, *Ajit Kumar Maulik versus Mukunda Lal Maulik* (AIR 1988 Cal 196) and *Dharam Shing versus Aso* (AIR 1990 SC 1888), in which law had stated that daughters are not entitled to father's property upon her marriage. HSA, 1956 applied to all countries except Jammu and Kashmir in India (Roy, 2011). Bates (2004) empirical study shows that, despite progressive legal initiatives in Maharashtra, women in Bheema did not enjoying inheritance rights because people did not make use of the provision of Hindu Succession Act (Amendment 2005) and also argues that “the effects of this law providing women coparcenary rights have yet to be seen” (Bates, 2004, 126). This argument shows the ambiguities in the implementation of this Act in Indian states.

A reform to the Hindu Succession Amendment Act 1956 was made in 2005, to establish egalitarianism, by making daughters as a coparcener in the joint family. It sets women out to be equal coparceners, that the inherent discrimination of the Mitakshara system of exclusive membership in joint family formally eliminated. However, the legislation, at the same time leaves women with lesser rights, than men in terms of inheritance rights (Patel, 2007; Saxena, 2008).

Still, there is no denying of the fact that it does bring changes in sections 6, 23, and 30, which discriminates women, under the provision of HSA, 1956. Under the

amendment of section 6, daughters can become equal coparcener by birth with son, in a joint Hindu family, governed by the Mitakshara law. Earlier it only dealt with the male heirs, but new amendment provided the daughters equal liabilities to dispose or to utilise such property rights. Amendment was made under Article 23 after 2005, in which daughters could also have the right to claim their equal share in the partition of the dwelling house, previously solely controlled by male heirs. Similarly, certain provisions were made under Article 24 of HSA, 1956 that forfeited a remarried woman's property rights. Here, section 6, abolished such discrimination and under provision of amendment 2005, allowed remarried widows legal inheritance rights (HSA 1956). In this context, Moshin argues that, Hindu women will obviously benefit from this historical amendment act and be eligible to inherit agricultural land; yet daughters of other religion will still face the same gender-discriminatory legislation (Mohsin, 2010, 147). Women in other religious communities are still governed by their own personal law, which appears to imbibe gender inequalities with respect to inheritance rights.

#### **4.2.2. ISLAM**

Islam came to India through the trade routes of the Arabs via the Arabian Sea and some of the trader settled down in the Malabar Coast in eighth century (Agnes, 2011b, 31). Sultans of Afghan and Turkish rulers entered India around the twelfth to thirteenth century and they started to introduce Shariat law. They assimilated with Hindu people and also adopted Hindu customs and culture like the, caste system, joint family property system, etc. The development process of Islamic law in India can be identified from three stages. First, from the duration of Islamic law. Second, from the period of imperialism, and finally from what was marked as the beginning of independent period (Mohsin, 2010, 46).

Quran is considered the divine revelation and is an important source of Islamic law. Its first principles exhibit equality between men and women, in all spheres. Despite this, it has been criticised on the ground that it guarantees unequal inheritance share of property: because women only receive half the share of what her male counterpart does (for instance, a son inherits a share that is equivalent to that of two daughters) (Kaushik,

2007; Fazalbhoy, 2012). Though, Muslim women are supposed to receive half of what her brother would, in practice, they are frequently deprived of that entitlement as well (Owen, 1996; Parashar, 2005a; Jaising and Sakhrani, 2007). Practically, women still face gender inequality. It might be stated that Quranic laws is interpreted to suit the requirements of the male members and thus women are accorded an inferior position (Engineer, 1994, 60). Women's limitations in inheritance rights are compensated by maintenance: this shows the notion of dependency, Muslim social structure, which is basically rooted on male dominance is considered as the diminishing women's access to property rights (Moors, 1995). Though, Islamic laws offer property rights when compared to women of other communities, yet they may not experience the same degree as that of their male counterpart. Women's rights are often negotiated with various factors, like customary law, religion, gender ideologies, or patrilineal systems of descent (Fazalbhoy, 2012).

As compared to Hindu and Christian Law, Muslim law appears to be superior in providing property rights for women, during independence period. The Islamic tradition, by and large remained patriarchal in nature and prohibited the growth of scholarship among women, particularly in the realm of religious thought (Siddiqi and Sarala, 2001, 309). Later, Islamic law made many reforms in the pre-Islamic world's area of succession: here women got right to inherit property with absolute power, Quran also gives specific shares of rights to property in inheritance (Malik, 2009; Mohsin, 2010). Islamic law is more liberal towards women in terms of inheritance right and provides equal right to both men and women. However, women in Islam are not aware of their rights. They have been considered as subservient, because of the artificial norms and customs of the society, that were not actually imposed by Islam (Qureshi, 2003, 10). Islamic inheritance laws have been misunderstood in the world, but it is supposed to be one of most perfect laws in early period (Mohsin, 2010, 46).

Indian Muslims are governed by the uncodified Quranic principles of inheritance rights (Saxena, 2008; Agnes, 2011b), but there are some specific statutes provisions of Muslim Personal law viz. the Dissolution of Muslim Marriages Act, 1939 and the

Muslim Women (Protection of Rights on Divorce) Act, 1986 in India, which gives absolute property rights to Muslim women.

Before the Shariat law 1937, there were broad principles of inheritance of Muslims in India, governed by customary law which was highly unjust and restored personal law, by preferring customs and practices (Jaising and Sakhrani, 2007; Malik, 2009). Before this Act, Muslims were guided by older traditions of ancient Persians, which treated women as inferior, as if second class citizens, with the imposition of purdha and other social evil practices (Nair, 2011, 25). In fact, one of the main arguments assigned to Shariat law is that it would provide equal right to property to women, which was often denied to them by terms laid by their norms, customs and religious ground (Fazalbhoy, 2012, 311). Shariat law makes no distinction between movable and immovable property and recognises the right of a female heir, like a widow or daughter. In fact, these rights have always been recognised for absolute inheritance (unlike the old Hindu Law) (GOIMESW, 1974, 140). The Quran sanctions *mehr* to married women: it is a sum of money or other property given to a woman by her husband at the time of marriage, and she has full right over it. It is meant to protect the wife against the arbitrary exercise of the husband's power to divorce, as well as it also stipulated at the time of marriage, future security (Agnes, 2011b, 100).

The judgment given by Supreme Court in the case of Shah Bano made a historical event, in Muslim women protection of rights on Divorce Act. This case challenged discriminatory rights of Muslim women: it created some relief from male hegemonic culture (Singh, 1989, 141). In the case of *Mohammad Ahmad Khan v. Shah Bano* (AIR 1985 SC 945), Bano was divorced by her husband and she filed a case in the court, for maintenance. The judgment was made without any basis from the Muslim personal law, since it is a part of criminal law that applies to all the citizens (ibid). But the husband refused to make payment and argued that under Muslim personal law there is no such obligation to maintain once wife gets divorced (Nair, 2011, 28). The argument of husband was rejected by the court and he was to oblige to maintain his divorced wife only during iddat (a three-month period after talaq) (Singh, 1989; Jaising, 2005b). Court also declared that those divorced women who are not able to maintain themselves can get



remedy from Central Government Act 125 Code of Criminal Procedure, 1973 (Singh, 1989, 141). Shah Bano also argued that her divorced husband had the obligation to maintain his divorced wife, until she was remarried. Even the Quran shows that there is an obligation for Muslim husbands to be fair to their divorced wives.

The Court judgment favoured Muslim women and some of the Muslim groups criticised the judgment by saying that it violates their personal law (Balasubrahmanyam, 1985, 1260). Women demanded that government should implement a uniform civil code applicable to people of all religions. This right was promised long ago under Article 44 of the Indian Constitution, but was not implemented properly, for women. This led to the acrimonious debate among the Muslim fundamentalists, in order to placate the situation and Muslim Women (Protection of Rights on Divorce) Bill, 1986 was introduced and it has been argued that it was only in the name protecting Muslim women and actually, in fact was only a patriarchal conspiracy against women (Singh, 1989, 144). This Act was in contradiction to the judgment and clearly excluded Muslim women for they could not recourse their rights, through Criminal Code (Hasan, 2005, 356).

However, such enactment also “brought concerns among the religious and political leaders in perpetuating gender discrimination against women in the name of religion” (Parashar, 2005a, 301). Further, Parashar (2005a) argues that the content of cultural identity very significantly constructed in private sphere and is often an disadvantage for women. Such gender-biased constructions of the society need to be deconstructed. In this case, Supreme Court expressed that Article 44 of the Constitution for “uniform civil code has so far remained a dead letter” (Singh, 1989, 146). On the other hand, any interference in personal laws provoked interference in their religious aspects. It has been seen that all personal laws are religion-based that clearly serve the patriarchal scheme.

It was only in *Danial Latifi* [(*Danial Latifi v. Union of India*, (2001, 7 SCC 740, 742-73)], Muslim divorced women get some relief in the provision of maintenance. This case could be seen as some kind of gender equality by providing maintenance provisions for divorced women. On other hand, the Court also described that Indian society as male

dominated, both economically and politically. It also places women in a dependent sphere (Mackinnon, 2005, 273). Though, this case challenged the root of patriarchy but Indian courts are seen as paralysed from the cultural sensitivity.

Muslim societies discriminate against women from cradle to grave (Siddiqi and Sarala, 2001, 295). Muslim personal law is not only a form of discrimination, but it also seemingly disadvantages women in many areas. The unequal rights become the main source of subordination of women, and such social constructions are maintained as a tool for women's oppression (Hasan, 2005, 121). The recent case regarding the triple *talaq* which was filed by Muslim woman, Shayara Bano, was the first that challenged the Muslim personal law practices, because it was considered as unconstitutional (Nair, 2016). Even triple talaq, though enshrined in shariah, has been frequently misused by irresponsible husbands (Ghosh, 2007, 115). It has been argued that there is a popular perception of Islam to be rigid, inflexible and immutable often placing women in an inferior position (Hansan, 2005, 123). In order to enhance a women's position and alleviate their suffering, legal reforms seems to be imperative, like the, Hindu Succession Act 1956 (Amendment 2005).

#### **4.2.3. CHRISTIANITY**

The law governing system of Christianity in India was influenced by the colonial legacy, especially from British imperialism. Christians were governed by Indian Succession Act of 1865 as well as customary laws, with regard to matter of inheritance. Further, until nineteenth century the converted Christian still followed their previous-customs and practices, with respect to inheritance, marriages ritual (Agnes, 2011b, 66). It was only during the later-half of the nineteenth century that statutory law was enacted, by British and the Portuguese. Indian Succession Act 1925, connotes a liberal view towards gender equality, on the ground that it creates equal rights for daughters and sons, in parental property. Even widows are entitled to one-third of her husband's property (Sivaramayya, 1991b; Parashar, 2005a).

A large section of Indian Christians were still governed by the customary laws, which prohibited daughters from inheriting rights in parental property. Though, Christians were governed by the provision of the Indian Succession Act, 1925, with respect to inheritance or succession, yet owing to legislative and judicial decisions, they were also governed by discriminatory personal laws in some regions (Sivaramayya, 1991b, 99).

Similarly, in Cochin and Travancore, Christians have their own succession act, the Cochin and Travancore succession act. Which is discriminatory in nature, on the ground of property inheritance rights. When succession of an immovable property of the intestate is concerned; a widow or mother shall have only life-time interest (Malik, 2009, 304). However, the concept of coparcenary or rights by birth in ancestral property for daughters not been recognised in Indian Succession Act, 1925. It gives some kind of gender-discrimination with respect to property inheritance rights, among the Christian community. Under the Travancore Succession Act of 1910, the rights of daughters were limited to one-fourth of the share of the son's or rupees 5000, whichever was less. Under the Cochin Succession Act, 1922, the share of daughters was one-third of the son's or Rs. 5000, whichever was less (Agnes, 2011b; Sivaramayya, 1991b). If property appeared to be excess, then it was inherited by sons and if there were no sons, it would be devolved to the nearest male relatives.

In 1957, the Cochin and Travancore Succession High Court affirmed that Christians, in the region, are not governed by the Indian Succession Act 1925. But, the princely territory of Cochin and Travancore were generally governed by this Act, which provide entitlement of stridhana for daughters. In fact, the main characteristic of the Travancore and Cochin Christian Succession legislations is that they are based on the former notions of the Hindu Law of inheritance (GOIMESW, 1974, 132). Christian women, whether married or unmarried were excluded from inheritance of property and parental property was passed on to male's line. Both the laws followed the Hindu law in matters of succession. They severely restricted the property rights of women belonging to the Indian Christian community.

The controversy was finally resolved by the judgment of the Supreme Court in the Mary Roy case. The judgment was made in *Mary Roy v. State of Kerala* (AIR 1986 SC 1011), which challenged the two provisions of pre-independence laws i.e. the Travancore and Cochin Christian Succession Act—which discriminated daughters. Mary Roy’s brother excluded her from sharing the parental property and she filed a petition in the court. Petition was filed under Article 32 of the Constitution of India. If anyone’s fundamental right was in threat then he/she could approach the court for justice. After independence, the court repealed all the discriminatory provisions of law, practiced in pre-independence period. This verdict was challenged on the ground of discrimination against women, in inheritance of property rights, as unconstitutional and a violation of the right to equality under Article 14 and 15 of the Indian Constitution (Agnes, 2011b; Malik, 2009; Nair, 2011). In this case, Supreme Court curtailed all the discriminatory laws which govern Christian women by replacing it with the Indian Succession Act, 1925.

#### **4.2.4. PARSI**

Parsi personal law is not based on a religious Zoroastrian foundations, un-like the Hindu and Muslim personal laws. Instead, their law is largely based on the Hindu customary laws and English common law. After the passing of Indian Succession Act 1925 (mainly governing Christian community), the Parsi intestate succession act was also incorporated, under the under section 50 to 56 (Act No. 39 of 1925). Before the passing of Act 1925, Parsi was governed by English common laws, which was discriminatory gender-wise, where married women were denied their own property (Mohsin, 2010, 172). Parsis were the ones who suffered in the British regime with respect to succession, due to the rule of common laws. With the result of their struggle, Parsi Intestate Succession Act was passed in 1864. Under this Act, widows and daughters enjoy equal property inheritance rights. Before this act, they were limited to maintenance facilities (ibid 72).

The amendment was made in the Indian Succession Act, 1991 (51) which provide equal shares for both sons and daughters, in parental intestate property (under section 51 sub- section, 2). Earlier “a female intestate’s daughters and sons received equal shares in

the intestate's property, while a male intestate's daughters received only half of what the sons received" (Indian Succession (Amendment) act, 1991). This amendment Act provides remedy from long-standing discrimination against Parsi women (Saxena, 2008, 294). It has been argued that Parsi laws are apparently quite gender-just, because the intestate property of the deceased is divided in equal share, among the widow and each child. If there is no widow, then there is equal share among the children (Malik, 2009, 303). Although, Parsi law provides women equal share in the property, but practically, her rights are only reduced to papers (Saxena, 1991, 112).

#### **4.3. PROPERTY RIGHTS IN INDIAN CONSTITUTION**

The conquest of British in India led to the changes, in the land holding system in India. The new system introduced by the British led to the destruction of the traditional system of rights, of the village community. They basically engaged in activities such as collecting taxes and introduction of land reforms, which included the idea of permanent settlement (1793), in which zamindar were to pay a fixed amount of tax to the government (Narively, 1988, 75). They established landlordism and individual peasant proprietorship, with the help of zamindari and ryotwari system, based on the private property land holding system (Chavan and Kidwai, 2006, 24). Further, the British also started an agrarian revolution, which ultimately created the formation of individual ownership of land in India. The basic problem of zamindari and ryotwari system created elite land holding pattern. There was also large amount of land holding in the ryotwari system. This kind of situation led the notion of a serious political issue, and the Indian National Congress was the first to demand land reforms, especially the abolition of zamindari system and some intermediaries like landlords (Narively, 1988, 73-74). In order to address such a situation, the British Government introduced the right to property, in the section 299 (compulsory acquisition of land) of the Government of India Act, 1935. The section of 299 (I) states that, "*no person shall be deprived of his property in British India save by authority of law*" (The Government of India Act, 1935). The concept of right to property began with Government of India Act, 1935, and after independence Constitution of India, was also dominated by the provision of this Act.

The Indian Constitution guaranteed right to property as a fundamental rights in Part III. Under article 19 (1) (f) and 31, under Article 19 (1) (f), it states that every person shall have right to acquire, hold and dispose of property, and Article 31 provided that no person shall be deprived of his property rights and shall be respected by the law. It was repealed after the 44<sup>th</sup> Amendment Act, 1978, by inserting article 300A which states that, “no person shall be deprived of his property save by authority of law”. After this amendment, the right to property no longer remained a fundamental right: it became a legal and constitutional right. On the ground of any infringement of property rights, people do not have right to file writ to the Supreme Court and under the Article 32 of the Constitution, he/she can approach the District Session Court or file writ to the High Court under Article 226 (Joshi, 2013).

The passing of right to property as a fundamental right in the Constitution created much trouble and underwent a series of litigation between the government and citizens. The state and central government came out with various land reforms like abolition of zamindari system, property conferment to the tillers, redistribution of property land to the landless peasants, etc. In the promulgation of Constitution of 1950 under Article 19 (1) (f) and 31, land reform was introduced in state of Uttar Pradesh, Bihar and Madhya Pradesh in order to abolish zamindari system. Such Land Reforms Acts were ruled by Allahabad, Nagpur and Bihar High Court respectively, which were unconstitutional in nature (Narively, 1988, 113). This resulted to the first Amendment Act made on 18<sup>th</sup> June 1951 and two new articles -31A and 31B were inserted, which specifically dealt with the abolition of zamindari system and land reforms. The first Bihar Land Reforms Act, was challenged in Patna High Court in *Kameshwar Singh versus Bihar* (AIR 1952 S.C.R., 889), which contravened the article 14 of the Constitution.

Under Article 31 (2) (deleted), person's property could be acquired or requisitioned only under two conditions. Firstly the acquisition or requisition could be used for public purpose and secondly, the law must provide compensation or payment to the property owner (Singhal, 1995). The issue of payment for compensation resulted into six continuous Amendment Acts i.e. 1<sup>st</sup>, 4<sup>th</sup>, 7<sup>th</sup>, 25<sup>th</sup> and 42<sup>nd</sup> and finally 44<sup>th</sup> which removed article 19 (1) (f) and 31 from the Constitution.

The meaning of ‘compensation’ under Article 31 (2), was described in *State of West Bengal versus Bela Banerjee* (AIR 1954 S.C.R., 558), in which the word ‘compensation’ denoted ‘just equivalent’. Legislature must ensure full compensation to the owner of the property. In this case, the West Bengal Legislature passed West Bengal Land Development and Planning Act in 1948, in order to settle the refugees who came from East Bengal. This Act acquired Bela Banerjee and others properties and case it reached the local court on the ground of land acquisition.

The Fourth Amendment (1955), the Apex Court in famous R.C Copper’s case popularly known as Bank Nationalisation case (AIR 1970 S.C., 1461), “removed the question of compensation from the purview of the courts, the adequacy of compensation was not a justifiable matter” (Narively, 1988, 116). The Bank Nationalisation led to the 25<sup>th</sup> amendment (1971) which replaced the word ‘amount’ for the word ‘compensation’. This appeared to be next step of repealation of Article 31 (2) (Singhal, 1995). The case of *Keshavananda Bharati’s Case* (AIR 1973 S.C., 1461), held that parliament’s amending power was limited and it could not amend the Constitution, ‘the doctrine of basic structure’ was un-amendable. The 44<sup>th</sup> Amendment Act, 1978, repealed ‘right to property’ from its fundamental character, and placed it as legal and constitutional right, inserted in Part XII under a separate Chapter IV “Right to Property” of the Indian Constitution.

#### **4.4. SEPCIAL PROVISIONS FOR NORTHEAST INDIA**

The United Nations also declared the year 1993 as the Year of the Indigenous People, under Article 33 of United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) stating that, “*Indigenous people have right to determine their own identity or membership in accordance with their customs and traditions*” (UNDRIP, 2008). The International Labour Organisation Convention 107 on Indigenous and Tribal Populations Convention, 1957, identifies tribal people as socially and economically more vulnerable with the need for special protection, within independent countries, as well as allows governance by their own customs, culture and conventions.

Tribes are those people who have common name or communities, speak the same language within the community, occupy the same territory and are guided by certain taboos on the ground of marriage, inheritance, occupation, etc. Hence, they are separate groups of people having their own identity and cultural relevance (Baghel, 2011, 94). Tribal society is governed by kinship bonds and hence all individuals are equal. There is an absence of hereditary division of labour and hierarchy as well as religious disabilities (Ghosh, 2007, 128). Tribal communities have their own customary laws which are unwritten, but followed. After independence, these areas came under the special provision of Fifth and Sixth Schedule, which was guaranteed by the Constitution of India. Even, in the colonial period these areas were categorised as excluded and partially excluded areas.

#### **4.4.1. FIFTH SCHEDULE**

Fifth Schedule was established for the administration of the designated 'schedule areas', and Article 244 (1) provides for a Tribal Advisory Council at the State level. "The Fifth Schedule permitted the state to extend their executive power to the Scheduled Areas, and granted the Governor of each state, the authority to make regulations for peace and good government, of any area in a state" (Baghel, 2011, 238). The Tribal Advisory Councils need to be consulted together with the Governor, in order to promulgate regulation in matters related to maintain peace and good government in this area (Burman and Netam, 1994; Prasad and Pramod, 2012). Governor has to submit an annual report to the President of these areas. Though, Tribal Advisory Councils is a statutory body, it does not act independently and often comes under pressure of the state government (Manchanda, 2009, 256).

Under 73<sup>rd</sup> and 74<sup>th</sup> Amendment to the Constitution which was established in 1993, in order to govern village level, a three tier structure of local self-government was introduced. Since, such laws do not cover the 'Schedule Areas', the Panchayat Extension to Schedule Areas (PESA), Act was enacted in 1996, under the provision of the Constitution's Part IX, to enhance self-governing system. The Act recognises greater



‘tribal rule’ at the local level, as well as provides authority to control future land transformation, among the tribal people (Manchanda, 2009, 265).

According to the Land Transfer Regulation of 1959, that was amended in 1970, the transfer of tribal land to non-tribal was proscribed. However, non-tribals could transfer their land to tribals (ibid). Further, the Supreme Court judgment on *Samatha v. State of Andhra Pradesh, 1997*, declared that tribal lands leased to private company become void in Scheduled Areas. The PESA Act extended its provision to the areas covered by the Fifth Schedule, such as Andhra Pradesh, Chhattisgarh, Gujarat, Himachal Pradesh, Jharkhand, Maharashtra, Madhya Pradesh, Orissa and Rajasthan. Fifth Schedule allows union to give directions to a state regarding the administration.

#### **4.4.2. SIXTH SCHEDULE**

Under Sixth Schedule, there is a provision of autonomy to the tribal state. It especially demarcates the Northeastern states into an ‘autonomous’ region. This area enjoys its own administrative system, in laws are made and also judicial authority is exercised. Most of the Northeastern states come under the provision of Sixth Schedule which includes Assam, Meghalaya, Tripura and Mizoram. These states enjoy autonomous councils for governance and are not covered by the provision of PESA. Under Article 244 (2) there is a provision for Autonomous Districts, Autonomous Regions and Autonomous Councils. The Autonomous District Councils have wide range of legislative, judicial and executive powers. They have law making power that need the consent of Governor, otherwise they stand void (Burman and Netam, 1994; Bijoy et al, 2010). There are various state level statutes which debar ownership of land by outsiders or non-tribals in tribal societies (Bijoy et al, 2010, 49). The Sixth Schedule was specifically meant for the protection of minor tribes from the threat from marginalisation, domination and homogenisation by the major tribal group (Manchanda, 2009, 257).

#### **4.4.3. WOMEN’S RIGHTS IN CUSTOMARY LAWS**

The sources of customary laws may be a comprehended sets of traditional rules and norms, considered as intrinsic to the tribal people. Tribal customary law may be seen as a

pattern of individuals and groups behavior, which might be practiced from one generation to the next. Customary laws gain their strength from the habitual obedience of community members (Ghosh, 2007, 130). Customary laws are generally territory-specific and also enjoy legal recognition, whereas personal laws do not share such element. In *State of Bombay v. Narasu Appa Mali* (AIR 1952 Bom 85) case, the Court expressed that it could not interfere with the personal laws or customary laws of any community.

The traditional theories of justice, along with customs and traditional practices favoured male-centric and patrilineal inheritance interests. This can be considered as a form of violence, because women are at a large disadvantage, as far as land is concerned (Saradmoni, 1986; Bunch, 2004; Chowdhry, 2005; Chakraborty, K., 2006; Bhadra, 2006). However, these rights are derived from customs and traditions, and they have equal validity in framing the laws (Menon, 1998, 16). The notion of equal validity of sources of law creates some kind of gender discrimination, unable to incorporate women's rights especially inheritance rights.

The Indian society carries the settings of patriarchal, patrilocal and patrilineal characters: patriarchy denotes the power of a cultural relationship, with enhanced man's supremacy. The notion of patriarchy is a widely known norm. Such traditional and social structure of ownership in property inheritance ensures the governance of men, limiting a women's right (Gonsalves, 1993; Anita, 2007; Saxena, 2008; Rao, 2008b). Most of the tribal communities in India also follow the patriarchal social structure. They too have son preference, but there are likely less discrimination pattern between daughter and son (Baghel, 2011, 21). Tribal societies share the same experience of inheritance of property rights, where tribal women do not inherit land (Kaushik, 2007), except in the case of a few tribal communities, where matrilineal inheritance is common or under special circumstances.

Customary law does not recognise the right to property for women, because it appears that male-centric societies do not allow them such rights (Anita, 2007, 199). The discernible reason in denying property rights for women can be seen as prevention of land-fragmentation and agricultural holdings, as well as land shortage (Owen, 1996;

Saxena, 2008; Malik, 2009). In a male-dominated society, the female child is unwelcome: they are subjected to subordination inside and outside their homes and are treated unequally. Women are therefore, the economically weaker sections of the society (Banerjea, 2006, 8). Though, legal statutes extend equal rights in theory, but in reality, if daughter and son get equal rights, it might lead to land fragmentation (Anita, 2007; Mohsin, 2010). So, such kind of dilemma also encourages women's subordination position in the tribal society.

