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Labour and Land Rights of Women in Rural India -

With

Particular Reference to Western Orissa

Reena Patel

**A dissertation submitted in fulfilment of the requirements of the degree of
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Supervised by: Ann Stewart

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Expressing what Manish has done for me is almost impossible: all I can say is this thesis would not have been completed without him.

Abstract

Hindu women's right to independent ownership of property has been established in India since 1956. Given that legal rights have not brought about a significant increase in women's ownership of land, this thesis explores the factors that affect women's effective claim to land ownership. Taking the particular case of Hindu peasant women in small farming households in Western Orissa, it analyses their ability to claim land ownership as the outcome of bargaining. The bargaining approach, as developed by economists, and by Amartya Sen and Bina Agarwal in particular, is adopted to analyse women's access to land as an effect of women's perceptions of self-interest and perceptions of women's contribution. The thesis evaluates the legal framework as it incorporates and reflects these perceptions. It argues that law constructs women's claim to land as a right addressed to 'Hindu' women, located within the family (through succession) and informed by religious ideology. It further argues that recognising women's interests as a basis of their claim to land ownership, as 'peasant' women, located within the household and affected by their work and role within agricultural production, would widen the scope of legal analysis. This would be a starting point towards a deeper understanding of the ways in which law impacts upon women's access to land.

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- A. Venkappa Bhatta v. Gangamma AIR 1988 Kerala 133.
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INTRODUCTION

Hindu women in India have been granted independent right of ownership to property under the law of succession¹. However, during the last four decades of its operation not many women have exercised their rights under the enactment (Devi 1994; Agarwal 1994; Sharma 1989). This thesis studies the construction of women's claim to independent land ownership within law in India. It argues that whereas law constructs such a claim as a right, addressed to Hindu women, located within the family and predicated upon religious ideology, it should include a consideration of women's interests in land ownership as peasants, within the household and as affected by their work and contributions. I argue that whereas law's construction is solely in ideological terms, including an analysis of the material factors that affect women's claim to land would broaden the scope of law. This broader analysis, I further argue, enables a more comprehensive evaluation of the particular factors which affect Hindu peasant women's ability to own land independently.

Taking account of the predominantly rural population in India, with subsistence agriculture as the mainstay in conditions of poverty, I have chosen to focus on land as property. In the context of rural India, land was and continues to be the only viable resource for the production of food and meeting basic subsistence needs for a large

¹ The Hindu Succession Act, 1956.

part of the rural population. Further, the statutory provisions sought, in particular, to overcome the traditional exclusion of Hindu women from land ownership. Land therefore assumes a primary significance in any critical evaluation of law which seeks to enable Hindu women's property rights.

I focus on Hindu peasant women in small and marginal farming households. Towards this, my field research was conducted among Hindu women from small and marginal farming households in three villages in Western Orissa. In these households, the minimal size of the landholdings precludes the use of hired labour, and production is carried out through the work of family members including women. Further, in overall conditions of poverty, the nature of agriculture may be characterised as subsistence production. Women's active labour participation is therefore a significant contributing factor to subsistence agricultural production in these households. Women in these households may be distinguished from landless agricultural labourers working on others' land. While the former work on the land owned by the family, the latter work on others' land for remuneration. Further, succession becomes a relevant means of acquisition and ownership for women within peasant households with some landholdings, whereas the issue does not arise for landless agricultural labourers.

Successionary land rights for women, particularly within the rural context, are significant for a number of reasons. First, the overwhelming dependence on agriculture as the means of survival makes land the most viable resource for all those depending upon it. In the absence of a social security net (Guhan 1992), ownership of

land is therefore vital to overcome dependence upon others for survival and for the fulfilment of vital subsistence needs. However, land markets in rural India are severely constrained due to the nature of subsistence production and limited potential for cash transactions. Further, the socio-cultural and political implications of land ownership, and the popular belief that the possession of land leads to power and prestige, results in low levels of land sales (Basu 1990). Succession is therefore the primary means of acquisition of land where the above factors do not readily allow for the acquisition of land through the conversion of other forms of property.

The problematique discussed by the research is the issue of Hindu peasant women's ability to effectuate the statutory rights to succession and assert ownership of their share in family land. This thesis addresses this in two ways, firstly it engages in a critical evaluation of law by discussing its socio-cultural and ideological context and secondly, it adopts economic analyses into allocation of resources within the family as a means of addressing gender relations and explaining resultant gender inequalities.

This thesis builds upon insights provided by the work of economists, anthropologists and sociologists on the interactions between gender, society and property. In the Indian context, anthropologists, economists and development policy analysts, among others, have investigated the factors which perceptibly impact upon women's access to resources. They emphasise the importance of taking account of the material and ideological structures within society which determine the status of women. Analysis of access to resources, and land in particular, has highlighted the need to take account

of gender relations operating at various levels in society, and impacting upon women in specific ways (Moore 1995; Agarwal 1994).

The bargaining approach² as developed by some economists has been particularly relevant to understanding the factors and processes which bring about a particular distribution of resources among members of a group such as the family, household or community. The approach has been useful in highlighting the impact of factors such as gender, status and class upon the way resources get distributed among individuals. It has also enabled an understanding of the processes involved in such distribution, whether, for example, they are co-operative or conflictual. Adopting this, the interactions between the various members are conceived of as negotiations involving both co-operation and conflict, where the outcome of negotiations would depend upon the relative bargaining position of the members. This conception is particularly useful in analysing resource distribution within the household, bringing into question the previously held belief that household distribution of resources is based upon total harmony, resulting from altruism, love and affection. The work of Amartya Sen (1983, 1987, 1990) and Bina Agarwal (1994, 1995) are especially significant for their contribution to the development of this conception, particularly in the context of South Asia. Both Sen and Agarwal have argued for the need to move beyond quantitative models predominantly used by economists and to take account of qualitative aspects in bargaining.

² The bargaining 'approach' as distinct from the bargaining 'model' is a development that enables the adoption of the 'model'. While the 'model' is based upon economic theoretic formulations of the various factors and outcomes and their relationship *inter se*, the bargaining 'approach' is broader, enabling a perspective based upon the incorporation of the principles.

I rely upon the framework developed by Amartya Sen on the impact of gender upon access to resources through negotiation and bargaining, and Bina Agarwal's application of this in relation to women and land ownership in India. Sen's framework elaborates upon the bargaining approach to take account of perceptions affecting the legitimacy of the claim³. According to this, legitimacy is affected by (the person's) perceptions of self interest and (others') perceptions of the value of her contributions. Sen places importance on perceptions of self interest in enabling a greater social legitimacy for their claim and therefore a stronger bargaining position for land. He goes on to argue that women's individual self-interest may often be lacking and needs to be enhanced, particularly in traditional societies like India.

In her work on gender and land ownership in India, Agarwal (1994) adopts and extends Sen's analysis. She provides a rich and detailed account of the position of women in relation to independent land ownership in the context of existing normative and institutional factors. Most relevant, however, is her debate with Sen's conceptualisation of perceptions. First, Agarwal contests his conceptualisation of and importance given to 'self-interest' in determining women's welfare as the outcome of bargaining. Further, Agarwal disagrees with Sen's proposition that women in traditional societies (such as India) tend to have a less sharp perception of their individual interests and argues that, 'what may be needed is less a sharpening of women's sense of self-interest, than an improvement in their ability to pursue that interest' (Agarwal 1994: 57).

³The components of the bargaining approach as developed by Sen and extended further by Agarwal are discussed in detail in the following chapter.

Thus, she argues that women's self-interest is clearly defined, even in traditional societies such as India. Moreover, that the focus needs to be upon creating and establishing the frameworks to uphold women's self-interest, rather than upon what that interest encompasses. She identifies law as one of the factors that would determine women's ability to bargain for land (Agarwal 1994: 66). Other factors include the social legitimacy of the claim and women's access to economic and social resources outside the existing support systems. She notes that existing laws regarding ownership of land by women are relevant for establishing the legal legitimacy of the claim. Additionally, women's knowledge of their rights and access to legal machinery and public bodies administering land are seen to be significant.

The development of the bargaining approach has enabled clearer analyses of resource allocation and distribution among individuals within a group. Within the family, in particular, it has allowed for the evaluation of social and cultural factors as they determine economic positioning. In the particular analysis of gender as it impacts upon bargaining, the role of tradition and cultural ideology can be seen to be significant in affecting material equality. The need to take account of cultural and ideological gender bias in elucidating inequalities in access to resources is clearly brought out by the bargaining approach.

This framework, although taking account of social and cultural realities in attempting to explain and develop economic outcomes, nonetheless acknowledges the role of law

largely as the means of establishing guarantees, and access to these guarantees understood in terms of access to its institutions and bodies. Similarly, law is by and large conceptualised in its formal and institutional sense in analyses of gender inequalities within economic and development studies in India. Rights, through embodiment in law, are assumed to have a pervasive and substantial impact and where the effectiveness of rights is in question, the focus is again largely upon access to legal institutions and external factors affecting such access.

This textual and formal understanding of law also characterises much of legal scholarship in relation to India. On the particular subject of gender equality, law reform in a number of areas reflects the reliance upon law as a means of establishing equality. The introduction of statutory enactments to promote gender equality through stronger legal sanctions in the areas of obscenity and dowry, and towards empowerment through affirmative action and property rights for women, are examples of legal action for change. Nevertheless, analyses of law, both by activists and scholars, have been predominantly formal and institutional. As Kapur and Cossman note,

‘the understanding of law as a simple instrument of either oppression or social engineering...has informed much of the earlier work on women and law in India’
(Kapur and Cossman 1996: 12).

Identifying three broad perspectives that may be discernible in the vast literature on

women and law in India as protectionism, equality and patriarchy, they argue that

‘the question of the role of law in women’s struggles for social change has not yet been sufficiently complex’ (Kapur and Cossman 1996: 22).

Similarly, although the Constitutional and legal framework that has emerged within the independent state in India has provided the focus of a significant number of challenges and debates, their particular operation has rarely been critically appraised⁴. In particular, the content, scope and application principles of equality and freedom, guaranteed by Articles 14 and 19 of the Constitution of India 1950 respectively, have seldom been critically evaluated⁵. As Baxi has argued, an evaluation of the principles having regard to the particular historical, social and economic context in which they are sought to be applied has yet to be systematically developed (Baxi: 1986).

In the context of Hindu women’s right to land ownership, the discussion becomes even more restricted. The operation of personal laws in India require that certain ‘personal’ aspects of an individual’s life are governed according to her religion. The rules within this body of law govern the areas of marriage, divorce, adoption, maintenance, inheritance and succession. This has led to the compilation of a substantial body of work on what comprises ‘Hindu Law’. The historical development

⁴ See Menon’s discussion (1993) in relation to abortion and the law for a critical analysis of the subject within the development and practices of the independent Indian state.

⁵ An exception with regard to women’s status as equal citizens under the India constitution is Pathak and Rajan’s critique (1989) of the judgement in the case of Shah Bano (Mohammed Ahmed Khan v. Shah Bano Khan AIR 1985 SC 945).

of such laws including religious texts, colonial legislation and post-independence legislation have been the subject of a vast amount of scholarship. However, while textual analyses of these sources of Hindu law abound, there is a noticeable gap in respect of contextual analyses⁶. Analyses of the foundations, development and present operation of Hindu law in its historical, political, social and economic contexts are scarce. This is particularly the case with regard to discussions of Hindu law as it affects women. Although various aspects of the role of religion within the secular model of the Constitution have been considered (Bhagwati 1993), including the philosophical foundations of the Constitution as opposed to traditional understandings (Coward 1993), there is a gap in considering in equal depth Hindu law as it exists today from a gender perspective⁷.

There exists, therefore, a gap in the existing scholarship in relation to Hindu women's land ownership. In focusing upon women's access to land, the work of Agarwal and Sen provide a framework which enables account to be taken of the social and economic context of women's exclusion from land ownership. However, it does not adequately address the legal context. At the same time, legal scholarship has by and large tended to be textual, with a focus on the formal aspects of law, without adequately acknowledging and taking account of the social and economic context in which the law operates.

⁶ For example, the 'authorities' on Hindu law such as Mulla (1994), Mitter (1984) and Kane (1968) provide, if at all, scarce analysis of the context, development and application of Hindu law having regard to the principles contained within it and in respect of the social, historical and economic conditions upon which they operate, particularly as they relate to contemporary society.

⁷ The most useful in this regard is the scholarship of J. D. M Derrett (1968).

This thesis seeks to address this gap, by developing and evaluating the bargaining approach from a legal perspective, as well as engaging in a critical evaluation of law by applying the bargaining perspective to take account of its social and economic context. It is an exploration of the existing legal framework in India as it operates to impact upon Hindu peasant women's ability to negotiate access to land. Applying the bargaining approach developed by Sen and further developed by Agarwal, it extends the analysis towards a framework for the evaluation of law. The application of the bargaining approach within the thesis enables a deeper understanding of what constitutes the specific social, religious and material context of Hindu peasant women. In this, it contributes towards furthering the study of law in its social context.

At the same time, the thesis contributes to a deeper analysis of legal rights guaranteed to Hindu women by critically evaluating the significance of religious and traditional norms, which are in opposition to the rights established by law. This thesis seeks to further the discussion of Hindu law within the broader constitutional framework by considering the relation of religious norms in the contemporary legal setting and its impact upon Hindu women. By considering the specific issue of women's right to own property under the law of succession, I attempt to further the understanding of Hindu law as it operates upon women 'on the ground'. Addressing the development of the contemporary legal framework as the culmination of the processes, debates and dominant values of the state and society preceding independence, the analysis of the law in relation to Hindu succession reveals the close interaction and continuation of pre-colonial, colonial and post-colonial law.

I discuss in depth the framework of analysis upon which the thesis builds in Chapter One. I explain the components of the bargaining approach, and discuss its relevance for a gendered analysis of access to resources. In particular, I highlight conceptualisations of the household that it has enabled. The bargaining approach has problematised prior assumptions about the unitary nature of the household, that it is characterised by a singularity of interests among all its members, represented by its head. It questions the assumption derived from a unitary conception of interests, that altruism thereafter dictates the equitable distribution of the resources among various members by the head. Rather, the bargaining approach conceives of the household as comprised of a plurality of interests of individual members, where the allocation of resources is not presumed as flowing out of altruism, but as a result of negotiation between the members.

The bargaining approach has also provided a framework for taking account of women's work and contribution in analyses of resource allocation and distribution. Within this, the recognition accorded to women's work is brought into focus as a determinant of their access to resources. I discuss the issues that are particularly relevant to women working in household production and subsistence agriculture. In these contexts, the recognition of women's work has been shown to be highly problematic. At the same time, the non-recognition of women's work has been shown to be a contributory factor in women's exclusion from access to resources.

The above issues raised in regard to developing gendered analysis of access to

resources by the bargaining approach provide the basis for a critical evaluation of the legal framework. I discuss the problems implicit within the liberal constitutional and legal framework in India from the perspective of addressing gender inequality. The assumptions of equality and neutrality within the liberal framework are discussed as problematic. In particular, these assumptions obscure the implicit location of the female within a subordinate status. I discuss these aspects of the law as they determine issues within the particular laws that regulate women's right to property. Further, in the specific Indian context, the history of its development through the colonial period and after raises questions about the particular direction of law in relation to gender equality. In particular, the inability of law to move beyond the colonial discourse predicated upon religion is discussed in relation to instituting rights within personal law.

Chapter Two discusses methodological issues of research carried out towards the thesis in the villages of Sahaspur, Ekatali and Karamdihi in Western Orissa. It highlights the personal nature of the research throughout its entire process. I explain the inception of the research problem, conceived as it was out of my own experiences, and discuss the specific research questions as they arose out of the conceptual framework. I explain my choice of sampling methods and data collection in engaging in group discussions with a total of 43 Hindu peasant women in these villages. I discuss my use of logical sampling as opposed to random sampling, and highlight the advantages of the group discussion in the context of my specific research. The issue of access and interaction between the researcher and the researched is discussed in the light of my own experience of being both an 'outsider' as well as an 'insider'.

Chapter Three presents and discusses the data generated through the discussions in the villages in Orissa. It highlights the clarity within which the women analyse their own experiences as Hindu women within peasant households with marginal landholdings. It presents the women's own analysis of gender within their context, the role of cultural and religious ideology in determining gender relations, and the impact of these upon Hindu women's access to land. It explores individual women's perceptions on the issue of Hindu women's right to land ownership and discusses their individual self-interest to acquire land through succession. It brings out the crucially important divergence between their own perceptions regarding their work and others' perceptions of their contribution.

Chapter Four discusses the provisions of the Hindu Succession Act 1956 (hereinafter referred to as HSA) as part of the historical development of Hindu women's legal right to property ownership. It discusses the regulation of women's property rights within classical or traditional Hindu law, and the changes gradually sought to be introduced by legislation. Indian legal history includes thousands of years of indigenous rule, during which evolved highly developed rules of conduct, administration of justice and government. Following this, the greatest impact upon the legal system in terms of the development of rules and institutions for the administration of justice came from the colonial experience. Post-independence India is marked by the adoption of the Constitution of India in 1950, providing the fundamental principles and framework in accordance with which all subsequent legal development must take form. It discusses the impact of colonial administration in the

codification of Hindu women's rights, and its subsequent form and content in the post-colonial constitutional framework. A critical evaluation of the HSA brings out inconsistencies among its provisions regarding women's right to acquire property.

In Chapter Five I evaluate Hindu women's self-interest in acquiring a share in parental property through succession, which is the objective of the statutory enactments discussed in Chapter Four. Based upon the close engagement of statutory law to Hindu religious principles discussed in that chapter, I evaluate specific aspects relating to women's position within Hindu principles as they might impact upon their right to land ownership. I do this through a discussion of their roles as wives, widows and daughters. Starting with references to these roles as discussed in ancient Hindu literature, I show their contemporary applications in decisions by courts and their resonance in contemporary society. I thereafter discuss the implicit as well as explicit assumptions upon which the legal changes incorporating Hindu women's rights to property were based. I evaluate the extent to which these assumptions are borne out, and the extent to which the law reflects and strengthens Hindu women's self-interest.

In Chapter Six I address the issue of work contributions as it affects women's claim to land ownership. Progressing from the evaluation of the religious and ideological context of law in Chapter Five, I discuss the material context of Hindu peasant women as agricultural workers and producers. The nature, extent and role of their contribution in household and subsistence agriculture is discussed. I highlight the problems that arise in the context of women's work, particularly within household and subsistence

production. These include problems with defining women's work, non-recognition leading to under-enumeration and the resulting persistent undervaluation. The ideological basis of such undervaluation is explored, where gender-biased ideology itself may be determinative of the low value placed on women's work and contribution. This chapter takes the example of land reforms in India as an example of the law's failure to take account of women's work and contribution to agricultural production. The case of land reforms, which were premised upon work contribution as creating the basis for land ownership for those who had been historically excluded, is presented as a reflection of the issues regarding women's role in agriculture. Its failure to take particular account of women presents an example of the outcome of the persistent undervaluation of women's work. The chapter discusses this failure within land reforms as it excludes women's ownership of land on the basis of their role and contribution, and argues that in doing so, fails to strengthen their claim to land ownership.

This thesis explores the impact of gender relations upon legal guarantees and entitlements. In the specific context of Hindu peasant women in small farming households, it discusses such impact as it is determined both by the ideological context of Hindu society, and within the material context of peasant women's role work and contribution in agriculture. The legal efforts to enact statutory rights to succession through the Act reflect an attempt to redress the material (non) relation of Hindu females to land through ownership, where such absence of ownership is an aspect of gender relations within the society. Whereas women in rural areas are primarily engaged, to various extents, as *workers* in agricultural production, the issue

that has been addressed by statutory enactment, but which remains and is discussed here, is of establishing *ownership* as the basis of women's relation to land. This thesis addresses women's claim to land ownership as established by the Act and as it is affected by their roles as workers in agricultural production. It attempts to study Hindu women's ability to exercise their statutory right and access to land ownership, through a study of their particular experience of gender within Hindu society and family, as well as their particular location within agricultural production in rural areas.

The aim of this thesis is to broaden the analysis of law in order to take account of women's experiences and location within the family and wider social structures. These are informed not only by culturally determined identities and relations, but also predicated upon material relations of work, production and contribution. Hindu rural peasant women's claim to land may therefore be conceptualised, within law, as not only affected by their socio-cultural reality, but also their socio-economic position. I will argue that at present law only locates women within structures defined primarily by culture and religion, whereas it could broaden its scope by taking account of the material structures within which they live.

CHAPTER ONE

CONCEPTUAL AND ANALYTICAL FRAMEWORK

1. Introduction
2. The Framework of Law
 - 2.1 The Constitutional Paradigm: ‘Liberal’ and ‘Modern’.
 - 2.1.1 ‘Modernity’ in Indian law and its engagement with the past
 - 2.1.2 Liberalism in practice: the Feminist critique
 - 2.2 Legal Pluralism
 - 2.2.1 Contextualising law: taking account of women’s lives
 - 2.2.1.1 Perspectives on work and contributions
3. Gender and access to resources
4. The Bargaining Approach
 - 4.a Breakdown well-being response
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 - 4.c Perceived contribution response
 - 4.1 The household
 - 4.2 Application of the bargaining approach
5. Conclusion

1. Introduction

In this chapter I identify the particular issues that arise in conceptualising Hindu women’s access to land within small farming households, developed and addressed through field research in rural Western Orissa. As I have pointed out, such access is primarily established by the HSA, which confers upon Hindu women the right to claim a share to property through succession.

The regime set up by the HSA is located within the broader constitutional and legal framework existing in India today. In order to evaluate the factors that affect Hindu women's ability to exercise their rights, I examine two fundamental aspects of this broader legal framework. I discuss the historically constructed role of tradition and modernity within the Constitutional (and derivative legal) framework, and the liberal foundation of this framework, arguing that these aspects have a critical bearing upon how Hindu women's right to property is constructed by law.

I argue that religion provides the ideological framework for the constitution of 'Hindu' law such as the HSA, within which the role of 'tradition' has particular implications for women. Whereas a major impetus for various progressive legislations, including the HSA, was the establishment of 'modern' values such as equality, the construction of this 'modernity' is itself a product of colonial engagement. The construction of the debate upon the opposition of 'modernity' to 'tradition', and the need to reconcile these, established religion as the legitimising principle. I argue that the existence of contemporary 'Hindu law' reflects the continued hegemony of religion, and within it, of tradition.

Further, I argue that notwithstanding guarantees of formal equality, the liberal principles embodied in the Constitution reinforce the reality of women's substantive inequality in two ways. First, the public/private distinction within liberal principles predicates the exclusion of formal law from the 'family' or the home. I argue that this operates to strengthen the role of religion and tradition in the regulation of women,

and functions predominantly within the family. Secondly, I argue that the exclusion of the family from law's purview, and the ideological construction of women's lives within it, results in the exclusion of the related but separate sphere of the household, its constitutive relations and women's lives within the household.

Taking up the insights provided by studies into legal pluralism, I argue for a broader focus in the discussion of the way in which women's lives are affected by law. I argue that the study of law in its broader context necessitates taking into account women's lived realities, and the analysis of the material and ideological processes and structures by which they are constituted. In analysing the relation between gender and access to resources, I argue that the bargaining approach enables us, in addition to ideologically derived constructions, to take account of the material processes and structures which form the totality of women's lives. I argue that whereas the legal framework structures Hindu women's claim to property as a *right*, addressed to *Hindu* women, located in the *family* and predicated upon (religion-based) ideology, the bargaining approach enables us to take into account in addition, within legal analysis, women's claim to property as founded upon their *interest*, as *peasant women*, located within the *household* and predicated upon their material conditions of work and production.

2. The Framework of Law

To evaluate the role of law in establishing effective property rights for women, it is

necessary to specify what one means by 'law' within the analysis. Law may be conceptualised and evaluated in various ways and at various levels, given its very nature and ability to both operate as a social system in society as well as prescribe and enforce norms of behaviour. Law may therefore be 'both a prescriptive norm and a descriptive fact' (Cotterell 1992: 8). Moreover, law may be studied within its own terms and with reference to its own conceptions, as legal positivists would argue, or it may be addressed and evaluated in relation to the social structure within which it operates (Cotterell 1992).

The scope of what we mean by 'law' and the functions it serves as such, are therefore a precursor to any evaluation, critical or otherwise, of 'law' within a given problem, society or other context. Regarding the particular problem of Hindu peasant women's land ownership within the broader legal and political context of the Indian state, my starting point is of law as prescriptive norms, embodied in rules, statutes and the constitutional framework, as well as judicial pronouncements on these. I evaluate the expressed aims which this law seeks to fulfil, drawing upon and engaging with analyses where law is discussed not in terms of individual rules and institutions, but as a social system in itself. I discuss the existence of a plurality of legal systems, sustained by the operation of religion and culture through social structures, in relation to its consequences for an analysis of law defined in its scope and functions as formal and positive.

Finally, the possibility of addressing gender concerns through law is explored and discussed. I discuss the inclusion of women's actual experiences and lived realities, in

broadening the scope of a critical evaluation of law. The inclusion of women's social, material and ideological realities within a discussion of law, even as narrowly defined as above, enables a critique of the broader legal and political paradigms within which the state and constitution are framed, as well as the individual legal rules themselves.