The Constitution of India provides contradictory provision with regard to tribal society, in the sense that Article 14 has enshrined equal rights and on the other hand, allows the practice of norms and customs (Mehrotra, 2006, 65). Customary laws are paramount among the tribal communities. Even the Constitution of India give special provision under the Fifth and Sixth Schedule, because tribal people are categorised as backward, in the context of social, economic and political sphere. Women do not enjoy the advantages of these laws; in fact, tribal women are still governed by the archaic system of customary laws of their tribe, in spite of the Constitutional provision, not able to achieve the gender equity (Bano, 2003; Banerjea, 2006; Malik, 2009).

Large masses of women are untouched and unaffected by the provision of the Constitution. Similarly, tribal societies also fail to address gender disparity, in many areas such as women's access to resources, because of the male-bias along with historical and cultural context and discriminatory customary laws (Mehrotra, 2006, 66-68). Tribal women suffer from certain disabilities. For instance, in agricultural activities, women are not allowed to plough land on the basis of religious ground, because they considered as impure (Chauhan, 1990; Baghel, 2011). However, among the tribal people their identity, culture and norms are paramount.

In the Garo and Khasi communities, mothers have the right to ownership in ancestral property and after the death of the mother, property is passed on to the chosen heirs (daughters). Inheritance/ succession are in the female lines (Roy and Rizvi, 1990; Sahu, 2002). Paradoxically, daughter who inherits property are perceived as the custodian of the property, not a sole owner, because the effective control of property is exercised by

men. Farnandez (2010) analysed that the Garos have female inheritance, but they remain a patriarchal tribe. Women inherit property no doubt, but they have to take permission from the uncle of the family, for the land alienation. If they married to non-Khasi or non-Jaintia men, then they forfeit their ancestral property. Hence, tribal women are demanding equal inheritance right but the customary laws been re-interpreted by men to suit their need. This has become an obstacle to gender equity, because their tradition has not changed (Farnandez, 2010, 47). Patriarchal ethos of the customary law ignores gender justice, that also plays an important role in the management and control of the natural resources including land.

The Chhota Nagpur Tenancy Act, 1908, established by Britishers, is an important act for the tribal population of Jharkhand. It restricts transfer of tribal land to non-tribal. This act was challenged by *Madhu Kishwar v. State of Bihar* case (1996) 5 SCC 125), which provided succession of property through male line, and women were left out from inheritance of tribal land, directly violative of Article 14 and 15. This case expressed serious concern that invalidating the existing law would bring chaos in the state. If tribal women marry to non-tribal and inherit tribal land, it would led towards the erosion of community identity as well as land alienation problem in tribal society (MacKinnon, 2005; Jaising, 2005b). The Supreme Court justified, that in this case, it is necessary to retain tribal land, otherwise communities' identity will diminish (Jaising, 2005a, 7). The court allowed tribal women, land for the occupation and livelihood purpose under Article 21, but they were denied ownership on the basis of inheritance/succession (Hasan, 2005, 359).

Women have to negotiate their rights within the domain of state law and community-based laws. Statutory laws somehow protect women's rights vis-à-vis community-based laws, which basically share patriarchal ideologies that support men's supremacy (Owen, 1996; Agnes and Ghosh, 2012). Further, in conflict between formal and personal laws, formal is always seemingly uniform in nature. Srimati Basu (2012) argues that, laws by itself is too inadequate to secure women's rights. Those women who claim legal right to inheritance of property in the family would often be called *haklenewali* (the woman who takes her rights). Such woman is seen as driven by some

kind of “overreaching greed, selfishness, lack of empathy and love for the natal family and a desire to cause family conflicts” (Basu, 2005a; 2012b). There is a notion that women seize parental property rights, grab the property and destroy their natal family (Basu, 2005a, 167). It shows that patriarchal settings and traditional practices remain as the obstacle in getting inheritance of property rights for women.

Most of the tribal population faced major problems in a) the migration of non-tribes to the tribal concentration areas as well as, b) in development activities such as construction of dams which result into land alienation (George and Sreekumar, 1994, 122). Land plays significant role for tribal people for agricultural activities and livelihood purpose and it also could enhance the social status of tribal women. Rao’s (2008b) study of Santal women in Dumkha district, Jharkhand, shows that land for them is not merely an economic resource but also secures social position and identity. However, men have distinct advantages. She examines that community identity of the adivasis has also been responsible for denying women rights to land.

#### **4.5 GENDER AND JUSTICE**

Gender justice refers to equal administration of justice, on the basis of sex and equal treatment in social, economic, legal, etc. or an absence of any kind of gender discrimination (Nair, 2011, 15). The social construction of male domination and patriarchal system is considered as ubiquitous and exercises unstoppable power, in which women remain as the marginal conditions. In most of the cases, they do not receive pre-requisite justice. It has been argued that law and justice terminology cannot benefit women at the grassroots level, in a sense that it’s inaccessible and unaffordable (Kaushik, 2007, 181). It generally has been agreed upon, that one of the greater causes of oppression of women could be seen from the unequal legal status in matters, relating to marriage and inheritance system in Indian society (Jaising, 2005b, 3). As mentioned the laws relating to inheritance is not uniform in India. Most of the communities are governed by their own personal laws or family, which are driven by customs, usages or religious aspects, all gender-biased (Malik, 2009; Jaising, 2005b). In this context, the

demand of a uniform civil code is under the shadow of patriarchal cultural and male dominance settings, as well as, from the practices of personal laws.

#### **4.5.1. UNIFORM CIVIL CODE: ISSUES AND CONCERNS**

The Indian Constitution, in its part IV, under Article 44, states that, *State shall provide a uniform civil code throughout the territory of India*. It is a Directive Principle of State Policy, not a Fundamental Right, which can be enforced by the Supreme Court. During the debate of this right in the Constituent Assembly, framers also discussed the result of the implementation. They expressed that, in the future it will ultimately abrogate the personal laws of various community. There is a wide range of opposition in the incorporation of this Article, especially from the Muslim Community. Their attack is on the ground that rights of personal laws are very intrinsic to their life-it's a part of their religion, culture-and if imposed it could ultimately lead to the erosion of their traditional culture and customs. In this context, Sri K.M. Munshi had explained that there was nothing sacrosanct about the personal laws, as they covered secular activities like inheritance and succession (GOIMESW, 1974, 142). Further, he states that if the personal law is considered as part of a religion, then it is impossible to achieve women's equality. This code might be bringing uniformity, as India is characterised by multiplicity in terms of community laws.

Article 44 states that there is no any relation between religion and personal laws. Article 25<sup>7</sup> guarantees religious freedom, where as Article 44 seeks to divest religion from social relations and personal law (Jani, 2013, 58). Hence, marriage, succession and other secular character cannot be brought under Articles 25, 26<sup>8</sup> and 27<sup>9</sup> which is enshrined by the Constitution of India, in religious matters. It only touches the personal life of a person but does not touch religion; such view was reflected by the Supreme Court of India, in the case of *Sarla Mudgal v. Union of India* (AIR 1995 SC 1531).

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<sup>7</sup> Provides freedom of conscience and free profession, practice and propagation of religion, subject to public order, morality and health.

<sup>8</sup> Provides freedom to manage religious affairs.

<sup>9</sup> Gives freedom as to payment of taxes for promotion of any particular religion.

Further, in the judgment of *John Vallamattom v. Union of India* (AIR 2003 SC 2903) Article 44 is based on the concept that there is no necessary connection between religion and personal law in a civilised society (Bakshi, 1991, 105). John Vallamattom was a priest from Kerala, who filed a writ petition in the year 1997, stating that Section 118 of the Indian Succession Act 1925, was discriminatory against Christians as it imposed unreasonable restrictions on their donation of property, for religious or charitable purpose by Will (Jani, 2013, 57). India is a pluralist society, in which people have faith in their respective culture, customs or religious belief which binds them as in one community. The Constitution attempts to integrate or unify all the section of the people. That's why, a secular character was provided to the Constitution, in order to achieve uniformity, within in diversity. However, a uniform law is highly desirable for the achievement of gender justice, as well as integrity and unity, among the different sects of people. On the other hand, more emphasis should be provided, that only rights are made uniform, not rituals, for they could violate the basic structure of the Constitution—secularism (Rout, 2013, 33).

Constitution of India, under Article 44, directs the states to enact a UCC, but personal laws in the name of 'protecting religion' constantly disadvantages women's rights at large in the society: it grants limited sharing of property by inheritance or succession (Nair, J., 2000; Kaushik, 2007; Parashar and Amita, 2008; Malik, 2009). It has been widely agreed that women are always treated as inferior and their rights are sandwiched between the controversy over UCC and the discourse over personal laws (Ghosh, 2007, 38). Personal laws have come to be seen as a community identity, so it cannot be controlled by the state because of their religious aspects; it also justifies the preservation of minorities' identity (Jaising, 2005b; Parashar, 2005a). Religious leaders also maintain that they have the authority to control personal laws (Hasan 2005, 368), that's why it has become a very contentious issue, in the Indian context. It has been argued that initiative for change or reform of personal laws should come from within the community, and not be imposed by the state, which can better define justification for reform (Jaising, 2005b; Hasan, 2005; Mackinnon, 2005).

The demand of a uniform family law or personal law should be independent from any religious ideology (Parashar, 2005a; Parashar and Amita, 2008b). Then only can it ensure equal rights for women. When the state is unable to address the issue of personal laws, even the Court comes to the conclusion that it is not law under the Constitution (Jaising, 2005b, 238). There are several cases which challenged the provision of personal laws, such as Madhu Kiswar, Shah Bano, Shayara Bano, etc. but these cases read out that if UCC is imposed, then it automatically weighs down the religious and cultural identities of the community. It also leads towards the escalation of an acrimonious situation, among minority and majority communities. Personal laws have become an island within the Constitution, untouched by its ethos, in fact introduction of family law in the Constitution is like, 'bull in a china shop' (Jaising, 2005b, 337-338).

It has been generally argued that women in India theoretically enjoy a number of legal rights, under the provision of the Constitution, but in practice they are in an inferior position which is clearly articulated from the lack of control over ownership of property and inheritance (Agarwal, 1996a; Gangoli, 2007). The long tradition of discrimination against women's claims on property rights is not only ideologically constructed but also materially affected (Patel, 2007, 117). Hence, laws relating to marriage, inheritance, succession are guided by a male-bias, which has led the dependency position of women.

## **CONCLUSION**

Flavia Agnes argues that the law and justice are correlated to each other and if laws become unjust, then it can be reformed into fair justice. The law of the land, Constitution of India is the medium which proclaims for equal justice to the grass-roots or marginal people of the country. The Indian Constitution promulgates the secular and democratic principles and an individual's rights can be secured under this provision. India is home to diverse communities and they are governed by their own respective laws, in areas like inheritance, marriage, divorce, adoption, etc. It has been argued that all-most all respective laws appears to be gender-biased. Therefore, women's rights have revolved within the domain of community-based and statutory laws.



Community-based laws always driven by a traditional setting: including patriarchal or male hegemonic structure, where women have to negotiate for their rights. In this context, the historical background of women's rights cannot be denied, in order to know the present position of women. In ancient Vedic period, the status of women was satisfactory. It was only in the post-Vedic era that women started to lose their grip with the expansion of private ownership of property. Undoubtedly, ownership of property favoured the male lineage and women were sidelined from inheritance of property rights. Further, the injunctions of various sacred religious Hindu texts such as Dharmasastras, Manusmriti, etc., further deteriorated the position of women, in the family and the society at large.

The introduction of two schools of thought i.e. Mitakshara and Dayabhaga in the Hindu tradition, itself occupied discriminatory position on the ground of inheritance rights. Under this classical law, women were excluded from inheritance rights, and not allowed to demand partition or inheritance rights. Women could enjoy property only in the scope of 'stridhana' in both the schools of thought, but it was given at the time of marriage as a bridal price. It has been argued that the concept of stridhana takes the form of dowry in the modern period.

The status of women in medieval period worsened with the foreign invasion and the introduction of various social evil practices such as child marriage, sati, purdha, female infanticide, etc. Women were treated like minors and their subordination further created a situation of dependency, upon men. In the colonial period, some reformation took place in areas like sati, ban on widow remarriage, female infanticide, etc. but, the context of inheritance rights was still governed by community-based laws. In fact, colonial legacy had no concern about the personal laws of the different communities. Though, reform took place in 1937, with the Woman's Right to Property, which provide equal right to widow as their husband, yet the truth was, this was far from what was actually practiced. After independence, Hindu Succession Act 1956, was passed which provide some relief to depressive, again it was Amendment in 2005, which entailed equal coparcenary for both sons and daughters in the joint family property. The Constitution of India became the benchmark in determining the scope of equal rights for women and

men. Right to property was inserted under Article 300A of the Constitution which stated that no person shall be deprived from property rights.

Indian society is characterised by pluralism, in which, different communities are guided by their own traditional culture and customs along with personal laws. Personal laws basically derived its sources from the religious aspects of the respective ethnic group or community, which govern in the area like marriage, inheritance and adoption. Different communities such as Hindu, Muslim, Christian and Parsi have their own personal laws, which have remained as discriminatory against women. These laws reinforce the concept of lineal descent or inheritance through male, and the patriarchal hegemonic structure always retain the dependency of women upon men in all the spheres. Shah Bano, Madhu Kiswar, Mary Roy and many more cases have challenged personal laws on the ground of violating Constitution provision, under Article 14, 15 (3) and 16 which guarantees equal rights to the citizens. Moreover, the amendment of personal laws endorsed the violation of religious faith and diminished the identities of the different communities. For example, Muslim antagonism towards amendments of the Muslim Personal laws in Shah Bano case.

The Constitution of India guaranteed special provision under the recognition of Fifth and Sixth Schedule for the administration justice of Northeast region. These areas were considered as 'excluded and partially excluded area' in the colonial period. Sixth Schedule exclusively focused on the protection of tribal areas and interests, culture, customs, etc., through the self-governance system. Constitution of India also created special provisions for the state of Nagaland (Article 371A), Sikkim (371F), Mizoram (371G), and Arunachal Pradesh (371H) with respect to their administration of justice. It has been noticed that vulnerability of tribal land is in terms of losing ownership, control over resources, and cultural identity. The state government has special constitutional provisions which empower the making of certain rules and regulations, regarding the prohibition on transfer of land from tribal to non tribal.

Generally most of the customary practices are necessarily favourable to women, but because of the presence of several traditional practices, women lag behind,

particularly in the realm of inheritance rights. Entitlement of inheritance forfeits if tribal women marry non-tribals in most of the tribal societies. Prevention of land alienation from tribal to non tribal is the main objective of this rule. In Northeast region patrilineal system dominantly operates the tribal society, except matrilineal inheritance pattern in Garos, Jaintia and Khasis of Meghalaya. Women inherit from female line, but practically, daughters are perceived as custodian of property, not sole owners. She needs to take permission from uncle in the land alienation.

The debate of implementation of UCC remains controversial because it abrogates the personal laws of various communities. Personal laws are very intrinsic to community life. It is a part of their religion, culture and if UCC is imposed then, would lead to the erosion of traditional culture and practices. Article 44 states that there is no relationship between religion and personal laws. The latter only touches the personal life of person but does not touch the religion; such view was reflected by the Supreme Court of India in the case of *Sarla Mudgal v. Union of India*. It has been argued that reform should come from the community itself because it cannot be imposed from outside. On the other hand, theoretically women enjoyed equal rights but practically, it only reduced in paper work.

## **CHAPTER V**

### **PROPERTY INHERITANCE LAWS OF WOMEN IN TRIBAL SOCIETIES: A CASE STUDY OF SIKKIM**

#### **INTRODUCTION**

Property inheritance laws (PIL) and gender justice has become a crucial issue with respect to tribal communities of Sikkim. Thus, PIL appears to be one of the main aspects of women empowerment in general, ranging from socio-economic and political spheres. PIL is a pressing need when comes to raising the status of women's but most of the tribal communities hinder the upliftment of women, their own customary laws. These laws, mostly interpreted from the male perspective, often leave out women and hinder their rights, especially rights like PIL. Concomitantly, property devolves from the male line which is commonly known as the patrilineal system: a major factor that acts as a stumbling block in PIL. The Indian Constitution, though guarantees gender equality, yet the presence of customary laws of different communities do not recognise such rights. Even if the Indian Constitution applies to the state of Sikkim, yet certain provision of the state cannot be overridden when it comes to the preservation of rights and identities, of the Sikkimese people. The application of such rights which shape the subject of state laws was not considered as women's rights, according to the Constitution of India.

In this context, the main objective of this chapter is to study the customs and practices, among the tribal society in relation to PIL, and its implication. This chapter also tries to highlight the research question: how does customary law along with patriarchal system function in tribal societies as critical hindrances towards women's PIL in Sikkim? Further, it helps to understand the nature of property rights, among the women of Sikkim, with special focus on tribal society. Firstly, this chapter identifies the main sources of customary laws in tribal society, and its relation with PIL. Secondly, it tries to explore the perception of women regarding property rights with the presence of legal rights.

## **5.1 TRIBAL SOCIETIES AND CUSTOMARY LAWS IN SIKKIM**

The word tribe is generally used for a ‘socially cohesive unit, associated with a territory, the members of which regard them as politically autonomous (Mitchell, 1979, cited by Nithya, 2014, 729). They share a common language, religion, customs and culture which segregate them another community. India is the second largest tribal country in the world and according the census of 2011, tribals-constitute 8.2 % of the total population of country. The largest concentrations are found in the Northeast regions including some parts of Rajasthan, West Bengal, Jharkhand and Orissa.

Under the Constitutional provision of India, Northeast regions constitute a population recognised as indigenous. These tribes have right to self-governing system. The separate administration system was formed by the Constituent Assembly during the independence. The Fifth and Sixth Schedule proclaimed different mechanism for administration. Further, special provision has been enacted which limit the transfer of land among tribal. Such laws have not benefited the communities, as well as women. Tribal communities demand for uniform equal rights across tribes by changing inheritance system, while among the matrilineal societies, Garo men are also asking for inheritance rights (Sharma, 2014).

Customary law is very intrinsic to tribal societies. The codification of customary rights, including senior male or head of the family and only few number of women hold land certificates or titles in tribal society. Women in the Northeastern region are often portrayed as enjoying greater liberty because of the absence of certain practices such as dowry, burqa-veiling-obligations (Buongpui, 2013). In spite of the absence of certain staunch fanatic practices, there are a few areas where women need to deal with traditional and customary practices. Like, gender inequality in terms of property inheritance rights. The inheritance of household property is determined by customary laws (Bhagel, 2011, 23).

Customary laws or practices cannot be understood without taking into account the history and growth of any community (Draft report on customary laws and usages of

Bhutia community of Sikkim, 2002). So, it is pertinent know the historical background of tribal communities' customs and practices, with regard to property rights. Lepcha, Bhutia and Nepalese are the three main ethnic communities of Sikkim. Nepalese communities mainly follow Hinduism, Lepcha and Bhutia mainly belong to Buddhism but among them some are the followers of Christianity, as well. The Hindu Marriage Act 1955 was extended in Sikkim, but the Sikkimese communities are still governed by the customary laws, with respect to succession, inheritance, marriage, etc. (GOS, 2015). On the other hand, different communities have their own culture, religion and language which define their ethnic boundaries. They can communicate through Nepali language as a common language. Some of the tribes in Sikkim have been listed in the Constitution sanctioning them in Scheduled status are Bhutia (including Chumbipa, Dophthap, Dukpa, Kagatey, Sherpa, Tibetan, Tromop, Yolmo) and Lepcha, Limboo and Tamang (GOI, 1978, (CO. 111)).

Lepchas are known as Rong-pas (rong means to wait or guard) and are the original inhabitants of Sikkim. They are primitively animist in nature but some of them have entered Buddhism and little over a thousand, had been converted to Christianity (Gorer, 1996, 38). During the monarchical period, Dzongu was the private estate of the Maharaja of Sikkim, which was administered by Kazis and Mandals (landlords). The Mandal held the land under the Maharaja, who was the ultimate owner; the householders have the usufruct of land but not the power to transfer it outside their family without the consent of the Mandal (ibid 127). The culture customs and traditions are inextricably linked with nature, but the changing times and modern developments are eroding their livelihood activities (Banerjee and Fareedi). Hence, they are known as 'vanishing tribe' and Dzongu has been declared as protected areas for the Lepcha, by the state government (Fonning, 2003). They lived in simple primitive state and had their own language but after the settlement of Tibetans, their script disappeared and at the same time matrimonial relations further affected their traditional system.

Earlier Bhutia community had the custom of worshipping ancestors before embracing Buddhism (Draft report on customary laws and usages of Bhutia community of Sikkim, 2002). In marriage, they follow the traditional customs and practices, such as

payment of bride price by the parents (Mukherjee, 1995; Bhutia and Mishra, 2014). When Bhutias migrated from Tibet, they inhabited two rivers valleys of Lachen and Lachung, and other parts of Sikkim. These areas are especially reserved ones, where right to settle or own land is not permitted to other groups. Dzumsa (village council) is the traditional administrative system of the people of Lachen and Lachung villages. This self-governing system was initially established during the first half of the 19<sup>th</sup> century in order to look after the administrative and societal activities, because these communities were too far to rule from the central authority. Dzumsa and its pipons (chief of the council) were recognised and used by the Kings in order to delegate his authority (Subba, 2008, 277). Sikkim became part of Indian Union in 1975 and the panchayati raj institutions system was introduced all over Sikkim, except in villages of Lachen and Lachung. The system of Dzumsa was officially recognised in 1985 and is practiced till today.

Dzumsa refers to the ‘gathering place’ of the people, or general council of villagers composed by the head of households with the charge of administering and organising activities, within the given territory. Pipon is the head of the Dzumsa, elected for one year by the villagers. Pipon and Gyapon are accountable for the application as well as preservation of community’ laws and regulations, and organisation of the main event of village. Gyapons are literally responsible for people, and they help pipon in their activities. For instance, in making decisions and making systems work and providing justice to the people of the village. If there is a dispute regarding ancestral property or violation of social norms, then the Dzumsa tries to solve this problem (Chhetri, 2013, 28). Only men can become Pipon and Gyapon of the Dzumsa, and women are officially authorised to become members of the system. Women cannot become pipon, but they can participate in voting procedures. The self-governing system does not encourage women to engage and till now Dzumsa consists of only male representatives, that clearly shows the secondary position of women in public affairs and community decision-making process (Bhasin, 2007, 16). Indian government has been given full protection in order to secure this system (Ghatak).

According to Pipon of Lachung (2014), “*traditionally ‘Daijo’ (gifts) are given to the bride which include gold, silver, yak or cow, one set of utensils, clothes, blankets*

*“gyaba” to carry child, etc. During a wedding, some fines are demanded from the bride’s side and after marriage, groom has to stay in the bride’s home for some time. If any property dispute case occurs in the society, then Dzumsa investigates the problem and give its judgment. He also reported that there are no customs of land-giving as a property to daughters but some of the parents give portion of land to their daughters as a gift” (information given by Pison of Lachung 2014).*

The word Sherpa refers to the *Easterner* which denotes that they migrated from the eastern parts of Tibet, from times immemorial, to Sikkim. They also come under the Bhutia category. The name Sherpa means “Eastern people” in the Tibetan language (Subba, 2008, 279). They lived originally in the frontier districts of the Tsing-hai-Sechwan provinces of China (Kham Eastern region of Tibet) (ibid). Subba states that due to the politico-religious and internal religious conflict, they were bound to leave their ancestral homeland. Their religion spoken language and culture vividly reflect their Tibetan origin. They settled in all the four districts of Sikkim.

Nepalese migrated during the influence of East India Company and constitute various clans with their different cultures and customs. They include Limboo, Rai, Manger, Newar, Tamang Brahmins etc. Newar, Bhramins, Chettri, Rai are the followers of Hinduism and Gurung and Tamang, of Buddhism. The Limboos or Limbus, or Yakthumgas are the descendents of ancient Kiratas, from the pre-historically occupied areas of “Limbuwan” (a land of the Limboos) prior to Prithivi Narayan Shah’s Gorkha invasion of 1774 (Stiller, 1968 cited by Subba, 2008, 297). They are the important tribes who belong to the Kirat family. Tamangs are a Mongolian or semi-Mongolian tribe and are probably descendents of a Tibetan stock, now modified by the intermixture with Nepal races (Darjeeling District Gazetteer, 1947, cited by Subba, 2008, 363). Dor Bahadur Bista (1967, 48) opined that the Tamangs are one of the major Tibeto-Burman speaking communities, who were originally called “Bhote”, meaning Tibetan. Later on the term “Tamang” was attached to them, because they were horse traders (ibid). “Ta” in Tibetan means “horse”, “mang” means “trader” (ibid).



All the communities of Sikkim share similar customs and practices with regard to PIL. The tribal people of Sikkim follow the patriarchal family system in which the father is the supreme decision-maker. The decision given by him is followed every one of his family members. Pattern of inheritance is based on the patrilineal system, in which immovable or movable property is traced through the “male line i.e. son, grandson, brothers born of the same mother, father’s brother’s son, etc. succeed their father and grandfather’s property”<sup>1</sup>. After the death of the father, the eldest son inherits all the property and takes charge of the family. And if in the family, there are two or three sons the property is divided among them. “All the property, either movable or immovable, belongs to the father or head of the family” (Bhattacharya, 2000, 37).

Under such condition, land tenure is always registered in the name of the male head of the household and women have no legal right to family property (Bhasin, 2007, 11). A woman inherits property, neither in the family of her father, nor in the family of her husband except ‘*jew-ni*’ (small portion of land) which is given by her father or husband<sup>2</sup>. Although, women acquire property by way of gift or under a will from her father or other relations, it comes with its own terms and conditions. Under the Married Women Property Regulations Act 1962, if Bhutia-Lepcha women marry non Bhutia or Lepcha men, they forfeit their ownership of property rights. Women have no legal rights in the family property, except for personal belongings and ornaments (GOS, 2015; Baghel, 2011). In some cases, women retain their custodian or usufruct rights to the family holdings and continue to live there until their death (Bhasin, 2007, 11).

In most of the tribal communities, if daughters remain unmarried, then only can they get property as a gift from her parents. Although, they may contribute in other household and agricultural activities such as to collect fuel and fodder for the family and bring water from the spring and provide food for the family (Subba, 2008, 253). They also play significant role in socio-economic activities. In Lepcha community, adopted children- Kup-Chop or Kup-Lam- are treated as the same as a man’s own sons-and can

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<sup>1</sup> Government of Sikkim, Draft Reports on Customary Laws and usages of Bhutia, Sherpa, and Lepcha communities of Sikkim, Law Department, Gangtok Sikkim (2002).

<sup>2</sup>. *ibid.*

become full-fledged legal heirs, through ceremony, performed by the Bongthing (traditional priest) (Foning, 2003, 199). Similarly, adopted son in other communities also have equal inheritance rights as the natural heir.

## **5.2 PROPERTY INHERITANCE LAWS**

### **5.2.1. Pre-merged Era**

Prior to the establishment of the British era, there was no codified law in Sikkim. The King (Chogyal) was the only source of all legal and judicial authority and his subjects were bound by orders, treated as laws (Sengupta, 1985, 247). The King, along with feudal lords and pipons or villagers headmen were the main sources of laws. On the other hand, the laws of Sikkim had been taken from a Tibetan manuscript (Banerjee, 2005, 65). With the influence of Britishers, certain laws were implemented for the benefit of people. Initiatives were also taken regarding any violation of women's rights. At that period, the King enjoyed a number of powers such as the legislative, executive and judiciary. He performed such powers according to the provision of Sikkim Government and legislative powers concerned. He summoned the assembly on the advice of the Chief Executive, who was the president of the Assembly (Sengupta, 1985, 231).

The King was considered as the owner of the land, and with his consent, some portion of land was given to kazi and thikadars, in terms of lease system (Chakrabarti, 2012, 92). Finally, Kazi and landlords leased out land to the tenants for agricultural production. Gradually, the introduction of administrative system by the British government brought vast changes in the social and political system in Sikkim. The new settlement of land reforms endorsed vast changes in ownership pattern. Such changes was introduced on the first political officer J.C White's notification, dated 2 January, 1897 that banned sale or sublet of Bhutia-Lepcha lands to any other persons. This was further strengthened by "the Revenue Order No. 1 of 1917 (Appendix II) issued by C.A. Bell, Superintendent of Sikkim" (Sharma, 2011, 126).

This order imposed prohibition in transfer of Bhutia Lepcha land to any other person. Further, this order also stated that Bhutia-Lepchas were not allowed to sell,

mortgage or sublet land, which included Biyaz, Masikata and Pakhuria system, to any other community without the concern of Sikkim Darbar (Appendix II). Furthermore, on 21<sup>st</sup> May 1931, the notification No. 669/G which stated that all citizens must follow the Revenue Circular Order No. 1 of 1917 clearly mentioned that no Nepali can purchase Bhutia-Lepcha's land. If any Bhutia-Lepcha bustiwallas were interested to give up for cultivation of land, they needed permission from the Darbar.

Further, the King identified an increased number of Nepalese immigrants that outnumbered the Lepcha-Bhutia population. As a consequence of this notification (No. 5063/F) came into existence in 1948 under this Act, Nepalese people were prohibited from acquiring land especially in North Sikkim (Chakrabarti, 2012, 93). The influx of Nepalese population led to the restriction of land holding pattern of Bhutia-Lepcha community, from any other community. Bhutia-Lepchas were exempted from paying land taxation but Nepalese had the compulsion to pay. It was only in 30<sup>th</sup> of August 1956, the King abolished the disparity in payment of land revenue system (Sharma, 2011, 129).

Various land redistribution mechanism were established, such as Land Back Scheme in 1966. Under this system, land owners were supposed to surrender their surplus land voluntarily to the landless laborers (known as sukumbasis in Sikkim) and they were free to choose the plot of land they wanted for cultivation (Chakraborti, 2012, 94). Under the Government of Sikkim Act 1974, many other inequalities were eliminated (Chettri and Yasin, 2012, 25-26).

The Sikkim Agricultural Land Ceiling and Reforms Act, 1977 (act no. 14 of 1978) passed with the objective to increase production, equitable distribution of means of livelihood and also to establish a new era of agrarian relationship (Sharma, 2011, 130). The Sikkim Agricultural land Ceiling and Reforms (amendment) act, 1985 (act no. 3 of 1986) and Land Bank Scheme 1995 stated that landowners donate a certain part of their land voluntarily to the government and such land was distributed to landless people (sukumbasis) (Lama, 2001, 46). But such reforms apprehensively attacked the existing safeguard of tribal people (Majumdar, 1986). Land rights of the indigenous Lepchas and Bhutias, which was protected earlier by the Revenue Order No. 1 of 1917, (it was

mentioned there that the land owned by the Lepcha and Bhutia community cannot be transferred to other communities), continued to be practiced after the merger of Sikkim with India because of the tribal status of those two ethnic communities (Chakrabarti, 2012, 93-94).

The present ruling government has taken all efforts in protecting the land rights of Bhutia and Lepcha communities. Although the Central Land Transfer Act has been enacted in Sikkim, the old laws barring purchase of lands belonging to Bhutia-Lepcha community by others, are still in place (GOS, 2015). Hence, such land reforms encouraged lease system for industries and other activities, which indirectly cause threat to the protected land rights of the Bhutia and Lepcha communities in Sikkim.

In 1961, the registration of documents relating to transfer of immovable properties was started in Sikkim and the government came up with the Notification O.O.No. 105/ L.R. Dated Gangtok on 25<sup>th</sup> February, 1961 by D. Dahdul, Chief Secretary, Government of Sikkim. This law was passed under the provision of Revenue Order of 1917, states that *“Nepalese who are marrying Bhutia-Lepcha girls or Non-Sikkimese marrying-Sikkimese women are acquiring immovable properties of Bhutia-Lepcha cannot be alienated in favour of a non-Bhutia-Lepcha and that Non-Sikkimese are not entitled to acquire any immovable properties in Sikkim”* (Appendix III).

Further, this order also states *Whether such money was her actual property or it is to be provided by her husband if she is married, in which case such other particulars of her husband including the community to which he belongs, his home address, what landed property he holds already in Sikkim etc. should be enquired into first. No person who is not a Sikkim Subject may purchase agricultural land in a court sale under this notification”* (Appendix III). Similarly, the Sikkim Subject Regulation Act passed in 1961 under Act 7 clearly mentioned that if any Sikkimese women married a person who is not a Sikkim Subject, she would not be provided a Sikkim Subject (Sikkim Express, 2014). Another important initiative taken in relation to women of Sikkim was the Married Women Property Regulation Act, on 12<sup>th</sup> October 1962 (Appendix V).

Sikkimese women's rights are still interpreted on the basis of this law that deviously divests their rights. The debate revolves around the artificial dichotomy between preservation of state identities and rights of indigenous people and gender equality. Woman with ownership of immovable property can enjoy such rights till her life-time under Section 4 of the Married Women Property Regulation Act. Under Section 6, if she marries a non subject holder, then her husband and their offspring will not acquire any interest in such property. On the death of a Sikkimese woman who appears to be married to non-Sikkimese, her immovable property cannot be transferred to her husband or children but instead to her Sikkimese male relatives. This Act has not been repealed till the present democratic system of government in Sikkim. Such old laws have remained as the key to the administration system.

The issue of Ruth Karthik Lepchani was political in nature, but on the ground of equal rights, her case-challenged the rules and regulation of the Namgyal dynasty which was based on discriminative perspectives. She was the leader of The Sikkim Independent Front party, which was formed in 1966; the main objective of the party was to fight against the monarchical rule in Sikkim. She was married to an Indian Muslim, A. Halim. Despite this she wanted to serve the local Lepcha people of Sikkim because their difficult socio-economic condition. "Lepcha people were getting alienated from their own land and she had no faith in the monarchical rule of Sikkim, because she believed that rulers were imported from Tibet only to rule and suppress the indigenous Lepcha" (Roy, 2010, 230). Consequently, she was arrested along with her husband in 1967 under the Sikkim Security Act, as well as the Sikkim Government Proclamation was issued which stated that: "A Sikkimese woman marrying a non-Sikkimese shall automatically lose her Sikkim Subjects" (Basnet, 1974, 148). Under this proclamation, a woman married to non-Sikkimese was considered no more the citizen of Sikkim. "She was jailed and interned six times within 12 years and had to suffer the monarchical rule's atrocities, as well as the Kazi's democratic rule for the innocent Lepcha people" (Roy, 2010, 230).

However, in 1969, Ruth was released from the jail with orders to quit Sikkim because she was no more a concerned subject of Sikkim. When Sikkim was stepping towards the democratic structure, she got a chance to take back her house and property.

But she was expelled by an order issued by B.B Lal, the chief Executive, government of Sikkim under the provision of Home and Police Department notification No 408/ H.P. (Roy, 2010, 231). Despite, she played a significant role in the democratic movement and believed that the condition of the Lepcha people could be improved through the establishment of a democratic system in Sikkim. On the basis of Married Women's Regulation Act 1962, Ruth was not considered to be the subject of the Sikkim state. She became the victim of an existing old law of Sikkim. Clearly, this shows that rights of women have been eclipsed within the rhetoric of traditional administration of justice along with male hegemonic structure.

On 21<sup>st</sup> April 1969, M.P Pradhan, Secretary of Land, Revenue Department issued another important notification which clarified the restriction imposed by Revenue Oder No. 1 of 1917 states that *women follow the nationality and community of husband, Bhutia- Lepcha woman marrying a person of community other than her own community only if such land was acquired by her prior to her marriage. Land acquired by her after her marriage to a non Bhutia Lepcha may be sold to any community* (Appendix VI). This Order clarified certain provision regarding the rights of Bhutia-Lepcha women on purchasing and selling their immovable property (especially land) after marriage, to the person of other community. Woman, with the possession of property before marriage has the authority to sale such property to other community. At the same time, Bhutia and Lepcha women who acquired land as a property after marriage and married non Bhutia-Lepcha could sell her property to any community.

### **5.2.2. Post-Merged Era**

The proliferation of the democratic system has led to a critical understanding on the ground of gender equality. Democracy contributes towards institutionalising gender practices but such implications impact upon various personal laws of the communities. The gender disparities, with respect to PIL, are still contested with the ideologies of a democracy.

In the Constitution (Thirty Sixth Amendment) Act 1975, Sikkim became the 22<sup>nd</sup> state of Indian Union (Appendix VII). Special provisions were inserted under Article 371F to meet its special needs and circumstances (Arora, 2006). Under this clause (k) the state's unique ethnic character and traditional laws were preserved and protected. This Article guaranteed several privileges to Sikkim, including local autonomy in governance, laws restricting people of non-Sikkimese settlers and business people, and special provisions related to central taxation (GOS, 2015). This Act also protects the tribal communities' land alienation.

The important issue regarding property inheritance rights was confronted with judgment made in the High Court of Sikkim in *Padma Kumari Ganesan v. State of Sikkim* in 1991. The democratic system of government also became a failure with the significant events, that took place in Sikkim. This case can reflect how women have to suffer from the traditional customs and practices or else old laws became the cardinal principle in the context of women's justice. The administrations of justice, for instance Married Women's Regulation act, 1962, are still shadowed with rules and regulations. This case also highlights how women have to suffer the traditional ways of thinking that are rooted in the patriarchal system, and male-dominant households and society.

This judgment challenged the whole scenario of women's PIL of Sikkim. Although, the judgment was not in favour with gender justification, yet it was a historic event that gave space to challenge the existing system of society and to women fighting for their rights. Padma Kumari was born in a Nepali community of Sikkim and was married to L.G. Ganesan, a non-Nepali. Both are Indian citizens and permanent residents of Sikkim. Her mother had executed a deed of gift in her favour, in respect to her properties, which was situated in Aritar, Renock block, East Sikkim (Judgment Padma Kumari versus State of Sikkim & others). She tried to transfer this property to her son's name but the registration process was rejected on the ground that her husband was non-Sikkimese. Therefore, she could not acquire or inherit any property in Sikkim, because they did not belong to Sikkim. Further, she took shelter at the High Court of Sikkim.

The writ petition was made by the petitioner on the ground that Married Women's Property Regulation Act, 1962 had never been brought into force in the state of Sikkim, and when such Acts come into enforcement it directly violates the Articles 14 and 15 (3) of the Indian Constitution. Finally, the judgment was made by the Court with reference to Married Women's Property Regulation Act of 1962, under section 6 states that *"If a Sikkimese woman marries a person who is not a Sikkim Subject, the husband and any offspring born of that marriage shall acquire no interest in any immoveable property which she may hold in Sikkim by virtue of Section 4 of this Regulation"* (Appendix V). The final judgment was made on the basis of the above said paragraph, in which the petitioner's son had been disqualified to receive and accept the immovable properties, under the deed of gift executed by her mother. Padma Kumari Ganesan's sons were born of that marriage and they shall acquire no interest in any immoveable property. So, petition was made as void on the basis of this regulation Act.

Empowerment of women through property rights is one of the avenues which lead towards the enhancement of economic security, especially in rural women. In this context, Sikkim Government took initiative by enacting Sikkim Succession Act of 2008 (Appendix IX) in the field of empowerment of Sikkimese women. It provided equal PIL for women in Sikkim. According to this Act, unmarried daughters along with sons have equal share in father's ancestral property. This Act states that, *"When a Sikkimese male dies after the commencement of this Act having at the time of his death an interest in the property or has a self-acquired property, the property shall devolve to the extent of his interest by survivorship upon the surviving members of his family which include his wife, sons and daughters if unmarried, in equal proportion"*. On the other hand this act also refers to the traditional practices by enhancing that, *"Where a female heir or descendant marries a person who does not possess Sikkim Subject Certificate/COI or has acquired foreign citizenship, such female heir/descendant shall follow the personal law of her husband and as such shall not acquire any interest in the property"*. Similarly, this act empowers widows' and divorcees' rights by stating that *"an abandoned or divorced woman having the liability to take care of the children with no source of income, shall have the right to a share in equal proportion, along with other heirs to the property of the*



husband. If woman has deserted her husband with or without children and has remarried, she shall forfeit the right to her share in the husband's property. However, the children shall be eligible to their share of property as per the law".

The Sikkim Succession Act 2008, schedule into two heirs in class I and heirs in Class II. Heirs in Class I include son, daughter, widow, mother, son of predeceased son daughter predeceased son, widow of a predeceased son. Similarly, heirs in Class II include son's daughter's son, son's daughter's daughter, daughter's son's daughter, brother's son, sister's sons, brother's daughter and sister's daughter. Such remarkable act cannot be fully implemented in the state of Sikkim: under the section 1(3) states *that It states that, 'it shall come into force on such date as the State Government may by notification in the Official Gazette appoint and different dates may be appointed for different provisions of this Act'* (Appendix IX).

The government has not enforced such acts in empowering gender justice, yet still remains as a Bill. The controversy relies within the implementation of the Succession Act 2008. This law would be unjust and unconstitutional under the Indian Constitution on the ground of gender equality. This led to some kind of injustice as part of legislation which would divest women from various rights including property rights.

Similar issue has been reflected from Jammu and Kashmir, in 2004. The Jammu and Kashmir Legislative Assembly passed the Jammu and Kashmir Permanent Residents Disqualification Bill (the Disqualification Bill), 'which proposed that women who married non-state subjects could no longer claim state subject status and would thereby lose both preferential treatment in government hiring and the ability to acquire new property in the state' (Ashai, 2010). Such a distinction was clearly gender-unjust since no such law applied to Kashmiri men who married non-Kashmiri women (Dhavan, 2004).

Sikkim Succession Act enhanced women directly in the socio-economic status. However, the ownership and control over natural resources not only create a sense of belonging and owning, but also helps women to enhance their self-esteem and confidence (Chettri and Yasin, 2012, 140). However, those women who have control over natural

resources such as property rights are likely to tackle the problem in family or society at large. Though, customs and traditional practices became hindering factors in acquiring property rights for women, but if they demand for their rights, then they definitely enjoy their rights. While conducting field survey the study came across with a successful case of Bhim Kumari Subba. She was the only woman who demanded for her property inheritance rights from her parents. Though, customs and practices debarred women, yet she legally fought for her rights. She challenged the structural domination of patriarchy in context of acquisition of property rights.

She reported that she got some portion of property in her name from her brothers. In the beginning, her brothers were not ready to give the property. For that reason, she approached the Sub Divisional Magistrate (SDM). The SDM advised her to settle this problem through the medium of panchayat. Finally, village panchayats settled the above mentioned case and she got some portion of land from her parental property. In this context, Bhim Kumari Subba had to seek her rights from her parents because customarily, women do not enjoy equal property inheritance rights. Only sons have the privilege to inherit father's property. Though, she got only some portion of land in her name, yet it was not as equal share with her brothers, which shows kind of gender-discrimination. It can be noted from this case that women' rights have been overshadowed somewhere in the domain of patrilineal or patriarchal setting, and they have to negotiate for their rights in the name of customary laws.

She expressed her views in following lines, *"I heard from C.M Chamling that daughters will also get equal property in his speech, and then only I came to know that even girls are getting equal PIL from their parents. So, I claimed my rights from my parent because I have been looking after them and they promised that they will give equal property with my brothers. My father was ready to give some portion of land in my name but my brothers and sisters-in-law opposed me and said that 'you are partitioning the brother's properties so we are not giving any land. If she get land then she will sell it'. Then I went to SDM of West Sikkim and she advised me to settle this problem within local panchayats and if the case cannot be solved then we will look into this matter. Later*

*on this matter being solved, I got a small portion of land from my brothers.”* (Bhim Kumari Subba, 17<sup>th</sup> May, 2015).

The demand of equal PIL reached climax when a bunch of Sikkimese women were demanding equal PIL in Sikkim under the banner of ‘Daughter of Soil of Sikkim’ (Sikkim Express, 2010). It has been argued that gender equality and property rights, as an issue appears to be very sensitive in state of Sikkim<sup>3</sup>. New modern laws of succession and inheritance somehow provide equal ownership of property for women. Demand of equal PIL became the centre of attraction, not only to state government, but also to Sikkimese women, who are unaware of their rights. It also gave alarm to state government. Though, Sikkim merged with Indian Union, the debate revolved around the violation of Sikkim’s old laws, if such equal PIL have been passed by the government (Sikkim e.newsletter, 2010).

“Daughters of Soil of Sikkim appealed a demand for equal PIL for women in Sikkim on 6<sup>th</sup> September 2010 to the state government, but till date, no such initiative has come from the government. At the time of meeting, Chief Minister Pawan Kumar Chamling verbally said that One Man Law Commission, Justice Patro, will be made in order to look after this matters but no action has been taken up. On the other hand, Women’s Council of Sikkim took initiative to look into this matter, but later on they themselves backed out. Members of Women Council consist of women who are all outsiders, but married to local Sikkimese men. Similarly, all the government secretaries are local and they were not interested in this matter” (Representative of Daughters of Soil of Sikkim, 26<sup>th</sup> February 2016). In this backdrop, the demand of equitable PIL become a very crucial issues in the state of Sikkim, in which Article 371F, guaranteed special provision in order to safeguard the interest of the Sikkimese people.

Grievances have been expressed by the representatives of ‘Daughters of soil of Sikkim’, “that only women has to suffer in a male-dominated system, along with the Old Laws which only safeguards the rights of male. Why only Son’s of Soil of Sikkim are the

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<sup>3</sup>. This view is expressed by SSSBS (Sikkim Sachet Swarojgar Birojgar Sangathang), *sikkime.newsletter*, on 9th Sept. 2010.

original citizens of Sikkim, and not Daughters of Soil of Sikkim. state was liberated from the shackle of monarchical rule but women did not enjoy their freedom with respect to PIL, because they are still binded by old laws which were passed by the Maharaja of Sikkim” (Representative of Daughters of Soil of Sikkim, 26<sup>th</sup> February 2016).

“Those Sikkimese women’s children, fathered by non-locals, have dark futures because those who possess property in Sikkim, according to traditional rules and regulation, either need to be sold or it is automatically passed on to the brothers in the family. A woman can enjoy her property, only in her life-time. After her death, property will be passed on to brothers. If she has no parents or brother to heir her immovable property, then it may finally goes in the hand of government. It will not go to her children. Under the notification No. 120/ Home/2010 Dated 26/10/2010 of Sikkim Gazette, section number 3 states that *“A person who has established beyond all reasonable doubt that he/she is the natural legal descendant of Sikkimese woman holding/eligible for a Certificate of Identification in terms of the State Government notification on the subject and is a resident of the State since birth”* (Appendix X).

Such persons are allowed Residential Certificates and women are allowed to get property rights, but the Notification which was published by Home Department Sikkim Gazette No. 23/Home/2015, dated 15/05/2015 supersedes the Notification No. 120/Home/2010. Therefore, under the provision of present notification, women are not entitled to property rights” (Representative of Daughters of Soil of Sikkim, 26<sup>th</sup> February 2016).

‘Daughters of Soil of Sikkim also gave the references of the judgment of Padma Kumari Ganesan, whose case was refused on the basis of Married Women’s Regulation Act 1962, and registration was repealed by the High Court of Sikkim. Though, Sikkim Government has passed the Sikkim Succession Act 2008, it failed to incorporate gender justice, especially with regard to property inheritance rights. They came up with few suggestion or recommendation citing that Sikkimese women are unsatisfied with discriminatory existing laws, which is why, new laws need to be passed, based on the gender justice. Secondly, mother’s immovable property should be passed on to her

children otherwise her children will become stateless, with this regard, equal effective laws need to be introduced. The descendents of parents born in Sikkim holding permanent residents or even working in the state for many decades, need to be integral to the state too. These points raise a few questions—Why do only unmarried women in Sikkim need to validate their statuses with an unmarried certificate? What about the men, in the same case scenario? Shouldn't the rules apply to both genders equally? Sikkimese women are like puppets in the hands of a male-dominated society. Their voices have been suppressed within the male chauvinist society. All the administrative systems are based on man-made features. Even educated women are afraid to raise their voices against gender discrimination, because they became victimised due to political issues' (Representative of Daughters of Soil of Sikkim, 26<sup>th</sup> February 2016).

On 11<sup>th</sup> November 2014, the Sikkim Government took up important steps in tandem with rights of Sikkimese people, in which, it stated that only Sikkimese-born girls who marry Sikkimese men can be provided with Sikkim Subject/Certificate of Identification (Sikkim Reporter, 2014; Sikkim Express, 2014). Non-Sikkimise women married to Sikkimese men could no longer enjoy government facilities.

The State Cabinet took important initiatives on 27<sup>th</sup> January 2015 regarding the rights of women. In this context, Cabinet decided that “*Sikkim subject certificate/certificate of identification (COI) mandatory for any type of appointment in the state government posts. Moreover, married women are required to submit the Sikkim subject certificate/certificate of identification of their father and husband.*” Again on 23<sup>rd</sup> February, Cabinet came up with certain modification to Notification No. 66/Home/95 dated 22<sup>nd</sup> November 1995 (Appendix VIII), amendment relating to the issue of COI. Under this provision, COI was denied to non-Sikkimese women who married Sikkimese men (Eden, 2015 in Sikkim Now). The denying of COI was mainly on the ground of protecting interests of local people but before the amendment of Notification 1995, Sikkim subject was already issued to non-locals who married Sikkimese men and under the notification of above, they no longer enjoy such rights in Sikkim.

Sikkimese women needed to produce her identity with the help of two men i.e. her father and husband. They would be identified either from her father or husband's identification. Further, Eden also argues that non-local women, who marry Sikkimese men, are also denied economic or professional prospects in the state. On the other hand, ruling government announced non-Sikkimese spouses to Sikkim Subject holder could be provided with COI (Himalayan Mirror, 2015). In this context, implementation of equal PIL in the state of Sikkim becomes debatable issues.

#### **5.2.2.1. NGOs and Women**

Non Governmental Organisations plays a crucial role in the upliftment of women from grass root level. There are many NGOs who have been working in Sikkim. Among them, The Family Counseling Centre (FCC), The Association of Social Health in India (ASHI) and the State Social Welfare Board (SSWB), Dristi (Namchi) are active organisations especially working for the rights of women. FCC mainly concerns its work with the counseling, referral and rehabilitative services to women victims. Those women, physically and psychologically became victim within the family or society at large. The main objective of SSWB is to implement various schemes for the welfare and development of women, through voluntary organisations. ASHI deals with the upliftment of down-trodden women and girls and tries, to eradicate and mobilise public awareness against social crimes. They also maintain short stay homes for the woman victim and her children. These NGOs regularly engage with counseling and rehabilitation for women and awareness programmes, in minimising the problem of drugs and alcoholic addiction.

**Table 5.1**  
**Complaints of Women**

	Types of cases	No of complaints
Cases Registered in FCC for the Year of 2014-2015	Tortured	56
	Maintenance	10
	Extramarital Affairs	12
	Family dispute	7
	Alcoholism	8
	Separation	1
	Deserted	15
	Total	109
	Cases Registered in ASHI for the Year of 2014-2015	Types of Cases
Marital dispute		27
Domestic violence		2
Rape/molestation		1
Alcoholism/drug addiction		23
Extramarital affairs		10
Total		63

Sources: Data collected from ASHI, Tadong, Gangtok and Family Counseling Centre, Gangtok (on 17<sup>th</sup> February 2016).

Table 5.1 shows that 56 tortured, 10 maintenance and 15 deserted (by husband) cases have been registered in the FCC, 2 for domestic violence, 23 for alcoholism or drug addiction cases have been registered in ASHI.

It has been observed from the table 5.1, that women are categorised as vulnerable, easily inclined towards discrimination in the society. They get mentally and physically tortured by their counterparts because most of their husbands are engaged in other activities, such as consumption of alcohol, drug addiction, extramarital affairs, etc. which leads to the family dispute. Consequently, lack of property ownership of women also gives space towards crimes against women. According to Bina Agarwal, those women who own title of the land are less likely to face domestic violence from the family or get tortured by her husband because they may gain self-confidence or bargaining power, in order to solve intra-household matters.

In order to achieve women socio-economic facilities, the government has initiated various welfare programmes to tackle gender gap. There are several missions that have been launched by Sikkim government ranging from State Commission for Women (2001) which basically deals with women empowerment. The main task of this commission is to bring awareness to women's rights, as enshrined in CEDAW and Indian Constitution, as well as laws relevant to women. It also empowers women to fight against violence and gain access to free legal aid. Campaigns to create awareness about inheritance right, maintenances right, and other women related issues have been examined.