2.1 The Constitutional Paradigm: 'Liberal' and 'Modern'

In this section I shall discuss the law as it creates the dichotomy in constructing a woman's claim to land. This dichotomy, as I have argued, is in constructing women's claim to land as a 'right', addressed to a 'Hindu women' located within the 'family' and framed by religious ideology, as opposed to addressing their 'interests', as 'peasant women', located within the 'household' and informed by their condition of work and production. The following discussion of law addresses the construction of Hindu women's right to property by succession (located within the first half of the dichotomy). It argues that the liberal Constitutional framework and the derivative legislations both creates this dichotomy and locates women within the confines of the family and religious ideology in its determination of their claim to land as a 'right' through succession. The construction of women's claim within family or the private domain, it is argued, is embedded in the liberal framework of law to which considerations of 'Hindu' ideology and identity are added. I will argue that law's incorporation of 'Hindu' structures is founded upon the particular historical processes through which it evolved. The consequent retention of religion, and 'Hindu' as a principle of construction within law is discussed as it completes law's construction of

women's claim to land as a right within the family, addressed to a Hindu women, and informed by Hindu religious ideology. Thus the discussion of law's 'liberal' character as well as its engagement with 'modernity' and 'tradition', taken together, demonstrate the process by which law both constructs and sustains a dichotomy, in framing women's claim to land, as well as locating women and their claim to land within one 'half' of this dichotomy.

The Indian Constitution is the embodiment of the avowed values, aims and objectives of the state after independence. It is a normative document, explicit in its vision of the society it seeks to foster. At the same time, it is a highly detailed document of the means and processes to be adopted in establishing such a society (making it the longest written constitution in the world). As such, it provides a clear statement of the vision and modalities of the post-colonial state.

As Rai notes, 'as a post-colonial state, the Indian state occupies a particular space within the society and economy' (Rai 1999: 241-242). Within this, the Constitution, and the legal framework it supports, is a relevant starting point for analyses of law and state in contemporary, post-colonial India. Indeed, as the Report of the Committee on the Status of Women notes, the role of law is highlighted in post-colonial states:

'The tasks of social reconstruction, development and nation building all call for major changes in the social order, to achieve which legislation is one of the main instruments. It can act directly, as a norm setter, or indirectly, providing institutions which accelerate social change by making it more acceptable' (Committee on the Status of Women 1975: 102).

The role of the post-colonial state is implicit in this understanding; it is conceived as different to that of the colonial administration in the way that the state addresses the citizens or subjects. While the colonial administration could not be presumed to be acting in the interests of the people, the nationalist debates and the independence movement culminated in a Constitution that expresses the congruence of state and citizens' interests in the unequivocal 'We the People of India....'⁸. Thus, the presumption in contemporary Indian society is that the means and institution of the state are aimed towards, and reflective of, the will and desires of the Indian people, or at least the majority of them. While the colonial period is seen as being indifferent to 'humanitarian concerns' and 'social demands', it was the nationalist movement prior to independence, and the independent state thereafter, within which reforms have been possible⁹.

Undeniably, this is based upon the understanding of law as an instrument of social change, as has been the predominant focus of those engaging with law in India to address a whole range of social concerns, including those relating to gender. Kapur and Cossman question this reliance upon law as social engineering, particularly the assumptions made within this of the positive role of law in advancing women's equality and full participation (Kapur and Cossman 1996). Although the limitations of law in bringing about social change is acknowledged, the reliance upon law as a means for bringing about social change

⁸ The Preamble, Constitution of India, 1950.

⁹ 'Status of Women in India', 1988.

‘... does not question law’s commitment to social change, nor does it consider the role of law in the subordination of women...It does not interrogate the ideological character of law in constituting and sustaining unequal power relations beyond the liberal understanding of explicitly discriminating laws. Rather, its focus is on law reform and law enforcement’ (Kapur and Cossman 1996: 25)

Whereas the constitutional framework provides the overall justification for these engagements with law reform, an understanding of the framework makes clear the tensions within itself. In particular, the liberal framework that the Constitution adopts sits uncomfortably with simultaneous state led initiatives to redress structural and historical inequality of various groups, among them women. Secondly, the desire to create a ‘New’ India continues to have difficulty, that is, to what extent and in which areas it should break with ‘India’ as of old. These tensions are most clearly borne out in relation to state action through laws and institutions, in respect of the historically disadvantaged groups whom they are meant to address (Galanter 1984; Menon 1995).

2.1.1 Liberalism in Practice: the Feminist Critique

The Constitution of India sets out to integrate women into a full, democratic

citizenship, through specific provisions¹⁰ towards their equality and empowerment. The benevolence, egalitarianism and protection afforded by the Constitutional framework may be argued to mask the true nature of the state and law in respect of women, as a paternalistic one. Kapur and Cossman have argued that this is indeed so in the case of India (Kapur and Cossman 1996). They have noted instances where the emphasis has been for the law to 'protect' women as the 'weaker sex', and argue that

'This protectionist approach simply accepts traditional and patriarchal discourses that construct women as weak, biologically inferior, modest and so on...the role of law is unproblematically asserted as protecting women. Laws that continue to treat women differently than men are accepted as a necessary part of this protection...women's ostensibly natural differences are deployed to justify any differential treatment in law, and in effect, operate to preclude any entitlement to equality' (Kapur and Cossman 1996: 23).

The feminist critiques of liberalism has challenged the fundamental liberal principles of rationality and autonomy of the 'individual', the limitation of the power of the state and the consequent presumption of equality among all 'individuals'. Pateman argues that in order to address gender equality and empowerment through law, it is not enough just to extend the concepts and arguments to women as well as men. It is necessary to rethink the concept of the individual (Pateman 1986, 1988). Smart discusses the various ways that the liberal framework of the 'modern' state, of which law is an instrument, simply does not and can not allow for action towards gender equality and empowerment (Smart 1984, 1989). Although the various strands of feminist thought may differ in the ways they understand and explain the relation of

¹⁰Provisions within the Fundamental Rights Chapter and the Directive Principles of State Policy.

women to the state, they all agree that exclusion is a significant aspect of it. The focus on the individual is based upon the assumption of an abstraction: a concept free of the characteristics of gender, class, race and age. This conception of an abstract, universal subject has been problematised and argued that it is sex/gender specific, affected by other factors of class etc. (Siim 1988).

Moreover, the concept of rationality was based upon assumptions of binary opposites within which the male and female were constructed (Barnett 1998). Thus, a distinction was drawn between body/mind, nature/culture, emotion/reason and so on. In addition, a central tenet of the liberal state has been the limitation of its action upon individuals, and certain areas where it should not act, where it is not its (or the law's) business (Barnett 1998). The public/private divide is based upon this, where:

‘Public may be used to denote state activity, the values of the marketplace, work, the male domain or that sphere of activity that is regulated by the law. ‘Private’ may denote civil society, the values of the family, intimacy, the personal life, home, the women’s domain or behaviour unregulated by law’ (O’Donovan 1985: 3)

As Jones has argued, the demarcation of the ‘public’ as fundamentally distinct from the ‘private’ resulted in women’s exclusion from public life (Jones 1988). Further, the distinction drawn between the male and female attributes combined with the demarcation of state action in the public/private realm to justify women’s subordination in the private sphere:

‘Hierarchical, patriarchal relations were held to be the natural characteristics of rule in the private sphere’ (Jones 1988: 13).

The problem, however, was not in making the distinctions alone, it was the correspondence assumed with the distinction between male/female. Further, there was a value placed on the male as superior and female as inferior, and difficulty arises when positive or negative labels are attached to these attributes, particularly when it is that negative values attach to those associated with the female. Bottomley et al point out that feminists of varying persuasions argue about how this should be addressed¹¹ (Bottomley et al 1987). However, there is general agreement that the primary distinction between male/female and its correspondence to public/private within liberal thought is highly problematic for women.

Freeman suggests that the public/private dichotomy is at the heart of a critical approach to family law (Freeman 1985). The public/private division, argues Kennedy, has the same relation as a number of other oppositions which:

‘...taken together, constitute the liberal way of thinking about the social world. These distinctions are state/society, public/private, individual/group, right/power, property/sovereignty, contract/tort, law/policy, legislature/judiciary, objective/subjective, reason/fiat, freedom/coercion...’ (Rose 1987: 63).

¹¹The cultural feminists, such as Carol Gilligan and Luce Irigaray, for example, would argue for the superiority of the ‘female’ attributes, whereas others have argued that these oppositions are not valid in the first place.

This contradictory position between the ideals of individual freedom and equality in the public sphere, and the assumption that women are naturally subject to men in the family, argues Pateman, is the reason for the state's inability to address women's concerns (Pateman 1986; 1988; Siim 1988). Feminist critique has challenged not only the exclusion of the private from law and the state based upon the construction of public and private (O'Donovan 1985; Pateman 1986, 1988), but has also shown the linkages between the two spheres which continue to be unrecognised by the state and law (Mackintosh 1981; Bennholdt-Thomsen 1981)

Although Rose (1987) has called for analysis that goes beyond the public/private debate, I believe that this analysis still has insights to offer us in attempts at a deeper understanding of law in India. Partha Chatterjee offers such an insight in his discussion of the resolution of the 'woman question' within the nationalist discourse of pre-independent Indian society. He argues that the inner/outer dichotomy was an ideologically more powerful extension of the spiritual/material divide within nationalist discourse. This in turn translated into a world/home split where the woman was placed firmly within the home. The impact of this was to contribute to a particular construction of womanhood, with certain qualities and responsibilities, and upon which construction they could participate in the movement (Chatterjee 1990).

The ramifications of the public/private divide may be seen in state reluctance to remove religion as the principle for personal (family) law. It may also be seen in the

reluctance to put into effect a Uniform Civil Code (Parasher 1992, 1997; Jaisingh 1996; Agarwala and Ramanamma 1994), although it is a Directive Principle of State Policy, and one which the state had undertaken a specific commitment to pass (Baxi 1986). Further, as I will show in Chapters 5, the legal reform of Hindu family law shows a clear ambivalence of the state towards a complete overhaul; instead, it retained much of traditional Hindu law relating to the family, while attempting to introduce change on an issue of fundamental significance within traditional Hindu law. In Chapter 6 I will argue that the public/private dichotomy is a self-perpetuating one. There is a dialectical link between the ideology of the 'private' and the non-recognition and undervaluation of women's work by the state and law. Where the law constructs the 'private' and places women firmly within it, so also it emerges that wherever women are becomes the 'private' in relation to law and the state. So, for example, the fact of women working in agriculture is not recognised and is gendered insignificant, by virtue of the fact that 'it is for the family' or 'pin money', making it a 'private' activity and therefore outside the scope of consideration.

These issues within the liberal tradition, which are challenged by feminists also bear upon the significant problem of the difficulty in securing substantive rights as opposed to formal rights. In its universal, abstract, individual subject liberalism ignores the realities of the individual, and all her attendant characteristics. Gender, class, status, power, age, religion or caste in the context of India are obscured or ignored. As Pathak and Rajan have summarised, taking the state's treatment of the subject in the controversial Shah Bano Case¹²:

¹²Mohammed Ahmed Khan v. Shah Bano Khan AIR 1985 SC 945.

‘Certainly, the Constitution of India, following Western constitutional models, did envisage (this) unity of the Indian subject within the legal system...In the ideal, subjects in law are undifferentiated, non-descript, equal and singular’ (Pathak and Rajan 1989: 573-577).

Thus, where the impetus for addressing gender inequalities seems to be derived from an agenda of law reform in India, it is even more problematic (Menon 1995; Kapur and Cossman 1996). Where women are simply ‘brought within’ legal provisions, without sufficiently taking account of their realities in terms of religion, caste or class, the gap law reform seeks to bridge will continue.

2.1.2 ‘Modernity’ in Indian law and its engagement with the past

The liberal, democratic constitutional framework characterising the independent Indian state is tied to the particular historical processes involved in and leading up to the formation of the independent state. Modernity was a core principle or aim around which the debates within the reform movement were organised, as well as within the nationalist movement. The Constitutional and legal framework of post-independent India is imbued with this. In particular, the rationale of most ‘progressive’ legislation in post-independent India has been the explicit adherence to ‘modern’ ‘civilised’ notions of the status of individuals and the role of the state towards securing these.

For example addressing the question of who demanded changes to the HSA, the Hindu Law Committee expressed the following :

‘... but more important than any other happenings in India are the repercussion of the events in the international sphere... India has been participating in international conferences and pleadings for human rights... with an eloquence which has commanded universal admiration. The eyes of the world are upon her now and it would be more than a misfortune if at this juncture she were to fail to enact ... a Hindu code in which there was equality before the law and in which disabilities based on caste or sex were no longer recognised. We are now almost bound in honour to remove these... This should be a sufficient answer to the question as to, who demands these changes in law?’ (Report of the Hindu Law Committee 1947: 5).

The adoption of a new Constitution in independent India with the simultaneous retention of the legal, judicial and administrative framework reflects post-colonial India’s continuing engagement with the past, colonial processes. One significant aspect of this continuance is the principle of modernity, which itself was a product of colonial discourse (Kidder 1978). The concept of modern as opposed to the traditional was at the heart of the various debates preceding independence. The social reform debates, the impact of European scholarship on India and British administrative policy gave impetus to the ‘modernisation’ of India. At the same time, the orthodox opposition to reform and the impact of orientalism argued for the perfection of ‘Indian tradition’ to be maintained.

These opposing movements were however organised around the same principle, that of religious sanction. Therefore, while the reformists sought to argue that the ‘modern’

was indeed in keeping with the true spirit of the Hindu religion, therefore sanctioned by it, the orthodoxy used their interpretation of religion to argue that it did not sanction the changes sought. British administrative policy and official discourse formed the basis upon which religion became the legitimising principle (Derrett 1968)¹³. Critiques have also come from scholars looking at the construction of issues and debates within colonial engagement. In particular, the implementation of law and its reform proved to be a predominant arena for these debates, and as such, law provided the basis for the embodiment of the outcomes within it. Lata Mani provides a vivid account of this process in the context of Sati, where time and again court pundits were referred the question ‘whether the practice was sanctioned by religious texts’ (Mani 1990: 100). The same is to be seen, for example, in the case of Courtesans (Oldenberg 1990; Nair 1993) and in the debates surrounding the issues of widow remarriage and age of consent (Chaudhury 1990, 1993; Chakravarti 1990, 1998).

The reform movement was a significant part of the debates preceding the nationalist movement and independence. Western education and its ideas of humanitarianism, rationalism and liberalism provided the basis for questioning accepted practices within Hindu society, and utilitarian ideas were the new framework for evaluating these (Desai 1959; Natarajan 1959). What is of particular significance for our purposes, however, is the interplay of reformist agendas, the privileging of religion within the structure of the discourse, is that women were pre-eminent signifiers of the issues both constructed and addressed by the debate as the embodiment of ‘tradition’ (Mazumdar 1976; Sangari and Vaid 1990; Chakravarti 1990; Chatterjee 1993; Nanda 1976). This

¹³ For a more formal historical account of the British administration in India, see Basu, 1983; Gledhill, 1964; Jain 1966.

problem has been aptly brought out by the remark of Uma Chakravarti:

‘The entangled relationship between law, custom, caste, property and gender was not so easy to disentangle...’ (Chakravarti 1998: 134).

The subsequent nationalist movement was itself founded upon the principles set up earlier (Heimsath 1964; Desai 1959). The means to create a new national identity was based upon the fundamental premise that had been in operation in the previous debates: the essential difference between the colonial masters and the subjects was based upon tradition. Nationalist thought, (as a derivative of colonial thought), argued that while modern European culture possesses attributes that enable its people towards power and progress, these attributes are missing in the ‘traditional’ societies under domination (Said 1978; Chatterjee 1993). Further, it argues that such domination is not unchangeable, for the cultural attributes are not immutable and modernity defines the change that is sought, for nationalism:

‘...asserts that the superiority of the West lies in the materialism of its culture, exemplified by its science, technology and love of progress, But the East is superior in the spiritual aspect of culture...*True modernity* of the non-European nations would lie in combining the superior material qualities of the West with the spiritual greatness of the East...’ (Chatterjee 1993: 51; emphasis added).

The story so far, of the history of nationalism and debates preceding it, illustrates the key role of ‘modernity’ and ‘tradition’ as opposing concepts in the search towards what could characterise the ‘Indian’, which could be the basis for forging a new

national identity through independence. This is indeed the basis upon which the modern, liberal post colonial state was formed, and which is implicit in the contemporary Constitutional and legal framework. Although it was the elite who could be identified with this modernising spirit of the nationalist movement, it is relevant to note that the policy makers under Nehru in post-independent India were these very same elites (Rai 1999).

The continued engagement of the post-colonial state with the debates of the past is evident in the framework adopted by the state itself. While independence brought the adoption of a new Constitution, a vast body of law, judicial and administrative continued as before with minor changes. The Constitution explicitly provides for the continuance of laws passed prior to its inception subject to certain conditions¹⁴. Moreover, this engagement continues to privilege religion and the concept of 'tradition'. Thus, the very constitution of 'Hindu law' in legislation and its implementation by the judiciary continues to be structured upon the same principles as in the processes prior to independence (Smith 1963). This, I will argue in Chapter Five and Six, has significant implications upon the constructions and definitions of a 'Hindu woman', her role and identity. I will argue that the attempt to 'modernise' her status through legislative reform in the post-colonial state is in fact constituted by this engagement, and ultimately fails to overcome it, thereby losing to a great extent its transformative potential.

Further, this continued construction of Hindu women within the framework of

¹⁴ Article 13, Constitution of India, 1950.

religious and traditional social structures, combined with the liberal distinction between the private/public, results in the state and law ignoring the material context within which women also live. By constructing women and their interests solely within the context of the social and religious structures, the law defines these only in terms of the family as the unit of society. Religion and tradition (and derived ideology) are constructed as the only operative forces in women's lives. This results in the exclusion of the factors of class and gender, among others, as they affect women's lives even within the family. By providing rules in respect to succession to family property, and women's right to this, Hindu law may be seen to be going beyond the limitations of liberalism in addressing women within the family and bringing it within the scope of law. However, by privileging religion and excluding a significant aspect of women's lives within the 'family' as peasants engaged in production, Hindu law actually limits its own conception of women. Thus, while it may seem that Hindu law in fact breaks down law's reluctance to enter the domain of the 'private' sphere of women's lives by touching upon the family, the parameters within which this is done, combined with its non-recognition of the material aspect of women's 'private' lives in the domain of work and production in effect, serves to reinforce the exclusion of women's interests from law (Parasher 1997).

The discussion highlights that the particular construction of women's claim to land, as 'Hindu' women's right to family land through succession, is in fact a derivative of the broader constitutional framework. This discussion brings out the limitations of a liberal constitutional approach to law as a means of bringing about social change, which, as has been noted, has dominated the engagement with law reform in India.

The discussion further brings out the particular issue of women's claim to independent land ownership, that limits interest within laws construction of the claim within this framework.

2.2 Legal Pluralism

The multi-cultural and multi-religious context of Indian society requires a discussion of legal pluralism. The existence of a plural bodies of law applicable to persons according to their religion is in itself a reflection of legal pluralism. Further, the colonial history of India has resulted in many instances and aspects of law instituted during the colonial regime continuing in post-independence India. The incorporation of common law within the Indian legal system as a result of British legal policy is an example of this.

Theories of legal pluralism have been advanced in a number of contexts. The study of customary law in 'indigenous' societies through the process of colonialism has provided rich understandings of people's interaction with plural legal orders (Chanock 1985; Merry 1988). This work has been further developed by research in Southern and Eastern Africa and the development of 'women's law', which has engaged a deep analysis of women's location within a variety of norms and structures (Bentzon et al 1998). The work of Scandinavian scholars has further developed analysis of norms within the administrative centres, and at other locales outside state law in the context of the Scandinavian countries.

Sally Falk Moore (1978) has developed the concept of the 'semi-autonomous social field', arguing that

'between the body politic and the individual, there are interposed various smaller organised social fields to which the individual 'belongs'. These social fields have their own customs and rules and means of coercion or inducing compliance' (Moore 1978: 58).

Although Bentzon et al point to a difference between 'anthropologists' legal pluralism' and lawyers' legal pluralism, arguing that the 'semi-autonomous social field', as developed by Falk Moore (1978), is a descriptive rather than normative concept (Bentzon et al 1998), it is useful precisely for enabling the recognition and description of the many structures and norms that affect women. As Petersen has argued:

'Including sub-state levels of normative systems and structures as a subject of study is both relevant and crucial if the aim is to increase knowledge of the actual legal situation of women in most countries. Such knowledge is necessary to put forward appropriate, relevant and realistic demands for changes in order to actual improvements in the lives of women' (Petersen 1997: 152)

Legal pluralism furthers our analysis of women's claim to land ownership as established by law in a number of ways. Firstly, it allows an analysis of the normative role of religion in women's lives. As we have discussed, law constructs women's claim to land on the basis of religious ideology and defines it as a right to 'Hindu'

women, located within the family. Although it may be said that state law is in fact recognising 'Hindu' principles and incorporating them within it, legal pluralism provides the basis upon which the contours of the normative effect of 'Hindu' law may be examined, and not merely assumed. It enables us to explore the extent to which 'Hindu' law 'exist as social fact because it receives social observance' (Woodman 1997: 183)

Secondly, the meaning of legal pluralism derives from its recognition that there are regulatory or normative systems other than formal law that affect and control people's lives. In studying women's lives as they are affected by law, in particular, scholars have argued for the adoption of a broader approach (Petersen 1997; Dahl 1986; Bentzon et al 1998). In order to describe, understand and improve the position of women in society, Dahl emphasises empirical data about the living realities of women in society. The operation of legal rules and the sources of law and legal doctrine are fundamental sources to analyse the complex interrelationship between law and life as they affect women (Dahl in Bentzon et al 1998). This, it is argued, means that

'In addition to conventional legal sources such as case law, statutes, subsidiary legislation, legal theories in textbooks and articles, the practices in fora where the arrangements which directly affect the position of women are made, are also examined. Examples of such fora are the family, the workplace, the church community, the local courts and administrative agencies' (Bentzon et al 1998: 66-67).

This perspective obtains a wider scope for the consideration of law, for law is seen as a rule generating and rule upholding process that takes place in various locales

(Bentzon et al 1998). A recognition of the plural and non-hierarchical structure of norms that affect women's lives leads to an

'...understanding of legal norms - or legal sources - as being engendered by different, overlapping, coexisting, co-operating and/or competing structures...a more profound examination and evaluation of both diverse types of norms and of the different values underlying such different normative systems...' (Petersen 1997: 154)

This understanding allows the analysis of norms that operate upon women's lives in a variety of contexts. Thus, in the analysis of rural women's claim to land in India, legal pluralism allows for the consideration of the statutory norms under the HSA, the operation of Hindu religious norms upon women and the evaluation of norms by which they are affected as workers in agriculture. Legal pluralism allows, in addition, to evaluate the operation of norms within the family, the wider society, the household, and the farm. As Petersen strongly argues:

'To my view it implies that both norms generated in families, workplaces, tribes, social and religious communities must be studied, considered and addressed in their complex interrelation if an improvement in the situation of women is to be achieved, and if the contribution of women to society can be acknowledged, valued and taken general advantage of for the benefit of both men and women, old and young' (Petersen 1997: 157).

Thirdly, therefore, legal pluralism provides the basis upon which the interaction between the various normative structures may be evaluated. In the case of evaluating Hindu women's claim to land, it would allow for an analysis of the impact of religious

norms upon the statutory norms and vice versa. It would also enable the interrelation between the norms affecting women's role in agriculture and the religious and statutory norms. Hindu women in their relation to land ownership, are governed by a combination of legal, social and cultural norms, values and institutions. To study the role and impact or effectiveness of one of these, namely statutory norms, is to overlook the essential interlinkages and impact of the others. It follows also, that to embark upon a process of increasing gendered access to resources through law, an understanding of the ways in which it may do so is essential. This not only prevents the exclusive emphasis on statutory law, based upon an erroneous assumption of its overriding power, but it also allows for more informed methods to be adopted. Methods that are informed upon the precise interdependence and interconnectedness of cultural values, religious norms, gender ideology and social organisation, in order to evaluate the maximum effectiveness of the statutory norm.

Legal pluralism addresses the critique of liberalism by providing the basis for law to shift its focus from the public world where it has hitherto been, to those arenas which are significant in their regulation of individuals. For a vast majority of women in the world, particularly in developing countries, this is the family/household. This is where they carry out their daily activities and by extension where they are most regulated. The issue of inheritance derives directly from the Hindu notion of 'family', as the property in question does not disturb distinctions made in Hindu law between ancestral and personal property. The effect of this is to strengthen and continue the operation of the family, specifically the coparcenary of which is the ancestral property. Thus the gender ideology operative here is directly derived from norms and notions

related to the 'family'.

It therefore provides, within legal analysis, the means to make the links between women as 'Hindu' women subject to norms of the family and religious ideology, and women as peasants, affected by norms in relation to work and production in agriculture. In conjunction, it allows for the focus of legal analysis into domains that it does not enter, and upon norms that the law does not recognise. Taken together, it provides within legal analysis the conceptual 'bridge' between the two aspects of the dichotomy posed earlier. Therefore, legal pluralism is a further critique of liberal law's restricted gaze and law's exclusion from 'private' domains such as the family within liberalism. It provides the analytical tool for moving towards a broader conceptualisation of gendered perspectives within law, to generate a better understanding of women's lives as they are affected by law in a variety of contexts.