State Commission for Women expressed that they continuously deal with women's issues. For instance, family dispute, physical and mental tortures, harassment and matrimonial dispute. As stated, these cases of abuse are registered more in marital cases. Land as a property claimed by women cases have hardly been registered: only two such cases have been registered in the year, 2015. So, they successfully settle the disputes and provide justice to women because they get property from their family. The Commission functioning process starts with careful study of the particular cases, then only do they take effective initiatives in order to give justice and attempt to settle the cases by giving counseling to both the parties. Similarly, various legal awareness programmes have been organised by the Commission in order to create awareness about women's rights but the social construction which was embedded male supremacy further undermines women's position. In order to bring changes in the society, emphasis should be given to embedded male supremacy, which perpetuates gender discrimination.

**Table 5.2**  
**Cases of Women's Property Rights**

<b>Registered Cases in</b>	<b>Year</b>	<b>Numbers</b>
<b>High Court of Sikkim</b>	2015	2
<b>District Session Court of East and West**</b>	2016	3
<b>State Commission for Women</b>	2015	2
<b>Total</b>	-	7

Sources: Data Collected from High Court of Sikkim District Court and State Commission for women (3<sup>rd</sup> March 2016)

\*\*Pending cases where women are party in property disputes.



Gender and property rights become crucial issues in the present context. Women are always sidelined from inheritance rights, in most societies, including tribal communities. As the collected data (Table 5.2) shows, only seven cases have been registered with regard to property rights, which give space to critical thinking about why women have not approached the Court or Commission or NGOs etc. The reason could be in the context that women are not aware of their rights or are not interested to fight their rights. However, the reason could also be grounded within the patriarchal ideology of the joint family. In most of the joint families, the father is head of the family and he would not allow partition of land. Partition of land would ultimately enhance the fragmentation of land holding pattern. Hence, pattern of land holding system in the joint family is also considered as the stumbling block in acquiring property. Secondly, claiming of property rights in the family also creates hostile relationship among the parents or relatives because family is such a bond in which all the member shares similar love, respect, etc. If legal property rights are claimed by the daughter then the family relations will come under hostile situation. In order to avoid such situations, women are reluctant to fight for their rights.

Several laws have been adopted by the union government or respective states that are not in accordance with any personal law of the community (Gupta, 2002, 1746). Personal law of communities or state's own policy prevails when it comes to the issue of inheritance, divorce, marriage, adoption and spousal support. Therefore, in the matters of inheritance laws, the state have either their own policy or state refers to the principle of customary laws with their respective community.

### **5.3 DATA AND ANALYSIS**

Four districts of Sikkim i.e. North: Lachen, Lachung and Dzongu, South: Perbing, Kewzing and Ravangla, East: Ranka, Rumtak and Penlong and West: Darap, Namboo and Pelling have been taken under this study.

**Table 5.3**  
**Scheduled Tribes in Sikkim**

State/district	Total population	Male	Female	ST. Pop	Male	Female
Sikkim	610577	323070	287507	206360	1,05,261	1,01,099
North	43354	24513	18841	28,715	14,741	13,974
East	281293	150260	101033	78,436	39,479	39,957
South	146742	76663	70079	41,392	21,556	19,836
West	136299	70225	66074	57,817	29,485	28,332

Sources: Registrar General of India, Census 2011 and total population of Sikkim extracted from Profile of Tribal People.

According to District Census Handbook 2011, North has the least Scheduled Tribe proportion of population (28,715), West is recorded as the second highest (57,817), South third highest (41,392) and East is highest (78,436). Tribal communities consist of Lepcha, Bhutia, Limboo, Sherpa and Tamang. Lepcha are considered as the primitive tribe of Sikkim. In December 2002, Limboo and Tamang were recognised with their status in Scheduled Tribe in Sikkim (Sinha, 2006; Subba, 2008). According to 2001 census, the total population of Sikkim was 5,40,851 and Scheduled tribe population was 1,11,405 (20.5%).

### **5.3.1. PROFILE OF THE RESPONDENTS**

A sample size of 200 tribal women has been taken under study with the help of close and open-ended questionnaires. The reason behind the close-ended questionnaire is that, some-times respondents are not interested to give answers in this particular situation and by asking few questions, the researcher needs to interpret the views of the respondent about the particular topic. Such type of questionnaires is meant for the respondents. Hence, open-ended questionnaires are also used, because the proposed research was exploratory in nature. It is very important to know the respondents' views and extra

information in the topic which researcher might not be aware of. It allows respondents to answer any questions there instead of selecting from the given options. Similarly, open-ended questionnaire have been applied to the various NGOs, eminent advocates and women leaders who are dealing with empowerment of women. Open-ended questionnaires provide rich qualitative data which helped in analysing the context and also in the collection of information from the specialists, in which researcher may have less knowledge.

Door-to-door-methodology has been used while taking interview with respondents. Each of the 50 respondents has been identified from the four districts. Numerous NGOs, state stakeholders, government officers, eminent advocates and those who are working upon the women issues are also taken into consideration under study.

The questionnaires firstly start with the demographic profile of respondents which includes education, age, occupation and marital status. The main objective of the questionnaires deal with how existing traditional customs and practices become hinder in getting property inheritance rights, for women in tribal society. The study also tries to highlight the opinion of tribal women regarding their rights and their sense of deprivation with respect to inheritance rights. The research also meted out how patriarchal system imposes barriers in getting property inheritance rights.

Various issues were raised during the research study for instance, customary laws, reason for denial of property rights to women, issues of patriarchy, control over property, empowerment of women through property rights, etc.

**Table 5.4**  
**Sample Tribes from four Districts of Sikkim**

Districts	Tribes					Total
	Lepcha	Bhutia	Limboo	Sherpa	Tamang	
<b>North</b>	15	35	-	-	-	50
<b>South</b>	10	2	5	12	21	50
<b>West</b>	-	17	31	2	-	50
<b>East</b>	16	27	-	6	1	50
Total	41	81	36	20	22	200
<b>Valid %</b>	20.5	40.5	18.0	10.0	11.0	100.0

Sources: Field Work<sup>4</sup>, (December 2014-June 2015)

An extensive research in the field, is very important in order to get comprehensive information. Under the field work, snowball sampling has also been used in linking with useful respondents, over a span of six months. The field work was conducted in the month of December 2014 at Lachung and Lachen in North Sikkim. This area is particularly inhabited by the tribal people, especially by Bhutias. And in Dzongu, while the majority are Lepcha people. After completing field work in the North districts, other districts were also thoroughly surveyed. 41 Lepcha, 81 Bhutia, 36, Limboo, 20 Sherpa and 22 Tamang respondents have been interviewed.

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<sup>4</sup> In order to collect the data, field work has been conducted during December 2014- June 2015 to complete the study. Hereafter it is referred as 'Field Work'.

**Table 5.5**  
**Demographic Profile of the Respondents**

<b>Communities</b>	<b>Lepcha</b>	<b>Bhutia</b>	<b>Limboo</b>	<b>Sherpa</b>	<b>Tamang</b>	<b>Total</b>
<b>Education</b>						
Class x	3	7	3	2	3	18
Below class x	23	25	16	8	10	82
Above class x	6	5	0	0	1	12
Graduate	0	6	1	0	0	7
Above graduate	0	5	0	0	0	5
No formal education	9	33	16	10	8	76
<b>Total</b>	<b>41</b>	<b>81</b>	<b>36</b>	<b>20</b>	<b>22</b>	<b>200</b>
<b>Occupation</b>						
Housewife	26	45	16	12	17	116
Student	1	4	1	0	0	6
Farmer	10	11	17	5	4	47
Business	0	9	1	1	0	11
Employee	4	12	1	2	1	20
<b>Total</b>	<b>38</b>	<b>81</b>	<b>36</b>	<b>20</b>	<b>22</b>	<b>200</b>
<b>Marital status</b>						
Married	39	65	28	18	19	169
Unmarried	1	15	6	0	2	24
Widow	1	1	2	2	1	7
<b>Total</b>	<b>41</b>	<b>81</b>	<b>36</b>	<b>20</b>	<b>22</b>	<b>200</b>
<b>Age</b>						
Below 20	2	3	2	0	0	7
20-30	2	13	6	1	7	29
30-40	20	39	18	11	11	99
40 above	17	26	10	8	4	65
<b>Total</b>	<b>41</b>	<b>81</b>	<b>36</b>	<b>20</b>	<b>22</b>	<b>200</b>

Sources: Field Work, (December 2014-June 2015)

It is pertinent to study the demographic criteria of the sample size, because respondent's age, education, occupations vary from one another. The level of education of the respondents reflects their knowledge on their rights. Education plays a significant role in

empowering women because it provides opportunities for socio-economic upliftment. Earlier the girl child was denied education: the reasons were financial constraints, early marriages, submissiveness, motherhood, and parental perception on girl education. Most of the respondents reported that they were not allowed to attend school because of the workload at home, like looking after a younger one in the family. In a few cases, parents have enrolled their daughters in schools, but early, immature marriage abruptly stop her studies. For instance, 38 % of the respondents have not even completed their formal education which shows education disparity in the collected data.

Similarly, the occupational background of the respondents also helped to understand the position of women, in family or society at large. Whether they are self-empowered economically, socially or politically. 58 % of the respondents are housewives which means, they have to only look after their family. Only 15.5% of them are engaged in business and are job holders, which means they are self-dependent. Property in the form of land is very significant for women who are involved in agriculture for their livelihood. Around 23.5 % of respondents have reported, they are farmers.

The objective of collecting information regarding marital status of respondent is to know whether they have been given property rights from their natal family or from marital family. The study revealed that married women hardly get property from their natal and marital family. Unmarried daughters also rarely inherit property rights. Gender-discrimination with respect to PIL may be used to ascertain the position of tribal women. Moving towards the age factor of respondents was to find out which age groups of respondents are more inclined towards the gender equality. Also, which age group of the respondents, is familiar with their rights and capability to handle problems independently. As table stated, that 30-40 age group of respondents appear to be highest in numbers and below 20 falls in the lowest rank.

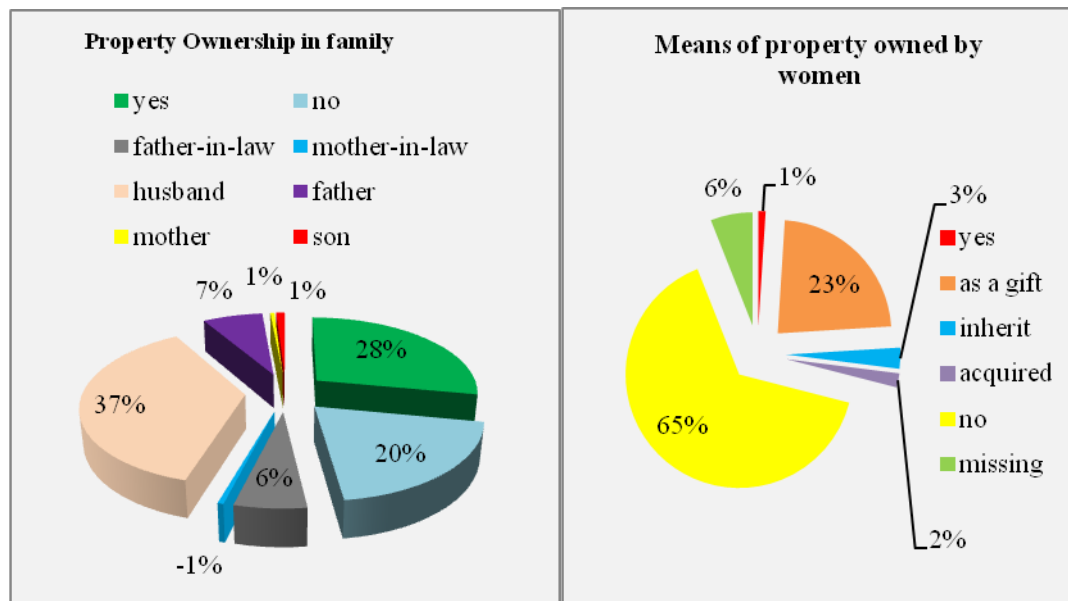
### **5.3.2. PROPERTY RIGHTS OF WOMEN**

Women in tribal society remain in a marginalised position with respect to ownership of property. The makeup of the society is such that it constitutes the transfer of titling of

land to head male members. The pattern of ownership of property remains befogged in terms of a patriarchal/patrilineal system. Basically, the father is the supreme decision-maker in the family and in this context, the property-related decisions is taken by the head of the family. Or after his death, all the immovable or movable property is succeeded by the son or sons and is equigeniture in nature, where all the ancestral property is equally divided among them. Women seldom inherit parental property. Some of the parents follow the customs of giving property as a gift to daughters. Property as inheritance or as a gift has very different meaning.

To inherit means to receive property after the death of the owner and gifting refers to such property, given by parents or somebody willingly. Therefore, in a tribal society, customary law does not guarantee PIL for women. The first figure deals with the question of ownership of property by women, where women own property along with other family members. The second figure indicate the means or methods by which women have owned their property, whether self-acquired, gifted, or inherited.

**Figure 5.1**  
**Women's Ownership of Property**



Sources: Field Work, (December 2014- June 2015)

Figure 5.1 clearly shows the community-wise ownership of property, which state that most of the property is either in the hands of father, husband or brothers. Only 28 % of the respondents who owned property but within this 23% respondents have acquire property as a gift from their parents, 3 % of them have inherited, leaving 2%, who have self-acquired it. Male member in family appears to be higher and the titling of the land is particularly in name of husband (37 %). In the first figure 20 % and second figure 65% of the respondents do not enjoy ownership of property in the family.

The nature of tribal community is patrilineal and property also devolves from male line to their descendants. It has been also observed from the study that male entitlement appears to be higher because, most of the property is either in the name of husband, father, and brother, or in father-in-law. In a traditional system of society, there were no customs of giving property rights to women. However, inferences can be drawn from these figures that women hardly inherit property from their parents. This shows that the perpetuation of gender-discrimination with respect to inheritance rights, is continuously limiting women's rights in tribal society.

### **5.3.3. ISSUES OF INHERITING PROPERTY RIGHTS**

In a tribal society, certain customs and traditional aspects play a significant role in determining their life-style. Regarding the ownership of property, gender equality laws need to be improved through legal aspects. So, women would enjoy equal rights among the tribal society. The present study attempts to analyse the question regarding the obstacle of inheritance rights for women. Overwhelmingly, the study found that the main obstacles to women's access to justice with regard to property rights, are conventional practices, norms that curtail women's understanding of their rights. If their rights are denied, then they do not seek for justice because such social norms become stumbling block in gender justice. Within the families, communities and society norms and practices are embedded in such a way that it curtails the achieving of gender justice, especially for rights of women.



Social norms and traditions can negatively impact upon the different rights of women. This social norms and traditions become one of the most challenging factors for women in demanding equality. Examples can be traced back to Garos of Megalaya in which property is inherited by woman. But when the management system arises, men take the first place. In other societies, patrilineal system is more famous where property is inherited by male descendant and women are lagging behind with respect to PIL. Girls can receive movable property of mother and sons inherit father's property equally.

**Table 5.6**  
**Reasons of Denying Property Rights to Women**

Reasons of Denying property rights for women	Community					Total
	Lepcha	Bhutia	Limboo	Sherpa	Tamang	
Customs	12	22	12	6	8	60
Conventional practices	14	27	17	10	9	77
Norms and values	1	4	3	1	2	11
Conventional practices, norms & values	1	3	0	0	2	6
Customs, conventional practices, norms & values	6	3	1	0	1	11
Customs and conventional practices	2	6	0	0	0	8
No	5	12	3	1	0	21
Other. Specify	0	4	0	2	0	6
Total	41	81	36	20	22	200

Sources: Field Work, (December 2014- June 2015)

Table 5.6 states that 60, 77, 11 out of 200 respondents believed that customs, conventional practices, norms and values respectively relinquished woman's right to property. 17 out of 200 also imply that customs, conventional practices, norms and values affect women's ownership of property. Only 21 of the respondents have reported that such customs and practices do not affect women's rights, because women have to be self-confident in order to fight for the rights.

It has been observed from this table that most of the respondents reported that customs, conventional practices, norms and values overwhelmingly encourage societies towards gender discrimination. Customs, norms and traditional values are those practices which are frequently used by communities in their day-to-day life and regular practice of such conventional values becomes the customary law. Under this system, the positions of women are not satisfactory because they do not enjoy their various rights. The position of women is categorised in the private sphere with workload of caring and rearing children. Such ideas exacerbate women in a submissive position where they are treated as the property of men, in many societies.

Feminists' theory show skepticism about epistemology about conventional practices and existing structure of the society and argue inclusion of women in knowledge-construction, especially from the liberal point of view. In this context, inclusion of gender equality with respect to inheritance rights would be means for the achievement of an egalitarian society.

Customary and religious aspects come first in the system of inheritance, marital property and access to land, in many countries especially in the developing countries. Sometimes customary laws contradict the statutory laws in terms of gender equality, particularly in the case of PIL for women. Statutory laws refer to formal law of the state, which are enacted and passed by the legislature of governments, for benefiting people. However, lack of knowledge in the provision of statutory laws along with lack of enforcement at the local level continue to undermine women's rights, in spite of the fact that statutory laws are based on emancipation principles.

Overwhelmingly, Indian Constitution also plays a substantial role in guaranteeing gender equality laws with regard to property rights. Under the Fifth and Sixth Schedule, there is a special provision for the tribal communities in the protection and preservation of their culture, customs and age-old ancestral practices. Another milestone concerned with gender equality in property rights been taken by the Hindu Succession Act (Amendment 2005). Hence, the rhetoric of women's rights remains as a contentious issue, within the polemic of customary and statutory laws in the given space.

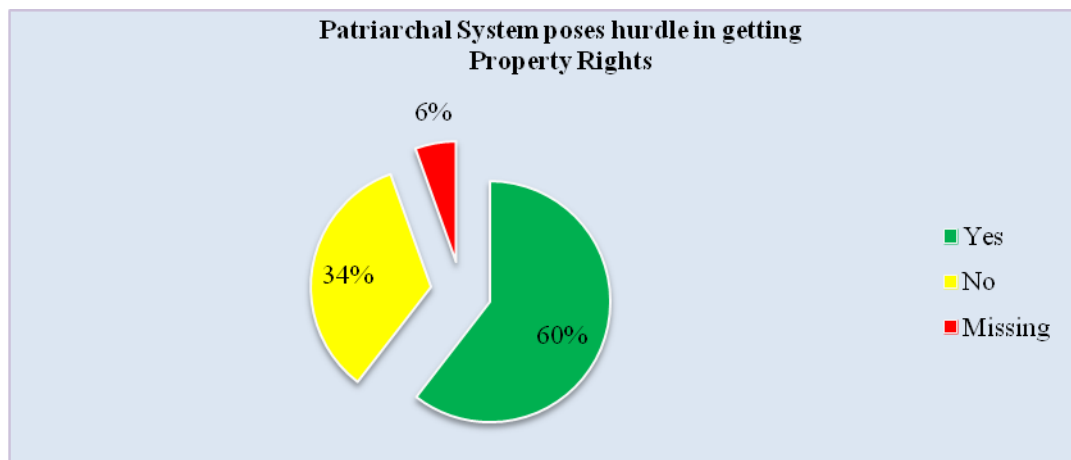
On the other hand, postmodernist feminists are skeptical about the existing society in which women are systematically excluded from the knowledge-construction and proposed deconstruction of common assumption of knowledge, such as male preferences in relating to property rights. But this theory is criticised on the ground of deconstructing the existing society, because it would create some kind of identity slippage of an individual or community or ethnic group, especially among the tribal community. Therefore, customary laws are very intrinsic to the tribal community and land alienation and land fragmentation would explicitly lead towards the slippages of identity.

### 5.3.3.1 Patriarchal System

Land is a natural resource and is considered as a pivotal asset for economic life, for the survivable of human beings. In tribal societies the pattern of ownership is normally based on an individual level, individuals own such land either through inheritance from forefathers or either purchase it from other communities or their own community. Tribal society is recognised as patriarchal in nature, where the father appears to be dominant in nature. All the decisions are taken under the consideration of the head of the family. Furthermore, means of inheritance also transfer from the father to sons. In this context, the study also explored the view of women in a patriarchal system. Whether such practices arouse hurdle in the inheritance of property rights, particularly for tribal women.

**Figure 5.2**

#### **Patriarchal System and PIL**



Sources: Field Work, December 2014-June 2015

The study explored the opinion of tribal women on whether patriarchal system debar woman from inheriting ancestral property of parents or not. In this connection, the majority of the respondents (60 %) agreed that patriarchy perpetuate gender inequality with respect to inheritance rights (figure 5.2). 34 % of the respondents provided negative attitude towards such rights because they emphasise upon education that would empower their children. They give more emphasis towards education system and if they get proper education system then, they themselves will be capable to tackle the problems.

Most of the tribal communities live in the joint family system. Under this, the family is basically composed of closely related kins or two or more nuclear families. In the joint family system, the head of the family enjoys supreme power in decisions, relating to partition of any property. Land fragmentation is another important factor in denying property for women, because in a joint family, the father tries to maintain unity among the family members. Hence, partition of family would lead to small portions of land, which could explicitly affect agricultural production. In this context, women also enjoy less individual ownership in family. This is one of the important reasons in denying property rights for women in tribal communities. In this connection, radical feminists argue that the notion of family and patriarchy are the main institutions which perpetuate oppression of women in the given space. Further the eradication of women's oppression would be realised through the abolition of existing knowledge, for example, family and patriarchy in which inheritance rights are mediated through the male's point of view.

**Table 5.7****Community-wise Distribution and the Status to bring the changes in PIL**

Community	Need to bring Changes in the Property Inheritance System					Total
	Strongly agree	Agree	Neither	Disagree	Missing	
Lepcha	6	27	5	0	3	41
Bhutia	17	57	4	1	2	81
Limbo	4	27	4	1	0	36
Sherpa	0	16	3	1	0	20
Tamang	7	9	6	0	0	22
Total	34	136	22	3	5	200
%	17	68	11	1.5	2.5	100

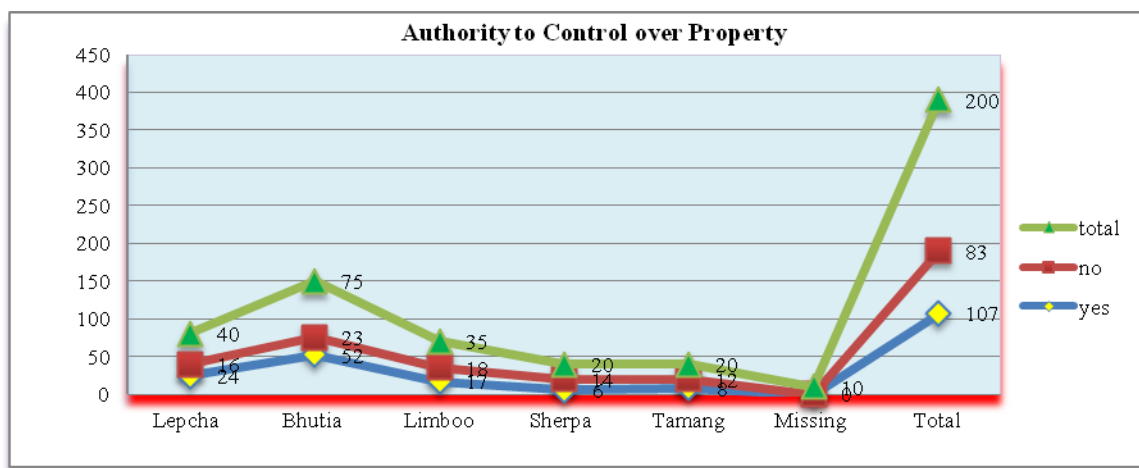
Sources: Field Work, (December 2014-June 2015)

As mentioned in the figure 5.2, most of the respondents have reported that patriarchal system is also one of the factors which restrain women from benefiting property rights. The debate smack towards changing the system of property inheritance rights, under which, women also have equal rights with men. Table 5.7 shows that the community-wise distribution as well as overall respondents expresses their views that effective changes need to be brought in PIL. It is important to bear in mind that changes need to be crucial in gender justice. 17 % (strongly agree) and 68 % (agree) of the respondents expressed the necessity and need to bring changes in the inheritance system. 11 % of the respondents neither strongly agree nor agree about particular issue and 1.5 % of them disagree about changing legal rights because it would give birth to strained relations among the family members.

From the liberal feminists point, legal equal rights with respect to inheritance rights would be edified in realising women's liberation. In this context, most of the respondents are explicitly driven by the legal reformation in the existing laws and need to bring changes.

The debate of authority to control over natural resources propelled women's position in the family. Land is considered as a productive asset: therefore the possession of land by women indirectly helps to combat financial challenges. Authority to control over property also reflects independence. Furthermore, the study also highlights the status of women in context with control over landed property, which is mentioned in given figure 5. 3.

**Figure 5.3**  
**Women's Control over Land Property**



Sources: Field Work, (December 2014-June 2015)

While collecting the data, majority of respondents belonged to the Bhutia community and Sherpa and Tamang were the fewest. The figure 5.3 represents that those women who have entitlement of property in her name, have independent control over property. On the other hand, those women who do not have control over property ultimately depend upon the male member in the family and they need to take permission from the head of family. Figure 5.3 shows that 107 respondents have reported that they have control over property but they need to take some advice from the male members in the family, because they cannot take independent decision. Further, out of 200, 83 respondents do not have control over property and 10 are missing.

It has been observed from the study that those women who do not have entitlement of property in her name cannot enjoy authority to control over property. Though, they can share their responsibility with male members but the ultimate decision would be taken by the head of the family. Liberalists' ideology postulates individual property rights would create some kind of sense of liberty and sovereignty. Hence, secure independent land rights significantly ensure women's sense of independence in the household and society at large. Concomitantly, according to Aristotle, possession of private property would bring less chances of conflict while benefitting the reward or recompense.

#### **5.3.3.2 Impact of Ownership of Property Rights**

Property rights with respect to land are very crucial element for the rural women and such rights ascertain the status of women in the society. It not only enhances economic security but also encourages women to engage in agricultural production. Women with entitlement of property leave some kind of impression in the family in terms of economic benefits and social development. So, this study also highlights the impact of property rights which might be help in improving the life standard of women in the society.