2.2.1. Contextualising law: taking account of women's lives

This section elaborates upon a central theme that has emerged within legal pluralism, particularly as it has been used to investigate and develop 'women's law' by scholars in the Southern and East African and Scandinavian contexts (Bentzon et al 1998; Dahl 1986; Petersen 1992, 1997). This development emphasises the need to develop analyses of law in order to explain and improve women's lives, and argues that the principal means by which this may be achieved is by taking into account women's

‘lived realities’ as they affect their interaction with law.

In ‘Towards a sociology of Indian law’, the call was made by Baxi more than ten years ago that ‘a rational comprehension of the role of legal systems in social stability and growth demands a more wide-ranging awareness of law as a social system’ (Baxi 1986: 3). At the risk of being accused of making gross generalisations, I believe it would be true to say that the impact of law as a normative system in people’s everyday lives is minimal in Indian society. This is not to say that the *belief* in law as a relevant means to address these is diminished, but that the *perceived* gap in law’s supposed power and actual ability to influence people’s lives is wide (Gandhi and Shah 1992). The most casual study must acknowledge this gap, and even upon a very preliminary analysis one is faced with a range of factors that are obviously significant in accounting for this gap. At the most basic level, poverty, illiteracy, language barriers, and insurmountable distances are only some that operate to limit access to the most ‘real’ or ‘visible’ aspect of law: the courts (Dhagamwar 1992). In this sense at least, the most cursory student of law in India must take into account the impact of these social realities upon law. Any further study of law in terms of this perceived gap, which is itself based upon expectations of law to provide solutions, must therefore acknowledge the social context within which operates. If one acknowledges the relevance of Baxi’s statement that ‘... understanding of lawyers’ law (that is legal processes as relevant to decision makers or lawmen - judges, lawyers, law reformers and jurists) is almost impossible without a sensitive grasp of the implications of law as a social process’ law (Baxi 1986: 1), it is even more so in the study of Indian law.

At the starting point of my research is the understanding that in order to understand the legal position of the women, it is necessary to focus upon the lives of the women as they are actually lived. The conception of a 'legal position' is based upon an abstraction; upon the organisation and analysis of ideas and concepts within an epistemological frame that gives meaning to and justifies or validates our ideas and concepts. In order to fully understand the way in which these abstractions become operationalised and constitute an aspect of reality, it is necessary to deal with the everyday lives of the women who make it so. Similarly, if we wish to understand the phenomenon where the abstractions remain, and has not become operationalised, one must again focus on the lives of the women as they are lived and experienced, in order to do so. The relation of the women's legal position must be explored through the facts and experiences that constitute their lives.

Therefore women's daily experiences must generate the 'problem' requiring exploration. While Smith is concerned mainly with sociology when she says that this 'provides the starting point for a more adequate sociology' (Smith 1987: 84), the principle remains true for legal analysis. Women's relationship, if any, to inheritance rights must begin to be understood with the problems that their lives might present within the context of inheritance. Again, to reverse the position, we can best begin with an exploration of the women's lives in relation to the land within their particular context in order to understand and analyse one specific aspect of that relation, namely ownership through inheritance.

What therefore is the identity of the women in the Hindu small peasant household

within their familial and social context? Does this identity form the premise upon which a particular relationship to land ownership is constructed? Does it operate to define and maintain notions of legitimacy of women's right to ownership? How is their work contribution perceived by the women, and how does this, if at all, relate to the construction of their identity? Is the notion of legitimacy, constructed by socio-cultural context, affected by evaluations of work contribution?

Using the perspective of the women's experience to generate the problematic, and by using the experiences as the reality against which hypothesis are tested (Harding 1987: 7) leads to a more complete understanding of any given aspect of social relation. The conception of law must be understood in its historical and contextual perspective.

To the extent that law must be made to take cognisance of, and account for, continued substantive inequality, a fuller understanding and analysis of the specificities that constitute women's 'lived realities', encompassing both the material as well as the ideological, would allow insights into the particularities of law as it may make a substantive impact upon women's lived experiences.

Taking account of the 'totality' of women's lives establishes the basis upon which we can extend our analysis of women's location and experience as peasants within family households. In addition to a consideration of their lives as they are structured by religion within the family, analysis of Hindu women's role as peasants and workers and contributors to agricultural production is complementary to broadening the scope of the analysis.

2.2.1.1. Perspectives on work and contributions

Thus far, I have discussed the framework with which law may be seen to construct women's claim to land primarily on the basis of religion and located within the family. I have also argued that legal pluralism presents us with an understanding that is closest to extending law's construction to include women as peasants, located within the household, engaged in work and production. Within this, the arguments for contextualising law to take women's 'lived realities' into account provide a means for operationalising such extended analyses. In this section, I will discuss the particular aspect of woman's work and contributions as significant to my analysis of woman's 'lived realities'. I will argue that in the case of rural peasant women in India, perspectives on their work and contributions are crucial to evaluating the particular context of their lives. Taking account of women's work and contributions in peasant households in India leads us to explore the context of women as peasants, within households, engaged in work and production in agriculture, in addition to an analysis which addresses them as Hindu women within the family, affected by religious ideology.

In examining the role of law in entitling women to land ownership within rural Indian society, an examination of women's work becomes significant for two reasons. First, a vast majority of the law's 'subjects', the Hindu women in rural households, are in fact

'workers' in those households. Moreover, it is the absence of ownership of land that determines their position as such, for without land they remain 'workers'. This therefore constitutes a very significant aspect of the reality that law must acknowledge and consider. Secondly, if policies (including law) are to adequately address gendered access to resources they must acknowledge women's role in production (Beneria 1988). Beneria has argued that women's work needs to be reconceptualised and assigned its relative value in order that 'women's role in society may be placed in its proper perspective' (Beneria 1988: 373). Where ideological assumptions are the basis for regarding women's work as secondary and subordinate to men's, this is reinforced by the lack of a clear conceptualisation of women's role in economic activity (Ginwala et al 1990). Addressing the issue of whether it would be useful for women to move beyond conventional concepts of the labour force and include women's role, Benaria identifies three main objectives for such an exercise:

'.... (1) to counteract the ideological undervaluation of women's work and give recognition to the long hours of labour in which they are involved...(2) the need to have as much information as possible about women's activities and their role in economic life. Planning development programmes... must be based on accurate information if they are to be fully relevant to about 50 per cent of the world's population...(3) to define economic activity in such a way as to relate it to human welfare...'(Beneria 1988: 384-385).

Thus, in addressing the issue of increased access to land for rural women, a fuller analysis of the framework of law must incorporate these issues. In order to incorporating women's role in production within our analysis we must first address the ideological construction of women's work, while also addressing the conceptual

basis upon which women's work is defined. In the context of Hindu peasant women in small farming households, therefore, the cultural values forming the basis of gender ideology, and the material reality of their role and contribution in agriculture need to be analysed in order to explore the dialectical links between the two. The effectiveness of property rights for these women may thereafter be seen in terms of the relationship of the legal structures to the existing dialectical links between gender ideology and material reality. Does the legal system strengthen and reinforce these links, or break them? Does it take account of these existing links and thereafter provide a structural basis for change?

Recent analysis of women's work in agriculture in India have repeatedly brought out the centrality of the need to consider the issue of women's work within the cultural context in which particular gender issues are defined (Sharma 1985; Bardhan 1985; Ahmed-Ghosh 1993; Mencher 1993). I consider the extent to which gender relations in India continue to be defined by the ideology of gender, class and caste ideology which is the product of the dominant patriarchal ideology through my discussion of women's work in agriculture subsequently, in Chapter six. As the World Bank report on Gender and Poverty in India (1991) states, the pervasive gender ideology affects the kind of work women seek and are considered suitable for. The need to comprehensively analyse women's role in production, particularly in developing societies within an agricultural base has led to extending the analysis of women's work within the household. The invisibility of women's work has been exposed, primarily by the inclusion of house work and work within the household as 'work' (Bagchi and Raju 1993; Papanek 1989; Sharma 1985).

In other words, the analysis of women's role in production, can be possible in such societies only by uncovering the 'purdah' (veil) that shrouds women's work: by looking 'inside' the domain that is predominantly female, and the range of tasks that are accomplished by women within the domain, the household (Ginwala et al 1990). Once this is achieved, women's actual role and contribution, particularly to agricultural production, can begin to be estimated¹⁵. In the Indian context, those engaged in the analysis of women's work are arguing for the inclusion of the time spent on the food, fuel and water collection as 'work', and have started to question the classical market oriented definition of 'work' (Bagchi & Raju 1993). Looking at women's reality and position in relation to law entails an understanding of the structures and their relations within these that result in their position. Within the specific context of inheritance to agricultural land in an Indian village, therefore, this would mean to include an understanding of her relation to the land as a worker/producer; her ability to own appropriate/own it as a beneficiary; and the processes and meanings whereby these are instituted and maintained, and which thereafter establish the basis of her interaction or non-interaction with the law, or non-engagement with the law.

¹⁵ Where there is a continuum of activities ranging from the house work proper/domestic tasks to support task within the household such as preparing meals for the workers, or taking food to the workers in the field, the question remains - where should the line be drawn so as to calculate the 'women's work'? Should such a line be drawn?

3. Gender and Access to Resources

My fundamental enquiry in this research is to explore and analyse the factors that affect Hindu women within small peasant households in their ability to own land. I seek to address the relation, in this case, between gender and access to resources, and to analyse, in particular, the way in which gender affects or impacts upon access to resources. Since the inception of various strategies to address women's place within economic development, the issue of increasing gendered access to resources has been a significant part of efforts at mainstreaming gender within development policies (Kabeer 1995; Tinker 1990; Weiringa 1994). Subsequently, within the broader literature on gender and development, more and more has come to be written of women's role in economic development (Boserup 1970): the extent and nature of women's contribution to economic development; the embeddedness of social, political and cultural relations within economic ones, and the need to consider all in addressing gendered effects (Moser 1993; Elson 1991); the need to address and account for women's work (Beneria 1988; Dixon-Mueller 1985; Bardhan 1985) and various specific studies detailing women's work in various contexts.

These are some of the areas developed by those working on issues relating to gender and development. Further, the fundamental notions have not been everywhere understood to mean the same; rather there is severe contestation and discussion over issues of what constitutes 'development' (Stewart 1993; Adelman and Paliwala 1993);

how is gender to be characterised; what constitute specific gender interests, the addressing of which would therefore lead to 'empowerment' (Weiringa 1994; Molyneux 1998; Kabeer 1995; Gasper 1996); who defines these and who/what do they represent (Chowdhry 1995; Hirshman 1995); what are understood to be the conditions of those who are to 'benefit' from such 'development' (Ranadive 1994; Mazumdar and Sharma 1990; Mukhopadhyay 1985), again to raise but a few of the issues that have been debated.

The focus generated by debates over development and the particular importance of addressing the gender dimensions of participation and benefits from development policies has also contributed to explorations of the ways in which access and participation are determined by gender. It has been established that gender determines to a significant extent and manner in which access to resources becomes available, as well as the means by which such access may be defined or legitimised. Whereas the notions of 'need' and 'rights' are primarily accepted as the basis of resource allocation and distribution, many have argued that the very definition of these notions are tied to the issue of gender (Fraser 1989; Jonasdottir 1988; Ferguson 1988; Moore 1995).

Gender identities, as they constitute gender relations (Moore 1995) determine the rights and needs of particular individuals that are established. This requires a process of contestation whereby a need becomes established as a right, where not only the satisfaction of needs are contested, but also the definition and interpretation of the same. To quote Fraser:

‘I take the politics of need to comprise three moments that are analytically distinct but inter-related in practise. The first is the struggle to establish or deny the political status of a given need, the struggle to validate the need as a matter of legitimate political concern or to enclose it as a non-political matter. The second is the struggle over the interpretation of the need, the struggle for the power to define it, and so, to determine what would satisfy it. The third moment is the struggle over the satisfaction of the need, the struggle to secure or withhold provision’ (Fraser 1989: 163).

In relation to women and land, the contestation is at all these three levels: to establish the need for women’s right in land, to define the parameters of that need, and to translate that need into actual rights in practice. Therefore, in order to understand women’s access to land as a resource, it is essential to conceptualise it within the framework of the social relations that determine gender relations and which in turn affect property relations. Gender relations refers to the relations of power between women and men which are revealed in a range of practices, ideas and representations, including the division of labour, roles and resources between women and men, and the ascribing to them of different abilities, attitudes, desires, personality traits, behavioural patterns and so on (Moore 1995). Taken as largely socially constructed rather than biologically determined, gender relations are both constituted by and help constitute these practices and ideologies in interaction with other structures of social hierarchy such as caste, class and race.

Agarwal echoes this in arguing for the recognition of the dialectical link between the material context and the gender ideology in conceptualising gender and access to

property (Agarwal 1995). She argues that establishing gendered access to resources requires contestation over matters which are simultaneously material and ideological, acting with and reinforcing one another, where gender ideologies can obstruct women from obtaining property rights. Ideas about gender underlie practices such as female seclusion, which erode women's personal autonomy through the control of women's mobility and sexual freedom (Dyson and Moore 1983; Gandhi and Shah 1992; Bagwe 1995). These ideologies and associated practices restrict both women's ability to exercise their existing property claims and to successfully challenge persisting gender inequalities in law, public policy and practice in relation to their claims (Agarwal 1994; Dyson and Moore 1983).

The link between gender relations, as an aspect of social relations, and property brings into focus the need to locate explorations of gendered access to property within the cultural and social systems within which they operate, for

'.....property is not primarily a relation between people and things, but a relation between people and people - a social relation or a set of social relations' (Whitehead 1984: 176).

The need to look at kinship relations within which property, marriage and labour are embedded, and which control women's control over property, is brought out extensively in Sharma's work (Sharma 1989). She discusses women, work and property in North West India and concludes that there is a very real difference in women's and men's relationship to property, highlighted by the fact that very few

women exercise their rights under the Hindu Succession Act, 1956 (Sharma 1989)¹⁶. Whitehead suggests that since concepts of property are ultimately bound up with the concepts of the person we need to look at how kinship systems help to construct men and women in different ways, as different sorts of persons, (Whitehead 1984). In her view, it is the kinship family system which constructs women in such a way that they are less able to act as fully operative subjects. She notes that

‘A woman’s capacity to ‘own’ things depends on the extent to which she is legally and actually separable from other people, the issue raised is the extent to which forms of conjugal familial and kinship allow her a individual existence so that she can assert rights as an individual against individuals’ (Whitehead 1984: 189).

The issue raised is the extent to which forms of conjugal, familial and kinship relations allow her an independent existence so that she can assert her rights as an individual. Conjugal, familial and kinship systems appear often to operate so as to construct the position of women as subordinate, such that by carrying kinship (or familial or conjugal) status women are less free to act as full subjects in relation to things and people (Whitehead 1984).

Although as Moore (1991) points out, this echoes the idea of the ‘domestic’ as enforcing powerlessness, and the family as the site of women’s oppression, it brings out the need to extend the analysis of the law to relations and organisations, and locate it beyond the public spheres into the household. The role of kinship, family and the

¹⁶Sharma also gives an insightful analysis on the significance (or not) of dowry as a form of property that has traditionally been accorded to women in Indian society. As she puts it, ‘dowry goes *with* the daughter *to* the son-in-law’, thereby refuting the claim that dowry may be considered women’s property (Sharma 1989: 163).

household structures as they operate towards constructing women's identity must be addressed. Further, the way in which particular gendered relations of production and distribution within these structures establish norms for legitimacy must be analysed. This would provide the basis for an understanding of how these identities are linked to access to property within the legal framework.

4. The Bargaining Approach

In attempting to analyse the exclusion of Hindu women from access to property, my starting point of analysis is the specific location of women within these structures and the particular interaction this brings about in terms of access to property. Locating the women within the family, conceptualising gendered access to property is based upon the bargaining approach as developed by Sen and Agarwal (Sen 1983, 1985, 1987; Agarwal 1994). Within this land is conceptualised as a resource accessed by the members of the family through negotiation. The outcome of the negotiation for the members involved would be determined by their respective fallback positions, where the outcome would be favourable if, failing a co-operative solution, a person would be in no worse position than before.

Amartya Sen's analysis of the bargaining model introduces another dimension (Sen, 1983, 1985, 1987). He recognises that the outcome of bargaining will depend not only on a person's fall-back position should co-operation cease, but also on what he

terms '*perceived interest response*' and '*perceived contribution response*'. The outcome will be less favourable to a person: (a) the less value s/he attaches to her/his own well being relative to the well being of others (*perceived interest response*), and (b) the smaller her/his contribution to the household is *perceived to be* (*perceived contribution response*)

Discussing the role of perceptions and disputing the identification of well-being with the fulfilment of perceived interests, Sen (1987) makes room for the causal influence of perceptions on ideas of propriety and legitimacy of different institutional arrangements and through that on the respective well-beings of men and women. He argues that perceptions of legitimacy and desert must be included in the analysis, since the assumption of clear and unambiguous perceptions of individual interests within the bargaining approach misses crucial aspects of the nature of gender divisions within and outside the family. The sense of appropriateness is related to ambiguities of perception of interests, and with certain perceived notions of legitimacy regarding what is 'deserved' and what is not, and the specification of felt individual interests must recognise perception problems.

Understanding of interests, well-being, obligations, objectives and legitimate behaviour is influenced by diverse identities and in some contexts the family identity may exert such a strong influence on perceptions that formulation of any clear notion of individual welfare may be difficult. In the context of traditional societies such as India, for example, family-centred perceptions may be so strong that,

‘.....if a typical Indian woman were asked about her personal ‘welfare’ she would find the question unintelligible, and if she is able to reply, she may answer the question in terms of her reading of the welfare of her family....’ (Sen 1987: 7).

Sen and Kynch (1983) note that various patterns of systemic discrimination may well be built into the sense of propriety as to who should get what (for example, it could be that it is regarded as unquestionably ‘right’ that the head of the family should get the largest share of the food when it is in short supply). Rural family members in South Asian countries like India may not have any clear perception of individual welfare, having instead some unsplitable notion of family well-being. That notion of family well-being may not be at all of the neutral, individualist type, and may incorporate systemic biases in favour of fulfilling the needs of some family members, e.g. males. Further, even the *perception* of the relative needs of different family members may be closely related to a sense of *priorities*, e.g. there may be the magnification of the needs of the males in general and the head of the household in particular (Sen and Kynch 1983: 364).

They illustrate the point with an example of perception bias in a post-famine health survey in India. In Singur, near Calcutta, in 1944 - the year after the Bengal Famine of 1943 - the All India Institute of Hygiene and Public Health carried out a health survey which included questions about the perception of one’s own health. There were many widows and widowers in the population surveyed. In reply to the question as to whether they were ‘ill’ or of ‘indifferent’ health, 48.5% of the widowers confided to being thus afflicted, while the corresponding number of widows was merely 2.5%.

The contrast is even more interesting when we look at the response to the question as to whether one was in 'indifferent' health, leaving out the category of being 'ill', for which some clear-cut medical criteria do exist. 45.6% of the widowers confessed to having the perception of being indifferent in health. In contrast, the proportion of widows who had that perception was - it is reported - exactly zero! (Sen and Kynch 1983: 364)

In focusing on perceptions, we are able to distinguish between well being and personal welfare, where the lack of personal interest combined with a great concern for family welfare is just the kind of attitude that helps to sustain traditional inequalities in intra-family divisions of resources¹⁷. Further, personal interest and welfare are not just matters of perception. There are objective aspects to it such as the person's functionings and capabilities: what she is able to do or be, for example, the ability to be well-nourished, to read and write, to take part in community life or to appear in public without shame (Sen 1985, 1987).

The following are the factors, identified by Sen, which would determine the outcome of bargaining and negotiation for the individual concerned, as developed by the bargaining approach. The outcome of bargaining and negotiation may be seen to be the result of these.

¹⁷As Sen puts it, the underdog may come to accept the legitimacy of the unequal order and become an implicit accomplice, and 'it can be a serious error to take the absence of protests and questioning of inequality as evidence of the absence of that inequality' (Sen 1987: 8)

4a. Breakdown well-being response¹⁸:

This refers to the position from which a person enters into the bargaining process as it affects the outcome. A particular solution is arrived at because if a person were to be in a worse position in the event of the bargaining process breaking down, than within the solution arrived at, any other solution arrived at through negotiation would be less favourable to her.

The breakdown position gives the person vulnerability or strength in bargaining. If in the case of a breakdown, one of the persons is going to end up in greater difficulty than previously, it weakens that person's ability to secure a favourable outcome. Where, for example, women come to believe that no other option is available, the situation of dependence upon the family for support and survival may be understood in terms of their worsened well-being should the existing outcome of the bargaining change. In other words, the weakness of their fall-back position is reflected in their position of overwhelming dependence. Factors such as greater illiteracy, persistent childbearing, norms of social exclusion and invisibility, loss of honour and status, among others, can lead to a weak breakdown position of women in particular within societies such as India.

¹⁸ 'Given other things, if the breakdown position of one were worse in terms of well-being, then the collusive solution, if different, would be less favourable to her well-being' (Sen 1987: 22).

4b. Perceived interest response¹⁹:

According to this, the solution arrived at would be affected by perceptions of self-interest towards a person's own well-being. Where the perception of self-interest attaches less value to her well-being, the outcome would be less favourable to such person, in terms of her well-being.

Sen argues that the influence of perceived interest on measures of well-being may be that the outcome may be formed by choosing a solution not on the basis of individual well-being, but that of perceived interests (Sen 1987). The person may get a worse deal in the collusive solution if her perceived interest takes little note of her own well being, as in cases where there is a bias against her individual interest.

Agarwal departs from this, debating his conceptualisation of 'perceived interest response' and its importance in determining the outcomes of bargaining in terms of women's welfare, disagreeing that women tend to have a less sharp perception of their individual interests in societies like India. She argues that to the extent that women do seek to maximise 'family' welfare, this could still be consistent with their long-term self-interest (even if it is at the cost of their immediate well-being), *in so far as women are more dependent on the family for their survival than men, both economically and socially*. Further, women may sacrifice their individual interests for the interests of family members out of conscious choice, but the notion of family itself needs probing.

¹⁹ 'Given other things, if the self-interest perception of one of the persons were to attach less value to her own well-being, then the collusive solution, if different, be less favourable to that person, in terms of well-being' (Sen 1987: 23).

Sacrificing for one's children may well reduce a woman's well-being, but this need not be a case of false perception on her part, as both altruism and the pursuit of self interest can be self-aware actions.

She also debates Sen's understanding that they may suffer from a form of 'false consciousness' about their own well being. Noting that the empirical evidence on this is limited, and that which exists suggests women's overt compliance with practices which disadvantage them, she argues that this does not necessarily mean that they accept those practices as legitimate. On the contrary, she argues, their perceptions are better revealed in their many covert forms of resistance to gender inequities, such as keeping a handful of rice before preparing every meal.

4c. Perceived contribution response²⁰:

Here consideration is given to the contribution a person is perceived to be making towards the overall wealth of the group within which negotiations are being carried out. Where a person is perceived to make a greater contribution to the overall wealth of the group, the outcome would be more favourable to that person.

Here, *perceived* contributions have to be distinguished from *actual* contributions. The perceived contribution of people can directly affect the 'legitimacy' of enjoying the corresponding share of the fruits of co-operation. The nature of perceived contribution

²⁰ 'Given other things, if in the accounting of respective outcomes, a person were perceived as making a

also has to be distinguished from the amount of time spent in working inside and outside the home. For example, time allocation studies show that women seem to do large amounts of work even when the so-called 'economic' contribution is perceived to be relatively modest. (Mencher 1994)

Sen places considerable importance on a woman's earnings outside the home for giving her a stronger fall-back position, and a clearer perception of her own well-being, and a higher valuation of her contribution (Sen 1987). Agarwal makes the argument that the notion of legitimacy needs to be broader than that captured by Sen's 'perceived contribution response'. Notions of legitimate shares may stem from a variety of ethical principles, of which a person's contribution is only one, and the principle of need may be another. Reducing the gap between women's actual contributions and social perceptions about their contributions may not, on their own, strengthen the legitimacy of their claims and improve their consumption shares, (as Sen suggests), if, for instance, the criterion for justifying particular shares is *needs* rather than *contributions*. But whichever criterion one uses, the recognised social and legal legitimacy of a claim could be both a *determinant* of bargaining power and an outcome of bargaining power. Perhaps both these factors may be taken as complementary to one another towards establishing the legitimacy of a claim.

Although Sen appears to emphasise only other people's valuation of women's contribution, Agarwal extends the analysis to include a woman's own valuation of her

larger contribution to the overall opulence of the group, then the collusive solution, if different, would be more favourable to that person' (Sen 1987: 25).

contribution which would also be relevant. She arrives at the conclusion that it is not so much that women need to realise that they **deserve** better, but that they need to believe they **can** get a better deal, and to know how that would be possible. In other words, in explaining intra-household gender inequalities and gender gaps in measures of well-being, Agarwal places much less emphasis than Sen on women's perceptions of their self-interest and much more on the external constraints on their acting on those interests. Or, what may be needed is less a sharpening of women's sense of self-interest than an improvement in their ability to pursue that interest, including by strengthening their bargaining power, part of which would come from improving their fall-back position, and a part from strengthening the legitimacy of their claims as perceived by others

4.1. The household

In this section, I focus on the 'household' as a concept that has significance for attempts to broaden law's consideration of rural women's claim to land ownership. In addition to anthropological perspectives of the family, feminist and economic perspectives have broadened the scope of analyses to include the household. The 'family' as a structure has been studied and detailed in different aspects by anthropologists, who have questioned the concept of the 'household' as the conflation of units of residence, reproduction and production into a single unified entity. Kabeer argues that the concept of the 'household' is nevertheless relevant to analyses of

distribution and allocation. She argues that

‘the empirical significance of household relationships in the daily management of resource entitlements, and as a routine context of people’s lives suggests that it has a certain facticity despite its shifting guises’ (Kabeer 1995: 114).

As I have argued earlier, legal analysis needs to incorporate analysis of women as peasants, within households. Whereas, the law, through the HSA, conceptualises them as Hindu women within the family, this section addresses the concept of the ‘household’ as significant within economic analyses to extend our analysis of law.

Within the bargaining approach, the household is conceptualised as a complex matrix of relationships in which there is ongoing negotiation, subject to the social identities based on age, gender, relationship of the members. The nature of the interaction between members is characterised by both co-operation and conflict, and the members co-operate insofar as co-operative arrangements makes each better off than non co-operation. Many different co-operative outcomes are possible in relation to who does what, who gets what and how each member fares. The outcome to emerge depends on the relative bargaining power of each member, particularly defined by the strength of the person’s fall-back position, and the degree to which her claim is seen as socially legitimate. The fall back position is determined by the range of outside options which would affect the member’s well being if co-operation ceased.(Agarwal 1994; Sen 1987; Folbre 1986)

The household has emerged from changed analysis within the economic models of sharing and altruism, represented by a unity of interests, towards a recognition of the plural, conflicting interests within it, where decisions are the result of contestation and co-operation (Kabeer 1995; Hart 1995)²¹. At the same time, analyses within feminist theory have increasingly located the family/household as the site of the women's oppression (Harris 1981; Whitehead 1981; Hartmann 1987). Moore (1991) argues

'households are important in feminist analyses because they organise a large part of women's domestic/reproductive labour. As a result, both the composition and the organisation of households have a direct impact on women's lives, and on their ability to gain access to resources, to labour and to income' (Moore 1991: 55).

This combined perspective focuses on the family/household as the locus of competing interests, rights, obligations and resources, where the household members are often involved in bargaining and negotiation. The outcome of such negotiation therefore, has been recognised to be determined not simply by economic factors such as access to resources, but by power and ideology (Hart 1993; Moore 1995; Kabeer 1995). Socially and historically specific views about the rights, responsibilities and the need of particular individuals determine the outcome of the bargaining.

The problem of precisely how the bargaining power in the household may be significantly affected by questions of power and ideology is posed by Moore (1994). Given that the household is a permeable rather than a bounded unit, and that the workings of the household have something to do with the social, political and

²¹ See Kabeer, 1995, for a clear, non-technical elaboration of the developments within and competing

economic processes outside them, she argues that it is possible to comprehend the workings of the household or the links which bend them to larger scale institutions and processes only by taking into account the relations of production (Moore 1995). She argues that the household is engaged in reciprocal relationships with the larger scale economic, political and social processes and institutions which produce social identities. Insofar as social reproduction may be understood as the production and reproduction of social identities (Moore 1995), the household may be seen as crucial to social reproduction.

The household is distinctive in that it is the site for the production of people and therefore the society, but also for the production of certain sorts of persons with specific social identities, particular rights and needs. The specificity of rights and the needs of certain people is determined by various cultural and contextual evaluations, and has an impact upon the intra-household allocation of resources. Bargaining within the household, between men and women, is often about political definition of terms and interpretation of normative practices and understandings (Kabeer 1995; Agarwal 1994; Moore 1995). Issues such as:

‘residence rights and inheritance laws are relevant to household analysis in that they not only describe sets of social and economic relations, but also encode ideas about gender ideologies, and about the different nature, tastes and roles of the woman and man in the society. Gender ideologies are not just ideas, cultural belief and notions that are somehow related to the economic and political processes, they are constitutive of them. Hence gender ideologies and other forms of differences such as race and class, which draw on the social identities are crucial to understanding social

conceptualisations of the household within economics.

reproduction, both at the level of the household and at the level of the state' (Moore 1995: 92).

An analysis of the gender and the household dynamics brings into issue how the household is characterised, whether as an undifferentiated unit or as an arena of both conflict and co-operation. Within the bargaining model of intra-household relations individuals are characterised by their own preferences, rather than aggregated as within the unitary conceptualisation. Therefore household behaviour should be understood explicitly as a collective process involving more than one decision unit (Hart: 1995; Kabeer 1995).

Since assumptions regarding the household can impinge critically on policy decisions regarding whom resources and programmes are directed toward (Ginwala et al 1990), there is a recognised need to take into account the intra-household allocation of resources (Kabeer 1995; Agarwal 1994; Tinker 1991). For example, policy makers in India have, (implicitly or explicitly), assumed a unitary household model and have tended to direct resources principally at male household heads, trusting that resources will be shared equitably within the household; but empirical evidence shows considerable intra-household inequities (Agarwal 1994; Dreze and Sen 1999; Kabeer 1995; Panda 1997; Dyson and Moore 1983; Agarwal 1992).

However, Hart points out that rather than simply shifting the focus from the household to the individuals within, there is a need to focus on *relationships* within and between households, and on the way these relationships are defined in terms of gender,

‘Taking account of gender is not simply a matter of adding women, or discrimination, but an account of how multiple understandings of ‘male’ and ‘female’ are socially constructed and embodied in everyday practices both within and beyond the household’ (Hart 1995: 40).

Gender in this sense is crucial to understanding not only *what* are the culturally variable rules governing access to and control over resources and labour, but also *how* definitions of rules, rights and obligations are reinforced, renegotiated and openly challenged (Whitehead 1981). A key insight of this gendered politicised understanding of the household is that policies not only affect different members differently, but also may provoke renegotiations of gendered relations within and beyond the household.

4.2 Application of the bargaining approach

Adopting elements of the bargaining approach brought out both by Sen and Agarwal, I explore the gender-biased outcome in relation to access to land. The perceived interests of women, characterised in terms of maximising ‘family welfare’ for their own well-being are sought to be explained in terms of the existing gender ideology that in fact excludes conceptions of their individual welfare, distinct from the family. This exclusion is derived from the ideology explicit in Hindu cultural and traditional values.

The family as a social unit is the site where these values and principles are lived out and become operationalised, as well as the site for their reproduction. Thus, Hindu understandings of the position of a woman, including her position as a daughter, (not being a part of her natal family, but only her husband's family upon marriage) the status accorded to her based upon performance of her duties and obligations as a wife, the loss of identity and entity as a widow, and the constant dependence characterised throughout her life course- form the basis upon which perceptions of the women of their own well-being are founded.

The role of legal provisions in maintaining and reinforcing these perceptions is brought out by reference to the principles of Hindu law relating to family and women's property. On the other hand, the law does not take any cognisance of, or respond to, the material reality of women's role in agriculture. Further, analysis of the material context of peasant women in small farming households requires a consideration of their role and contribution within the economic production process of which they are a part. The nature of and the size of the holding, in addition to the subsistence nature of the production, leads to the fact that a significant part of the women's role is within their own homes and the family land. This locates my analysis within the family/household.

Posing the persistent undervaluation and estimation of women's role and contribution in agriculture, in official spheres and studies, as the direct reflection of the same undervaluation within the wider society, I explore the second aspect of perceived

contribution: the perception of women themselves within agriculture. In this, I draw out the links between gender ideology and the material context of Hindu peasant women to expose the difference in perceptions of others' and their own perceptions. I evaluate the effect of these factors upon negotiating access to land by analysing the effect of gender ideology, in combination with others' perceptions of women's lower contribution, to deny the legitimacy of women's access to land.

Notions embodied in cultural practices, which define what is permissible, in what contexts, within which spaces, and using what modes of conduct, are crucial to women's ability to self-manage land. They also have a significant impact upon the visibility and recognition that may be given to women's actual roles and contributions within agriculture. For example, the principle of female seclusion is rationalised in terms of family and personal honour, female chastity, modesty, and the need to control female sexuality, among others. Further, a woman's character and chastity may be associated with compliance to norms of seclusion, so that women who observe the norms are assumed to be chaste and good and those who transgress them to be of questionable moral character.

The strength of operative gender ideology to perpetuate women's exclusion from land brings out the limitation of conceptualising women's access to land as the result of the factors operating within the bargaining approach. The overriding effect of notions of legitimacy determined by gender ideology is brought out by the perceptions of women when they say:

‘Equal inheritance by brothers and sisters.....would only have one result. Brothers and sisters would quarrel. Brothers would want to obtain their sisters’ shares and sisters might feel they were not adequately reimbursed. The close protective relationship of brother and sister would be in jeopardy’ (Agarwal 1994: 265).

Again, laws providing for equal shares in family land were viewed as:

‘a deliberate and sinister attempt to destroy the family and morality.....this equality must have the inevitable consequences of increasing divorce, desertion, adultery, destroying the love between husband and wife, depriving the children of the certainty of a normal home life, setting brother against brother, son against father, and man against man; that it would in a word, atomise society by gnawing at the foundations of the social bonds’(Agarwal 1994: 271).

Perceptions and understandings such as these are causally linked to the decreased significance of women’s own perceptions of contributions in relation to increasing the legitimacy of their claims, as the basis of such a claim would militate against the ideological constructs. Thus, women’s own perceptions of a higher contribution may not affect the outcome primarily because of the operation of gender ideology that is constituted upon, and constitutive of, women’s exclusion from land. Notions of a greater legitimacy of desert and therefore to greater access, are in fact subject to, and limited by, the exclusion of access to land from its operation. What we have therefore, may very well be a circular argument.

This is a reflection of the issue brought out by Agarwal as she explores the effect of

gender differentials in bargaining power, not only in outcomes but also *what is bargained about*. Not all issues may be accepted as legitimate ones for contestation.

At any given time, for any society, some decisions would fall in the realm of :

‘...that which is accepted and a self-evident part of the social order, which goes without saying and *is not open to questioning or contestation* - the undiscussed, unnamed, admitted without argument or scrutiny’ (Agarwal 1994: 58)(emphasis added).

What constitutes ‘tradition’ may itself be subject to challenge and change (Risseuw 1991) and such change would come about ‘when the dominated have the material and symbolic means of rejecting the definition of the real that is imposed on them, or within the bargaining framework, when the dominated have a stronger bargaining position’ (Agarwal 1994: 59). Agarwal posits that the strength of a person’s bargaining power therefore, (1) is defined not only by material circumstances but also by symbolic meanings; and (2) not only affects the outcomes of bargaining over those issues/items which are admitted into the realm of contestation, but also what issues/items are so admitted. The premise is that the greater a person’s ability to physically survive outside the family, the greater would be the bargaining power within the family. Inequalities based upon gender or age among family members in respect of these factors would place some members in a weaker bargaining position relative to others.

However, in my own view the strength of the approach lies in its *explanatory*

potential, if not its *emancipatory* potential. It provides a framework that is grounded in culturally constituted identities, generating the means to evaluate the actual interactions between people in a relational context. It provides for a framework grounded in the interaction and operation of action within a structure, allowing us to analyse the precise ways in which each may impact the other by taking into account the individual's internalised conception of 'self interest' as well as the externally validated notions of 'contribution' and 'desert' in order to establish legitimacy of a claim. Further, one cannot disregard its emancipatory potential in the light of the fact that the perceptions of women's contributions have not been positively enhanced, as yet, either in popular or policy terms. In this context, one may hypothesise that the approach presents a comprehensive mode for bringing issues of women's ownership of land within the realm of what may be contested.

5. Conclusion

In analysing the factors that affect Hindu women's ability to own land within small peasant households, I have argued that it is necessary to evaluate the legal framework within which such access is framed. An understanding of the ideological background of law as it constructs 'Hindu' law and the HSA within religious discourse enables us to understand the construction of 'Hindu' women and their right to ownership through succession within this. The historical processes which structured colonial debates around 'modernity' and 'tradition' in turn reinforce the operation of religion, particularly upon the lives of women. Whereas the liberal principles of the legal and constitutional framework enable formal guarantees of equality, they also operate to

exclude actual inequalities from the realm of the law. I have argued that this is the result of the public/private distinction implicit within liberalism, analogous to the division maintained between family/work. This serves on the one hand, to reinforce the operation of religious ideology in women's lives, within the 'private', and to exclude from the purview of law the work that peasant women are engaged in, within the 'family'.

Thoughts developed on legal pluralism enable us to broaden the scope of law's scope and domain, allowing for the evaluation of the impact of religious norms upon women's lives, as well as the expansion of legal analysis within the household and the workplace. The breadth afforded by legal pluralism to take account of the totality of structures and processes, informed by a variety of norms, is strengthened by the arguments to contextualise law and take account of women's lives as they are actually lived.

I have argued that the context of law must take account of the material aspects of women's lives in addition to the ideological, where analysis of gender and property have shown the two to be inextricably intertwined. The framework I have adopted for embarking upon an analysis which incorporates both aspects is that of the bargaining approach. I have argued that the bargaining approach provides us with a framework that enables us to take account of the norms and processes that affect women's access to resources. In addition, it allows for the analysis of the interaction between the ideological and material conditions that impact upon such access.

Thus, whereas the issue of Hindu women's right to property has been framed by law in exclusively ideological terms, the bargaining approach enables us to expand the framework of law by allowing the incorporation of the material aspects of women's lives within the analysis. This allows for a more complete evaluation of the factors that affect women's ability to access property, and therefore to evolve an understanding of law which has a broader frame of vision.

CHAPTER TWO

METHODOLOGY

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1. Introduction

This chapter is devoted to a description and analysis of field research conducted towards the thesis. My field research was conducted among Hindu peasant women in three villages in two districts of Western Orissa. The linguistic and cultural particularities combined with my personal interest, familiarity and access in this region, and in these villages in particular, were the main reasons for focusing upon this area. The chapter details the issues raised and methods adopted to address them, both for the outcome as well as the process of the research.

My approach in conducting field research resulted from my theoretical framework,

which is the take-off point for the field research. Perspectives gained from legal pluralism and the need to contextualise the study of law established the necessity for conducting field research with women as the basis of analysis. The field study of women's own experiences of what constituted their realities in turn provides the basis for analysing their claim to land as framed within law. In chapter One I emphasised the need to study law in its social context, and that the proper development of law as a means of effecting change must begin with a description, analysis and discussion of the ways in which the reality of people's lives informs law. In other words, law's problematic must have peoples' lived realities and experiences at its core (Maguire 1987). Thus, a discussion of gendered access to resources as a problem for law must primarily revolve around the experience of gendered exclusion, the structures and frameworks that determine or influence such exclusion, and the principles, norms or values that provide the foundational base and support for the operation of these frameworks.

The experience of gender as it operates to exclude, provides the perspective which generates the lines of enquiry adopted and the material I sought to gather in my field work. In order to explore the framework provided by Sen and Agarwal, to analyse women's access to land as affected by their perceptions, I needed to gather data that *voiced women's perceptions of their own experiences and realities* on the issues of land ownership and work contribution. I was interested in their conceptualisations of three broad issues: firstly, the meanings, boundaries and determinants of their gender identity or, what it was to them to be female; secondly, the relations between gender and land ownership if any; and third, the relation between gender identity, land

ownership and work contribution, if any. The questions I needed to ask were therefore towards collecting information on these broad issues.

The nature of the data I was looking to gather in turn affected the method I adopted to achieve this. I required a setting and form of interaction that would enable the participants to respond freely. Since I was asking women about what they thought or understood, the involvement of the respondents in the research was personal as their response would be a statement of themselves. However, given that the culture is one where silence is a woman's virtue, this mode of expression itself was unfamiliar. That they were to speak of *their own* opinions could be even more intimidating and therefore problematic for them. In such a situation, I was conscious that the mode of interaction was vitally significant so as to minimise the possible intimidation and provide the greatest encouragement. I therefore decided to have discussions with women only, without the presence of any men, in groups rather than on an individual basis.

The conceptual issues I set out to address in my research determined the field work I conducted and my theoretical framework provided the basis for the nature of the information I was looking for. This information depended upon a certain type of questions being answered, which in turn required a particular kind of interaction through which I could hope to gain some answers.

2. The research problem

The research problem, as I conceived and developed it, was very much the outcome of

my own personal history and experiences²². I have always keenly felt the ‘distinctiveness’ of being female in my society where, more often than not, I perceived this distinctiveness to place me at a disadvantage²³. My earliest memories are of being quite outraged (as much as a girl of five could be!) at being told that I could not do things, like go out and play cricket with ‘the boys’ even though ‘the boys’ were my elder brother and his friends. Or, the time when my cousin’s wedding was being discussed, and the talk was about the people who were coming to ‘see’ her as the first step. My reaction is clear in my memory (and in my parents’ it appears). I asked aloud, ‘Are girls like cows in the market, that people come to ‘see’ them?’²⁴ Things only became worse after that as I grew up, as for any other girl that I knew of. The things I could not do became more in number at the same time that the things I was *supposed to do* increased too. The reason, that I was a girl, although not explicitly stated at first, was stated more and more, particularly in response to a defiant challenge.

As my own understanding of my experiences developed, aspects of gender as a means of establishing social relations became clearer. Within the specific context of my location in a family with predominantly rural ties, also having access to good education, lower middle class but with prospects for upward mobility, gender was

²² In narrating my own experiences, I acknowledge the relevance of Helen Robert’s note, that ‘...providing the background within which a piece of research is conceived and developed.....makes explicit the paradigms within which the research is set.’ (Roberts 1995: 17)

²³ Although I recognise that it is not a simple matter of classifying in positive or negative terms alone, I am here pointing to the origin of the development towards my own personal objective to scrutinise, analyse and challenge gender roles.

²⁴ ‘Seeing’ somebody is the first step in the process of an arranged wedding, and it is the male suitor and/or his family who go to ‘see’ the girl. The event is very important for the girl’s family, for they, their home, and status are assessed by the visitors, and only if it is favourable do the negotiations remain open. The girl’s role, however, is solely to present herself to the visitors in order that her physical characteristics and outward demeanour may be gauged. There is no attempt to engage the girl further, so that typically, the girl brings something into the room, then either leaves immediately or sits quietly in a docile manner. Although these days more and more people make an effort to speak to the girl or encourage the suitor to talk to her, I am not sure the original purpose of ‘checking her out’ has been replaced. Also, the reverse is unthinkable: a girl never goes to ‘see’ a boy.

experienced through various practices and their implicit, but often explicitly stated, values. Practices within the family such as limited segregation, female-specific rituals and observances, as well as public experiences such as concerning personal safety, movement and even celebrations such as festivals, were underlined by specific values, ideals and roles attributed to being female.

Gender, then, is constructed through defining values and ideals in the given society, upon which roles are fostered and gender identity is developed primarily through the successful inculcation of these in the person. The experience of gender thereafter becomes inextricably linked with these values, and this is the site upon which further meanings, interactions and experiences can then be negotiated within various contexts. The family, the caste group/community, society or the state may become the site where issues such as access to education, health, personal freedom, safety, marriage and reproduction, to point out a few, are experienced specific to one's gender. The question that arises is: what does that experience actually *mean* to those who experience it in a given context? How do any set of values that might be operative function to influence or affect what one may construe as a 'gendered' experience to make it so? Further, is there any other aspect of gender, as it was experienced, that could reverse the order? In other words, is there any potential to evolve new values, based upon gender as it is in fact experienced, which may in turn become another value in the social construction of gender? Thus, my research was of twofold purpose for me: that of understanding the gender hierarchy in rural Indian society, and of transforming it. Although the transformative potential of qualitative field work, has been argued as desirable and even essential by some researchers, particularly feminist researchers (Mies 1982, 1986, 1988), I was quite clear that my research was but the first, necessary step towards

understanding²⁵.

I began with the understanding that the reality of women's lives in rural peasant society presented the interface between their culturally constructed identities, and as major contributors to production from land. Although one could gain documented information on the predominant role of women in agriculture, the sight of women's work in agriculture is plain to see even for the casual visitor in village India. Women are vital and productive workers in the Indian economy. However, the social construction of gender in India hinders access to resources for women, as the question of who gets what is closely linked to gender. Access is related to the very meaning of male and female, and part of the culture's definition of the woman is her association with the 'inside', or the home, while men belong to the 'outside', where the livelihoods are earned and political and economic power is exercised. This social construction of gender is embedded in the interlocking religious, economic and kinship structures which define the social domain of the men and women.

On the basis of women's high level of work participation and contribution to agricultural production, my query was whether this aspect of women's identity, that is, as agricultural labourers and producers could have any impact upon their identity constructed by the Hindu culture in a way so as to facilitate their effective ownership of land? Given that the primary legal instrument establishing the right to such ownership for Hindu women, the Hindu Succession Act, was effective only marginally in increasing women's access to property, I was interested to look at the issue from the

²⁵ See Gunsell Berik's account of her research in rural Turkey for a similar conceptualisation (Berik 1996).

perspective of the women to whom rights within the law were addressed.

Illiteracy, poverty, inaccessibility of the courts and other administrative institutions, and ignorance of the law in particular, are common exclusionary factors operative upon a majority of the people in India, particularly in rural areas. While the relevance and significance of these factors cannot be diminished, I had the notion of there being a different set of factors and circumstances which interacted with the above in a way to further marginalise and dispossess women. Is there a more fundamental barrier to legal effectiveness of property rights, relating to women's perception of their entitlements particularly when the resource is land? In order to explore this notion I decided to look at the factors which might form the basis for the women's decisions to access the legal provisions or not. *Do these factors impact upon the legitimacy of women's claim to land as perceived by the women themselves? In particular, what are their perceptions of self interest and work contribution, and how do these, if at all, in turn affect women's notions of legitimacy of land ownership through inheritance?*

2.1. Issues for study

My research problem led me to focus on individual Hindu small peasant women as the focus of my analysis. Starting with the questions 'who is the individual woman that the law addresses the right to inherit to?' and 'within what constructions does she exist, if at all?' it became necessary to both explore the constructed identities, and search for aspects of identity outside the constructions. I use the term 'individual' to explore both

these respects. (Moore 1995). Within the specific context of inheritance under the HSA, this duality presents a dichotomy. While the subject is taken as constituted by a specific relation as a member of the family and therefore subject to constructions by the ideology and power relations within it, she is simultaneously constituted as a holder of rights that are contrary to, and militate against, fundamental aspects of that ideology. I therefore needed to direct my enquiries towards what they understood and perceived, and the particular issues that arise for them in their lived realities. The dichotomy presented by law on the issue of the subjective identity required exploration, necessarily through the subjective analyses of the women themselves.

In search for answers to my conceptual issues therefore, I needed to study several interconnected aspects of women's lives in order to obtain information relating to the issue of land ownership and the role of law. Domestic relations within the family, interpersonal linkages between family members, the relationship between legal obligations, religious obligations and social relationships, and the experience of gender within all of these were the broad areas that demarcated and delimited my field of research. Gluckman and Devons point out that such circumscribing

‘.....allows the researcher to cut off a manageable field of reality from the total flow of events, by putting boundaries round it both in terms of what is relevant to his problems and in terms of how and where he can apply his techniques of observation and analysis.....’ (Gluckman and Devons 1991: 19).

I subsequently narrowed my field of study to five main issues that I needed to address in order to understand Hindu women's ability to exercise their right to land ownership.

First, what were women's understandings and experiences of female ownership of land? Secondly, how did different aspects of their gender identity affect, in their understanding, land ownership for women? Third, what were their notions of self interest in relation to land? Fourth, what was their perception of their work contribution in agricultural production? Finally, how, if at all, did the last two affect their understanding of female ownership of land? These could further centre around two main areas within which I framed the detailed issues.

2.1.1. The right to inherit property:

The following were the specific questions, around which the issue of women's right to inherit property as the participants understood it, was addressed.

1. Do they think they have a legitimate claim to land ownership? What, according to them, would the legitimacy be derived from?
2. Would they consider the right, granted by law, as impacting on the above?
3. Given that they have a right to inherit, would the women be willing to claim their legal share in parental property? What were their reasons?
4. Would they be willing to claim their share in their husband's property? Would the reasons for this differ from those above?
5. Would they encourage or expect their daughters to claim inheritance? Why, and under what circumstances?
6. Could their work contribution affect the legitimacy of their claim on land?
7. Did they have any other interest in land, other than ownership, that they would consider legitimate, such as effective use of the land? What was the basis of this?

Is it different from their interest regarding ownership?

2.1.2. Work:

The second cluster of specific questions revolves around the respondents' perceptions of work, and an evaluation of whether these impacted upon right to ownership of land. I began with a query regarding their definition of work and included the following specific issues.

1. What work were women engaged in within the households? Would they include housework as well as work in cultivation?
2. How did they evaluate their work contribution as compared to that of male counterparts with the family? What was their perception of others' evaluation of their work?
3. Was there a difference in the case of the paid agricultural labourers for both the above?
4. Did they feel entitled to any privileges as a result of their work participation? If so, what? How does this affect their status in the family, if at all? In the context of labourers, did the earning of wages affect their status?
5. What role in decision making regarding the land and cultivation did both the groups have? Did they think it could improve with greater work input?