**Table 5.8****Property Rights make changes in the Status of Women in Society**

Property ownership would make/making any changes in the status of women	Community					Total	%
	Bhutia	Lepcha	Limbo o	Sherpa	Tamang		
Yes	2	11	0	3	6	22	11
No	4	4	1	2	3	14	7
Living standard in family & society	19	36	19	7	1	82	41
Respect	2	4	2	4	7	19	9.5
Decision making role and economic benefit	1	4	1	1	3	10	5
Social development	1	0	0	0	1	2	1
Living standard in family & society, Respect	10	15	2	2	1	30	15
Living standard in family & society, decision making role and economic benefit	2	0	6	0	0	8	4
Living standard in family & society, respect, decision making role and economic benefits	0	1	5	0	0	6	3
Living standard family & society, decision making role, economic benefit and social development	0	6	0	1	0	7	3.5
Total	41	81	36	20	22	200	100

Sources: Field Work, (December 2014-June 2015)

PIL empower women in a myriad of manners ranging from improvement of life, standard, dignity or respect from society. Table 5.8 states that 11% of the respondents reported that it obviously would bring changes in life, and maximum number of respondents i.e., 41% of them stated that it definitely would increase the living standard of the family and the society. 9.5 % expressed that it would provide a sense of respect, similarly, 15 % of them have stressed that it would increase the living standard and bring respect in the family and society. In fact, almost all the respondents have provided positive attitude towards the particular issue. Ironically, 7 % of the respondents denied that entitlement of property rights would not make any changes in their living standard, respect or bring changes in social, political and economic development. Basically, they are engaged in other jobs and some of them have no such rights.



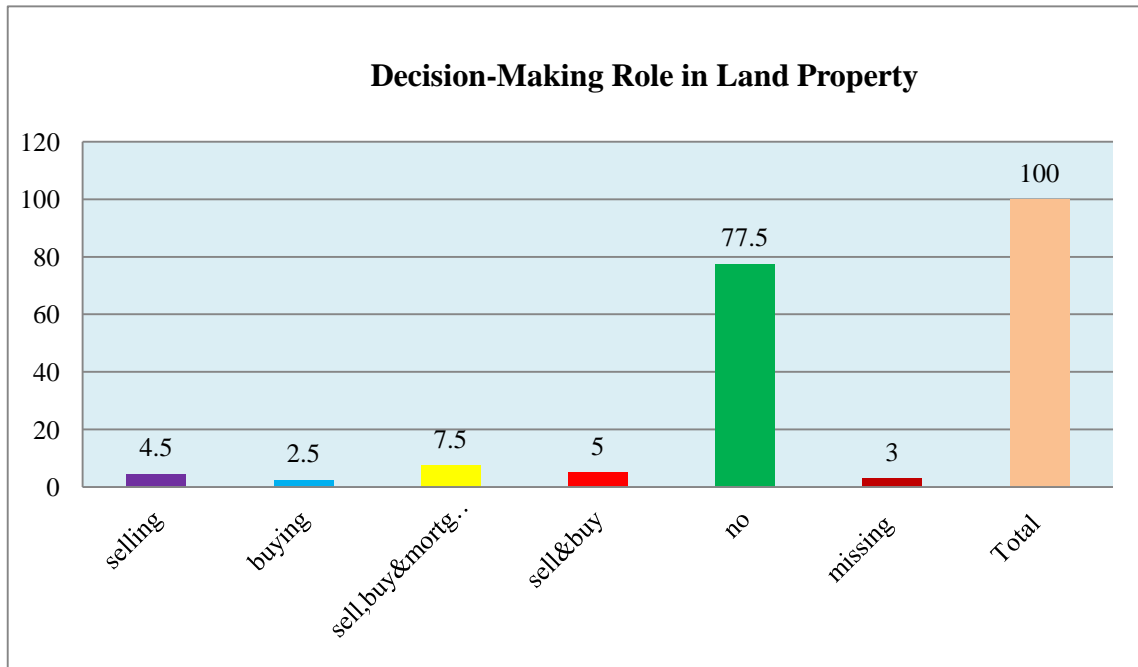
It has been observed from the above table that property rights automatically improves living standard in the family because if women does not have any source of income, then it helps in income-generation from agricultural production and that in turn changes their life-style in the society. Especially, in the word of Jeremy Waldron, ownership of private property promotes virtues like responsibility, self-reliance and also defines individual's identity and brings respect of people. Similarly, if a woman has an entitlement of property as assets, then she would be recognised and respected by the society. Respect can be earned from the family as well as from society.

### **5.3.3.3 Decision-Making Process**

In household matters, both men and women take decisions equally for instance, buying and selling of agricultural production, education of children, buying materials of day-to-day life, etc. In the case of land as a property, the title normally belongs to the father, husband or male members. Though, women take equal decisions yet they are not taken into consideration in most of families. In the earlier days, the concept of selling of land was not common among the tribes. Land was communally owned for their livelihood. As time passed individual ownership came into existence, but the customs and practices of inheritance was limited only among the male members in the family. Further, the communities started to follow their own customary law in which father's property was inherited by his sons in equal manners and daughters were left out.

Mortgaging of property is rarely a practice in tribal communities in Sikkim. Communities only mortgage their property when they have extreme financial crises. In order to meet the financial crises, they mortgage their lands to the government agencies and in turn the government provides them loans with some conditions. State governments also give various loans such as agricultural loans to farmers, educational loans to unemployed, skill development loans for youths, etc. but in return land or certain conditions need to be fulfilled. This shows that if women own property then they can easily tackle with financial crises.

**Figure 5.4**  
**Role of Women in Land Property**



Sources: Field Work, (December 2014-June 2015)

Society being patriarchal in nature does not welcome gender equality in terms of succession in tribal society. Cultural outlook emerged as the main reason behind the marginalisation of women from benefiting various rights. What has been emerged from the research is that there is negative attitude in tandem with decision-making role with regard to property rights for women in tribal society. Figure 5.4 reflects that women rarely take part in decision-making with respect to property in the family. Regarding the selling of property only (4.5 %) and buying (2.5 %) respondents enjoy such rights. 7.5 % respondents are hardly participate with their counterparts in areas like selling, buying as well as mortgaging. Only 5 % of the respondents reported their less contribution in selling and buying matters of the property. Surprisingly, 77.5 % of the respondents do not engaged in selling, buying and mortgaging in matters relating to property. On the other hand, most of the respondents are engaged in other activities of the household such as buying and selling of the agricultural productions, engaging in social activities and earning money, etc.

Though their numbers are greater yet they cannot enjoy independent decision-making process. The reason lies with the titling of property because registration of land appears in male members. Those women have possession on ownership of property they only have an independent decision-making role in family, otherwise they need to depend upon with the head of the family. According to libertarian perspectives, right to property essentially ensures the liberty and denial of property rights basically deprive women their liberty. Utilitarian theory often described as ‘greatest happiness in greatest numbers’ would mean that if women own secure land property rights then it would explicitly create happiness among individuals. According to utilitarian theory, the possession of ownership of property and more registration of land in the name of women would definitely give some kind of pleasure or happiness. Therefore, their decision-making role would also improve in the household matters.

#### 5.3.3.4. Property Rights and its Importance

**Table 5.9**  
**Inheritance of Property Rights**

Community	Do you think that property inheritance right is necessary for women?			Total
	Yes	No	Don't Know	
<b>Lepcha</b>	36	3	2	41
<b>Bhutia</b>	68	7	6	81
<b>Limbo</b>	32	3	1	36
<b>Sherpa</b>	16	4	0	20
<b>Tamang</b>	19	3	0	22
<b>Total</b>	171	20	9	200
<b>%</b>	<b>85.5</b>	<b>10</b>	<b>4.5</b>	<b>100</b>

Sources: Field Work, (December 2014-June 2015)

The study shows that 85.5% (table 5.9) of respondents expressed that property inheritance right is most crucial, in order to fight against financial instability. On the

other hand, only 10% respondents have negative response towards the inheritance of property rights. Generally, respondents who have children opined that property should go to the sons, because they are the parents' custodians at old-age stage. This clearly inculcated gender biases about rights of women, itself in family. Furthermore, a bunch of respondents opined that property rights would not necessarily empower women.

Lack of awareness is another important aspect regarding the inheritance of property rights among the tribal women in Sikkim. It has been observed from the study that about 4.5% of the respondents are unaware of property rights. This gave result that legal awareness about their rights among them, is most significant factor, which ultimately in one way or another leads to empowerment. No doubt, the State Commission for Women and other NGOs have played a significant roles in creating legal awareness about their legal rights, but some of the women in remote areas also need some kind of guidance. At the same time, it has been also observed from the study that some daughters are not interested to claim property rights because it belongs to their brothers and sisters-in-law. On the other hand, a bunch of respondents also reported that when girls marry, she will also receive some share of property from her husband on the ground if they did not get from natal family.

Many respondents have answered that property inheritance right is necessary for women. They felt that girls should get equal rights from their parents. It helps to safeguard against the financial instability from their husbands, and it would assure them care and comfort at old age. According to James Mackintosh, property acts as a 'sheet-anchor' of the individual and society at large, which means during poverty or financial crises it plays a significant role in order to combat such situations. Moreover, ownership of property is considered as a symbol of respect and strength in the family as well as in the society. According to classical liberalists, self-ownership of property would provide freedom or liberty. Especially from the John Locke point of view, he stressed that the right to property is inalienable rights and it has been given by nature of equal terms and manner. In this connection, property right is very crucial for women in shaping their sense of freedom in the given society. Paradoxically, few parents were against the idea of giving property rights to their daughters because it might cause hostile situation among

the siblings, since there is no such customs of giving property rights to women in the society.

#### **5.3.3.5. Women and the means of Improvement of their Capacity and Skill**

Education Facilities: literacy level and educational facilities play vital role in development process of any society. Universal primary education is one of the main aspects of Millennium Development Goals of the United Nations. Literacy rate and educational development is the key variables in improving quality life including life expectancy, learning levels relating to health facilities and nutritional aspects of children. Similarly, it also helps to generate awareness about various human rights as well as helps in acquiring new knowledge and skills. According to 2001 census, the literacy rate of Sikkim was 68.8% which increased in 2011 census to 82.2%, which means 13.4% increased in the level of literacy. This indicates that Sikkim is moving towards a greater level of literacy rate. The literacy rate of male was 76.7 and female (60.4) in 2001 census, which increased to 87.3 (male) and 76.4 (female). Educational facilities improve capacity and skills of the human being.

**Table 5.10**  
**Improvement in Women’s Capacity and Skill**

How women need to improve their capacity and skill?	Community					Total	%
	Lepcha	Bhutia	Limboo	Sherpa	Tamang		
Education facilities	16	51	14	10	8	99	<b>49.5</b>
Govt. scheme-SHG, ASHA. Etc	1	1	1	0	2	5	<b>2.5</b>
Leadership programme	6	1	1	3	7	18	<b>9</b>
Counselling & awareness programme	2	3	3	2	4	14	<b>7</b>
Others. Specify	0	0	0	2	1	3	<b>1.5</b>
Education facilities & leadership programme	7	5	14	0	0	26	<b>13</b>
Education facilities & govt. scheme SHG, ASHA, etc.	2	4	0	1	0	7	<b>3.5</b>
Education facilities & govt. scheme SHG, ASHA etc, leadership programmes	4	4	1	0	0	9	<b>4.5</b>
Education facilities leadership programme and awareness programme	2	2	1	0	0	5	<b>2.5</b>
Education facilities counselling & awareness programmes	1	10	1	2	0	14	<b>7</b>
<b>Total</b>	<b>41</b>	<b>81</b>	<b>36</b>	<b>20</b>	<b>22</b>	<b>200</b>	<b>100</b>

Sources: Field Work, (December 2014-June 2015)

The study mainly focuses on four aspects i.e. educational facilities, schemes provided by the government including SHGs (Self Help Groups), ASHA (Accredited Social Health Activists)<sup>5</sup>, etc., leadership programmes as well as counseling and awareness programmes. Table 5.10, 49.5% of the respondents gave more emphasis upon educational facilities of children. Secondly, 13% of the respondents expressed that not only educational facilities but leadership programme is also one of the main aspects of empowerment of women. Only 9% of them believed that leadership programmes in each

<sup>5</sup> ASHA is community health workers instituted by the government of India’s Ministry of Health and Family Welfare as part of the National Rural Health Mission. ASHA constitute with the local trained women who act as a health educators and promoters of community. Retrieved from [www.nrhm.gov.in/comunitisation](http://www.nrhm.gov.in/comunitisation)>. Accessed on 23<sup>rd</sup> February 2016.

and every society incurred women development. 7% emphasised upon counseling and awareness programmes which is crucial for the development of any society. Furthermore, 7% of them believed that educational facilities and counseling as well as awareness programmes should go side by side.

Government came up with many schemes for the empowerment of women from the grass root level by creating various programmes such as SHGs, ASHA, NERLP (North East Rural Livelihoods Projects)<sup>6</sup>. In this context, 8 % of the respondents strongly believed that educational facilities along with such schemes of government and leadership programme play significant role among tribal women. It can be sketched out from the table that most respondents stressed upon educational facilities which help to improve women's capacity and skill.

Similarly, demanding of legal ownership of property rights is one of the crucial factors for women's overall development in the society. In this context, several legal initiatives have been taken for the overall development of women from the grass-roots to a global level. International legal protection of property rights is based within the key provision of Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).

So, it has been observed from the study that different schemes of the government, as well as various international legal laws are not able to benefit women in the grass-root level especially in the area of inheritance rights. In this context, effective leadership and counseling programmes as well as government schemes are imperative in order to address women's issue with special focus on inheritance rights, and such initiatives need to be established by the state government.

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<sup>6</sup> The main objective of the NERLP for India is to improve in rural livelihoods, especially for women, unemployed youth and the most disadvantaged tribal people. The project is for the period of five years and it covers two districts each in Mizoram, Nagaland, Sikkim and Tripura. There are four components of this projects which include social empowerment, economic empowerment, partnership development and project management (extracted from [www.worldbank.org>projects>north-east](http://www.worldbank.org/projects/north-east)). Accessed on 24<sup>th</sup> February 2016. It is funded by World Bank.

Figure 5.5

Women and Legal Entitlement of Property Rights



Sources: Field Work, (December 2014-June 2015)

Adequate ownership of land, housing and property would empower women socio-economically. In order to meet the basic needs of human being, property rights have greater task. Figure 5.5 shows those respondents 61 out of 200 strongly agree that legal property play significant role for women. Similarly, 108 out of 200 (agree) respondents reported the necessity of legal property rights. Those who belong to category of no formal education also agreed that legal entitlement would bring some changes. So, it is very pertinent to have legal property rights in the state which is considered as the safeguard of the rights of human being.

According to legal positivists, individual’s property rights would be protected by the law. Property rights bind individuals through a network of legal rights and such judicial mechanism need to be performed in terms of transparency in providing justice. Likewise, Rawls *Theory of Justice*, expounds justice as fairness. According to Rawls, that justice would become fairness when the marginal people or least advantageous people would benefit on the ground of equality, especially women in the society. Utilitarian theorists argue that individual property rights need to be protected by the laws of the state and if the state and its laws are unable to protect or preserve it, then it leads towards a conflict situation. In this context, state and society have to play greater roles in executing



the legal rights for the protection of the rights of the people. Liberal feminists' theory is also driven by the notion of equal legal rights and opportunities for the emancipation of women from a male dominated society.

#### 5.3.4. EMPOWERMENT THROUGH PROPERTY INHERITANCE RIGHTS

Empowerment can be defined as the process of creating awareness among women and their greater engagement in socio-economic, political and cultural activities. Such activities would lead towards representation in the decisions-making process. It also implies that enhancing their ability to control and exercise influence over natural resources.

**Table 5.11**  
**Empowerment of Women through PIL**

Community	Is it property inheritance laws empowers women economically, socially and politically?			Total
	Yes	No	Missing	
Lepcha	31	8	2	41
Bhutia	65	11	5	81
Limbo	27	6	3	36
Sherpa	16	4	0	20
Tamang	16	6	0	22
<b>Total</b>	155	35	10	200
<b>%</b>	<b>77.5</b>	<b>17.5</b>	<b>10</b>	<b>100</b>

Sources: Field Work, (December 2014-June 2015)

Table 5.11 represents that 77.5 % of the respondents expressed that property rights is considered to be one of the means of empowering women. Only 17.5 % of the respondents reported that property inheritance law would not empower women.

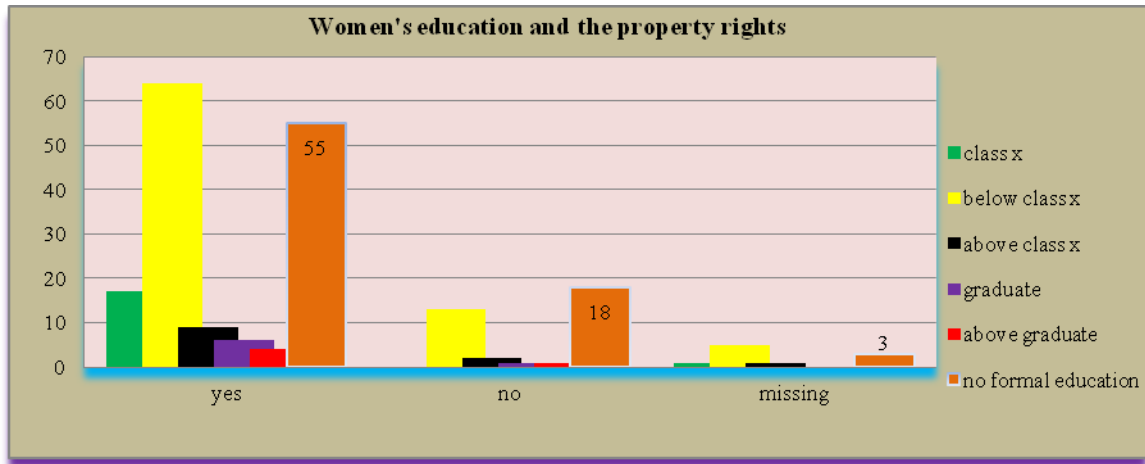
It has been observed from the study that if women have ownership of land rights, then they would have a powerful influence and ability to control their environment and

contribute towards a developing society. Further, from the point of economic empowerment, ownership of property enabled financial assistance by selling, mortgaging or by leasing. Women with property rights make income-generation by giving lease or taking loans from government or other financial institutions. It not only secures economic aspects for women, ownership of property also improves education, family health and wellbeing. Women with ownership of land are likely to enjoy better feed, health and education. Because women themselves engage in agriculture and generate income which ultimately rises household expenditure, they can even afford health and education. It also helps to increase investment process for family welfare and needs are fulfilled.

From the social benefits aspects, it helps in two levels: household and community. At the household level, it helps in times of illness, death of the family members, divorce and plays a significant role in fighting difficult conditions. Its importance at old-age cannot be undermined. Those women who possess ownership of property would likely be seen as greater participants in community level activities and organisations. From the social perspectives, ownership of property is optimal and contributes to the overall wellbeing of women, along with their family and community. Many women also report that property rights in one way or another is a matter of pride and dignity. Property owners are treated with some degree of respect and there is an innate sense of status in it. Also, responsibility of property owners is acknowledged by the family. On the other hand, their pride lies in their contribution to welfare of family and community.

In terms of political empowerment, participation in the political process in different levels help women to engage in formation of political forums and then can be involved more on land rights movement. Political empowerment comes out from the representation in decision-making structures. Women who cannot own, or control property would often play limited roles as they lack in the representation on decision-making process of household as well as in community. Political spheres provide platform for women to become leaders: it helps to increase participation of ordinary women in politics and governance and they become aware about their rights.

**Figure 5.6**  
**Impact of Education on PIL**



Sources: Field Work, (December 2014- June 2015)

Qualified respondents insist that PIL have impact upon women’s status in the family, as well as society. It appears from the figure (5.6) that 38 % of respondents have not completed their formal education but they have a sense of what is fair in terms of gender equality, with respect to property rights. They believe that property rights not only empower women in society, but also help in decision-making process in household matters. It leads towards the independence rights in family, as well as in the society. On the other hand, 17.5 % respondents provide negative attitude towards the response of the question, they believe it’s not going to help women, because they are involved in extra activities such as jobs, business, etc.

Rights to own, access or control over property is indeed marked as progress for tribal women because such rights are particularly related to their contexts and cultures. It also increases the probability of achieving aspirations, which improve their sense of empowerment, sense of status, further opens up possibilities for participation in nation-building, which can be interpreted as empowerment. Land is a productive resources and it also acts as a security, legacy and symbol of status, and as a social or political mobilising force. Most of the respondents felt that land is not only meant for their fulfillment of desire, but also fulfils the desire of their children first, and then communities.

### 5.3.4.1. Land Rights and Women

The study attempted to analyse how inheritance of property would empower women, particularly tribal women. Women with property rights would likely revolve round the gamut of certain grounds, such as life security, bargaining power, economic security and food security.

**Table: 5.12**  
**Impact of Land Rights**

Property right would empower in which way?	Community					Total	%
	Lepcha	Bhutia	Limboo	Sherpa	Tamang		
Life security	22	40	12	15	14	103	<b>51.5</b>
Bargaining power	1	0	0	0	0	1	<b>.5</b>
Economic Security	4	2	0	3	4	13	<b>6.5</b>
Others. Specify	1	3	0	0	0	4	<b>2</b>
Life security, Bargaining power & Economic Security	8	21	8	2	0	39	<b>19.5</b>
Life Security and Bargaining power	4	12	14	0	3	33	<b>16.5</b>
Life Security and Economic Security	0	2	2	0	1	5	<b>2.5</b>
Missing	1	1	0	0	0	2	<b>1</b>
<b>Total</b>	<b>41</b>	<b>81</b>	<b>36</b>	<b>20</b>	<b>22</b>	<b>200</b>	<b>100</b>

Sources: Field Work, (December 2014-June 2015)

Table 5.11 shows that, 51.5 % of the respondents elucidated that property rights would help in life security, because if women have property rights, she would less likely face problems in her life. Similarly, 19.5 % of the respondents have strongly pointed out that property rights helps in a secure life, greater bargaining power and economic security in the family. 16.5 % of the respondents stressed upon life security and bargaining power, and 6.5 % stressed only on economic security.

It has been observed that property rights undoubtedly provide life security in the future, because when children have property rights, it becomes a potential medium of

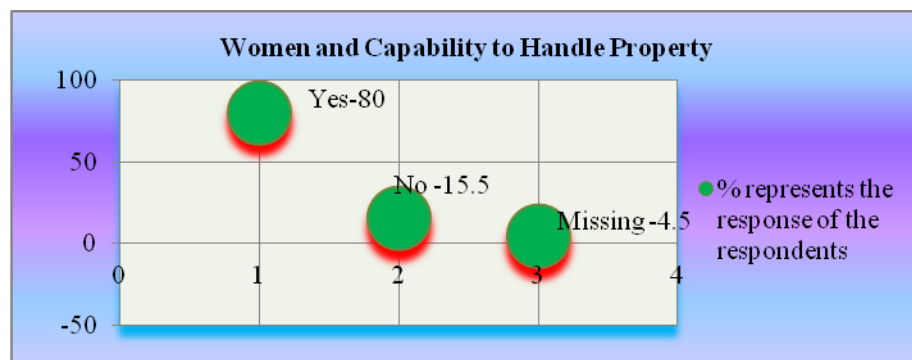
earning. Immovable property provides life security. If women do not have any source of income then land can become an alternative source for livelihood. Land is a natural resource and it is impossible to create new land. According to Bina Agarwal, productive land would likely help in livelihood process of family and when women do not have other sources of income, then immovable property plays a significant role. Further, she also argues arable land improves bargaining power of women in intra-household and at the community level. Bargaining power on the sale, lease, or mortgage of the assets would encourage women's independent life choices. It has been observed from the empirical study that if women have entitlement of property, they are less likely to be tortured by their counterparts.

### 5.3.4.2. Capability in Management of Property

Potentiality in handling property rights shows important elements of women's status in the family and society. In this backdrop, the study also tries to collect opinion of the respondents. Capability in handling property would indirectly raise a women's position and role in decision-making process, in household matters. It also enhances women's bargaining power in intra-household relations. Figure 5.7 reflects that women can also handle property with their male counterparts in the family members.

**Figure 5.7**

### Women's Capacity in Managing Property Rights



Sources: Field Work, (December 2014- June 2015)

In Figure 5.7, 80% of the respondents said that they have the potential to handle property, immovable or movable equally with their husbands, father, brother, etc. in the family. 15.5% respondents believed that they do not have the potential to handle property rights with their male counterparts. They reported that all the decisions could be taken by the head of the family i.e. father, brother, father-in-law, or who-ever appears to be head in the family. This shows that they totally depend upon the male members. Lastly, 4.5% of them did not answer the question which was asked during field survey either by choice or for no knowledge on such rights.

Women also share responsibilities in household matters. This shows that they are equally capable in managing property rights. If they possess independent land rights, then they do not have to depend upon their male counterparts. Such rights would secure their nature of independent ideology, which ultimately empowers their role in economic and cultural activities. They also reported that if they have control over property then it will make them economically strong in the family. Moreover, they can also get a chance to contribute in decision-making role, in household matters with their male counterparts.

## **CONCLUSION**

Earlier women were not treated equally with men with respect to inheritance/succession, social status, and religious responsibilities, as well as in administrative systems. Lots of changes have been made with respect to equality between a man and woman. Various legal, economic and political rights have been given by the state legislature, ranging from local to global level. Tribal people have their own rules and regulations which govern their day-to-day life. In the midst of these community-centric practices women somehow remain marginalised in some of the areas such as inheritance/succession, particularly among the tribal community. In order to come out from this conventional practices, gender equality administration of justice need to be brought.

The Constitution of India guarantees special provision for Northeast region for the preservation of identity. Customs and culture are very intrinsic to the identity of tribal people. Though women occupy better positions as compared to women in other parts of

India, yet there are some grey areas where women have to compromise their rights. Especially the pattern of inheritance and succession appears to be based on the patrilineal system, where women have been sidelined from various rights except in some of the tribes of Meghalaya, in which the matrilineal inheritance system is in practice. Yet in spite of the situation in Meghalaya, women still are in same condition like others, because property though inherited by daughters seeks men as active agents in channelising, when it comes to the question of land property family.