These questions specified aspects of women's perceptions about which I sought to gain some insights. They provided the anchor of our discussions, allowing me to steer the

discussion around these specific issues.

3. The setting: two Districts in Western Orissa

I conducted my research in three villages in two districts of Western Orissa. Orissa is one of the 26 States in the Indian Union. It is situated in the east of the country, bordered by Madhya Pradesh to the west, Andhra Pradesh to the south, Bihar in the north and West Bengal to the east.

Orissa has a population of 4% of the total estimated population of India according to the 1991 Census (Directorate of Economics and Statistics, Bhubaneswar, Orissa, 1994). It is divided into 30 districts, with a total area of 155,790.2 sq. kilometres. Districts are the highest level of administrative blocks within the states. These are further divided into sub-division tahsils, blocks, municipalities and Notified Area Councils ('NACs'), Panchayat Samitis and finally the village Panchayat in every village. The administration at the district is headed by the District Commissioner, and the subsequent levels are headed by the Sub-Divisional Officer, the Tahsildar, the Block Development Officer and Chairman and members of the Panchayat Samiti and village Panchayat respectively.

In terms of workforce, Orissa has a total of 11,826,915 workers; 8,588,073 males and 3,238,842 females. Cultivators form 44.21% of workers as against a national average of 38.75%. Of these, females constitute 26.03% in Orissa. Agricultural Labourers are

28.85% of the total workers, of which females constitute 54.73% and males 22.96% (Directorate of Economics and Statistics, Bhubaneswar, Orissa, 1994).

Orissa ranks 17th in the female work participation rate according to the latest figures. The rate was highest in the North Eastern states and lowest among the Northern states. Sikkim has the highest rate of 52.74 and Punjab the lowest of 6.78, while Orissa is nearer the national median of 22.73, with a female work participation of 20.85 in the state. This has increased from 19.81 in 1981 (Agricultural Situation in India 1994). The average work participation rate of both men and women is 36.3 in Orissa compared to the national rate of 37.68 (Computed from data from the Directorate of Economics and Statistics, Orissa, 1994.)²⁶

The average size of holdings in the state has decreased from 1.47 hectares in 1985-86 to 1.34 hectares in 1991 (Agricultural Situation India 1994). This would be classified as a **small** holding.²⁷ The number of marginal, small and semi-medium holdings have increased by 13.4%, 13.8% and 1.7% respectively in 1991 as compared to 1985-86. During 190-91, the proportion of marginal, small, semi-medium, medium and large holdings in Orissa was 53.7%, 26.2%, 15%, 4.7% and 0.4% respectively. My field research was conducted in two Districts in Western Orissa: Sundargarh and Jharsuguda. This area is among the poorest in the state and may be representative of

²⁶ For the national figure, see, 'Statistical Profile of Women Labour', Fourth Issue, 1993, Labour Bureau, Ministry of Labour, Government of India, Table 1.5, p5.

²⁷ The classification of holdings is as follows:

Marginal: 1 hectare and below.

Small: 1.0-2.0 hectares

Semi-medium: 2.0-4.0 hectares

Medium: 4.0-10.0 hectares

Large: 10.0 hectares and above

the areas in dryland agriculture, using traditional farming methods.

3.1. Focus on Sundargarh and Jharsuguda

3.1.1. Sundargarh

Sundargarh is the second largest district with an area of 9,712 sq kms. It has a total of 1,744 villages and 9 towns. The population is 1,574,000 persons, comprising 4.97% of the total state population. The number of females is 761,000 as against the male numbers of 813,000, with a ratio of 936 females to every 1000 males. Of the total population, 1,049,000, or approximately 66.6% of persons live in rural areas, while 525,000 persons live in urban areas. The female literacy rate is 39.6 compared with the male literacy rate of 65.41 and an average rate of 52.97 (Directorate of Economics and Statistics, Bhubaneswar, Orissa, 1994).

The total number of workers in Sundargarh is 620,000, out of which 508,000 persons are main workers and 112,000 persons are marginal workers²⁸. Of the main workers, 86,427 were females, constituting 17% of the total and 421,712 males, making 83% of the total. The total number of cultivators is 197,019, of which females number 23,674 and males 173,345. In other words, females constitute 12% of the cultivators and males 88%. In the case of agricultural labourers, the total number is 91,068 of which females constitute 35,861, or, approximately 40%, and males constitute 55,287.

²⁸ According to the Census definition, **main workers** were those who had worked for at least 6 months (183 days) or more. Those who had worked for less than 6 months, or, 183 days in a year, were termed as **marginal workers**.

approximately 60%. Of the total of 112,533 marginal workers, 102,254 or 90% of the workers are female and 10,279 or 10% of the workers are male (Directorate of Economics and Statistics, Bhubaneswar, Orissa, 1994).

The number of operational holdings in agriculture was 166,007 in 1991 from 154,005 in 1985-86, an increase of 7.79%. The total area of the holdings, however, decreased from 293,051 hectares in 1985-86 to 287,757 hectares in 1991, a decrease of 1.81%. The average area per holding decreased from 1.90 hectares in 1985-86 to 1.73 hectares in 1991²⁹ (Directorate of Economics and Statistics, Bhubaneswar, Orissa, 1994).

3.1.2. Jharsuguda

Jharsuguda is the second smallest district in the state, covering an area of 2203.2 sq kilometres. It has a total of 356 villages and 3 towns. The population totals 447,000 persons, of which 21,600 are females and 23,100 are males. The number of females per 1000 males is 938. It constitutes 1.41% of the total state population. The rural population numbers 288,000 and the urban population is 159,000, amounting to 64.4% and 45.6% of the total respectively. The literacy rate is 52.64, female literacy rate being 37.01 and male literacy rate being 67.21 (Directorate of Economics and Statistics, Bhubaneswar, Orissa, 1994).

The total number of workers is 175,000, of which main workers are 150,000 and marginal workers are 25,000. Female main workers constitute 18.5% of the main

²⁹ Holdings of the size of 1.0-2.0 hectares would fall within the class of small holdings.

workers, numbering 27,820 and males number 121,936, making up 81.5% of the total. Of the marginal workers, females are 22,257 and males 2,456 in number, making up 89% and 11% of the total respectively. There are a total of 49,000 cultivators. Females constitute 15.5% of the total with a number of 7,598 and males form 84.5% of the total with a number of 41,388. In the case of agricultural labourers, who total 36,000, the number of females is 12,063 and that of males is 23,743, or, 33.5% and 66.5% of the total respectively. There is no separate data on operational holdings in Jharsuguda, owing to its recent existence as a separate district (Directorate of Economics and Statistics, Bhubaneswar, Orissa, 1994).

The above data brings out some facts of the state as a whole and these districts in particular. Firstly, it is clear that they are predominantly rural, far out balancing the urban areas both in organisation and population. Secondly, females constitute an overwhelming proportion of marginal workers and conversely, a disproportionately small number of main workers. Thirdly, women constitute an insignificant group among cultivators, but grow substantially in proportion to male agricultural labourers. Fourthly, there is a negative female-male ratio. Fifthly, the female literacy rate is significantly lower than that of males, though close to the national figure of 39.42³⁰.

I chose to focus on Western Orissa for conducting my research primarily because of my affinity and familiarity with the region. Generations of my family have been residents within the area and I myself have lived in the area as a result of my parents' location there. My wider family also live in the area and we are part of a kinship and

³⁰ See, Supra note 26, Table 1.4, for national figure.

caste structure that is predominantly located in this geographical region. My personal history and experiences provided the starting point of my concern over women's overwhelming sub-ordination to men in the society, and in particular, over the issue of property as a means for economic empowerment of the women in this socio-cultural setting. My training in law further led me to question the role, if any, of law providing the basis for such empowerment.

The geographical region of western Orissa comprises of the districts of Sambalpur, Sundargarh, Jharsuguda, Kalahandi and Deogarh. I have chosen three villages in two of these districts as the basis of my study: Sundargarh and Jharsuguda. These are bordered by Madhya Pradesh on the west and Bihar in the north. This region can be distinguished from the rest of Orissa geographically, linguistically, culturally and even economically.

The people in the districts speak a dialect of Oriya, known as 'Sambalpuri Oriya'³¹, which is prevalent throughout the region. This differs from the Oriya which is spoken in the coastal and other districts of Orissa, and also spoken by a large number of people in the adjacent districts of Madhya Pradesh such as Raipur, Raigarh and Surguja. The dialect has a different mode of pronunciation as well as grammatical structure, and contains a large vocabulary which is not a part of the official Oriya language. The Official Oriya language, it may be pointed out, is that spoken by the people in the coastal and other areas. Although I have described Sambalpuri Oriya as a dialect, it's

³¹ Named after the neighbouring district of Sambalpur, which became part of Orissa in 1936, on the basis that Oriya was the language of the area. Previously under the administration of the central provinces, Sambalpur was transferred to the Orissa division of the province of Bengal on the recognition that Oriya, and not Hindi, was the mother tongue of the people (Sambalpur Gazetteer, 1971: 79).

distinctiveness from the Official Oriya may be gleaned from the fact that people speaking the latter cannot understand the former without having learnt it.

4. Groups chosen

I had interviews with a total of 45 persons, of whom 42 were women, and 3 men. The respondents were chosen from two sub-caste or groups: *Agharias* and *Kisans* from the villages of Sahaspur and Ekatali in Jharsuguda district and Karamdihi in Sundargarh district. The social structure within Jharsuguda and Sundargarh parallels that in other parts of India, being divided into a number of castes and sub-castes, closely allied to the professions traditionally undertaken by the members. Of these, the *Brahmins* and the *Karans* form part of the upper castes, as in other parts of India. Among the lower castes, my study draws upon the experiences of women from one caste which is intermediate in the caste hierarchy within the region, the *Agharias*, and from another, which is among the lowest castes, the *Kisans*.

Agharias

The majority of the women among whom I conducted my study belong to the *Agharia* caste. They are migrants who migrated to the region from Delhi as a result of persecution under the Sultanate of Delhi (Gazetteer 1971: 113). They are a class of cultivators, and normally constitute the major landholding class as a group in the

village where they are settled. However, the landholdings themselves are not large in size, and most of *Agharia* agriculturists would fall within the category of small or medium peasants. While they are a significant group in Sambalpur district, they are more concentrated in Sundargarh and Jharsuguda districts (Gazetteer 1971: 113).. They are not amongst the higher caste of the *Brahmins* or the *Karan* (the writers) caste, but have achieved a relatively high social status. In some villages, members of this caste have become the *Gountias* or village heads. The *Agharias* speak a distinct language of the same name within their homes and among kin, but also speak *Sambalpuri Oriya*, particularly in dealings with other members of the public. The *Agharia* language is more closely allied to Hindi than Oriya, and contains a number of words and terms from other north Indian languages such as Gujarati and Marathi.

Kisan

One group of women within my study belong to this caste. Within the social hierarchy of the caste structure, the *Kisan* are among the lowest castes, although not falling outside it as untouchables. They are also mainly cultivators, though lower in status to *Agharias* as such. The land owned by them generally fall within the category of marginal holdings, and in some exceptional cases, small holdings. As such, a large number of people from this community are also engaged as field labourers and farm servants. They would also work as hired daily waged workers for other manual work. The women in my study were working as labourers during the appropriate seasons, and as domestic help/workers during others, in addition to cultivating their own small plots of land.

Using my prior knowledge of the general population and social and economic structure of the villages, I used 'judgement sampling' (Honigmann 1991) to make the selection on the basis of specific characteristics such as age, sex, religion and land holding status. I included both married and unmarried women, aged between 20 and 66 years, Although the sampling was not therefore purely random, the selection on the basis of particular characteristics does not prejudice the validity of the study where

'Use of judgement and opportunistic samples in fieldwork is predicated on the researcher's primary interest in the *system* of behaviour rather than the way in which the behavioural traits of individuals with specific characteristics are distributed in a known universe whose systematic nature is either taken for granted or ignored' (Honigmann 1991: 83).

In taking account of the above factors in selecting my sample I had the following reasons:

Firstly, they are part of the land owning castes and labourers respectively, and the nature of landholdings is predominantly small and marginal. This was important for my research, as the problem was based upon exploring the link, if any, between the legitimacy of their claim and their work contribution in cultivation. This contribution is generally most significant among marginal landholding households for the reasons that the landholdings are generally not large enough to require hired labour and that the family income of such households is not large enough to pay for hired labour.

Secondly, the groups included women of differing marital status. This was relevant in order to assess the differences, if any, in perspectives and position within the household by virtue of marital status. Given that marriage is the most important event in establishing a woman's status in the society, and its significance in relocating her from her natal to marital family, it was necessary to trace differences in her position vis-à-vis inheritance of parental property based upon her marital status.

Thirdly, age becomes a relevant factor in tracing the internalisation process whereby a woman loses membership and allegiance to her natal family and becomes a member, with rights and obligations, of her husband's family. It was necessary to include women of various ages (1) in order to obtain a representative view of a woman's subjective membership and affiliation to her natal family as an unmarried woman, and to her husband's family upon marriage, (2) in order to trace any deviations from this process even on the part of women who may have been married for many years and (3) in order to assess the conformity to the process of women who may not have been married, and as such, relocated to the husband's family for very long.

My sampling therefore was based upon analytical rather than statistical grounds, given that the study involved a search for validity of findings rather than representativeness of the study population³². Discussing the adoption of relevant methods for selecting a sample, Finch and Mason distinguish between sampling using the logic of analytical rather than enumerative induction in the following manner:

³² See Finch and Mason's account (1990) of how they incorporated this in their research on family obligations.

‘Enumerative induction abstracts by generalisation, whereas analytic induction generalises by abstracting. The former looks in many cases for the characters that are similar and abstracts them conceptually because of their generality, presuming they must be essential to each particular case; the latter abstracts from the given concrete case characteristics that are essential to it and generalises them, presuming that insofar as they are essential, they must be similar in many cases’ (Finch and Mason 1990: 28).

Such methods are

‘..... logical as long as the field worker expects mainly to use data not to answer questions like ‘how much’ and ‘how often’ but to solve *qualitative* problems, such as discovering what occurs, the implications of what occurs and the relationships linking occurrences’ (Mead 1952, 1953 in Honigmann 1991: 83, emphasis in original).

Thus, my sample selection was based upon the objective of developing the conceptual and theoretical issues I had to address. The characteristics of sex, age, marital status and land holding were key factors both in defining the parameters of the research problem as well as in obtaining data relevant to address the issues within it.

5. Observation and Group Discussions

I utilised the first phase of my field study, undertaken in July and August 1995, primarily towards the gathering of national statistical and official data, to explore the issues detailed earlier with individual women that I came into contact with. At this time, I did not select a sample according to the criteria I had identified, but engaged

with individual women irrespective of caste and occupation. I explored the questions and issues I had highlighted through informal, semi-structured interviews. Although I did not embark upon this specifically as a pilot study, it nevertheless enabled me to subsequently reflect upon the issues and questions I had focused upon. In providing the opportunity for such reflection it did serve to function to that extent as a pilot, although my interaction at this stage was based upon specific issues I had already identified and did not require me to revise these as a result of this interaction.

Although I was familiar with many aspects of women's lives and work in the particular setting of the village from my visits to relatives during vacations, I intended to carry out a detailed observation for my study. This was important for my study, as my analysis was to be based upon the experience of women themselves, and not upon my assumptions of a prior understanding of what these experiences may be. I lived in the two villages among relatives for a total period of two months in July and August, 1996.

During this period I observed the activities and the tasks that the women performed. I questioned them about their various tasks and about the significance of particular activities. I would participate also by assisting in those tasks, such as in the cooking and other household tasks of my host; accompany the others on their trips to the fields and to the communal baths in the morning and evening. The trip to the pond for bathing is a very 'female' or 'male' activity. Men and women collect in groups, collected by picking up each member along the way or meeting previously, and go to the 'ghats' which are separate for both men and women. I gathered particular details

about individual women from these trips to the ghats. I became familiar with which family they came from, whom they were related to and who the other members of the family were, whether I was related to them, and many other aspects of their personal and family's position in the village. I also participated in the observance of religious festivals and the performance of rituals within the household that took place during this time.

Together with participant observation over a period of two months, I gathered information through informal, unstructured interviews conducted through group discussions. I had discussions with four groups, and within these the number of participants in the discussions ranged from 5 to 18. The process of getting the group together sometimes took up to two hours, as I first had to send someone around to the various houses to request the women to come, and then waited as they completed the specific tasks they may have been engaged in before they could be free. I found the evenings, around the time when the cooking for the evening meal was completed by the women to be the best time for holding the discussions, as there was normally a break before the meal had to be served by them. The discussions ranged from one and a half to two hours, depending upon the time available.

The merits of combining a diversity of field work strategies have been put forward by Burgess (1991). Morris Zelditch (1991) suggests that narrow definitions of field research are inadequate and that the method should encompass observation, informant interviewing and sampling. He further makes the point that for studying

institutionalised norms and statutes, informant interviewing leads to the best results, while a combination of participant observation would, if added, allow for the study of unverbaliised norms as well.

Keeping the issues I had to consider as an anchor, I engaged the respondents using mainly non-directive questions and a few directive questions³³. This was a necessary method as I was interested in their expression, to the maximum possible extent, of what they thought, in relation to the basic issues I wanted to consider. As Burgess (1991) points out,

‘The unstructured interview provides the opportunity for the researcher to probe deeply, uncover new clues, open up new dimensions of a problem and to secure vivid, accurate, inclusive accounts from informants that are based upon personal experience’ check page no

I attempted to direct the discussion towards particular issues, without constraining the flow of their thoughts and expressions. The only direction was provided through steering, posing questions that brought the discussion back along the lines of my enquiry. The unstructured interview therefore

‘....assumes the appearance of natural, interesting conversation. But to the proficient interviewer it is always a controlled conversation which he guides and bends to the service of his research interest’ (Palmer 1928: 171 in Burgess 1991).

The questions included hypothetical questions in order to find out what the

³³ For some very informative and interesting strategies in conducting a successful unstructured

respondents might do in particular situations, such as regarding the possibility of pursuing a legal claim, granting the daughter's share of land. I also posed some 'devil's advocate' questions, hoping to perhaps shock the respondents and obtain a different response to discover their position, only to be firmly corrected by their unambiguous restatements.

Group discussion as a form of unstructured interviewing has been advocated by researchers like Banks (1957) and Chandler (1954). Conducting the interviews in groups proved to be more fruitful than I had envisaged, as it was clear that the support of other women gave strength to each others' voices. Chandler (1954) argues that a group discussion provides informants a means to discover their world and argue over the situations in which they are involved, and I found this to be true. Although the dynamics of the group discussion may potentially limit interaction among the various members within it as a result of personal, social or cultural hierarchies that it reflects, my experience did not reflect this. Whereas women located at different positions within established hierarchical relations by virtue of age, role and status did form part of the same group, this did not appear to have a 'silencing' effect upon those who were at the lower end of the hierarchy. Rather, their membership within the group reduced the differences in personal positioning vis-a-vis one another. In addition, the support of others when they did express an opinion enabled, for example, the younger women to speak regardless of the presence of older women to whom they may otherwise have deferred through silence. It appeared to me that the group discussion fostered the women's engagement with each other regarding the issue I was probing. Thus, what

interview, see Whyte (1991)

was said by one would be taken up by another in a different strain; sometimes one would express an opinion which had not been considered by the others, but they would then go on to consider it. As the researcher, one of the first and most lasting impressions I had was of their keenness to explain to me exactly how they conceived of their reality, often pointing out to me that I was harbouring misconceptions.

6. Access and Interaction: Between ‘Insider’ and ‘Outsider’

As a researcher, I was privileged to have relatively easy access to the women. My position was privileged in that I am a member of the *Agharia* sub-caste, and therefore *prima facie*, not an ‘outsider’ to many of the women who were of the same caste. In two of the villages, many women with whom I had discussions were relatives by blood. Others were related kin, given that within a relatively small caste group such as the *Agharias*, ‘everybody can be traced as being a relative of somebody else’. Researchers have written of how they, as female researchers, obtained access to the field through the connections and position of their male relatives (Abu-Lughod 1993; Gupta 1979; Berik 1996). In my case, interestingly, the ‘gatekeepers’ were all females, and it was my relationship to them that enabled me to gain access. It was the reputation and influence hitherto wielded by my grandmothers that allowed me access as a researcher.

Although, as I have said earlier, I was known to many of the women as a member of the *Agharia* caste and was an ‘insider’ in that sense, I was also in many ways an ‘outsider’ who represented much that they could not share through their experiences. I

represented unusual independence for a female, given that I had lived outside the physical guardianship of my parents in 'foreign' places from a very young age ('foreign' here is equivalent to its normal meaning, although it extends to distant places, not necessarily only those crossing national boundaries). My fluency in English was evidence of a very exclusive and privileged education, also representing a significant exposure to Western culture³⁴ and values, which are in turn alien to theirs. This was perhaps substantiated, in their eyes, by the fact that I was unmarried even at the age of 27, wore 'Western' attire such as trousers and skirts, had my hair cut short and was not particularly deferential in attitude, to name but a few aberrations. As caste networks operate, this meant that almost all of the women knew of me, as 'so-and-so's daughter' 'doing such-and-such', that made me 'different'/ 'modern'/ 'foreign' and 'not really one of them'

While many have brought out the limitations imposed upon and faced by foreign women in doing field research, particularly in Middle East and the South (Pettigrew 1988; Kumar 1992), in my experience my 'otherness' in fact gave me the freedom to do what I had to do. My lack of conformity in terms of dress, role, interactions and work as a 'student' researcher were, I found, tolerated and even indulged by many in the villages. Wolf (1996) refers to this aspect, that whereas she expected the villagers in her study to be scandalised by her personal situation, they were in fact 'delighted rather than scandalised'. The interaction was based not only on my otherness, but most importantly, my being different gave me freedom only because I was taken to be first

³⁴ This becomes clearer if one takes into account the fact that most English medium schools till recently were in fact run by foreign missionaries. Being a residential student, as I was, therefore meant an even greater exposure and inculcation of their culture, social ways and behaviour.

and foremost, one of them. *Jati*³⁵ affiliation was the primary binding factor, upon which the differences in class background could operate. I was very conscious of these differences, which I have learnt from experience could even minimise the scope for identity of interests based upon gender. However, I found that the differences were taken as a given by the women, and it was because of their knowledge, that I could not fully understand what constituted their lives, that they embarked upon the discussions whereby they could enlighten me. In what could be seen as a reversal of the power relations in the research process, *they* were telling *me*, because I was ignorant, and they were telling *me* because I was one of them in terms of the extensions of the family that often denoted the *Jati*.

In addition to *Jati* the importance of being able to speak the local language, *Sambalpuri* and *Agharia* in conducting my research cannot be overstated. While *Jati* enabled to a great extent the women's initial agreement to enter into an interaction with me, the interaction itself became a meaningful one by virtue of the language. In this situation, it was my knowledge of their language and my ability to communicate with them using their own expressions and in their terms that really gave me their acceptance and affinity to share their thoughts and ideas with me and their trust to allow my probing into their personal opinions. While my family status and personal qualification gave me access, the intimidation this might have produced was possibly reduced by my knowledge of their language.

³⁵ This is the term for sub-caste, which is in fact the operative 'caste' in Indian society. It connotes affiliation to the community not only on the basis of membership, but where it is small, approximated kinship as well.

I should note here that the *Agharia* language is considered by many to be rustic and in many instances is replaced by Oriya as a result of upward social mobility. The migration and relocation of families in urban areas produces a similar effect where the language is no longer in use. Language as an aspect of identity was clear in the questions and comments of many women expressing their pleased surprise at my knowledge of it, pride that I had not discarded it, and implicit acceptance. My sharing of the language re-established my identity as 'one of them' although this process was within the context of interactions with me as a researcher.

My *Jati* membership also allowed me to gain access to the group of *Kisan* women. As labourers, these women were generally hired by an *Agharia* large landholding family in the village and also worked for *Agharia* households as domestic helpers. Thus, I gained access to these women as a 'relative' of those who provided their employment. In this case, my role as a researcher would have been completely as an outsider, were it not for the commonality of language and gender. In this case, the class and power connotations are clear, and I am aware that my 'higher' position may have implicitly compelled the women to allow me access, at the same time that their actual participation and responses in the discussion may have been a constrained one. Further, in both situations my qualification as a lawyer gave me a position both of authority and a point of seeking informal advice. Nevertheless, my family background, language ability and caste affiliation allowed me access to have discussions with the women as freely as I did, amounting to what I believe was a successful research.

7. Collection of Documentary Information

In order to assess the implications of policy statements and studies on the role of women in agriculture, I sought to gather relevant material in two ways: by archival research in organisations, libraries and state departments and by personal interviews with administrators at the district level. I conducted archival research primarily in New Delhi, where I searched the records and libraries at the Central Statistical Office, the Office of the Registrar General of India, Indian Council of Agricultural Research, National Social Sciences Documentation Centre, Institute of Economic Growth, Indian Statistical Institute and libraries at Delhi University. I also sought to gather data from the offices of District Commissioners ('DC's, the executive head of a District) and Tehsildars (land records officers in subdivisions of the District) in Sambalpur, Sundargarh and Jharsuguda.

In order to get representative figures for women's claim to land from inheritance, I had initially decided to collect the data from the relevant records in the various offices. However, the difficulty I encountered in this process proved insurmountable due to lack of time, as the method of keeping records made it impossible to collect the data from the offices. First of all, the records relating to the land are kept in two separate offices. The Land Revenue or *Tehsildar's* office records the title to the land, and any claim to the title must be established and admitted to the records there. Thus, a demarcated piece of land would be registered against the title holder, and the register would include all the members of the joint family. It was here that one had to establish a claim to addition of name to the register, or a share in partition. There was no

classification by sex in any of these categories. Thus, the register included names of all persons, including females who inherit their own share in a joint family property, those who inherit the share of a male relative upon partition and those whose claim was being challenged, without any apparent classification on the record. It was possible to sift out the cases of inheritance of the first category only by an examination of the full details of the record. The difficulty of collating information on females' ownership through inheritance was further compounded by the fact that the register also included titles granted under land reform policies.

The office of the Registrar recorded all legal transfers of land between the parties, including transfer through sale, gift, inheritance or otherwise. Again, in this office too, entries are not classified by the gender of the parties, or the nature of the title or transfer. This necessitates the perusal of every entry in the Register for the required period in order to distil those relating to a particular transfer or title, and those in which women are the title holders or transferees. A similar problem arises in attempting to compute how many might be in the process claiming title. In the court of law, the problems are the same, hence the difficulty in computing the number of women who have previously attempted to establish their claim or are in the process of doing the so.

Finally, the District Civil Courts are yet another site where information is located. Where a name has been registered in the Tehsildar's office, it may further be challenged by relevant parties in a court of law. Again, there exists no classification on the basis of sex, and statutory cause of action, so a detailed examination of the case file would be necessary to find out how many cases in relation to Hindu females'

inheritance to property had been instituted.

Thus, one would have to make a thorough search of all the three offices in order to arrive at some estimate of the number of cases where Hindu women have successfully claimed their share in inheritance. The problems become very real in the face of the lengthy bureaucratic processes that require official permission for perusal of records, exorbitant fees as a private person (Rs. 7 for every entry perused at the Registry office), the method of file keeping and the unavailability of staff to provide assistance for this lengthy and time consuming process. This resulted, as I have said, in discarding my original plan to document some statistics.

8. Interview with Officials

Given the predominant role of DCs in administering all policies of the state, I conducted semi-structured interviews with the DC in Sambalpur and Jharsuguda districts. These interviews were towards gaining an insight into some of the issues from the perspective of the administration. Here, my background as a doctoral researcher from UK gave me access to the functionaries. The issues for discussion included a consideration of the various policies being implemented in the district addressing the problems of rural women specifically; to what extent these included a focus on women cultivators. I further raised questions as to whether there was a need to conceptualise of and address women in agriculture independently as main workers and with respect to the problem of instituting credit facilities targeted at women

engaged agricultural production as cultivators.

I also interviewed land records officers ('Tehsildar' and 'Sub-Tehsildar') in Jharsuguda and Sundargarh districts. This was necessary in view of the fact that government policies of land redistribution aimed at landless persons are administered by these officials. The main issue in this case was to consider the factors which are taken into account in such redistribution and whether these allowed for a focus to be placed on women as the beneficiaries.

9. Conclusion

To summarise, I adopted participant observation and unstructured interviews with my informants as the most appropriate means to gather data on the issues of relevance to me. Keeping in view the theoretical concerns of my research, I selected a sample taking account of specific characteristics that were relevant to my analysis. All of these were conducive towards my main concern, which was to obtain insights into the women's own perceptions of gender roles and experiences in relation to females' ownership of land and the role, if any, of work contribution as a potential basis for ownership.

The field research was to me an opportunity to include women's realities, their experiences and perceptions as the basis of deepening any understanding of law. Ann Oakley writes:

'...I regarded sociological research as an essential way of giving the subjective situation of women greater visibility not only in Sociology but more importantly, in society, than it has traditionally had. Interviewing women, was, then, a strategy for documenting women's own account of their lives...' (Oakley 1995: 40).

In exploring law as it relates to women, then, the need to develop an understanding of the specific, real ways in which women understand their locations within the various structures of society which inform the law is even greater. My adoption of methods for uncovering what women understood/experienced was expressly towards this end, using an interactive method of interviewing. Again, the fact of bringing women's voices into society is even more relevant and urgent where the norm places greater value on silence; here the very act of speaking is itself outside the norm, and even more so to speak of *one's own opinions as a woman*. The methodology I adopted, based upon soliciting and encouraging women to express and voice their own opinions may itself be seen to be subversive of the dominant norm. In the context of a patriarchal structure of the society with its controls upon women, coupled with the idealisation of 'non-presence' silence reflects the ultimate condition of the absence of autonomy. I hope that the research process may have contributed to the women in some small way, towards initiating a process of greater control, starting with the identification and expression of their own interests.

CHAPTER THREE

FIELD STUDY IN WESTERN ORISSA - THE RESPONSES

1. Introduction
2. Perception of self interest
3. The experience of gender
4. Ownership of Land
5. Work and contribution to the family welfare and income
6. In the context of labourers.
7. Work and ownership of land.

1. Introduction

In this chapter, I present, discuss and analyse responses from women with whom I engaged during the field research. As I have argued in Chapter Two, the issues raised for discussion by my conceptual framework required me to obtain empirical data from women. I discuss the responses of women as they elucidate and substantiate their understandings of themselves as Hindu women, with a right to own family land through succession, informed by Hindu religious ideology. I present their own evaluations of their claim to land framed within this construction. I also present their conceptualisation and understandings of their role as peasants, their work and contribution to agriculture as it affects their perceived claim to land. Within the framework of evaluation of the bargaining approach in particular, I needed to know the perceptions of Hindu women working in small peasant households regarding their self interests, the value of their contributions, and the legitimacy of their land

ownership in order to evaluate the law as it impacted (or not) upon their resulting position to bargain for land within the family.

In the sample areas land was, and continues to be, the only source of income and the most significant form of property, more so for the small and peasant farming. The purpose of this study was to explore the understandings which women themselves have of their rights, both societal and legal, and thereby examine the fundamental issues relating to women's ownership of land. The field research also included women's own assessment of their contribution to the family both through work on the land and other duties performed in the household, to determine the correlation, if any, between work done and their understandings in relation to land ownership.

It is not in question that there has been gender progressive legislation in India³⁶. But the question which remains unanswered is whether these have actually empowered women through control and ownership of property or at least created a perception of their rights among women. This thesis begins from the position that it is important to analyse women's perceptions of their location within the social and family set-up, and their consequent relation to the wider material and ideological structures. I aim to contribute insights into the social matrix as it may impact upon the understanding and perception of rights.

Within the prevalent norms of traditional Hindu society, there is an implicit, and often

³⁶ The range of legislations addressed to removal of gender injustice is wide. Prominent among these are those relating to dowry, dowry-deaths, inheritance and succession, rape, obscenity, sex trafficking and prostitution.

explicit, conjunction of women's roles and position with that of the family, caste and other social structures. The strongest expression of this may be found regarding the concept of 'honour'; the family's 'honour' resides in its female members. The interest of the family overrides the individual interest and within the family the interests of the woman are subservient to the interest of the family. One of the common factors underlying the understanding of all the women interviewed in the sample group was that, since they perceived their interest to be the interest of the family as a whole, it was beyond their comprehension as to why they should have any 'individual' self-interest. It becomes imperative, therefore, to understand women's perception of the family, parents, husband, sons and daughters.

Within my sample study I have also tried to understand and distinguish the women's perception of their rights in the event of them being ignorant of these on the one hand, and under circumstances where they are informed of their legal right to property on the other. Could their perception of their rights as a whole be different under assumed circumstances where the women are aware of their legal rights? Would knowledge of the process of implementation and administration of those rights, and the benefits which would accrue to them if they were to claim their rights over the property, affect their perceptions?

I have quoted the replies of the women to the questions posed before them since it brings forth the rather simplistic understanding of their perceived rights. The simplicity transcends the realm of theoretical understandings and brings to the fore the realities for the conception and formulations of women's rights in the Indian context. I

would like to emphasise that the replies have been directly translated and not paraphrased in interpretation. The statements included in this text came from various women within the groups. However, since I have relied upon taped recordings of the discussions, (taken with permission), it has not been possible to identify the individual women and attribute the statements to them by name.

2. Perception of 'self interest'

Feminist writers and researchers have for a long time raised questions regarding the value that societies attribute to women's role and the way in which this affects their status. In the context of rural India, women's status is affected by a variety of factors, including caste, religious beliefs, social structures as well as poverty and exclusion from the processes of decision making. While these factors may be seen to be operating upon women's lives to create a certain position, they may also be seen as the experiences and understandings of individual women.

Through their own expressions I shall present women's understanding and experiences in relation to certain aspects of their lives, in particular, upon ownership of land by women, individual or self interest as distinct from the family and their role in the family's survival and well being. Given that the rights within the HSA are addressed to the individual woman as the subject, there is an implicit assumption of an individual interest which the right seeks to protect. This raises the issue whether there

exists an understanding, individually and collectively, of peasant women's own independent and individual self interest.

The most consistent response to the questions of individual self interest posed before the women was one of non-comprehension and puzzlement. In fact, it was difficult to convey the idea of the self and self interest to the women interviewed. Within the local dialect 'Sambalpuri', there is no word which may in definition be the corresponding word or term for 'self/individual interest'. If we define 'self interest' as the need and requirements of the individual, the Sambalpuri translation '*Nijjaur*' would mean the interest of the person concerned *inclusive* of others with whom the person is concerned or related, in this case the family to which the woman belongs. If the others are to be excluded from the scope, it must be done expressly and explicitly. Therefore I had to reformat the question in a syntax which implied that their interest was exclusive of the interest of the family.

When posed with the broad question whether they *desire* acquisitions for themselves personally, for example, the respondents acknowledged that they did desire so, although the desire was neither determinate nor concrete. The issue of being entitled to these acquisitions being exclusively, however, led to extreme confusion. The common reply was, '*myself alone?....., how can I think of myself alone?....., what is there to think for myself?.....*'. I could not easily convey my idea of this exclusivity, even though I tried to use examples of problematic situations which the individual woman might have to face, such as being destitute. But even to these scenarios the response was, '*.....but how can I have a problem for myself?*'. However, some of the women did concede that if they did not obey their husbands and sons there would

be a problem!

The fundamental and important understanding amongst the women was that the desire and furtherance of their individual interest would go against the interest of the family. They were, to begin with, unable to distinguish between their own individual interest and the interest of the family as a whole. Further, their personal interest was in the welfare and benefit of their family.

'No, we don't think for ourselves alone, separate from our family and children. We can never think of ourselves alone once we are married, and have a husband, his family, and our children. Whatever we do is only for them.'

The simplicity of their understanding and almost overriding considerations in favour of the family are aptly brought forth by the following replies:

'.....Myself, alone? What is there to think for myself.'.....'I do think for myself that I may have a problem but then the problem is of the family because the whole family is there and we all work together but it cannot be mine alone.'..... 'no way, no way....there cannot be a problem for me alone..... how can I have a problem for myself, how can I think of myself alone.'.....'as long as I have sons and daughters I can never think of anything as mine alone''if I don't listen to my husband and sons then I will have a problem.'..... 'I will worry about what to eat, what to wear, what to drink and how to survive. I would need food and clothes'.....'of course I would like to have something.... if you go somewhere, would you not like to have some money of your own? But what if you have nothing?No, I don't have anything. No land or farm or people and if you don't have anything and you have a problem then you can very well hang yourself and die. With so many people that is exactly what is happening and so many women hang themselves or eat poison and kill themselves because they don't have anything to live by'.

The replies above also bring forth the fact that the women in the sample study do not have ownership over movable, and more importantly, immovable property of any significant value. It is poignant that the extent of their self interest is at best survival, and even the requirements for this such as food, clothing and shelter seem to be too much to expect sometimes, and giving up on survival itself seems to be a feasible option. The persistent poverty in the rural areas means that the women seek greater satisfaction through the improvement of their families' economic situation and of their status within the family. They see themselves as one component of the family and the extended group related by birth and marriage. The concept of individuality, exclusive of these structures, seems alien to them.

3. The Experience of Gender

'But men enjoy their position because they are men, and we are inferior because we are women. This is our tradition and our culture. No matter how much we work, we will always be in this position once we are married. This is the base reality, no matter how much you may try to analyse otherwise.'

'A woman can never think of anything as hers alone as long as she has sons and daughters'. '.....Women belong to their husbands and depend on them...'

In the preceding section I have dealt with the understanding of women as part of the family which by implication excludes their individual or self interest. What is it that makes these women perceive themselves as mere cogs in the family wheel, bound by

societal norms and dicta? These women seem to have, apparently, rationalised and accepted their situation and do not seem to be desirous of changing the status quo.

Yet, the question remains, are their desires bound by limitations of economic necessity or simply their understanding of what a woman ought to be in the particular context?

In the course of this study I came across instance after instance where the women explicitly attributed their position to the construction of womanhood.

*'What do my parents have to do with me? As a **daughter** I am not their responsibility any more. My parents will not give me anything.'*..... *'There is the expectation that sons will look after the parents in old age. As regards the daughter, it will depend on the marital family and how she relates to them, but the parents can't depend on them.'*..... *'In the case of a daughter, the parents cannot expect her to support them in difficulty because she belongs to another family after marriage.'*

'We do not worry about our daughters once they are married.'..... *'Once she is married we are no longer responsible for her.....parents have less responsibility towards their daughters than their sons'*..... *'On the rare occasion that we go to their (the parents') home, they will take care of our needs. But that is all we can expect'.*

The sense of not being part of the parents' family is deep-rooted. Marriage is the watershed in their lives when their ties with the natal family are severed, both socially and formally.

'Even though sons and daughters might be equal so long as they are at home it changes after marriage.Even if the girl were to live in the same village after marriage, it would be the same. Marriage itself means that the girl belongs to another family no matter where she lives. She is no longer part of the family.'

So much so that in one of the groups I was told,

'When we get married, our ties are completely severed. We no longer have any right to expect anything in our parents' home. In our community they 'immerse our bones' when we get married. From then on, our life is in our husband's home, and it is here that we must find the means for survival'.

(What they are referring to is the practice amongst Hindus, of immersing a deceased person's bones in the river or sea after cremation, in this case symbolising the death of the daughter for her natal family.)

Although the lack of belonging in the parents home is justified by the idea that she will become part of her husband's family, which is a woman's real family, the reality is that even here women live in fear of being cast out. She belongs to the family, in the sense that it is at their pleasure that she enjoys the security of a home, but the home does not belong to her in any permanent secure way. The sense of insecurity is amply conveyed by the responses. As they said,

'...so if I were to express any dissatisfaction at my situation, they (my husband and sons) will throw me out. That is so common....Then where do I go? That is the difference between men and women, that they can threaten to throw us out, but the same thing does not apply to women. Because when the parents marry us off they have given us to the in-laws, and if they throw us out then where do we go? Men have a right in the house.'

The insecurity felt by the women reinforces, and in turn is reinforced by, the almost total dependence of the woman on her marital family after marriage. Further, the two

combine to manifest an ideology whereby values and norms are created for women to live by, which they themselves come to internalise, so that the balance is maintained and their security is assured. Their rationalisations of the obligatory allegiance to the husband and his family, necessitated by the need to maintain their material and emotional security are brought out when they say:

*'Her husband and his family will be responsible for her well-being'.....'Once we come to our in-laws after marriage, we have to **accept** whatever is our lot. It is the men who have the rights, so even if they were to commit the gravest wrongs they can never be wrong and no matter how much we do, we can never be right. And even if we were to make the smallest of mistakes, we would be ostracised.'*

*'It is because of our tradition.....so if I acted according to what I thought my in-laws would not trust me any more, because they would think I am acting selfishly, and separating myself from the common objectives of the family'..... 'After marriage, there is no choice, we have to work whether we want to or not. **It is our duty**'.....*

Many women in the sample study perceive their rights and identity in terms of the 'status' or 'role' which society bestows upon them, and ordain their entire understanding based on this rather limiting factor. This is aptly reflected in their response,

'As women, our honour lies in remaining within the house unless absolutely necessary and looking after the family interest therein, and in being obedient to our husbands. If we were to become the subjects of public discussions we will lose our honour, and thereby what is most important to us. The fear of this happening would stop us from doing anything that would, even remotely, cause such a loss of honour. No matter how desperate our situation we will perceive our honour'.

The societal requirement of honour has been so deeply embedded in their psyches, that they consider it above their physical well being

'As far as property is concerned we will take the assistance from our brothers, husbands or parents. But we would not under any circumstances claim our share in the property'.

The gender roles within society have been cast in specific and exclusive compartments. As is evident from the responses of the women, it is expected and sanctioned for sons to support their parents. Further, the women's preference for sons is justified on religious grounds. In particular, it is based upon the practice of offering oblations for the spiritual benefit of ancestors, and performing the funeral last rites of the parents. These, according to Hindu belief, shall be performed by the son and under no circumstances by the daughter³⁷.

'As parents, we should treat both sons and daughters equally. But in our society, the way things are understood, we need sons. We need them for the offering of 'pindas'³⁸ '.....whether one believes in it or not, one needs at least one son to offer 'pindas' after one's death.....It is the tradition.'

It is within this delimitation of women's role and functions within the family and society that the women perceive themselves and develop an understanding of the self. How do these norms and values, the alienation of the girl from her natal family, and subsequent need to find security within the marital family, combine with these deeply imbibed ideas of the role of a female to affect the development of her personality, and

³⁷So much so that in the absence of a male offspring, the son of the daughter has been prescribed as the person for the performance of the last rites of the grandparents.

³⁸Offerings, made of rice balls, during the funeral rites of parents according to Hindu practice.

her interpretation of the society around her? How does she then locate herself within the larger society and its institutions such as the law? These are issues that must be probed.

4. Right to ownership of land.

The discussions started with me explaining that I was interested in what they thought about certain aspects relating to their ownership of land. What emerged from the responses most of all was the distinct correlation that the women made between gender and ownership of land. As one woman very succinctly pointed out to me,

'The land goes to the men simply because they are men. It has nothing to do with who works on it. Whether the son wants to cultivate the land or leave it fallow, he will still have the right over that land.'

In the words of another,

'No, even if it was the practice for daughters to support parents in old age parents, it would make no difference to the daughter as far as the property is concerned, because no matter how much they acknowledge the daughter/sister's support, parents will never be willing to give land to daughters or sisters. Perhaps they will give her a tiny share, in memory of the father or the mother, but never more.'

There is a sense of futility regarding the extent to which this ideology binds. Asked whether they would feel women were entitled to a share if they supported their parents, the reply was:

'It would be futile, for no matter how much one does, for as long as there is a son, parents will never give their land to a daughter.'

On the other hand, regarding their own actions as parents, the same ideology became relevant in denying land to their daughters. Asked whether they would provide land for their daughter's security, the response was prevaricative:

'Parents do wish to provide for their daughters as well, but they are afraid of their son's reactions.'..... 'How can we give them if there are sons? If we give her land when there is so little, what will we give to the sons?'..... 'Daughters don't have as much right as a son in the father's land....it's not the same as for sons'

'There is the expectation that sons will look after the parents in old age, as regards the daughter it will depend on the marital family and how she relates to them, but they can't depend upon her support. How can she then in that case claim a right in the parents property. No matter how little the son has the parents would expect him to support him even by selling the last bit of land if need be. in case of a daughter after marriage she belongs to another family. so the parents cannot expect the same of her. Therefore we would not give land to a daughter'.

The understandings of themselves as women, and the specificities of their position within the family and society, their interaction with social and cultural norms and values as they perceive them, the absence of an interest exclusive to their individual selves, and the bias in favour of males - all these factors combine to produce a particular conception of the right to ownership of land, which expressly includes only males and reinforces the exclusion of females.

'I alone can't have a right'..... 'Yes he (referring to the husband) has all the rights

over it and can therefore do what ever he wants to do with the land. We (the wife and children) all have a right but he has more of a right. It is because the land belongs to him and because we depend on him and therefore also acquire a right over the land. It is because we belong to him that we are entitled to the property which is his'.

'Even if we were to be given land, we would not have the courage to assert ourselves.'

The insecurity faced by women in the marital home imparts a particular significance upon their relations with the father and brothers. They depend upon them for support in case of trouble in the marital home. To this end, they use their share in the father's land as the means to ensure and maintain cordial relations with the natal family. The implicit understanding is that they will receive support from the brothers in troubled times, in return for relinquishing any claim over a share of the land. In this regard brothers hold a special place in a woman's life, paradoxically, after her marriage, when she is no longer part of her natal family.

'How many would be willing to fight with their brothers. If it was convenient we would all claim our rights or shares.' ' Parents' property belongs to every body in the family. Where there is a good relation between the brothers and sisters perhaps it is possible. But otherwise it would be very difficult. Also it may be easy where there are only one son and daughter but in a situation there are more children particularly more brothers it is impossible to think of the brothers giving up part of their already divided shares to their sisters. It does not happen like that' 'That is why they do not claim, because brothers will turn against them. That is what will happen. Will women take the land and accept that they cannot go to the mother's house any more? Will they stop relating to everybody in the mother's family?'

Similarly, the relationship with the sons is based upon dependence in old age, and the

necessity not to antagonise him by dividing his share with the sisters. Apart from the expectation that it is sons who will support the old parents, women face another issue - the possibility of widowhood. In this context, although they might in reality be legal owners of a share of the late husband's land, they are keenly aware of their physical dependence upon the son. Alone, without the husband, and possibly old themselves, they would not be able to either cultivate the land without the son's support, nor to be physically secure and cared for. This creates the need, therefore, to keep the sons happy, and not antagonise them, least of all by claiming their share in the husband's land, or lessening his share by giving the daughter her due.

'..... at least in theory we believe that we should have right over the land but in reality whether we would actually fight our sons is doubtful'..... 'Where the sons are grown up or adults they can refuse to maintain us or give us any right in the family land. But we cannot do the same to them. From what the law is we should claim our shares but in reality we cannot'.

According to the women, the issue of ownership was compounded because the property in question was land.

*'It would be possible to claim if it were something else. Land is different.'.....
 'It will not be given to us because it is fixed, and the income is continuous. In the case of jewellery, for example, no matter how much it is worth, it can only be sold once, and the income eventually exhausted. But in the case of land, the income is assured for always, however small. It is the source of income.'.....
 'No, no matter what, land cannot be given.'..... 'In case of difficulty faced by the daughter, those who are in a position to do so will help their daughter or sister financially'.*

' Where the subject is land, it can never be that no one else has any control

*over it simply because it belongs to me.'..... ' I would cause a separation between my husband and myself by referring to anything, most of all **land**, as mine'.*

5. Perspectives on work and contributions

To describe a typical day in the life of a peasant woman during the weeding season, (very broadly)

'I wake up around 4 in the morning, cleaning up after the previous day, cook the meal for the day, get the children ready for school and then leave for the field, around 8 in the morning. I return home around 1 p.m. By this time the children are also back from the school. After lunch, and a brief rest, I start the rest of the day's work at home, such as cooking, cleaning. I go to sleep around 10 p.m.'

I was surprised at the extent to which the women in the group asserted that they were the primary workers in their families. They were very clear that on the whole, taking into account both field as well as housework, there was no doubt that they, the women, worked more than the men of the household.

'As far as work is concerned, women work more, because they not only work on the fields, but also in the house and look after the family in general'.

In fact, according to them, it is the women who work more, even on the fields, in the various stages of cultivation throughout the year, until the crop is finally sold or ready for consumption.

However, the issue that was problematic for all the women was the recognition of their work by others; their family and the society. Though they themselves felt that their position was the same as their husbands and sons in terms of the work put in for the family, they felt that this was not how it was in fact perceived by their husbands and sons. They understood that their work was not recognised and was considered to be useless in the society, even though they thought otherwise:

'Even if I work for eight days a week it is nothing, and if they (the men) do a little bit of work it is a lot. The way things are, I cannot say we should do this or that with the land, they are the ones who decide, and the women are supposed to be working as labourers as long as they have husbands and sons. As long as we have husbands and sons, we can only work for them.....Even if we work, it is not considered to be work'.

Although I was attempting to understand what relation women's work might have to the possibility of them being owners of land they worked on, it was brought out by the women that the relation does exist, though in reverse. Without ownership over the land they worked on, they became reduced to labourers, albeit unpaid ones; and the men, by virtue of ownership of the land in fact became the virtual owners of the women's work itself. The right of ownership also gives the man the greater power to decide on the use of the land.

'Another factor is that men in peasant households start believing that they have power over the work done by the women, because they are the owners of the land, that the women are working for them. So they will never acknowledge or recognise the women's work, or give her any freedom or right in recognition for the work done by them. Women therefore cannot decide on any issues relating to the work done on

the land or otherwise for the sustenance of the family; at best they may only make suggestions which may or may not be accepted by the men’.

Again, women’s work is undervalued because it is considered to be part of their obligatory role in the marital household. As I was told,

‘The work we did at home was of our own free will, because we wanted to. After marriage, there is no choice, we have to work whether we want to or not. It is our duty.....In our cases at least, though women work much more than men, men enjoy a better position because they are men. They have a higher position because they are men, and we have an inferior position because we are women. No matter how much we work, we will always be in this position once we are married. This is the reality, this is in our culture and tradition’.