Sikkim constitutes three dominant communities- Lepcha, Bhutia and Nepalese- with small number of people from the plain regions. According to 2011 census, the total tribal population of Sikkim is 33.79% out of 6, 10,577, which means Nepalese are in majority. Talking about the religion aspects, a large number of people follow Hinduism followed by Buddhism and Christianity, as well as Islam. After the merger with India, the tribal people of Sikkim are still governed by their own customary laws with respect to inheritance/succession, marriage, divorce, etc.

Prominent example can be traced back to the Dzumsa system of Lachung and Lachen of North Sikkim. Dzumsa, which means meeting place of people, is the traditional administrative system of this village. It is a local-self governing system of this particular village, constituted by the Pipon and Gyapon, who are elected for a period of one year. Under such self-governing systems till now, women have no preference to become pipon but they can participate in selecting the pipon for the village.

Tribal communities of Sikkim are guided by the patriarchal family system in which the father appears to be the supreme decision-maker. However, all the movable or immovable property of the father is inherited by the sons in the family. In the case of two or more sons, then equigeniture method is followed. Daughters rarely get property from parents, if they get then it would be gift from the parents or some of them have self-acquired. In some of the family, if daughters remain unmarried then only she can get some portion of shares. But under the Married Women's Regulation Act 1962, if a Bhutia-Lepcha marries into another community, they forfeit their chance for ownership

of property rights. In some cases, women retain their positions as the custodian of family property in her life time.

In the epoch of pre-merged Sikkim, all the administration of justice was run by the King. The King was the only source of legal and judicial authority and with the influence of the British, certain laws had been passed for peoples' benefit. Administration of justice was carried out by the King with the help of feudal lords and pipons. However, there were many laws passed in this period such as Revenue Circular No. 1 (1917), Sikkim Subject Regulation Act (1961), Married Women Property Regulation Act (1962), etc. that is still in practice in Sikkim, even after having stepped towards a democratic system.

Various land reforms were adopted by the state government such as Land Back Scheme 1966. Under this scheme, land owners needed to voluntarily surrender their land to landless labourers. The Sikkim Alienation of Land (Regulation) Bill, 1989 and the Sikkim Transfer of Land (Regulation Bill), 1989 were also passed, by the state legislature. Similarly, The Sikkim Agricultural Land Ceiling and Reforms Act, 1977 (act no. 14 of 1978), The Sikkim Agricultural land Ceiling and Reforms (amendment) act, 1985 (act no. 3 of 1986) and Land Bank Scheme 1995 are prominent among this land reforms. Hence, such reforms apprehensively attacked the rights of indigenous people of Sikkim which was protected earlier under the provision of Revenue Order No 1 of 1917. When Sikkim became a democratic state; some of the old laws were still continued in practice to safeguard the land rights of the two indigenous tribal communities. Thus, it became a sensitive issue regarding the maintenance of customary laws, which governs the land ownership and on the other hand prohibits land alienation to outsiders. An effort has been taken in the protection of land rights of indigenous people, by the state government. On the other hand, these land reforms also encouraged tenancy and lessee for the purpose of industries, companies, institution, etc. which further enabled the alienation of land, traditionally protected by the state government.

In 1961, registration of documents relating to transfer of immovable properties was started in Sikkim and this was passed under the provision of Revenue Order 1 of



1917. Further Married Women's Property Regulation Act 1962 was passed by the state government which states that Sikkimese woman forfeit ownership of property, if she marries a non-Sikkimese. Such immovable property need to be disposed either by sale, mortgage or can be enjoyed in her life-time, like, in the case of (*Padma Kumari Ganesan versus State & others*). Sikkimese women's rights are still interpreted on the basis of these laws, which basically are based on gender discrimination.

The proliferation of the democratic system led to a critical understanding on the ground of gender equality. Gender equality with respect to PIL though introduced, yet somehow impacted upon customary laws of tribal communities. When Sikkim merged with Indian Union in 1975, special provision was also inserted under Article 371F (k) in order to preserve the identities and rights of the indigenous people. This Article guarantees several privileges to Sikkim including local autonomy in governance, laws restricting people of non-Sikkimese origin to settle in and restriction of tribal land alienation.

Sikkim Succession Act, 2008 was passed by the state government which provides equal PIL for women in Sikkim. Under this act, unmarried daughters along with sons have equal share in ancestral property of father. Divorcee and widows also-share equal proportion with others heirs if she has no source of income and has children to look after. Further, this act introduced on the basis of traditional practices proclaims that under act 2, women: who marry to persons without a Sikkim Subject Certificate cannot acquire any interest in property. But, this has not been fully implemented in state of Sikkim. Proponents argue that such laws would go against the provision of Constitution, which basically deals with the principle of gender equality. If such laws have been enacted in state of Sikkim, it may lead to a form of injustice, for under such circumstances, women have to compromise with their rights. Similar experience has been shared by the women of Jammu & Kashmir, according to Permanent Residents Disqualification Bill, 2004, in which those women who marry non-Kashmiris cannot own property rights.

Demand of equal PIL was made by Sikkimese women in 2010 under the banner of 'Daughters of Soil of Sikkim', which gave alarm to the state government, as well as

innocent women. This movement came across with much criticism on that ground that if equal PIL will come into force then it automatically violates the old laws of Sikkim. Such old laws are the guiding principles of administration in present Sikkim. Government has not reacted against the movement started by the Sikkimese women till now.

The Government is continuously taking initiatives with regard to safeguarding traditional laws of Sikkim by announcing on 11<sup>th</sup> November 2014 that only Sikkimese-born girls marrying Sikkimese men can be provided with Sikkim Subject. Furthermore, they also made an important announcement that married Sikkimese women required to submit the Sikkim subject of their father's, as well as husband's on 25<sup>th</sup> January 2015, for any government facilities. Under the Notification No. 66/Home/95 dated 22 November 1995, daughters-in-law were also included into the Sikkimese fold, but now the government has denied this, on the ground of the protection of local status. Again the ruling government also announced on 12<sup>th</sup> June 2015 that non-Sikkimese women married to Sikkim Subject holders can also be provided with Certificate of Identification. So, in this context demand of equal PIL become very critical issue between the gender equality and state autonomy.

There are a very few number of cases been registered in relation to property rights, which goes to show that women do not approached the Court, Commission or NGOs or are not aware about their rights. Another reason is the system of patriarchy or joint family, in which property remains in family head. Most of the women do not want to claim property legally in the family that gives the chance of a hostile relationship, among the family members. If women demands property in the family, then it gives birth of hostile relations among family members.

The main sources of customary laws are customs, traditional practices, usages which have been practiced from generation to generation, by particular communities. This law is based on unwritten laws. Under this system, women are always categorised in a subservient position and they are treated as the property of the men in the society, especially with regard to inheritance right. When it comes to the question of women and control of property, it has been observed that women hardly take a control over property.

On the other hand, women who do not have ownership of property ultimately depend upon the male members in the family.

It has been observed that the male entitlement appears to be maximum than female. Most of the land is registered in the name of the father, father-in-law, brothers and sons. Daughters do not inherit property but some of them receive it as a gift from parents. The study found that the main obstacle to women's access to justice with regard to property rights are social norms, that limit both women's understanding of their rights and their options for seeking redress, when rights are denied. Norms and culture are embedded in such a way within the families and communities that it perpetuates gender inequality and limits the extent to which women's rights are realised, in practice. This social norms or conventional practices negatively impact upon the administration of women's justice. However such aspects become the challenging factor in demanding of property rights for women.

In general, those women who do not have entitlement of property are likely in a vulnerable position in the family. Further, they have to face torture from the husbands or family members. However, tribal women in Sikkim rarely face such kind of problems. If title of property belonged in the name of male members, then they'd have to follow their decisions. The inference can be drawn from the study that women hardly have authority and control over property. If women own property, then it would bring some changes in their lives, such as improvement in living standard in family and society, respect, economic benefits, social development, etc.

In the context of decision-making, the father is the head of the family: he makes major decisions. The study shows that women cannot completely take a decision in the household matters but they can share responsibility with men. Mostly their voice has not been taken into consideration. Land is considered as a pivotal asset for the economic life for the survival of any community.

However, education is the key to create awareness among any marginalised groups in a society. The collected data reflects that almost all the respondents have

positive attitudes towards inheritance of property rights for women. In-fact, the respondents who have not even completed their formal education staunchly support the rights of women. So, they challenge the existing laws which do not benefit the welfare of women. Furthermore, the study also shows that property inheritance right is necessary for women because it safe-guards against financial instability, helps as insurance in getting old age care, or its acts as a symbol of respect and strength in the family, as well as in the society. Women in remote areas are not aware about their rights. So in order to create such awareness among them educational facilities, various government skills and programmes, counseling or leadership programmes need to be established.

Ownership of property empowers women on the ground that it enables financial assistance by selling, mortgaging or by leasing, which lead to income-generation. It secures economic aspects which ultimately improves education, family health and well-being. It also politically empowers by encouraging participating in political processes and representing in decision-making process. The lack of an opinion prevents women from ensuring their rights, therefore by engaging in the political process, they can introduce gender equality. Further, women with ownership of property have greater bargaining power in intra-household activities. The study conjures up women's position to command over property that indubitably would bring life security, bargaining power, economic and food security, among the tribal women. If women do not have any source of income, then land would be an alternative for them.

## **CHAPTER VI**

### **CONCLUSION**

The main objective of this study is to examine property inheritance laws in the tribal society that is dominated by patriarchal driven customary laws in Sikkim. The study examined the experience of women to understand how patriarchal customary laws enforced gender inequality with respect to PIL: an area where women have for long been denied a fair due. These laws are mostly in favour of the –male gender and always with an agenda to strengthen the existing patriarchal structure of the society. The study was carried out, with the tribal communities in focus, particularly concentrating on the women from the tribal societies of Sikkim.

The study began by analysing different theoretical underpinnings of property rights, that have been shaped mostly by western political philosophers. The study specially focuses on land for it is –considered as real property and plays a significant role in agriculture, shelter, as well as bestows one with an identification, in the given space. At the same time, gender equality and control over property have become a critical issue when it comes to women, for its access is interpreted through the men folk, especially in the tribal societies. Therefore, many initiatives have been taken up at various levels, be it local, national or worldwide. Indian Constitution is a key provider of gender justice. However, customary laws and patriarchal fabric of the society hinders justice and curtails women from benefiting PIL. The gap that exists between the two, is a factor that has not yet been researched upon yet. Therefore, to bridge it, the proposed topic was studied and examined with a special focus on the tribal women of Sikkim.

The proposed research employed both qualitative and quantitative mode of enquiries. Data was collected through primary sources with field survey with the use of open and close-ended questionnaire and data also was collected from secondary sources such as books, journals, reports, etc. The study has been organised into six chapters including introduction and conclusion.

The discussion on Chapter II deals with the conceptual framework of property rights. The notion of property is not immutable because western world attitude is driven by financial security while indigenous people are confined within the concept of preservation of land, for their own identities. Property rights are edified by the western political thinkers from classical to modern context, because in primitive society, private ownership of property was unknown. Gradually with growth of population and subsequent engagement in agricultural activities paved the emergence of private ownership and private property rights. The expediency of laws were also realised and different laws emerged as the guardian for the protection of individual's rights for example, Greek, Roman, Common, Hindu laws, etc.

Classical thinkers, Plato and Aristotle, developed the concept of property rights, in the state of nature. Plato advocates common ownership of property because he envisaged that private property could hamper the unity of the state and is hence, incompatible with the smooth functioning of the governing system. This theory was criticised by Aristotle, on the ground that it ascertained conflict situation among the workers, about their incentive: if lethargic and hard workers were rewarded the same recompense, then there would be chance of conflict.

Furthermore, the seed of individual rights developed from the Enlightenment period with many thinkers who contributed to the concept of property. Hobbes argued that property is created by the state. Without this, there would be no property rights, because state was created in order to protect individual's property. According to Rousseau, private property would create inequality, which gives birth to human ego or self-interest. Individuals need to surrender their life, liberty and the property to the general will, and their rights would be protected by the common force of the society. During the 19<sup>th</sup> century, property rights was referred to as 'bundle of rights', it was considered, not just simply about individual absolute rights, that has been developed in the work of Blackstone and under Roman laws. Property rights are the bundle of sticks in which each sticks represents right to sell, mortgage, and lease, donate, etc. Hence, it also developed the idea of capitalism.

Under classical liberalism, property rights are imprescriptible. State has limited moral authority to interfere with the rights of the people. Classical liberalism intertwined with natural laws and it derived its sources from theological aspects. According to John Locke, right to life, liberty and property are natural rights of the human being, given by nature. They are inalienable rights and generates less interference from the other without prior permission of an individual. The Lockean labour theory of property, states the mixing of one's labour to a piece of land to become the owner of that particular property. Modern liberal thinker, like John Rawls, holds that basic liberties of an individual and right to property is protected by his first principle of justice. Justice as fairness, could be achieved when the least advantaged or marginal people enjoy equal rights and same liberties in the society.

Libertarians also lay emphasis upon self-ownership of property and consider human rights are inalienable. Robert Nozick states that the primary right, is right to freedom and right against coercion from the other, with minimal interference from the state. The principle of utilitarian theory often described by the phrase 'the greatest happiness in greatest number', appears to mean that property helps to attain the greatest happiness. Such rights should be protected by the law or the government. This theory also stresses upon self-ownership of property and one should not interfere with the possession of property by another. If such conditions have not been fulfilled then it leads towards conflict.

Marxists theory views that private property is not a natural right as stated by Locke. They stress upon the replacement of private property with socialist property because it is an instrument of exploitation by those who possess property. Further, private property creates class conflict between capitalists and proletariats, who assume the positions of dominant and dependent classes. Abolition of private property is one of the means to end exploitation, which involves changing ownership of property from bourgeoisie to proletariat or from class to common ownership. So, it needs to be abolished with a socialist revolution under the leadership of class-conscious workers.

Moreover, the common theory of Marxists approach seems to be inconsistent with the liberal view of individualistic ownership of property. In this context, different communities are driven by their own system of property inheritance pattern, such as patrilineal, matrilineal and bilateral. In patrilineal system, property is devolved through the male lines, whereas in matrilineal from the female line. In bilateral, both daughter and son get equal property in the family. Property rights of an individual can be enforced by the societal, cultural and legal forces, in the given space. Women's ownership of property, and the concept of empowerment revolve within the domain of economic and socio-political realms.

However, in terms of economic empowerment of women, property plays a significant role, in income-generation through agricultural production and combating the financial crises and poverty reduction. From the social perspective, property rights helps in two levels: household and community. In the household level, it helps in crises situation such as death, illness, divorce and education of children and at the community level, it helps to engage the community's various activities. Similarly, ownership of property, also encourages women to participate and compete in political activities, by using property as a credit. Further, women's property rights need to be protected by the state legislative system or judicial mechanism, in equal manner. Only then, legal empowerment would be possible.

In brief, Chapter II presents that discourse of property rights that have been developed among the various political thinkers. The main debate revolves around the common and private ownership of property. The proponent of common ownership states that it creates some kind of unity in the society and there is a chance of prevention of land fragmentation and alienation, especially among the indigenous people. Earlier the concept of communal ownership of property was practiced among the tribal communities and due to the influence of enlightenment and industrial revolution, the concept was diverted into individual ownership of property. The liberalism and libertarian theory were driven by individual ownership of property, that determine liberty and freedom and utilitarian perspectives with a focus on the accumulation of property itself as a means to achieve happiness. Women having a command over individual property rights would



create happiness. In fact, it is one of the most important means to achieve women empowerment.

Chapter III specifically examined the different feminists discourse and its relevance for women in tribal societies. Feminists, in their movement, were skeptical about the existing society, because they believed the society was male-dominant in social institution, structures and by nature. Their main goal was to achieve equality in all the spheres of the society. It sought to end women's continuous exclusion from gender stereotyped paradigm by throwing away the shackles of differences. They wished for men and women to come under a common measure. Political thinkers from Plato and Aristotle, Hobbes, Locke to Rousseau, identified natural differences between men and women; men being naturally more rational and capable to look into politics and public life, while women into the private sphere. This, because women were believed to be more inclined towards emotional, passive and irrational. Such kind of notions reflected women's vulnerable position in the family and they had to depend upon men for security and social protection.

Access to property rights revolves around the rhetoric of gender inequality which has been a historically and socially accepted trend. Gender discrimination in relating to property rights have often been interpreted through patriarchal or patrilineal ideology and women's rights has been befogged within the socio-cultural system. The various studies have concluded that men and women do not enjoy equal PIL, with the presence of legal provision, as well as discriminatory practices of the countries.

Customary laws act as hindrances in getting PIL, for they set patriarchal social norms and often lead toward inadequacy, for independent ownership of land rights. There is no any custom of providing inheritance of property rights, especially to women, except in a few matrilineal and bilateral inheritance systems. Hence, customary laws could be deemed as an impediment in getting inheritance rights for women in general, and tribal women in particular.

Most of the South Asian countries—Latin American and Sub-Saharan African countries—share the common view of patrilineal and patriarchal structure of the society, in which the father appears to be the sole mediator, with respect to PIL. Agriculture is the prime factor for most of these countries and land is considered as a single source of livelihood and income-generation instrument. Property rights reinforce women's inequality in the credit market, because land is often required for collateral credit purpose for social security, rearing of children after divorce settlements etc. However, in most of the developing countries, large number of male migration explicitly impact upon collateral credit purpose.

Women are often left out with de facto rights because titling of land is an area is believed to be specifically subjected to male members in the household. Among the South Asian countries, women have to face myriad of problems in the name of customs and practices. For example, women have to completely depend on men in land ploughing system. They are not allowed to plough land due to customary norms and practices or on religious grounds. It creates a kind of dependency situation upon men and also restrains women from independent land holding pattern. Feminist consciousness encompasses various theoretical approaches such as liberalists, radicalists, socialist/Marxists and post modernists. The desideratum of liberal feminism is to bring equal rights in the male-dominated society. They advocate reforms in present practices, instead of revolutionary change in field of legal and political rights. The idea of justice, equality and freedom should be governed, equally in the society. They insisted that women should have equal opportunities, economic and civil rights, as well as property rights with men. The discrimination against women can be decreased through means of legal aspect, which include voting and participation in the labour force, civil and property rights.

Marxists feminists stressed that classicism is the fundamental cause of women oppression. They states that private property creates women's oppression, because those who do not own private property and would have to economically depend upon the capitalist class. So, capitalism is the root cause of subordination of women, and in order to achieve women liberation it must be replaced by a socialist system, free from any form of economic dependency. Radical feminists' quest relies upon emancipation of women by

rejecting all traditional aspects. They identified that men are oppressors and stress on the elimination of patriarchy. As they stated, family is the root cause of women oppression and it needs to be abolished. Patriarchy and inheritance of property rights are intricately related to each other. When the question comes to the pattern of inheritance rights, then son preference appears to be in forefront, and women have to compromise their rights.

Post modernists feminist show skepticism about the primacy of epistemological discourse and also look to deconstruct commonly accepted knowledge or culture. Men and women are the example of common assumption of culture, where knowledge is socially and historically constructed, and it is not given by the nature. Under such traditional epistemology, women are systematically excluded from knowledge construction. But this theory was criticised on the ground that it deliberately encouraged identity slippages and hyphenated the identity of an individual.

In an international level, several initiatives have been taken for gender equality, with regard to property rights. Human rights in international level are acting under the domain of United Nations and under this UDHR, CEDAW, etc., especially address gender discrimination. The series of world conferences declared by United Nation General Assembly declared, International Women's Years in 1975, in 1985 and a third World Conference of Women was convened in Nairobi that urged members to take constitutional and legal steps to eliminate gender discrimination, including property rights. World fourth Conference on Women was held in Beijing 1995, and it asserted women's rights as human rights and committed to specific actions to ensure respect for those rights.

Millennium Development Goals also look into the promotion of gender equality and empowerment of women, with respect to property rights. There are several regional organisations including, SAARC, ASEAN and African Union that also play significant roles in creating gender justice. However, such initiatives have not been applied effectively to address the paradigm of equalities. The reason of the failure to enhancement of gender equality revolves around the variability of PIL, from country to country, as well as, most of the countries are governed by their own customary or

personal laws. States are often unable to tackle the discriminatory inheritance law which governs women. No matter what the status and power of women, male dominance prevails in the sphere of political, social cultural, educational, religious systems. Women's subordination is the oldest, most pervasive and universal form of oppression since history.

In brief, chapter III argues that gender equality in relation to property rights has become a crucial issue of concern, because women are denied from their entitlement for empowerment. Feminist theories argue that the existing society is based on male-bias and they locate their ideas by claiming an egalitarian society, in which both men and women enjoy equal rights. In this context, liberal feminists are driven by the demand of legal equal rights, in order to achieve their goal. Marxists and socialists feminists wished for socialists' ownership of property that would bring equality among the people. Similarly, radical feminists argue that institutions like patriarchy and family must be demolished from the society. Postmodernists are driven by the utopian idea of deconstructing the common assumptions of culture. Several initiatives are taken for the upliftment of women, but due to the presence of customary laws and personal laws, women do not benefit in the grassroots level.

The gist of Chapter IV is to analyse the obstacles in the implementation of Constitutional provision that guarantee equal rights, especially to women in tribal societies. India is home to diverse communities that are governed by their own personal and customary laws. Specifically, the area of inheritance or succession laws, depend upon their customs, cultures or traditional practices and tribal women are still guided by their own customary laws. Community-based laws have its grip on the conventional practices and can be interpreted through a patriarchal structure where women have always treated in minor position.

India is a pluralist society in which different communities are governed by their own customs and religious aspects, known as personal laws. For example, Hindus, Buddhists, Jains and Sikhs are governed by Hindu Succession Act 1956, Muslims by the Shariat law and Christians and Parsi by the—Indian Succession Act 1925. Women's

rights are plausibly more susceptible on the ground of personal laws, which basically driven by religious argument. In classical Hindu law, under Mitakshara School, ancestral property devolves in favour of the son by birth and daughters cannot become coparcener. Even if they demand equal rights, that explicitly challenge the deep-rooted patriarchal system.

Under Dayabhaga School, only one mode of succession occurred where father is the absolute owner of property and only after the death of the owner, property would be succeeded by the heirs. Indian society is guided by a deep-rooted patriarchal setting and a socially-accepted notion of male domination further adds fuel to the flame, in perpetuating gender inequality. Hindu Succession Act 1956, was passed on the basis of equal rights of inheritance, but it does not guarantee full property rights in the joint family, in which there exist preference of son coparcenary rights, by birth. In this context, Hindu Succession Act, 1956 was amended in 2005. It sounds more egalitarian for it makes daughters as a coparcener, in the joint Hindu family under section 6. However, it has been argued that though inherent discrimination was formally eliminated, the legislation still leaves women with lesser rights than men, in terms of property rights.

Indian Constitution guaranteed right to property under Article 300a, after 44<sup>th</sup> amendment act 1978. Under this act, property rights no longer remain fundamental rights: it became legal and constitutional right. Feminist consciousness demanded gender equality on the basis of UCC, which was enshrined in the Constitution under Article 44, but this demand disappeared under the shadow of personal laws, which has been channelised by the ethos of patriarchal male domination. UCC is supposed to be a magic wand in relieving women's torment, but opponents argue that it leads to the erosion of traditional culture and norms. It was only in *Sarla Mudgal v. Union of India* that the Supreme Court justified that UCC only touches the personal life of person but it does not touch the religion of the communities.

Post-independence guaranteed special status for Northeast region under the provision of Fifth and Sixth Schedule, by the Constitution of India. Under this provision, most of the tribal states have enacted prohibition on transfer of land from tribal to non-

tribal; the discernible reason behind this, appears to be land alienation and slippage of community identity. The traditional customs and practices favour a male-centric and patrilineal inheritance system, in which tribal women are sidelined. The Constitution of India also conveyed a contradictory provision in relating to tribal people, in a sense that under Article 14, 15 (3) and 16, it enshrines equal rights and on the other hand, it allows the practice of gender-discriminatory customs and norms. Madhu Kiswar's case justified that invalidating of customary laws may create some kind of erosion of identity crises and land alienation. That's why, non-tribal women are not allowed to enjoy the property of tribal women. This case exhibits that women's rights has been overshadowed by the domain of patriarchal ethos, along with the traditional practices and norms of the tribal society.

In a succinct, Chapter IV reveals that woman's rights have been shattered by the various communities-based law, which are considered as highly unjust for women. In the areas like inheritance, marriage, adoption, separation, etc. communities are still guided by their own customary and personal laws. Further, these laws are mediated through patriarchal ethos for their own benefit, especially in inheritance system, in which property normally devolve through male line, in a patrilineal society. With a few exceptions like the communities of Garos and Khasis of Meghalaya, where matrilineal system is followed. Indian Constitution guarantees equal rights, but at the same time, allows tribal people to continue their customary laws. In most of the tribal society, woman do not enjoy PIL under customary laws.

Chapter V examined the issue of PIL and women of Sikkim with special focus on tribal societies. Mostly tribal people are agriculturalist in nature, which is why, land plays significant role for their livelihood and income-generation. According to the District Census Handbook of Sikkim (2014), agriculture is the primary activity of the people of Sikkim and about 15.36% of the total geographical area of the land is devoted to agricultural productivity. Hence, tribal women in Sikkim are also involved in agricultural sectors. Lepcha, Bhutia, Sherpa, Limboo and Tamang are the major scheduled tribe of Sikkim and according to 2011 census, tribal people constitute 33.79% out of 6, 10,577.

Tribal people follow their own religion: some of them follow Buddhism, and some of them are also followers of Christianity and Hinduism. Hindu Marriage Act, 1955, Indian Christian Marriage Act 1972 and Hindu Succession Act 1956 (amendment 2005) are extended to Sikkim but most of the tribal people still follow their own customary laws in areas of inheritance, marriage, separation, etc. Among the Bhutia community, a prominent example to be traced back to, is the Dzumsa system of Lachung and Lachen of North Sikkim. This system is based on a self-governing system. Under this, all the administration of justice is enacted through the head chief of the village (Pipon). Gender discrimination on the ground of becoming pipon still exists-woman cannot become chief of the Dzumsa but they can participate in voting procedures.