Further, the practice of seclusion which inculcates the feeling of ‘shame’, arising from the fact that women are the upholders of honour and respect of the family to the world at large, also plays a role. Women feel restricted in contesting these attitudes towards their work, for to do so would bring the matter into the public domain, and make them subject to the public gaze, thereby derogating from their honour and causing them and their families shame:

‘In the middle classes, as opposed to the lowest classes of peasant women, the women are restrained because of the feeling of shame which they have. So in the case of women like us, we would be much more reluctant to make public in any manner an issue that is related to our home. This is both because of the feeling of shame and our fear of society’.

This response brings out the particular way in which caste and class combine to impact upon gender ideology. The feelings and reactions in relation to ‘honour’ and

'shame' were expressed as being particularly significant by the *Agharia* women. As they have expressed, the notion that women must uphold the family honour, that moving away from the private and into the public domain will bring 'shame' and thereby cause loss of status is in direct correlation with their superior social position. This was borne out by the discussions with the *Kisan* women, who did not perceive a similar operation of the ideology in respect to them. The significance of honour and the need to women to uphold it did not operate as the underlying ideology upon which the undervaluation and non-recognition of their work was based.

6. In the context of labourers

In my study I found that the position of women labourers was perceived by the non-wage earning cultivators to be better than their own as regards recognition of work and position in the family. Women labourers were perceived to have more authority in the household owing to the fact that they earned their own money.

'And where both of them are working on others' land, the men cannot dominate the women as much as our men do. After all, both of them are working, and he knows that, so what can he say to dominate them?.....In the labourer's family, both of them earn money, and with that money buy food for sustenance. For women who are small peasants and work to grow their own food, it is more difficult to get their work recognised.....that is why many women who are small peasants think it is better if they were to become labourers, so that they would at least get paid for the work done'.

The women who did not work as labourers also felt that labourer women did not have the same constraints of social sanction through 'shame' and honour as they did.

'In the middle income families as opposed to the low classes of women, the women are restrained because of the feeling of shame which they feel with respect to men. On the other hand low class women do not have the same restricting factors. So in the case of women like ours we would be much more reluctant to make public in any manner an issue which is related to our home. This is both because of the feeling of shame and the fear of the society'.

7. Work and Ownership of land - Is there a connection?

There are three issues here: First, is there a desire for some return for the work done by the women? Secondly, what is the return/reward as they perceive it? And third, can ownership of land be a return for work done? The unequivocal response was in the negative. The women did feel the lack of some material returns for the work done by them, except as the means to their survival, in terms of food, clothing and shelter. Asked if there is anything more that they perceive as a reward for work done, the answer was, the welfare of the family. All of them identified this as their reward, and were horrified at the suggestion that perhaps they should want something more:

'We get nothing except the satisfaction that we are doing something for the family.'..... 'No, we do not think in terms of returns for our work in that sense. We think that we work for the welfare of the family, and not in terms of our personal efforts and rewards. So, the satisfaction, however little, that our children and family are being looked after is our reward. We cannot expect anything more'.

'We do not get anything apart from our means of survival, and the satisfaction that the children and family are being looked after, with the expectation that we will have the security of being looked after when we ourselves grow old.....No, we don't think

of ourselves alone, separate from our family and children. We can never think for ourselves once we are married. Whatever we do is only for the children, husband, in-laws.'.....'Nothing can be ours alone. Whatever we earn belongs to everyone in the family. If I were to say anything is mine, everyone else is equally likely to do the same'.

'How can we think of being compensated for what we do for our home? When we have given birth to children, we have to look after them. It is our responsibility. They will grow up well only if we devote ourselves to them, and not if we are trying to separate what is ours as opposed to theirs'.

'We don't think we should have a right in the property. If they give us a share, fine, if they don't, even that's fine. In this family, everything is ours after all - the mother-in-law, the father-in-law, the husband, the children. So what is there to separate as mine after that?'

8. Conclusion: Can the right to own land be a reward for work done?

As I have said earlier, the answer is a clear No. To quote from the unambiguous replies:

'We do think of a reward, but not in terms of getting our individual share of land..There is no correlation, in our mind, between our work, and the fact that we don't own property. If tomorrow we were to be totally excluded from the land, we would stay away.....There is no relation of work with who owns property'.

'The land goes to men simply because they are men. It has nothing to do with who works on it. Whether the son wants to cultivate it or leave it fallow, he will still have a right to the land'.

'If the brothers do not look after us, our parents cease to care for us, only then would we think of a share in land'.

The limited resources available to these groups of peasants was another factor in rejecting the idea of individual claims.

'When there is barely enough for the family's needs, how can we think of our own share.'..... 'As it is, there is so little. There is one plough, a tiny bit of land. My brothers have to survive on that. How can I then think of a share in that as mine, and still expect to be cared for by them?'

To conclude, the operation of gender biased ideology locates the women of my sample within a matrix where the individual self is minimised. Simplistically, how does this bode for the operation of law especially property law, which starts with a presumption of the clarity of individual wants/needs/desires? The only aspect where the individual in the woman is recognised and understood as such is the recognition of themselves as workers. Beyond that, the individual needs and desires extend to include the family.

The perceptions of women, that they are not entitled to a share in parental property, were clearly expressed, as I have tried to present in this chapter. The knowledge of their formal rights to acquire a share does not in any way impact upon the fact that their lives, entitlements and rights are informed by very different norms and world views. Formal laws do not appear to form part of this discourse.

This discussion highlights the construction of Hindu peasant women's claim to land derived from religious ideology. In particular, it highlights the role of 'Hindu' women within the family, and the operation of religious ideology to construct the 'Hindu' female as essentially precluded from independent property ownership. The near-

impossibility of claiming ownership of family land through succession for most of the women arises out of their perceptions and understandings of themselves as Hindu women, of their role and position within their families, and the operation of religious ideology to inform these. Whereas they do not have an interest in claiming land through succession, the religion-derived gender ideology precludes, as Hindu women, from substantiating their right to succession as Hindu women. Although the discussions show that their experiences as peasant women engaged in work and production provide the basis for their interest in land ownership at least in some contexts, it remains limited to the extent that religious and gender ideology combine to devalue their work and contribution. A significant point, however, is that this devaluation, is not subscribed to by the women themselves, but understood as ascribed by religious ideology. This provides an instance where the dichotomy is collapsed; where as Hindu women, they express their claim (within the family/household) as a result of their work and contribution as peasants in agricultural production.

What then, is the content/ideology of the law, supposedly formulated to 'empower' women and bring about social change? Why is it invisible in these women's lives and insignificant in affecting the norms they are bound by? The succeeding chapters will attempt to discuss this.

CHAPTER FOUR

THE DEVELOPMENT OF FEMALES' PROPRIETARY RIGHTS IN HINDU LAW

1. Introduction.
2. The statutory development of Hindu women's right to property.
 - 2.1. Historical development
 - 2.2. The Hindu Succession Act 1956.
 - 2.2.1. Successory right of females in Mitakshara coparcenary property
 - 2.2.2. Absolute ownership
 - 2.2.3. Position of Widow, Daughter and Mother
 - 2.2.3.1. Widow
 - 2.2.3.2. Daughter and Mother
 - 2.2.4. Retention of Mitakshara coparcenary
 - 2.2.5. Females' Property and Succession thereto
 - 2.2.6. Provision regarding dwelling houses
 - 2.2.7 Testamentary Succession
 - 2.3. Summary: overall change in females' position under HSA?
3. The development of Hindu law and the central role of religion
4. Conclusion

1. Introduction

Hindu Law³⁹, of which the law of succession forms a part, includes other areas of family life such as marriage, adoption, maintenance and guardianship. It is the personal law of Hindus as understood formerly under colonial rule, continuing to the present day. As such, it is the combination of principles of the *Shashtra* as applied and

³⁹ While the focus of this chapter is on succession; for the broader subject of Hindu law within which it falls, see Mulla 1990; Derrett 1968, 1970; Kane 1968; Sen 1984; for compilation and commentary of general principles and law.

administered by the colonial courts, the central and state statutes of both pre and post-independence India, and judicial decisions.

In order to evaluate the extent to which the law provides a framework for negotiating independent ownership of land for women, I shall present and discuss the legal provisions relating to the position of women, situated within the religious context. I shall attempt to show that the development of codified Hindu law has been towards the incorporation of a new principle, to legitimate women's independent ownership of land. I shall argue that the inclusion of females' successory rights to parental property under the Hindu Succession Act 1956, introduces a principle that is a significant departure from what has traditionally been practised and upheld. At the same time, important aspects relating to these successory rights remain unchanged by the Act. Thus, it contravenes existing norms, understandings and attitudes by introducing a fundamental change and simultaneously retains other significant aspects in relation to females' rights. In doing so, it sets up a self-contradictory position, affected as it were by fundamentally opposite forces, ultimately raising issues regarding the ultimate effectiveness of the changes themselves.

Towards this, I will deal with the law relating specifically to Hindu women's right to succession. Tracing briefly the statutory development of the right first, to a Hindu widow to hold a limited estate and subsequently its conversion to an absolute estate, and the inclusion of the daughter and mother as equal heirs with the sons and the widow of a Hindu male, I will outline the relevant provisions and the changes sought to be effected. Included in this section will also be the provisions within the HSA

which limit the rights of women. This section will also bring out the effect of the statutory developments of the Hindu law, arguing that these act as piecemeal changes, affecting only specific subject areas, and leaving a whole body of uncodified Hindu law untouched, which continue to operate along with statutory provisions.

Secondly, a brief history of the development of 'Hindu law', and the central role of religion. I will argue that the development of Hindu law has resulted in the institution of religious norms as binding law within the contemporary legal system. To the extent that enacted laws establish the legitimacy and operation of religious norms, I will argue that there arises a tension when alien principles are brought within the frame of existing religious/legal norms. I will argue that law operates to perpetuate and actively sanction the practice of religious norms and values affecting the individual directly, and social institutions like the family, indirectly.

2. The statutory development of Hindu women's right to property

2.1 Historical background: Mitakshara and Dayabhaga schools

The personal law governing Hindus in India today is 'Hindu Law', consisting of both traditional Hindu law and statutory law. It includes pre and post-independence statutes and judicial decisions as administered by courts both under British rule as well as independent India⁴⁰. The traditional Hindu laws have been declared and interpreted

⁴⁰ The adoption of the Indian Constitution did not pose a break from colonial laws or judicial and administrative framework, but allowed for the continuance of these, with some exceptions: Art. 12,

through commentaries. These commentaries, have in course of time appear to have acted with ever increasing force of law. The commentators, through their opinions and conclusions, amplified narrow provisions of the law and added a mass of relevant matter that came to be understood as the law (Mulla 1991).

The Hindu law of Succession in its traditional form remained in application throughout the country until the middle of the nineteenth century. There are two principal schools of Hindu law, the *Mitakshara* and *Dayabhaga*⁴¹. The *Mitakshara* law as well as the *Dayabhaga* rules were in force in various parts of the country, with the courts applying and interpreting the principles contained therein in the process outlined earlier. While the *Dayabhaga* school operated mainly in Bengal and Assam, the *Mitakshara* school was in force in the rest of the country. Both these systems of law were derived from *Shastras* and based upon digests or commentaries by sages (*Smritis*). The *Mitakshara* was based upon the commentaries of Vijnaneshwara on the *Yagnavalkya Smriti*, and the *Dayabhaga* was founded upon the text by Jimutvahana.⁴²

As explained by the Judicial Committee of the Privy Council in *Collector of Madura v. Mootoo Ramalinga*:

Constitution of India 1950.

⁴¹ Apart from the two principle schools mentioned above, reference must be made to certain systems prevailing among considerable section of people inhabiting the west coast of south India. These schools called the Marumakkattayam, Aliyasantana and Nambudri embodied a system of regulations which have received judicial recognition. These schools have largely similar principles though they do differ in certain aspects. The fundamental difference between the Marumkkattaym and the other schools of Hindu law is that it is founded on the matriarchal family and descent is from a common ancestress, whereas in the other schools descent is from a common patriarch.

⁴² Mulla and Kane for details on the two shoools of Hindu law.

‘The remoter sources of Hindu law are common to all the different schools. The process by which those schools have developed seems to have been of this kind. Works universally or very generally received became the subject of subsequent commentaries. The commentator put his own gloss on the ancient text, and his authority having been received in one and rejected in another part of India, schools with conflicting doctrines arose. Thus the *Mitakshara* which is universally accepted by all schools except that of Bengal as of the highest authority, and which in Bengal is received also as of highest authority, yielding only to the *Dayabhaga* in those points where they differ, was a commentary on institutions of Yajnavalkya; and the *Dayabhaga*, which wherever it differs from the *Mitakshara*, prevails in Bengal, and is the foundation of the principal divergence between that and the other schools, equally admits and relies on the authority of the Yajnavalkya. In like manner there are glosses and commentaries upon the *Mitakshara*, which are received by some of the schools that acknowledge the supreme authority of that treatise, but are not received by all’ (Mulla 1990: 42; italics added).

As regards property and inheritance the two schools had significant differences. The *Mitakshara* was based upon the coparcenary consisting of males of up to four generations, in the undivided property of which every male (coparcener) acquired an absolute interest by birth. The amount of this individual interest fluctuated with births and deaths of coparceners, and could be determined at any time only by partition from the coparcenary, to become his separate property. However, until such partition, the property was held jointly as joint family property and included property inherited from male ancestors as well as any separate property that was pooled by an individual coparcener into the joint family property. Devolution of property was thus by survivorship and there were many restrictions on the powers of alienation of joint family property. Rights of disposal over separate property were, however, absolute. The separate property included self-acquired property, as well as property inherited

from persons other than direct male ancestors. In the presence of male descendants extending to four generations, property inherited from direct male ancestors as well as the person's own share in the joint family upon partition became joint family property and subject to the same restrictions regarding alienation.

Under the *Dayabhaga* system, males did not acquire a right by birth and division of shares could take place only upon the death of the owner. The owner had absolute rights over all his property and was able to dispose of it as he wished. Devolution was not by survivorship and each heir took a definite share.

Under the *Mitakshara*, women could not become coparceners, hence they did not have a right in the joint family property by birth. However, they were entitled to be maintained by their male relatives as wives, widows or unmarried daughters, the last being entitled to marriage expenses and associated gifts. A widow could inherit a limited estate of her husband's separate property in some circumstances, (the absence of any of the following: sons, agnatic grandsons and agnatic great-grandsons), and on condition of chastity. A daughter's claim, again to a limited estate, came after the widow's, and an unmarried daughter was preferred to a married one. Thus, a daughter could claim a share in her father's property only in the absence of both a mother and the listed male heirs.

Under the *Dayabhaga*, property of a male was to go in the first instance equally to his sons, or, the share of one predeceased to devolve upon his male lineal descendants. On the absence of these males alone could a chaste widow inherit a limited estate.

The daughters came after the widow, again unmarried ones getting preference over married ones. However, women under the Dayabhaga inherited an interest in all property, separate and joint family.

2.2 Statutory changes leading to The Hindu Succession Act, 1956

From the above, it is clear that under customary Hindu Law women did not have any substantial claim in the inheritance of property, and even in the remote occasions where they could inherit, it was only a limited estate. The first statutory enactment to directly impact upon this position of women in the matter of inheritance was the Hindu Women's Right to Property Act of 1937. The effect of the Act was to include the widow, predeceased son's widow and widow of predeceased son of a predeceased son as entitled to a share in the property of the male they survived. However, this share was only a limited estate. The next major change regarding the proprietary interest of Hindu females was through the provisions of the Hindu Succession Act, 1956. The Act has overriding application in respect of any of the matters dealt with in the Act and repeals all existing laws inconsistent with it⁴³. However, it does not touch or affect the law relating to joint family and partition and the previous law continues to operate in such matters⁴⁴.

The law of inheritance by which Hindus are governed today is the HSA. It was enacted in order to codify and amend the law relation in to intestate succession

⁴³ Section 4, HSA.

⁴⁴ Thus for instance the right of the mother or widow to a share on partition between the father and sons in a Mitakshara family or between the sons after the death of the father is not affected or abrogated by this Act. *Gopal Narain vs. D.P. Goenka* (71) A. Delhi 61.

among Hindus and to give effect to equal rights to both female and male heirs. It sought to improve upon the position created by the Hindu Women's Right to Property Act 1937, under which widows for the first time became entitled to an estate⁴⁵. This estate was only a limited one, however, and the widow could not dispose of it according to her will. The Act of 1956 provides for the property of a female to be her absolute property⁴⁶.

A brief outline of the specific changes brought about by the HSA is provided below. For purposes of clarity, it should be borne in mind that among the two main schools of Hindu law discussed earlier the Mitakshara is most widely prevalent.

2.2.1 Successory rights of females in Mitakshara coparcenary property

The HSA provides for succession of property by the female or a male heir, claiming through such a female, although its provisions are not applicable to succession of Mitakshara coparcenary property. Under Section 6 the law is stated as follows:

‘when a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:

provided that, if the deceased has left him a surviving a female relative specified in Class I of the Schedule or a male relative, specified in that class who claims, through such female relative, the interest of the deceased in the Mitakshara coparcenary

⁴⁵ Section 3, Hindu Women's Right to Property Act 1937.

⁴⁶ Section 14, HSA

property shall devolve by testamentary or intestate succession. as the case may be, under this Act and not by survivorship’.

Although this section deals with succession, it has bearing on other branches of Hindu law such as joint family, adoption and maintenance and lays down rules of far reaching consequences. It prescribes that where a coparcener dies the Mitakshara coparcenary will not become disrupted but the surviving coparceners may continue to remain members of the joint family without arriving at any partition and subject to the important proviso engrafted on the rule, the undivided interest of any coparcener in any coparcenary property will upon his death devolve by survivorship upon the surviving coparceners.

The order of devolution of property of a male Hindu dying intestate includes the daughter, widow, mother, daughter of a predeceased son, widow of a predeceased son, daughter of a predeceased daughter, daughter of a predeceased son of a predeceased son and widow of a predeceased son of a predeceased son.⁴⁷

2.2.2 Absolute ownership

Under the Hindu law in operation prior to the coming into force of the HSA a woman’s ownership of property was limited with regard to her rights of disposal by acts inter vivos and also her testamentary power in respect of that property. Absolute power of alienation was held only in property obtained from certain sources. Her rights over property were understood depending upon her status as a maiden, married

⁴⁷ Section 8, HSA.

woman or widow.

Section 14 of the HSA overrides the old law in respect of all property possessed by the woman and declares that all such property shall be held by her as a full owner. The Act confers a full heritable capacity on the female heir and this section dispenses with the traditional limitations on the powers of a female Hindu to hold and transmit property. Under this section, limited ownership where it existed is converted into absolute ownership. The consequence of the altered law is to affect the incidents of women's property, not only in respect of property that might be acquired and held by her after the coming into force of the Act but also in respect of property that might be acquired by her in the past and possessed by her.

For example, the undivided interest of the husband in the joint family property devolved upon the widow immediately on the death of the husband, and she would be in possession of the property. The effect of the Section 14 is to transform that statutory interest of the widow of which she was a limited owner into that of a full owner. That fact she had not sought partition before the present Act came into force in 1956 made no difference. Similarly where at the time of her death the widow was in possession of her share of property to which she was entitled under the Hindu Women's Right to Property Act, 1937, that share or that property would devolve upon her heirs and the latter would be entitled to prosecute a suit for partition filed by the woman (Mulla 1990).

2.2.3 Position of Widow, Daughter and Mother

2.2.3.1 Widow:

The widow of a male Hindu inherits simultaneously with a son, daughter and the other heirs specified above⁴⁸. The share of the property taken by her under the Act is absolute and not as a widow's estate, by the application and operation of section 14 of the Act. If there are more widows than one then all the widows together, take one share. The old law has also been changed, insofar as unchastity of a widow is, under the Act, no longer a ground for disqualifying her from succeeding to the estate of her husband. Further, under the provisions of this Act, remarriage of the widow is not a ground for divesting the estate inherited by her from her husband. The Hindu Widow Remarriage Act, 1856, though it legalised the remarriage of widows, had the effect of divesting the estate inherited by her as a widow. By her second marriage she forfeited her interest taken by her in her first husband's estate, and it passed to the next heirs of her husband as if she was dead. The rule laid down in that enactment is not applicable to a case governed by the HSA and the widow becomes the full owner of the share of interest in her husband's property that may devolve on her under the provisions of this Act. Her remarriage, which would evidently be after the vesting in her of her share of interest on the death of the husband, would not operate to divest such share or interest. The widow of a predeceased son inherits simultaneously with a son, widow and other heirs specified in Class I of the Schedule. She is, however, not entitled to succeed if, on the date of the succession, she has remarried.

2.2.3.2 Daughter and mother:

⁴⁸ Section 9, opcit.

The daughter, whether married or unmarried, inherits simultaneously with a son, widow and the other heirs specified in Class I of the Schedule. Each daughter takes one share which is equal to that of a son. She takes her share as an absolute share and not as woman's estate. Further, there is no priority between married and unmarried daughters, signalling another major change from the customary law where unmarried daughters were given preference over married ones.

The mother inherits along with the son, widow, daughter and other heirs specified in Class I of the Schedule. She also takes her share absolutely. Unchastity of the mother is no bar to her succeeding as heir to her son; nor does divorce or remarriage constitute any such bar. The Hindu Widow's Remarriage Act, 1856, has not been repealed but section 4 of the present HSA in effect abrogates the operation of the same, in respect of matters dealt with by it. Section 4 and 14 of the HSA clearly establish that the remarriage of the mother is no bar to the mother inheriting as a heir of the son and there can be no divesting of the interest that she acquires in his property by reason of remarriage. This includes adoptive mothers because under the old Hindu law and now under the Hindu Adoption and Maintenance Act, 1956, an adopted son is deemed to be the child of the adoptive parent or parents for all purposes with effect from the date of adoption.

2.2.4 Retention of Mitakshara coparcenary

The Hindu law of inheritance evolved subsequent to the joint family system, and applied to property held in absolute severalty as distinguished from property held by the joint family. A Hindu joint family is comprised of all persons lineally descended through males from a common ancestor, and includes their wives and unmarried daughters. A daughter ceases to be a member of her father's family on marriage and becomes a member of her husband's family. A joint or undivided Hindu family may, for example, consist of a single male member and widows of deceased male members, or a male Hindu, his wife and unmarried daughter, or a male Hindu and his wife, or even two female members. Within this operated, in the Mitakshara, the coparcenary consisting of males of up to four generations, in the undivided property of which every male (coparcener) acquired an absolute interest by birth.

Prior to the enactment of the HSA and during the debates around the Hindu Code Bill, it was felt by certain sections that radical reforms was required in the Mitakshara law of coparcenary. In particular, it was felt that where one of the coparceners died it was necessary that not only in case of his separate property but also in respect of his undivided interest in the coparcenary property there should be an equal distribution of that share between the male and female heirs and particularly between the daughters and the sons⁴⁹.

The HSA prescribes that where a coparcener dies intestate the Mitakshara

⁴⁹ Section 10, opcit.

coparcenary does not necessarily become disrupted. According to the notion of the undivided family governed by the Mitakshara law, no individual member of the coparcenary, whilst the family remains joint and undivided, can predicate, of the joint family property, that he has a definite share in the same. His interest is a fluctuating interest, capable of being enlarged by deaths in the family and liable to be diminished by births in the family. It is only on partition that he becomes entitled to a definite share.

The HSA does not interfere with the rights of the members of a Mitakshara coparcenary. Nevertheless, without abolishing joint family property, it recognises, upon the death of a coparcener, the right of certain preferential heirs to claim an interest in the property that would have allotted to such coparcener if a partition of the joint family property had in fact taken place immediately before his death. Such preferential heirs, to mention some, are the daughter, the predeceased daughters son and the predeceased sons daughter.

The section proceeds first by making provision for the retention of the right by survivorship and then engrafting on this rule the qualification noted above. The initial part of the section ('*..... shall devolve by survivorship*') stresses that the HSA does not interfere with the special rights of those who are members of Mitakshara coparcenary except where the deceased has left him surviving a daughter's son or any female heir specified in Class I of the schedule⁵⁰. Thus, intended to be remedial and beneficial, the proviso to the section confers new rights upon the specified female

⁵⁰ This is done by introducing the concept of a notional partition immediately before his death and the carving out of his share in the coparcenary property as of that date.

heirs only by superimposing upon the integrated structure of the law relating to the Mitakshara coparcenary.

Probably the best solution would have been to abolish the ancient legal formulae of acquisition by right of birth and devolution by survivorship under Mitakshara law and adopt the Dayabhaga system of the joint family. As noted earlier, the difference between these systems in respect of ownership and succession to property is significant. The Mitakshara recognises two modes of devolution of property, namely, survivorship and succession. While the rule of survivorship applies to joint family coparcenary property (not subject to the rules under this Act), the rules of succession apply only to property held in absolute severalty, or separate property. Most significantly, whereas the ownership of the coparcenary property is in the whole body of coparceners and the essence of a coparcenary under the Mitakshara law is the unity of ownership, females are completely excluded from this. No female can be a coparcener under the Mitakshara law; a wife is not her husband's coparcener, nor is a mother a coparcener with the sons.