Tribal people of Sikkim are also predominantly governed by the patriarchal and patrilineal family structure. In such societies, inheritance system is exclusively rooted in the male prerogative, for example, from father to son, grandson, brother, etc. In a patriarchal society, the father is the head of the family and the supreme decision-making process. The rule which laid down by the patriarchal male dominated set-up seldom offer disadvantages to own or access of property for women. Undoubtedly, intestate property of father is inherited by the eldest son who takes charge of the family.

The discriminatory institution of the patriarchal system often contributed to the subservience position of women. It continually emulates and perpetuates gender inequality in ownership pattern. Under such circumstances, land tenure is always registered in the name of male head of the household and women are sidelined from their land rights. Tribal women do not have legal inheritance of property rights. She neither inherits property in natal family nor in conjugal family, because men are still perceived as natural inheritors of the property. In some cases, they acquire property as a gift from parents under the will of her father or other relations. In most families, if daughters remain unmarried, then only can they get small portion of property as a gift from their parents.

During monarchical period, law was passed by the king such as the Revenue Circular Order No. 1 of 1917, which mainly focused on prohibition of transfer of land

belonging to Bhutia Lepcha to any other person. Under the Married Women Property Regulation Act, 1962, women cannot have interest in ownership of property, if she marries to non-local. Such immovable property need to be disposed either by sale, mortgage or could enjoy in her life-time. Women are still interpreted through this laws, which are by its core foundation, gender-biased. Democratic principles contribute to the notion of gender equality in all spheres, but gender disparity, in relating to property rights is still contested, with scope of democracy in Sikkim.

When Sikkim became part of Indian Union in 1975, the state's unique traditional laws, customs and practices of the people were preserved and protected under Article 371F (k) of the Indian Constitution. This Article protects several privileges in local autonomy of governances, land alienation of indigenous people and preserves traditional culture and customs. In this context, Constitution of India was faced with a contradictory situation. On the one side, it allows the state to practice its customary laws and on the other side it states the fundamental rights of individuals to enjoy equality and liberty in a multicultural society. The issue of equal rights of women and predominant provision of customary laws sounds to be fettered within the polemics of community identity.

Empowerment of women through property rights is assumed to be the means of ameliorating the economic security, especially for rural women. Sikkim Government also enacted Succession Act in 2008, which provide equal PIL for Sikkimese women. However, this Act is driven by the old traditional practices in which women cannot have interest in property, if they marry non Sikkim subject. Ironically, the government has not fully implemented the act. In fact, its enforcement would be unjust and unconstitutional on the ground of gender justice.

The desideratum of feminist consciousness inspires for an egalitarian society and aims to distort the existing knowledge-created-space for women, to demand for equal rights. Under the banner of 'daughters of soil of Sikkim', Sikkimese women demanded equal inheritance rights but their voice arguably was unaddressed beneath the dominant patriarchal society. This demand was criticised on the ground that if brought into practice then it automatically violates the traditional laws of Sikkim. There are less number of



cases that have been registered related to property rights which gives results to women's inaccessibility and inapproachability to the Courts, NGOs, and Women Commission, because most of the women are unaware of their rights and obligation. Undoubtedly, State Commission for Women and other NGOs have played significant role in creating legal awareness about their rights. However, women in remote areas need to take more into consideration. Another, plausible reason might be the existence of joint family system or patriarchy, in which property remains in head of the family.

It has been observed from the study that male entitlement on land property appears to be maximum, because the land is registered in the name of male members in the family. Daughters do not inherit property but some of them may receive property as gift from their parents. The main obstacle to women's access to justice with regard to property rights are social norms that limit both women's understanding to their rights and their options for seeking redress when rights are denied. Property rights is optimal in contributing to the overall wellbeing of a women in areas like, life security, bargaining power, economic security and food security.

It provides life security in the future too because if her children have no other source, it would be their medium of earning the basic needs. It also affects bargaining power of an individual in household matters, through the power to over-sell, lease or mortgage to enhance an independent life. Further, it helps in of financial instability. Command over property would less likely make a woman vulnerable to domestic violence. Therefore, in order to escape from violence, women need to know their socio-economic rights including property rights.

In brief chapter V shows, that customary law is paramount to tribal people of Sikkim. In the areas like inheritance or succession, marriage, divorce, etc, most of the tribal society still follows their own customs and practices. Further, tribal people base their lives on a patriarchal and patrilineal system, in which household decisions are taken by the head of the family and inheritance system, also devolves from male lineage. Under such circumstances, tribal women enjoy limited rights especially in the inheritance system, because there are no customs of providing property rights.

Land is interpreted through the male member and the main reason of denial of property to women is restriction of tribal land alienation. There are various Acts that have been passed by the state government related to PIL, but women least benefit from these rights. Under the—Constitution of India, tribal people enjoy special provision under Fifth and Sixth Schedule which protect and preserve the unique identity, traditional laws, customs and practices. Therefore, the issue of equal rights of women and predominant provision of customary laws sounds to be fettered within the polemics of community identity.

On the basis of comprehensive analysis of the issue under examination, the study makes certain significant observations as follows. Our analysis suggests that property rights is a fundamental institution in the society whose ownership and possession ensure empowerment. The notion of property rights and its various perspectives infer that it is a means to achieve empowerment for individuals in the society. Property in terms of land is considered as the natural resource that plays a significant role in agricultural activities, in providing shelter and denoting one's identification, status, responsibility, power, self-reliance and confidence. Women with ownership of property rights would enjoy liberty and freedom and it gives some kind of sovereignty. Property right is an inalienable right, which is given by nature to everyone with minimal interference from the state and from other occupancy.

Property rights are prerequisite for the economic empowerment of women in terms of income-generation from agricultural production. It also acts as a collateral credit during financial and poverty alleviation. From a social perspective, property rights would empower women in terms of providing pride, respect, wellbeing, and improves bargaining power. Similarly, woman with property rights would be highly engaged in political arena and participation in political process that helps to encourage representation, in decision-making level.

The study also argues that most of the developing countries in South Asia and Africa, gender inequality in relating to property rights have become a critical issue, because it is often interpreted through patriarchal and socio-cultural system, in which

customary and personal laws are signified as hindering factor. Several initiatives adopted under the provision of United Nations such as Commission on Status of Women, series of World Conferences, CEDAW, etc, comprehensively work in women's issue, but most of the women, especially from the rural areas are unaware and don't implement such initiatives. In this context, feminists consciousness challenge the traditional and existing society in which women are sidelined from the knowledge construction, and their socio-political and economic rights.

India is home to diverse communities. On top of that, different communities are governed by their own community-based laws in the areas like inheritance/succession. These laws are driven by the traditional setting including patriarchal or male hegemonic structure where women have to negotiate for their rights in the given space. The Indian Constitution provides gender justice but amendment of personal and customary laws violate the religious faith and hamper identities of the communities. Further, Indian Constitution itself is contradictory in nature for it provides gender justice, and carries principle of equality on the one hand, and on the other, it allows the communities to preserve and protect their culture, customs and norms. Hence, Indian feminists argue that reform should come from the community itself because it cannot be possible to impose laws from outside or the government. Numerous laws have been enacted for the protection of the rights of women but the problem lies within the practical implementation of such laws, because it merely reduced to paper work.

Women do not get equal status with men in respect to inheritance/succession, social status, and religious responsibilities, as well as in administrative systems. Various legal, economic and political rights have been enacted to provide equality between a man and woman from local to global level legislatures. Tribal people have their own rules and norms known as customary laws where women somehow remain marginalised in areas such as inheritance/succession. In order to get justice for women, these conventional practices need to be transformed to bring gender equality among tribal communities.

The Constitution of India guarantees equal rights through fundamental rights but at times special provision that are enshrined for Northeast region through Fifth and Sixth

Schedule for the preservation of identity appear to compromise women's inheritance and succession rights. Sikkim constitutes three dominant ethnic communities such as Lepcha, Bhutia and Nepalese. Even after the merger with India and institutional practice of democracy, patriarchal customary laws dominate in the practice of inheritance/succession, marriage, divorce, etc. For example, the Dzumsa system, that is still prevalent in Lachung and Lachen of North Sikkim, is the traditional administrative justice system based on customary laws. It is a local-self governing system of this particular village, constituted by the Pipon and Gyapon, who are elected for a period of one year. Under such self-governing systems till now, women have no preference to become Pipon though they can participate in the election process.

Tribal communities of Sikkim are guided by the patriarchal family system in which the father appears to be the supreme decision-maker. However, all the movable or immovable property of the father is inherited by the sons in the family. In the case of two or more sons, then equigeniture method is followed. Daughters rarely get property from parents, if they get then it would be gift from the parents or some of them have self-acquired. In some of the family, if daughters remain unmarried then only she can get some portion of shares. In some cases, women retain their positions as the custodian of family property in her life time.

In 1961, registration of documents relating to transfer of immovable properties was started in Sikkim and this was passed under the provision of Revenue Order 1 of 1917. Further Married Women's Property Regulation Act 1962 was passed by the state government which states that Sikkimese woman forfeit ownership of property, if she marries a non-Sikkimese. Such immovable property need to be disposed either by sale, mortgage or can be enjoyed in her life-time. Sikkimese women's rights are still interpreted on the basis of these laws, which basically are based on gender discrimination.

The proliferation of the democratic system led to a critical understanding on the ground of gender equality. Gender equality with respect to PIL though introduced, yet somehow impacted upon customary laws of tribal communities. When Sikkim merged

with Indian Union in 1975, special provision was also inserted under Article 371F (k) in order to preserve the identities and rights of the indigenous people. This Article guarantees several privileges to Sikkim including local autonomy in governance, laws restricting people of non-Sikkimese origin to settle in and restriction of tribal land alienation.

Sikkim Succession Act, 2008 was passed by the state government which provides equal PIL for women in Sikkim. Under this act, unmarried daughters along with sons have equal share in ancestral property of father. Divorcee and widows also share equal proportion with others heirs if she has no source of income and has children to look after. Further, this act introduced on the basis of traditional practices proclaims that under act 2, women: who marry to persons without a Sikkim Subject Certificate cannot acquire any interest in property. But, this has not been fully implemented in state of Sikkim. Proponents argue that such laws would go against the provision of Constitution, which basically deals with the principle of gender equality. If such laws have been enacted in state of Sikkim, it may lead to a form of injustice, for under such circumstances, women have to compromise with their rights. Similar experience has been shared by the women of Jammu & Kashmir, according to Permanent Residents Disqualification Bill, 2004, in which those women who marry non-Kashmiris cannot own property rights.

Demand of equal PIL was made by Sikkimese women in 2010 under the banner of 'Daughters of Soil of Sikkim', which gave alarm to the state government, as well as innocent women. This movement came across with much criticism on that ground that if equal PIL will come into force then it automatically violates the old laws of Sikkim. Such old laws are the guiding principles of administration in present Sikkim. Government has not reacted against the movement started by the Sikkimese women till now.

The Government is continuously taking initiatives with regard to safeguarding traditional laws of Sikkim by announcing on 11<sup>th</sup> November 2014 that only Sikkimese-born girls marrying Sikkimese men can be provided with Sikkim Subject. Furthermore, they also made an important announcement that married Sikkimese women required to submit the Sikkim subject of their father's, as well as husband's on 25<sup>th</sup> January 2015, for

any government facilities. Under the Notification No. 66/Home/95 dated 22 November 1995, daughters-in-law were also included into the Sikkimese fold, but now the government has denied this, on the ground of the protection of local status. Again the government also announced on 12<sup>th</sup> June 2015 that non-Sikkimese women married to Sikkim Subject holders can also be provided with Certificate of Identification. So, in this context demand of equal PIL become very critical issue between the gender equality and state autonomy.

The main sources of customary laws are customs, traditional practices, usages which have been practiced from generation to generation, by particular communities. This law is based on unwritten laws. Under this system, women are always categorised in a subservient position and they are treated as the property of the men in the society, especially with regard to inheritance right. When it comes to the question of women and control of property, it has been observed that women hardly take a control over property. On the other hand, women who do not have ownership of property ultimately depend upon the male members in the family.

It has been observed that the male entitlement appears to be maximum than female. Most of the land is registered in the name of the father, father-in-law, brothers and sons. Daughters do not inherit property but some of them receive it as a gift from parents. The study found that the main obstacle to women's access to justice with regard to property rights are social norms, that limit both women's understanding of their rights and their options for seeking redress, when rights are denied. Norms and culture are embedded in such a way within the families and communities that it perpetuates gender inequality and limits the extent to which women's rights are realised, in practice. This social norms or conventional practices negatively impact upon the administration of women's justice. However such aspects become the challenging factor in demanding of property rights for women.

In general, those women who do not have entitlement of property are likely in a vulnerable position in the family. Further, they have to face torture from the husbands or family members. However, tribal women in Sikkim rarely face such kind of problems. If

title of property belonged in the name of male members, then they'd have to follow their decisions. The inference can be drawn from the study that women hardly have authority and control over property. If women own property, then it would bring some changes in their lives, such as improvement in living standard in family and society, respect, economic benefits, social development, etc. In the context of decision-making, the father is the head of the family: he makes major decisions. The study shows that women cannot completely take a decision in the household matters but they can share responsibility with men. Mostly their voice has not been taken into consideration. Land is considered as a pivotal asset for the economic life for the survival of any community.

However, education is the key to create awareness among any marginalised groups in a society. The collected data reflects that almost all the respondents have positive attitudes towards inheritance of property rights for women. In-fact, women who have not even completed their formal education staunchly support the rights of women. So, they challenge the existing laws which do not benefit the welfare of women. Furthermore, the study also shows that property inheritance right is necessary for women because it safe-guards against financial instability, helps as insurance in getting old age care, or its acts as a symbol of respect and strength in the family, as well as in the society. Women in remote areas are not aware about their rights. So in order to create such awareness among them educational facilities, various government skills and programmes, counseling or leadership programmes need to be established.

Ownership of property empowers women on the ground that it enables financial assistance by selling, mortgaging or by leasing, which lead to income-generation. It secures economic aspects which ultimately improves education, family health and well-being. It also politically empowers by encouraging participating in political processes and representing in decision-making process. The lack of an opinion prevents women from ensuring their rights, therefore by engaging in the political process, they can introduce gender equality. Further, women with ownership of property have greater bargaining power in intra-household activities. The study conjures up women's position to command over property that indubitably would bring life security, bargaining power, economic and

food security, among the tribal women. If women do not have any source of income, then land would be an alternative for them.

On the basis of the study, PIL and women in tribal society of Sikkim, certain policy initiatives may bring changes to the current situation and enables the drawing of a few recommendations. Easy access and approachability for the women to the administrative justice system of judiciary executive and bureaucracy may transform the existing situations. Civil society and media would play critical role in getting PIL to women. Women's representations in state legislatures, panchayat raj institutions and decision-making bodies also could bring changes. Like other states, Sikkim government can encourage female land registration by providing concessions in registration and stamp duty. Furthermore, a task-force and judicial commission need to be constituted to bring reformation in customary laws specifically associated with persistence of patriarchal attitudes, deep-rooted gender stereotypes, etc.

In another level, the support from international donor agencies—such as World Bank, Food and Agricultural Organisation, USAID, for the execution of various plans and schemes, is needed. Organisations related to women's property rights, especially in rural areas, need to be encourage to empower women in multiples areas. State Women's Commission, and different NGOs need to play significant roles in creating awareness about various legal facilities provided by the governments and other developmental agencies in grassroots level. Lastly, implementation and enforcement of existing laws appears to be challenging factor in getting equal rights for women. In this context, an effective and gender sensitive property inheritance laws need to be introduced by the state government.



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## APPENDICES

### Appendix I Questionnaires

Dear Madam,

I am Sanita Rai, PhD Research Scholar, Dept. of Peace and Conflict Studies and Management, Sikkim University. I am doing research on PhD thesis on “Property Inheritance Laws of Women in Tribal Societies: A Case Study of Sikkim’. In this regard, I am conducting a field work to collect data from women of tribal societies in Sikkim to understand their perceptions on Property Inheritance Laws. The information provided by you will be used only for research purpose.

Thanking You,

Yours Sincerely,



Sanita Rai

### Questionnaires for Tribal Women

Lepcha Bhutia Limbo Sherpa Others
Housewife Student Farmer Businesswoman Employee
Class X Below class X Above class X Graduate Above Graduate
Married Unmarried Widow

Below 20 20-30 30-40 Above 40		
Q No.	Questions	Answer
1	Do you own property?	Yes _____1 No _____2 If no then Father-in- Law Mother-in-Law Husband Father Mother Other. Specify
2	Have you received property from your parents? If yes then which method	Yes _____1 No _____ 2 As gift By inheritance means Other. Specify
3	Do you think property inheritance rights are denied to woman?	Customs Conventional practices Norms and values Other. Specify
4	Whether such custom and practices become the hindrances in getting property rights?	Yes _____1 No _____ 2
5	How much land do you own?	1. One acre 2. Less than one acre 3. Two acre 4. Less than two acre 5. Three acre and more than three acre
6	Do you have authority to sell or mortgage the property which you owned?	Yes _____1 No _____2
7	Are you facing any problem in family due to lack of property? If yes then	Yes _____1 No _____2 1. torture form the husband 2. lack of respect from the family 3. lack of respect from the society 4. Others. Specify
8	Do you think property ownership would make/ is making any change in your status in the family and society?	Yes _____1 No _____2 living standard in family and

	If yes then which way	society, 2.respect decision making role economic benefits social development political development
9	Who make major decisions in your family?	1. father /father-in law 2. mother/ mother-in-law 3. husband 4. you 5. brother 6. jointly in family
10	Does patriarchal system pose hindrances in getting property rights? If yes, please tell us about	Yes _____1 No _____2 _____ _____
11	Do you think there is a need to bring changes in the property inheritance system?	1. strongly agree 2. agree 3. neither 4. strongly disagree 5. disagree
12	Do you think women should not demand share of property? Do you agree	Yes _____1 No _____2
13	Do you make any decision regarding landed property matter?	1. Selling 2. Buying 3. Mortgaging 4. Others
14	Do you think that property inheritance right is necessary for women?	Yes _____1 No _____2
15	How women need to improve their capacity and skill in society?	1. education facilities 2.Scheme provided by government –self help group, ASHA etc. 3. leadership programme 4.counselling and awareness programme 5. Other. Specify
16	Property right would empower in which way?	1. Life security 2. Bargaining power 3. Economic security 4. Others

17	Do you think you are capable to the handle of immovable property equally with your husband/ brothers, etc., If yes why (give details of reason)	Yes _____1 No _____2 _____ _____ _____
18	Do you think that property inheritance rights would secure your life and future generation? If yes please tell us about it	Yes _____1 No _____2 _____ _____
19	Legal property ownership may provide overall development of women.	1. strongly agree 2. agree 3. neither 4. strongly disagree 5. disagree
20	Is it property inheritance laws empowers women economically, socially, politically?	Yes _____1 No _____2

### QUESTIONNAIRE FOR PIPON AND GYAPON

Personal information:

Name:

Place:

Education qualification:

Age:

Gender:

Community:

Position- pipon/ gyapon

1. Do you have self-governing property inheritance system? Yes/no.  
If yes please tell us about it

.....

2. Do you have customary property inheritance laws for women in your community?  
Yes/no.

If yes, could you please elaborate in details:

3. Do you have a customs of giving property rights to women in your own community?

Yes/no. if yes. How

1. As a gift
2. as legally
3. as illegally
4. Others

4. Are you aware that the Sikkim Government passed property inheritance laws for women in Sikkim? Yes/ no.

.....  
Is it property inheritance laws empowers women economically, politically culturally and socially? Your opinion:

.....  
**QUESTIONNAIRE FOR NGOS & ADVOCATES AND OTHERS EMINENT SCHOLARS WHO ARE WORKING UPON EMPOWERMENT OF WOMEN**

Name;

Address;

Aim of the NGOS and Civil society:

1. What are the various activities that your organisation undertakes to empower the women?

.....  
2. How does it help in empowering women about their rights?

1. Campaigning about awareness programme

2. Giving counselling

3. Educating them about their different rights particularly in rural women.

4. Others

3. Is it property inheritance rights enhance women's overall development? Yes/no.

.....  
4. Are you aware that property rights have been passed by government of Sikkim? Yes/no.

.....  
5. Do various customs and practices become hindrances in getting property rights for women? Yes?No

.....  
.....



## **Appendix II Revenue Order No. 1**

With reference to the Oder dated 2<sup>nd</sup> January 1897, it is hereby again notified to all Kazis, Thikadars and Mandals in Sikkim that no Bhutias and Lepchas are to be allowed to sell, mortgage or sub-let any of their land to any person other than a Bhutia or a Lepcha without the express sanction of the Darbar or Officers empowered by the Darbar on their behalf, whose order will be obtained by the landlord concerned. If anyone disobeys he will be severely punished. In this order the term 'mortgage' means mortgaging the whole or part of holding on the Biyaz or Masikata system and the term sub-let means sub-letting the whole or part of holding on the Pakhura system.

Definition:

1. 'Biyaz' means mortgaging land to another person who enjoys the produce of the land as interest so long as the principal loan remains unpaid.
2. 'Masikata' means mortgaging the fields to a creditor who enjoys the produce of the field as an annual instalment towards the loan.
3. 'pakhuria' means sub-letting, where a rayot allows another new rayot to settle upon a portion of his own holding, generally receiving from him some rent in cash and some assistance in cultivating his own fields.

Gangtok  
17<sup>th</sup> May 1917  
(development Report)

C.A Bell  
Superintendent, Sikkim State (Human

**Appendix III Land Revenue Department, O.O.No. 103/L.R. Government of Sikkim,  
Gangtok, February, 1961**

It is hereby informed for the general guidance of all the Darbar Officers dealing typically with registration of documents in Sikkim, that the following procedures should be strictly followed and observed in cases of transaction relating to transfer of immovable properties.

That it has come to the notice of the Darbar of late, that Nepalese who are marry-Bhutia-Lepcha girls or Non-Sikkimese marrying-Sikkimese women are acquiring immovable properties of Bhutia-Lepcha cannot be alienated in favour of non-Bhutia-Lepcha women that Non-Sikkimese are not entitled to acquire any immovable properties in Sikkim.

It is therefore, to be observed that whenever a transfer of a landed property in Sikkim happens to be women, the registering officer before allowing the registration of the document relating to such transfer, should make an enquiry as to from what source the may for the purchase of the property, where the transfer is by sale, is being obtained by her. It is also to be ascertained whether the purchase money forms her actual property, or it is to be provided by her husband if she is married, in which case such other particulars of her husband including the community to which he belongs, his home address, what landed property he holds already in Sikkim etc., should be enquired into first. In the case of transfer otherwise than by sale also such as gift etc., similar particulars of the husband of the woman if she is married are to be furnished/ the Registering Officer is to undertake and complete all the preliminary enquires as intended above, and should then refer the case to the Dewan of Sikkim with his forwarding report for a decision. Pending specific decision for the coming from authority concerned, the registration of such transfer documents should on no account be finalised.

By Order,  
D. Dhadul  
Chief Secretary

#### **Appendix IV Sikkim Subjects Regulation 1961.**

(As amended vide Notification No. S/277/61 dated the 16d1 January, 1962, Notification No. S/252/65

dated the 26d1 July 1965 and Notification No. 790/H dated the 3rdDecember 1970).

HOME DEP DEPARMENT

NotificationNo.156/S-61

Dated Gangtok, the 3m July 1961

(Published in the Sikkim Darbar Gazette, Extraordinary, dated the 3m July 1961).

The following Proclamation of the Chogyal of Sikkim is hereby notified:

WHEREAS it is expedient to define clearly the status of Sikkim subjects and to make provision for acquisition and loss of such aforesaid status:

NOW, THEREFORE, The Chogyal of Sikkim has been pleased to make and promulgate the following Regulation.

1. Short title and extent-

(i) This Regulation may be called the SIKKIM SUBJECTS REGULATION, 1961.

(ii) It shall extend throughout the territory of Sikkim.

2. Commencement-

This Regulation shall come into force on such date as may be appointed for the purpose by the Chogyal of Sikkim.

3. Certain persons domiciled in Sikkim Territory at the commencement of the Regulation to be

Sikkim subjects-

1. Every person who has his domicile in the territory of Sikkim immediately before the commencement of this Regulation shall be a Sikkim subject if he:

(a) Was born in the territory of Sikkim and is resident therein, or

(b) Has been ordinarily resident in the territory of Sikkim period not less than fifteen years immediately preceding such commencement; provided that in the said period of fifteen years any absence from the said territory on account of service under the Government of India shall be disregarded; or

(c) Is the wife or minor child of a person mentioned in clause (a) or clause (b):

Provided that a person shall not be a Sikkim subject under this section unless he makes a declaration to the effect that he is not a citizen of any other country at the time of inclusion of his name in the register of Sikkim subjects to be maintained under this Regulation: Provided further that in the case of a minor or a person of unsound mind, such declaration may be made by his guardian.

Explanation: no person shall be deemed to have his domicile in the territory of Sikkim unless:

(i) He is a person who has made Sikkim his permanent home and has severed his connections with the country of his origin such as by parting with his property in that country or acquiring immovable property in Sikkim. Provided that a person shall not be deemed to have a permanent home in Sikkim if he indicates an intention of returning to his country of origin, by keeping a live interest therein even though he might have parted with his property in his country of origin and the mere parting of such property will not be regarded as proof of a person's having acquired a permanent home in Sikkim.

(ii) The wife and minor children of a person having his domicile in Sikkim shall also be deemed to have domicile in Sikkim for the purpose of this section.

(ii) In any case of doubt as to whether a person has his domicile within the territory of Sikkim under this section, the matter shall be decided by the Chogyal with the assistance of a Board consisting of persons to be appointed in accordance with the rules made under this Regulation.

4. Certain persons, though not domiciled in Sikkim, to be Sikkim Subject. Any person, who has not voluntarily acquired the citizenship of any other country, though not domiciled in Sikkim, may, on an application made to the authority prescribed by the rules made under this Regulation be registered as a Sikkim subject if he is a person whose ancestors were deemed to be Sikkim subject prior to the year 1850.

5. Sikkim Subject by Descent:

Every person born after the commencement of this Regulation shall be a Sikkim Subject if at the time of his birth his father is a Sikkim subject under this Regulation, whether or not the birth takes place in the territory of Sikkim.

6. Status of women married to Sikkim subjects:

A woman of foreign nationality who is married to a Sikkim subject after the commencement of this

Regulation shall ordinarily be eligible to be registered as a Sikkim subject, on making application therefore to the Government of the Chogyal in the manner provided by rules under this Regulation, and after announcing her former nationality and on taking oath of allegiance. Provided that the Government of the Chogyal after giving a reasonable opportunity to the person of making a representation may refuse such application.

7. Certain persons not to be Sikkim subjects:

(a) Any person who renounces his status as a Sikkim subject, or voluntarily acquires the citizenship of any other country, or takes an oath of allegiance to a foreign country or Ruler thereof without the consent of the Chogyal's Government; or

(b) Any Sikkimese woman who marries a person who is not a Sikkim subject; or

(c) Any person, other than a person referred to in section 4, who severs his connection with Sikkim such as by parting with his property in Sikkim and migrates to a place outside Sikkim and India after the commencement of this Regulation, or has not been ordinarily resident in Sikkim for a continuous period of seven years, shall thereupon cease to be a Sikkim subject.

8. Naturalised subjects:

(i) The Government of the Chogyal may, if application is made to them in the manner provided by rules under this Regulation by any person of full age and capacity who at the date of the commencement of this Regulation is a national of another state but otherwise fulfills the requirements of section 3 of this Regulation to be a Sikkim subject, grant to him a certificate of naturalization if he renounces his former nationality; and the person to whom such certificate is granted shall on taking oath of allegiance, and on his name being entered in the Register to be maintained under this regulation, be a Sikkim subject by naturalization from the date on which the certificate is granted

(ii) If a certificate is granted to any person under the last foregoing sub-section his wife after renouncing her former nationality and taking oath of allegiance be granted certificate of naturalization.

(iii) The Government of the Chogyal shall also have the power to naturalise a person upon application made therefore in the manner prescribed by the rules, provided that the Government of the Chogyal are satisfied that;

(a) He has been in the service of the Government of Sikkim for a period of not less than ten years immediately preceding the date of his application, or

(b) He has rendered meritorious service to the state; and the person to whom such a certificate is granted shall, on taking oath of allegiance, and upon his name being entered in the Register of Subjects, be a naturalized Sikkim subject from the date on which the certificate was granted;

(iv) The Government of the Chogyal may at the same time naturalise the wife and minor children of a person who is granted a certificate of naturalization if application thereof is made.

9. Loss and deprivation of Nationality- Loss of status of Naturalised Subjects:

A naturalized subject shall lose his status as a Sikkim subject if he ceases to reside ordinarily in the territory of Sikkim or fails to comply with any of the conditions subject to which the certificate of naturalization may have been granted to him and thereupon his name shall be removed from the Register of Sikkim Subjects.

10. Deprivation of status of Subjects:

Subject to the provisions of this section, the Government of the Chogyal may by order deprive any Sikkim subject who is such by registration under section 4 or by naturalization under section 8 of this Regulation of his status if the Government are satisfied that such, a subject:

(i) During any war in which the Chogyal or the government of India are engaged, unlawfully traded or communicated with an enemy or communicated with an enemy or has been engaged in or associated with business-that was to his knowledge carried on in such a manner as to assist an enemy in that war; or

(ii) Shown himself by act or speech to be guilty of disaffection or disloyalty towards the Chogyal or

(iii) Obtained the certificate of naturalization by fraud, false representation or concealment of material facts;

(iv) Within five years of naturalization has been convicted of any offence in any country and has been sentenced to imprisonment for a term of not less than twelve months; and such a person shall cease to be a Sikkim subject with effect from the date on which such order of deprivation is passed; Provided that a person shall be afforded a reasonable opportunity of making a representation before an order of deprivation is made.

MISCELLANEOUS

11. Offence and Punishment: Any person who for the purpose of procuring anything to be done or not to be done under this Regulation makes any statement which he knows to be false in material particulars or recklessly makes any statement which is false in material particulars, shall be liable in summary conviction to imprisonment for a term not exceeding two years.

12. Evidence of Status as Sikkim Subject: The Government of the Chogyal shall prepare and maintain a Register of Sikkim Subjects in accordance with rules to be framed under this Act and the entry of a person's name in such a register shall be prima facie evidence of the person's status as a Sikkim Subject.

Provide that a person's name may be removed from the aforesaid Register of Sikkim Subjects and any certificate of status as a Sikkim Subject granted to him may be cancelled with effect from the date of the original grant when the Bard constituted under section 3(3) of Sikkim Subject Regulation is satisfied that the said person's name had been wrongly entered in the Register at any time and submits a finding to that effect to the Government of Sikkim. Provided further that an appeal shall lie to the Chogyal against any such finding by the aforesaid Board.

13. Power to make Rules: The Government of the Chogyal may make and promulgate such rules as may be necessary for carrying out the provisions of this Regulations.

14. Repeal: All rules, regulations, orders and instructions hitherto in force in Sikkim territory in relation to the definition, acquisition and loss or deprivation of the status of Sikkim subjects are hereby repealed.

TASHI NAMGYAL,  
MAHARAJA OF SIKKIM

By Order

Sd .D. DAHDUL Chief Secretary,  
Government of Sikkim

**Appendix: V PART III-Rules, Orders, Press Notes, etc. HOME DEPARTMENT,  
Notification No.1155 /H, Gangtok, 12<sup>th</sup> October 1962.**

The following Proclamation of His Highness the Maharaja of Sikkim is hereby notified; Whereas it is expedient *to* provide for the rights of Sikkimese women married to persons other than Sikkim Subjects to acquire, hold and dispose of immovable property in Sikkim and to, provide for rules of succession *to* property held by such Sikkimese women.

NOW, THEREFORE, His Highness the Maharaja of Sikkim has been pleased to make and promulgate the following Regulation;

**I. Short title and extent**

- (i). This Regulation may be called Married Women's Property Regulation, 1962.
- (ii) It shall extend throughout the territory of Sikkim.
2. This Regulation shall come into force on such date as may be appointed for the purpose by His Highness the Maharaja of Sikkim.
3. In this Regulation the term
  - (a) "Sikkimese" means a person who is a Sikkim Subject at the time of her marriage.
  - (b) "Law" means Statutes, regulations, rules and includes customary law.
4. A Sikkimese woman who holds immovable property in Sikkim at the time of her marriage shall continue to hold such property notwithstanding her marriage with a person who is not a Sikkim Subject and shall have the power to dispose of such property either by sale, mortgage or otherwise to a Sikkim Subject during her life-time.
5. A Sikkimese woman married to a person who is not a Sikkim Subject shall have no right to acquire any immovable property or any interest in such property in the territory of Sikkim subsequent to her marriage.
6. If, a Sikkimese woman marries a person who is not a Sikkim Subject the husband and any offspring born of that marriage shall acquire no interest in any immovable property which she may hold in Sikkim by virtue of Section 4 of this Regulation.
7. Notwithstanding the provisions of any other law to the contrary any immovable property in Sikkim which may be held by a Sikkimese woman at the time of her marriage shall not on her death devolve on her husband if she had been married to a non-Sikkim Subject nor shall it be inherited by Any offspring of such marriage.
8. Any immovable, property held by a Sikkimese woman married to a person who is not, a Sikkim Subject is contemplated in Section 4 of this Regulation shall devolve on her death and be inherited by such person or persons who would have been regarded but for her marriage -as her next of kin under the rules for intestate succession, provided always that such next of kin in order to succeed to such property is a Sikkim Subject.

This Regulation was published in Sikkim Durbar Gazette dated 12.10.1962-Ed.

**Appendix: VI                      Land Revenue Department, Notification No. 28/L.R.,  
Government of Sikkim, 21<sup>st</sup> April, 1969.**

There has been some doubts about the right of a woman to purchase or sell land after her marriage to a person of other community due to restrictions imposed by Revenue Order. I of 1917 and in order to clarify the position in this regard. It is hereby notified as follows:

- a. Women follows the nationality and community of her husband.
- b. Bhutia-Lepcha women marrying a person of community other than her own community only if such land was acquired by her prior to her marriage.
- c. Land acquired by her marriage to a non Bhutia-Lepcha may be sold to any community.
- d. Sikkimeses of Tibetan and Bhutanese origin enjoy all rights and privileges of Bhutia/Lepcha except that they may not by land from the latter community.

By Order,  
M.P. Pradhan  
Secretary  
Land Revenue Department



## **Appendix VII The Constitution (Thirty-Sixth Amendment) Act, 1975**

**AN ACT** (16.5.75) further to amend the Constitution of India. Be it enacted by Parliament in the Twenty-sixth Year of the Republic of India as follows.

1. (I) This Act may be called the Constitution Amendment (Thirty Sixth) Act 1975

(2) It shall be deemed to have come into force on the date on which the Bill for this Act (introduced in the House of the People as the: Constitution Amendment Bill, (Thirty eighth 1975), as passed by the House of the People, is passed by the Council of States.

2. In the First Schedule to the Constitution, under the heading "I. The STATES", after entry 2. I. The following entry shall be inserted namely: "22 Sikkim the territories which immediately before the commencement of the Constitution (Thirty-sixth Amendment) Act, 1975, were comprised in Sikkim".

3. After article 371 F of the Constitution, the following article shall be inserted, namely: 371 F notwithstanding anything in the Constitution.

(a) The Legislative Assembly of the State of Sikkim shall consist of not less than thirty members.

(b) As from the date of commencement of the Constitution (Thirty-sixth Amendment) Act, 1975 (hereafter in this article referred to as the appointed day)

(i) The Assembly for Sikkim formed as a result of the elections held in Sikkim in April, 1974 with thirty-two members elected in the said election (hereinafter referred to as the sitting members) shall be deemed ,to be the Legislative Assembly of the State of Sikkim duly constituted under this Constitution.

(ii) The sitting members shall be deemed to be the member of the Legislative Assembly of the State of Sikkim duly elected under this Constitution and;

(iii) The said Legislative Assembly of the State of Sikkim shall exercise the power and perform the functions of the Legislative Assembly of a State under this Constitution.

(c) In the case of the Assembly deemed to be Legislative Assembly of 'the State of Sikkim under clause (b) the reference to the period of five years. In: clause (1) of article 172 shall be constituted as reference to period of four years and the said, period' of four years. Shall be deemed to commence from the appointed day;

(d) Until other provisions are made by Parliament 'by law, there shall be allotted to the State of Sikkim one seat in the House of the People and the State of Sikkim shall form one parliamentary constituency to be called the parliamentary constituency for Sikkim

(e) The representative of the State of Sikkim in the House of the People in existence on the appointed day. Shall be elected by the members *of* the Legislative Assembly of the State of Sikkim;

(f) Parliament may, for the purpose of protecting the rights and interests of the different sections of the population of Sikkim. Make provision for the number of seats in the Legislative, Assembly, of the State of Sikkim which may be filled. by ,candidates belonging to such sections and for the delimitation of the assembly constituencies from which candidates 'belonging to such section alone may stand for election to the Legislative Assembly of the State of Sikkim'

(g) The Governor of Sikkim shall have- special responsibility for peace and for an elaborate arrangement for ensuring the social and economic advancement of all sections of the population of Sikkim and in the discharge of his special responsibility, under this clause, the Governor of Sikkim shall, subject to such directions as the President may, from time to time, deem fit to issue, act in his discretion.

(h) All property and assets (whether within or outside the territories comprised in the State of Sikkim) which immediately before the appointed day were vested in the Government of Sikkim or in any person for the purposes of the Government of Sikkim shall as from the appointed day, vest in the Government of the State of Sikkim;

(i) The High Court functioning as such immediately before the appointed day in the territories comprised in the State of Sikkim shall on. And from the appointed day, be deemed to be the High Court for the State of Sikkim,

(j) All courts of civil, criminal and revenue jurisdiction all authorities and all officers, judicial, executive and ministerial, throughout the territory of the State of Sikkim shall continue on and from the appointed day to exercise their respective functions subject to the provisions of this Constitution;

(k) All laws in force immediately before the appointed day in the territories comprised in the State of Sikkim or any part thereof shall continue to be in force therein until amended or repealed by a competent Legislature or other competent authority.

(l) For the purpose of 'facilitating the application of, such law as referred to in clause.

(k) In relation to the administration of the State of Sikkim and for the purpose of bringing the provisions of any such law into accord with the provisions of this Constitution on, the President may, within two years from the appointed day, by order, make 'such adaptations and modifications of the law, whether by way of repeal or amendment, as may be necessary or expedient, and thereupon, every such law shall have effect subject to the additions and modifications as' may be necessary and any such adaptation or modification shall not be questioned in any Court of law;

(m) Neither the Supreme Court nor any other court shall have jurisdiction in respect of any dispute or other matter arising out of any treaty, agreement; engagement or other similar instrument relating to Sikkim which was entered into or executed before the appointed day and to which the Government of India or any of its predecessor Governments was a party, but nothing in this clause shall be construed to derogate from the provisions of article 143.

(n) The President may, by public notification, extend with such restrictions or modifications as he thinks fit to the State of Sikkim any enactment which is in force in a state in India at the date of the notification

(o) If any difficulty 'arises in giving effect to any of the foregoing provisions of this article, the President may, by order; do anything (including any adaptation: or modification of any other article) which appears to him to be necessary for the purpose of removing that difficulty: Provided that no such order shall be made after the expiry of two years from the appointed day;

(p) All-things done and all actions taken in or in relation to the State of Sikkim or the territories comprised therein during the period commencing on the appointed day and ending immediately before the date on which the Constitution (Thirty.-sixth Amendment) Act, 1975, receives the assent of the President shall, in so far as they are in conformity with the provisions of the Constitution as amended. by the Constitution (Thirty-sixth Amendment) Act, 1975, be deemed for all purposes to have been validly done or taken under this Constitution as so:

4. In the Fourth Schedule to the Constitution, in the Table,


(a) After entry 2 I, the following entry shall be inserted, namely 22. Sikkim

(b) Existing entries 22 to 25 shall be renumbered as entries 23 to 26 respectively;

(c) For the figures. '2 31 the 'figures" 2 3 2 "shall be substituted

(c) In article 81', in cause (1) the words and figures and paragraph.4 of the Tenth Schedule shall be' omitted.

(d) The Tenth Schedule shall be omitted.

**SIKKIM**  
  
**GOVERNMENT** **GAZETTE**  
EXTRAORDINARY  
PUBLISHED BY AUTHORITY

Gangtok Friday, 8th December, 1995

No. 198

GOVERNMENT OF SIKKIM  
HOME DEPARTMENT

No: 66/Home/95.

Dated: 22nd November, 1995.

**NOTIFICATION**

In supersession of the Memorandum No. 5 (92) 229/GEN/EST, dated 25th September, 1976, Notification No. 285/GEN/EST, dated 28th January, 1980, Memorandum No. 5 (92) 5/GEN/EST, dated 9th April, 1981 and Circular No. 339/HS/87, dated 17th March, 1987, the State Government is hereby pleased to authorise the District Collectors, Sub-Divisional Officers and Revenue Officers within their respective jurisdiction to issue Certificate of Identification to the persons falling in the different categories as indicated below on the recommendations of the Gram Panchayat and being duly satisfied with such recommendation:-

1. A person whose name is found recorded in the Old Sikkim Subject Register or
2. A person whose name is not found registered in the Old Sikkim Subject Register but he/she has established beyond doubt that the name of his/her father/husband/paternal grandfather/brother from the same father has been recorded in the Old Sikkim Subject Register or
3. A person who has or had agricultural land in rural areas and has been ordinarily residing in the State of Sikkim or
4. A person who is holder of Indian Citizenship Certificate issued by the District Collector, Government of Sikkim under the Sikkim (Citizenship) Order, 1975 as amended vide the Sikkim (Citizenship) Amendment order, 1989 or
5. A person whose father/husband has/had been in Sikkim Government Service on or before 31.12.1969. Certificate of Identification obtained by such persons shall be for the purpose of employment only.

The Form prescribed for submission by Gram Panchayats to District Collectors/Sub-Divisional Officers/Revenue Officers for issue of Certificate of Identification is at Annexure I. Certificate of Identification henceforth shall be issued on the basis of verification report and recommendations of Gram Panchayats. Gram Panchayats have to be very careful in respect of verification and recommending such cases. In case Certificate of Identification is issued to wrong person on the recommendations of Gram Panchayat, such Gram Panchayat shall be liable for punishment under appropriate Acts or Rules.

For issue of Certificate of Identification to the applicants of notified bazar areas necessary verification shall be done by the concerned Police Station and Sub-Divisional Officers on the basis of guidelines indicated above.

Certificate of Identification shall be issued to the applicant by the issuing authorities.

By order and in the name of the Governor,

**K.A. VARADAN**  
CHIEF SECRETARY  
(F. No. 103/90-91/L.R.)

**SIKKIM**  
**GOVERNMENT GAZETTE**



**EXTRAORDINARY  
PUBLISHED BY AUTHORITY**

**Gangtok**

**Monday 28<sup>th</sup> July, 2008**

**No. 308**

**GOVERNMENT OF SIKKIM  
LAW DEPARTMENT  
GANGTOK**

**No. 22/LD/P/2008**

**Date: 24.07.2008**

**NOTIFICATION**

The following Act passed by the Sikkim Legislative Assembly and having received the assent of the Governor on 28<sup>th</sup> day of June, 2008 is hereby published for general information:-

**THE SIKKIM SUCCESSION ACT, 2008  
(Act No. 22 of 2008)  
AN ACT**

to provide for law relating to succession to movable and immovable properties of Sikkimese people.

Be it enacted by the Legislature of Sikkim in the Fifty-ninth Year of the Republic of India as follows:-

**PRELIMINARY**

**Short title,  
extent and  
commencement.**

1. (1) This Act may be called The Sikkim Succession Act, 2008.  
(2) It extends to the whole of Sikkim.  
(3) It shall come into force on such date as the State Government may by notification in the Official Gazette appoint and different dates may be appointed for different provisions of this Act.

**Application  
of the Act.**

2. The Act shall apply to-
  - a) any person who possesses Sikkim Subject Certificate/Certificate of Identification (COI);
  - b) descendants of Sikkim Subject Certificate holder identified through COI.

Note:- A woman who has married a non-Sikkimese or has acquired foreign citizenship shall not be eligible to enjoy the rights of descendants and heirs held as descendants under this Act.

Note: Descendants include sons or daughters and their lineal descendants and include those as specified in Schedule I.

### Definitions.3

In this Act, unless the context otherwise requires,- (a) “Act” means The Sikkim Succession Act, 2008;

(b) “Administrator” means a person appointed by competent authority to administer the estate of a deceased person’

(a) “Government” means government of Sikkim;

(b) “heir” means any person male or female is entitled to succeed to the property of an intestate under this Act;

(c) “intestate” means a person is deemed to die intestate in respect of property of which he or she has not made testamentary; disposition capable of taking effect;

(d) “minor” means a person who (has not or attained majority) or has not completed the age of eighteen years.

(e) “probate” means copy of a will certified under the seal of court of competent jurisdiction with a grant of administration to the estate of the testators;

(f) “Sikkimese” means persons belonging to Bhutia, Lepcha or Bepali Community of Sikkimese origin identified through Sikkim Subject or Certificate of Identification;

(g) “Will” means the legal declaration of the intention o a testator with respect to his property which he desires to be carried out after his death.

Act not to in apply to apply to certain applicability of person/class or community 4. (1) The State Government may by notification the official gazette exempt the this Act to the members of community or tribe or sect or such other category etc as ay be specified if it is considered expedient to do so.

(2) The State Government may by notification withdraw or revoke such exemption prospectively.

### Part I

#### Intestate Succession

#### Intestate property 5.

(1) A person to deemed to die intestate in respect of all property of which e has not made a testamentary disposition.

(2) where the intestate has left no widow his property shall go to his lineal descendants or to those not being lineal descendants according to rules of succession contained herein after and if he has left none who are of his descendants and shall to the next of descendants from his brother or to sister if unmarried or abandoned by husband.

(3) A husband surviving his wife shall have the same right in respect of her property if she dies intestate as a widow has in respect of her husband’s property if he dies intestate.

#### Devolution of property 6.

(1) When a male Sikkimese dies after the commencement of property of this Act having at the time of his death an interest in the property or has a self-acquired property, the property shall devolve to the extent of his interest by survivorship upon the surviving members of his family which includes his wife, sons and daughters if unmarried in equal proportion:

Provided that if the deceased has left behind him a surviving female relative who claims interest in such property in such case the property shall devolve to the extent she is entitled.

(2) If two or more heirs succeed together to the property of an intestate they shall take property per capita and as inheriting respective shares in equal proportion.

(3) The property of an intestate devolves upon the wife or the husband or upon those who are of the kindred of the deceased as per the Schedule.

(4) Where an intestate has left a widow but not lineal descendants, the property will devolve to the next of the kindred of the brother of the deceased husband in the manner as specified in the Schedule.

(5) Where a female heir or descendant marries a person who does not possess Sikkim Subject Certificate/COI or has acquired foreign citizenship, such female heir/ descendant shall follow the personal law of her husband and as such shall not acquire any interest in the property:

(6) Where the parents of a minor die intestate such property shall be looked after by administrator if none of the relatives of the deceased within the eligible category of heirs comes forward to look after the property.

(7) Where a person has no son the property will devolve on the daughter subject to sub-section (5) of section 6

(8) An abandoned or divorced woman having the liability to take care of the children and has no source of income, shall have the right to a share in equal proportion along with other heirs to the property of the husband:

Provided that where a woman has deserted her husband with or without children and has remarried shall forfeit her right to her share in the husband's property. However, the children shall be eligible to their share of property as per the law.

(9) The property of an intestate shall devolve in equal shares among all the heirs.

**Right of child in womb 7**

Notwithstanding anything contained in sub-section (1) of Section 6 a child who was in the womb at the time of the death of an intestate and who is subsequently born alive shall have the same right to succeed to the intestate as if he or she had been born before the death of the intestate.

**Preferences of heirs 8**

Heir related to an intestate by full blood shall be preferred to heirs related by half blood, if the nature of relationship is the same in other respects.

**Disqualification of heirs 9**

(1) A person who commits murder or abets the commission of murder or abets the commission of murder shall be disqualified from inheriting the property of the person murdered.

(2) If any person is disqualified from inheriting any property under this Act, it shall devolve as if such person had died before the intestate.

**Escheat. 10**

If an intestate has left no heir to succeed to his or her property in accordance with the provisions of this Act, such property shall devolve on the Government and the Government shall take the property subject to all the obligations and liabilities to which an heir would have been subject.

## Power to make Rules 11

The state government may, by Notification, make rules for carrying out the purposes of this Act.

## Part II

### Testamentary succession

#### Testamentary succession<sup>12</sup>

Every person of sound mind not being a minor may dispose of his property by will.

#### Will obtained by fraud etc. 13

A will or bay part of a Will, the making of which has been caused by fraud or coercion or importunity is void.

#### Will may be revoked or altered. 14

A Will may be revoked or altered by the maker of it at any time when he is competent to dispose of his property by Will.

#### Execution of Will 15

A will shall be executed according to the following rules:

- (a) The testator shall sign or shall affix his mark to the will or it shall be signed by some other person in his presence by his direction.
- (b) The signature or the mark of the testator or the signature of the person signing for him shall be so placed that it shall appear that it was intended to give effect to the Will.
- (c) The will shall be attested by two or more witnesses.

## Schedule

### Heirs in Class I

1. Son, daughter, widow, mother, son of predeceased son, daughter of a predeceased son, widow of a predeceased son.

### **Heirs in Class II**

1. Son's daughter's son
2. Son's daughter's daughter
3. Daughter's son's son
4. Daughter's son's daughter
5. Brother's sons
6. Sister's sons
7. Brother's daughter
8. Sister's daughter


Class II heirs shall come into play only in the event of Class I heir not being available.

By order

R.K Purkayasthae

LR-cum-Secretary Law Department File No. 16 (82) LD/P/2008



**SIKKIM**  
  
**GOVERNMENT** **GAZETTE**  
**EXTRAORDINARY**  
**PUBLISHED BY AUTHORITY**

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Gangtok Monday 1<sup>st</sup> November, 2010 No. 591

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GOVERNMENT OF SIKKIM  
HOME DEPARTMENT  
GANGTOK

No.120 /Home/2010

Dated: 26/10/2010

**NOTIFICATION**

The State Government is hereby pleased to authorize the District Collectors and the Additional District Collectors within their respective jurisdiction to issue **Residential Certificates** to persons falling in the different categories as indicated below on the recommendations of the Gram Panchayat or the Nagar Panchayat/Municipality and being duly satisfied with such recommendation after proper police verification:

1. A person who has established beyond all reasonable doubt that he/she was a resident of the State of Sikkim as on 26<sup>th</sup> April, 1975 and has been residing therein since then, or
2. A person who has established beyond all reasonable doubt that he/she is the natural legal descendant of the person referred to in category 1 above and has been a resident of the State since birth, or
3. A person who has established beyond all reasonable doubt that he/she is the natural legal descendant of a Sikkimese woman holding/eligible for a Certificate of Identification in terms of the State Government Notification on the subject and is a resident of the State since birth, or
4. A person who has established beyond all reasonable doubt that he/she is/was a regular employee under the Government of Sikkim and is settled therein, or
5. A person who has established beyond all reasonable doubt that he/she is the natural legal descendant of the person referred to in category 4 above and is a resident of the State since birth.
6. A person whose spouse is eligible for grant of a Residential Certificate under any of the above mentioned categories and is a citizen of India and a resident of the State.

Application for a Residential Certificate shall be submitted in the form prescribed to the respective District Collectors along with relevant documents. The District Collector may issue the Residential Certificate after due verification from the Gram panchayat/Nagar Panchayat/Municipality and the police.

The issuing authority is also authorised to cancel the Residential Certificate of a person if it is reasonably established that the Certificate has been obtained by him/her or on his/her behalf by misrepresentation or suppression of any material fact.

Any person aggrieved by the refusal to grant or cancellation of his/her Residential Certificate by the Issuing Authority may apply within one month of such refusal or cancellation to the Secretary, Land Revenue & Disaster Management Department for redress.

**BY ORDER AND IN THE NAME OF THE GOVERNOR.**

TT Dorji, IAS  
Chief Secretary  
File No. Home/Confdl./158/1994/2/Part