On the other hand, the Dayabhaga recognises only one mode of devolution, namely succession and does not recognise the rule of survivorship even in case of joint family property. The reason is that no member of the family has a right by birth and every member of a Dayabhaga family holds his share in quasi-severalty. This passes on at his death to his heirs as if he was absolutely seized thereof, and not to the surviving coparceners as under the Mitakshara law.

This would have also achieved the desired goal of bringing about uniformity in the diverse principles of Hindu law operative throughout the country by assimilating the Mitakshara to the Dayabhaga in this respect. It would also have the merit of equable treatment of the nearest female heirs of a coparcener. When moving the Hindu Succession Bill, referring to the Rau Committee's recommendations, Pataskar, Minister for Law, observed⁵¹:

'...To retain the Mitakshara joint family and at the same time to put the daughter on the same footing as a son with respect to the right by birth, right of survivorship and to claim partition at any time, will be to provide for a joint family unknown to the law and unworkable in practise.... In the circumstances.... the Rau Committee came to the only possible conclusion that hereafter.... the law need recognise only one form of joint family, namely, the joint family, known as the Dayabhaga system of law. In this matter, I would be willing to be guided by the wishes of the house...' (4 Lok Sabha Debates 1955: Col. 8014).

The Rau Committee considered the retention of the Mitakshara coparcenary and suggested conversion of the Mitakshara and Dayabhaga coparcenary. However, sentiment in favour of the retention of the Mitakshara coparcenary ruled and the rules laid down in section 6 are a compromise having some of the merits and also the demerits which attend such adjustive legislation (Mulla 1990). The decision of the house was to retain the Mitakshara coparcenary and to confer on the daughters and the other female members, mentioned in class I of the schedule, the right to share the undivided interest of the deceased coparcener. This is a compromise between the progressive and the conservative sections of the House and over the vast territory covered by the Mitakshara law, the discrimination inherent in the coparcenary has

⁵¹ 4 Lok Sabha Debates, col. 8014 (1955).

survived. It appears that the main consideration that prompted the committee at arriving at its decision is the uniformity in the Hindu law that would be achieved by the measure rather than promotion of equality of sexes⁵².

The HSA has been amended by legislation in various states, which provide for the women to become a coparcener in a Mitakshara coparcenary. For example, the Hindu Succession (Andhra Pradesh Amendment) Act 1986, confers on daughters the rights in coparcenary properties and is an important statute in the post-Independence legislations affecting the joint Hindu family. It incorporates views which was discarded as 'unknown to the law and unworkable in practise' three decades earlier⁵³.

The principle on which the Andhra Pradesh amendment relies is that of equality as enshrined in the Indian Constitution. It is intended the amendment will better the condition of the women in the Hindu society (Sivaramayya 1988). Similar amendments to the HSA have been made in Karnataka⁵⁴ and Tamil Nadu⁵⁵. However, the overall effect of these changes have yet to be seen.

2.2.5 Females' property and succession thereto

Section 15 presents a definite and uniform scheme of succession to the property of a

⁵² Report of the Hindu Law Committee 57 (1947). Clause 7, rule 4 says: 'Each surviving daughter of an intestate shall take half a share whether she is unmarried, married or a widow'.

⁵³ Pataskar at the time of moving the Hindu Succession Bill in the parliament stated that a coparcenary consisting of sons and daughters is 'unknown to the law and unworkable in practice' (Sivaramayya 1998).

⁵⁴ The Hindu Succession Act, Karnataka (Amendment) Act 1994, which came into force on 30th July 1994.

⁵⁵ The Hindu Succession (Tamil Nadu) Amendment Act 1990.

female Hindu who dies intestate after the commencement of this Act. The section groups heirs of a female intestate into five categories. Sons, daughters, children of any predeceased son or daughter and her husband are the heirs specified under the first entry taking simultaneously and to the exclusion of those specified under the subsequent entries. Failing all heirs of the intestate female specified in the above, her property devolves upon the heirs of her husband. These are preferred to those in the next category, namely the mother and father of the intestate. On failure of the mother or father the property devolves upon the heirs of the father and in case of failure of all the previously listed heirs, upon the heirs of the mother.

However, there are two important exceptions engrafted upon the general order of succession enacted in the five entries. The exception relates to the property inherited by the female from her father or mother and property inherited by her from her husband or father-in-law. In case of a female intestate dying without issue property inherited by her from the father or mother will revert to the heirs of the father in existence at the time of her death and not upon the husband or the heirs of the husband in accordance with the general order of succession laid down in the entries. Similarly in case of a female intestate dying without issue, property inherited by her from her husband or father-in-law (as widow of a predeceased son) will revert to the heirs of the husband in existence at the time of her death and not upon the heirs of the father or mother in accordance with the general order of succession laid down in the entries.

2.2.6 Provision regarding dwelling houses

Where a dwelling house is included in the property of a Hindu dying intestate and the heirs are both male and female, the HSA⁵⁶ precludes the female heir, in cases where the house is occupied by the deceased's family, from initiating partition of the dwelling house to realise her share. It is only upon the event that the male heirs divide their shares that she may claim hers. The Act attempts to provide for the female's interests by granting her the right of residence in such house, the limitations are clear, in that this right is only available to an unmarried daughter, deserted or separated wife and widow⁵⁷.

2.2.7 Testamentary succession

A coparcener under the Mitakshara law has no power to dispose of his coparcenary interest by gift. However, the extension of this principle, which disentitled a coparcener to make a bequest of his interest in the coparcenary property so as to defeat the rights of the other members to take by survivorship, is now abolished⁵⁸. Thus, any Hindu male or female may now dispose of by will or other testamentary disposition (including in case of a male any interest in a Mitakshara coparcenary), in accordance with the provisions of the Indian Succession Act, 1925, or any other law relating to such dispositions applicable to Hindus. This power of testamentary disposition is subject to the rights of maintenance of persons who are entitled to claim maintenance as dependants of the testator or testatrix.

⁵⁶ Section 23

⁵⁷ In *Putti Ramulu v. Kotha*, AIR 1985 Ori. 70, the High Court set aside a ruling by the lower court directing partition of such a house where the claim was initiated by the female heirs.

⁵⁸ section 30

2.3 Summary: an overall change in females' position under HSA?

The above brief outline of the relevant provisions regarding the position of females in Hindu law as changed by the Hindu Succession Act of 1956 may suffice to make some observations on the extent to which change has in fact been attempted. In considering and evaluating the present law governing intestate succession, the traditional foundation and historical operation must be kept in mind, in addition to considerations of constitutional principles of gender and social equality and progress, at the same time that possibilities for reforms are considered.

At the outset, the scope of the change purportedly sought by the statute is severely limited in its application. The application of the Act is excluded where it is expressly excluded from operation under any land legislation for the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings.⁵⁹ Where a tenancy or land tenure legislation makes a special provision for devolution of rights to land, the provision will prevail and in that event the provisions of Act will be inapplicable to such devolution. But if the land tenure legislation itself makes the personal law of the parties applicable the provisions of this Act must be applicable⁶⁰.

Since all legislative powers in relation to agricultural land are vested in the provincial legislatures under the Constitutional scheme, this provision allows for a skewed

⁵⁹ Section 4 (2), HSA.

⁶⁰ *Nidhi Swain v. Khati Debya* 1974 AIR. Ori 70.

application of the provisions of the Act among the various states. Further, the impact of such disjuncture is significant, as land reform measures were the primary means for the redistribution of land as a fundamental step towards redistributive justice and empowerment of a large section of the rural population. However, the exclusion of the application of the HSA also allows for the exclusion of gender equality within such redistribution and empowerment.

Secondly, as we have seen, the context within which the law operates is the joint Hindu family in which property interest passed primarily through males. This is substantiated and perpetuated through the continuation of the Mitakshara coparcenary. Therefore, although females of the description within the section have acquired an equal share in the property of a Hindu dying intestate, they themselves do not have a share in the joint family property by birth. Males, however, continue to have a right by birth.

Third, the power to dispose of property through testamentary succession in effect provides for a means to deviate from the principle of enabling females to share equally in succession to the property. This has in fact, led to what is now acknowledged to be a common means of ensuring that property does not in fact pass to females.

Fourth, the provision regarding dwelling houses establishes a clear discrepancy in the avowed objective of the statute to guarantee equality to females. By making a female's claim to her share subject to the males' decision to partition, and providing

the right of residence during that time only for an unmarried daughter, the statute establishes a clear hierarchy among males and females.

3. The central role of religion in the development of Hindu law

The dual basis of Hindu law is envisaged as complementary and not contradictory, where the traditional Hindu law may be modified or abrogated by the statute. In this section, I will argue that a hierarchy is created where statutory laws may have created new rights and obligations or altered the existing structures in certain cases. Where the society living in accordance with traditional Hindu laws and having absorbed it within their family and social structures is faced with a new statutory norm, the introduced norm may be perceived as alien.

Hindu society reflects a deep rooted adherence to values based on the precepts and fundamental principles of the religion. The conceptions and propositions contained in the various *Shastras* or *Smritis* continue to operate, be understood and propagated, even after centuries have passed. As Parasher notes, religion clearly has a positive function in Hindu society, as norms and values derived from it affect the everyday lives of Indian women in very tangible ways (Parasher 1992).

Derrett argues that the ideas to be found in the *Shashtra* are abandoned on the surface, but the attitude of mind and conception of life are the same as those expressed in the sacred literature. This literature continues to be believed and accepted because the beliefs they express are the real attitudes, inherited leanings and group aspirations of

many people; all the features of the Hindu understandings are voiced in the literature where customs, usage, ethics, philosophy, superstition, religion and fantasy combine (Derrett 1970).

The moral and factual legitimacy of religious norms as binding law is rooted in the Hindu concept of *Dharma*. Although the concept is of an indefinite nature, *Dharma*, is to be ascertained from the *Shastras*. The concept of law is therefore founded upon moral principles drawn from the *Shastras* as expositions of *Dharma* and since its inception, law contained a teaching of righteousness as an inherent constituent (Baxi 1986). Although the concept of *Dharma* or righteousness is not rigid, and communities may have vastly differing customs and practices, it nevertheless pervades Hindu society. The common morals applicable, as ideals and norms, to all sections of the community in their dealing with each other, and within themselves, are part of the Indian heritage and traditional knowledge (Derrett 1968).

The significance of religious precepts as they affect any satisfactory understanding of their role and impact as normative forces are described by Derrett thus:

‘This attention to religious requirement is not merely as a question of mindfulness of the honours traditionally due to deceased ancestors, and to the *devas* and the other spirits benign or less benign..... It is the question of mindfulness that there are unseen forces having a constant relation to our lives. Belief in an almighty power, or ‘God’ is an important sanction, and self-discipline, which is considered the best discipline, is all the more effective by the operation of this superstitious or religious sanction. Thus, for example, a person will abstain from doing things that would violate the moral principles, such as stealing what could be easily stolen, because evil will befall him as *Dharma* is violated, continuing through his many rebirths’ (Derrett

1968: 36).

Here religion is not taken to be the personal belief system of an individual alone, although it may be existent, but in the aspect where it is not confined to personal belief. Speaking of the Hindu religion, in particular, it is essential to note that it is a social phenomenon, irrespective of personal belief, where the character or right to perform a religious observance depends upon factual membership of a social group (Derrett 1968). One might say that all that appears to be social is in fact religious, and all that appears to be religious is in fact social (Dumont 1970). Further, as Srinivas writes, the practice of the Hindu religion is largely dependent for its perpetuation on such social institutions as the caste, joint family and village community and it may even be inseparable from them (Srinivas 1967).

The development of Hindu law, is reflective of a process whereby *shastric* principles embodied in the Hindu *Shastras* and religious texts became instituted as legal rules. Under British rule, the administration of justice was based upon the scriptural texts of the Hindus and Muslims. Hindus were to be administered on issues of inheritance, marriage, caste and other religious institutions or usages according to the laws of the *Shastras*⁶¹ (Jain 1966). The dominance of religious sanction as the legitimising principle for reform of Hindu law has been brought out in great depth by many writers (Mani 1990; Oldenberg 1990; Nair 1993; Chakravarty 1998, 1990; Heimsath 1964). It is now generally accepted that the reliance was in fact on the customs and traditions as practised mainly by the Brahmins, and that the process of institutionalising Hindu law

⁶¹ The Plan of 1772, issued by Warren Hastings, laid down that 1. *Shastris*, or those learned in the *Shastras*, were to be responsible for the reporting of the law and the sentence therefrom, and 2. the *Shastris* must be consulted for the adjudication of any matter with the 'listed' subjects.

led to the privileging the shastric texts over local custom, (Derrett 1968; Chakravarty 1990, 1998) the supremacy of religious prescription as the basis for law remained in both its application through judicial decisions and statutory reform in the colonial period.

The post-colonial adherence to this position is reflected in the continued existence of separate personal laws of Hindus, Muslims, Christians and Parsis, notwithstanding the Constitutional declaration of secularism as one of the fundamental principles of the State in the Preamble⁶², the guarantees of equality regardless of religion⁶³, among others, and the express objective of a Uniform Civil Code⁶⁴. The case of State of Bombay v. Narasu Appa Mali⁶⁵, where the Supreme Court held that personal laws do not fall within the scope of 'law' within the Fundamental Rights chapter of the Constitution, makes clear that the foundational principle for these 'laws' continues to be religion, and not constitutional principles, even where there might be an express contravention of the latter by the former. Again, the debates in Parliament at the time of discussing the proposed Hindu Code Bill in the 1940's and 1950's reflect the sought legitimacy of law in religion

The development of the HSA reveals that the efforts to address the particular issue of females' property rights have been bound by the tension to retain, embody and reflect the overall structure and premises of traditional Hindu law, as well as the attempt to change particular aspects within it. As Parasher notes,

⁶² Preamble, *Constitution of India 1950*.

⁶³ Article 14, *op cit*.

⁶⁴ Article 44, *op cit*.

⁶⁵ AIR 1952 Bom. 84

‘Though India has not imported foreign laws for the family and religious institutions, it is nevertheless true that the modern state legislations incorporate principles that are quite contrary to the principles in traditional jurisprudence, particularly in aspects relating to women’ (Parasher 1992: 31).

4. Conclusion

This discussion of the contemporary law relating to succession under the Hindu Succession Act has brought out the statutory framework within which women’s claim to land ownership has been addressed within Hindu law. The provisions are addressed to Hindu women, and their claim is framed as a right to succession. Such succession is to property owned by the family, with the emphasis on parental property. The provisions within this framework derive their content from religious norms, incorporated within and to some extent codified through judicial decisions. The HSA clearly reflects the religious, ideological basis upon which Hindu women’s claim to land is constructed.

A narrow critique of the Act clearly shows that various provisions would be contrary in effect, where some particular provisions would limit the application of others. Thus, while a daughter has equal rights to her father’s ‘property’, she is immediately excluded from the ‘joint family property’ and limited to ‘self acquired’ property. Again, her ‘right’ does not extend where the property may be a ‘dwelling house’ where others of the family may be in residence.

The Act also presents a conflict with regard to underlying principles. The retention of the Mitakshara coparcenary reiterates the fundamental division drawn within traditional Hindu law between males and females in respect of property rights. The continuance of this is antithetical to females' proprietary rights, yet this is precisely where the law attempts to locate its introduction of the same. The responses of women in the field, presented in Chapter Three, clearly reflect their lack of acceptance of females' rights to parental property within the traditional family structure. To the extent this structure corresponds to the underlying framework of the Hindu family upheld by the law, it overrides the effect of the introduced changes.

Further, by locating the changes to females' property rights within the family, the law overlooks possibilities that may be less self-conflicting. Property rights of women within their marital family are at present only available to them as widows. This represents a limitation of the right, conceived not only with respect to the husband's property alone, but coming into being only upon his death. The discussions with women in the field show that whereas they are unable to accept their rights vis-à-vis parental property, they would argue for a share in the property of their marital family that is not limited to a widow's share of her husband's property. This brings out the need for law to incorporate this and develop a regime of marital property.

I have argued that the Hindu law has developed to incorporate a new value and create a new role for Hindu women as independent owners of land. The next chapter will trace the roles within the family applicable to Hindu women, and within these, the specific norms and values implicit or explicit for the fulfilment of those roles, and the

extent to which the law does provide a framework for negotiating the incorporation of
a new value and creation of a new role

CHAPTER FIVE

AN EVALUATION OF WOMEN'S SELF-INTEREST IN THE HINDU LAW

OF SUCCESSION

1. Introduction
2. Resonance of contemporary perceptions with models from the past
 - 2.1. Position of female as daughter, wife and widow.
 - 2.1.1. The daughter
 - 2.1.2. The wife
 - 2.1.2.1. Chastity
 - 2.1.2.2. Duties and Obligations
 - 2.1.2.3. Supercession
 - 2.1.3. Widowhood
 - 2.2. The significance of Marriage
 - 2.3. Ownership of property.
 - 2.3.1. The daughter
 - 2.3.2. The wife
 - 2.3.3. The widow
 - 2.4. Stridhan
3. Models, Roles and Identity
4. Conclusion

1. Introduction

As we have seen in the previous chapter, the HSA lays out the framework within which Hindu women's claim to land is constructed. This construction is addressed to Hindu women, where the claim is to property within the family through succession. In this chapter, I examine the specific contours of this construction within law and its effect upon Hindu women's claim to land, in order to evaluate women's ability to own land independently. I have argued in Chapter 2 that conceptualising women's access to land as an aspect of bargaining allows us to analyse both internal factors, such as ideological persuasions, as well as external factors such as their role in work and contribution. Having established the HSA as constitutive of the ideological

framework of law, in this chapter I will address the issue of how this ideological framework operates to affect Hindu women's claim to land constituted within HSA.

I shall discuss the impact of the ideology implicit within the HSA upon Hindu women's self interest to land - the 'internal' aspect which affects the bargaining position and ultimately their claim to land. The aim of this chapter is to evaluate the concept and parameters of self-interest of women that operate within Hindu law, and the extent to which this does or does not strengthen Hindu women's ability to contest for land through succession. This chapter will analyse the extent to which the legal provisions, notwithstanding the introduction of values with the aim of enabling women's equal position, in fact continue to promote the pre-existing values that disempowered women. In particular, it will be shown that women's interest to acquire property independently, through succession, promoted on one hand by the provisions of statutory laws, is in fact overshadowed by law's stronger promotion of women's interest as engulfed within that of the family, and the non-recognition of their individual interest, separate from their family.

Having provided the background information regarding women's successory rights within contemporary Hindu law in the previous chapter, I shall bring out specific aspects of values and principles affecting women embodied within Hindu law. Here I shall detail prescriptions regarding women's position and roles contained in Hindu religious texts which formed the 'Shastric' basis of Hindu law. These aspects will be shown to be very much operative as principles of Hindu law through the reference to selected judicial decisions in post-independence India. Further, these aspects will also

be shown to be reflective of perceptions and understandings of women's role and identity as expressed by women in the field, brought out in Chapter Three.

In this, the references to post-independence judicial decisions are not aimed towards establishing the substantive application and development of the HSA. The pronouncements within the judgements are highlighted in order to establish the extent to which they reflect norms and principles regarding women contained within Hindu religious texts. Further, the judicial decisions referred to are used as examples of the clear and unambiguous incorporation within law of these religious principles, expressed through judicial decisions. While, therefore, the decisions referred to are themselves interpretations of the HSA, the objective in highlighting them is to establish the extent to which these interpretations reflect Hindu religious norms and strictures regarding the status, roles and position of women. The case law referred to therefore, does not provide a substantial or exhaustive coverage of the application or interpretation of the HSA or Hindu Law. It is for these reasons, further, that an attempt has been made to rely equally upon judgements by the highest level local courts, the High Courts, as well as the Supreme Court, in order to reflect the underlying incorporation of religion-derived gender norms within law.

I will then draw upon concepts and analyses of the identity of Hindu women in order to complete the analysis of the effect of law's sanction of the roles prescribed by religion and culture. The effort will be to argue firstly, that the roles, values and position accorded to Hindu women, sanctioned and upheld by the legal framework, ultimately have the effect of constituting, and to the extent that law is aimed at

changing, in fact perpetuating, Hindu women as persons whose interest is completely submerged with that of the family. Secondly, I will argue that while women identify themselves more with the family of the husband, the legal changes assume and take into account her identity with the natal family. Further, this assumption is extended to include the ability of women, as daughters, to compete with brothers within the same family for the fulfilment of their interest to independent ownership of land in the natal family within which their identity is assumed.

2. Resonance of contemporary perceptions with models from the past

This section will detail some aspects of women's lives as dealt with in ancient Hindu literature. The interactions between some aspects of Hindu philosophy, mythology, worship and morality combine to create a way of life that is neither a religion nor a philosophy alone, but nevertheless constitute for the Hindu a set of distinct principles and values, having the force of ascription over thousands of years. For this purpose, the works primarily drawn upon are commentaries upon the relevant sections of the '*Manusmriti*'.

Together with the drawing out of principles relating to women's lives within the Hindu socio-religious framework, as illustrated by writings within these texts, I will incorporate their application within the legal framework, where they have been expounded and applied, by reference to judicial decisions in the field of Hindu law. As noted in the previous section, Hindu law today is comprised of a plurality of

norms derived from a variety of sources. However, the point to be reiterated, drawing from the outline in the preceding section, is the centrality of religion in the evolution of Hindu law. What this denotes is twofold: first, that although statutory and judicial developments have sought to introduce hitherto alien principles within Hindu law, they are at the same time *bounded* by and draw validity from the broader framework of Hindu law; and second, that the ideas, principles and resulting norms contained within what may otherwise be considered to be purely religious texts are transformed into binding principles of law. While this falls within the Hindu conception of law, that law is an expression of *Dharma*, in the context of post-independence developments through statutory law this in fact becomes a limiting principle for the purposes of introducing new principles within this framework, particularly if these are in conflict with religious prescription.

The *Manusmriti* is one of the most authoritative, respected and popular law books of India, having to its credit the largest number of commentaries. It has the position, effectually, of the most authoritative reservoir of law; due both to its traditional history and the systematic and cogent collection of existing law that it gave to the people with clarity and in simple, comprehensible language (Mulla 1990). The *Manusmriti* records many genuine observances of the ancient Hindu and gives a vivid idea of the society and customs then existent. It must be made clear, however, that I refer to the *Manusmriti* as an example of the textual source of obligations and codes addressed to Hindus. Further, that the scope of the *Manusmriti* extends to a vastly greater number of subjects than what I deal with, hence my references may not be held to be misrepresentative. However, I have sought to overcome this by making

references to statements that appear least ambiguous in their expression. My references to it will be drawn from commentaries and translations by other historians and authors.

The particular aspects covered regarding the position of females in the family and wider society as prescribed under traditional Hindu law are as follows:

1. Position of female as wife, daughter and widow
2. Significance of marriage
3. Duties and Obligations
4. The right of women to property
5. The concept of *Stridhana*

2.1 Position of female as daughter, wife and widow

2.1.1 The daughter

From ancient times, Hindu society has preferred the birth of a son to a daughter. The gods are invoked through hymns, to grant sons to the bride. Indeed, daughters are conspicuous in the Rigveda by their absence (Das 1993). In later periods of history too the male progeny continued to be distinctly preferred to the female ones. The daughter is declared to be a source of misery while the son is the saviour of the family, the latter is the only hope of the family, while the former is a source of trouble to it. Many hymns, especially within the marriage ceremony, express the

preference for a male offspring, such as in the *Saptapadi*⁶⁶, where the bridegroom addresses the bride as follows:

‘Come now, let us beget, let us place the seed together that we may attain a male child’ (Mitter 1984: 198)

During the marriage ceremony the prayer of the bridegroom is to Indra⁶⁷, to grant his bride ten sons. Ceremonies such as the *Garbhadhana*⁶⁸ ceremonies reveal the keen desire of ancient Aryans to have a male offspring and medicinal herbs were given to the pregnant woman in order to get a male child. The same anxiety for the securing of a male child is reflected in the act of placing a male child in the lap of the bride when she arrives at her husband’s home after the marriage. The anxiety of begetting a male child is reflected by special ceremonies, as well as the prayers offered in others for the purpose. The prayer is, ‘The birth of a girl, grant it elsewhere, here grant a son’. It is further prayed that the male children be followed by male offspring only and never by female ones.

The birth of a female child did not cause much rejoicing, and she was put aside as the male child was received by the parents with joy. The grounds for preferring a son to a daughter were that the son always remained with the parents, continued the family line, offered oblations to the ancestors for the spiritual benefits, was a support to the parents in their old age and helplessness and added lustre and glory to the good name of the family by his noble and brilliant achievements (Das 1993). This is a statement

⁶⁶ Part of the marriage ceremony where the bride and the groom take seven steps in front of the ritual fire.

⁶⁷ Indra is the King of the gods in the Hindu pantheon.

⁶⁸ *Garbhadhana* was a ceremony to mark the conception of a child by a married woman, and to offer prayers for the well being of both mother and child.

of contemporary society as well, as reflected in the case of Sushila Bala Saha v. Saraswati Mondal⁶⁹, where the judge supported eldercare as a possible basis of property division, making reference to the son's duties to maintain the parent and thereby to deserve a share of the property.

As for the daughter, she was considered more a liability than an asset. There was a change in her *gotra*⁷⁰ after her marriage (Mitter 1984), upon marriage she migrated to another family and therefore ceased to have any direct spiritual benefit for her parents. Nevertheless, it was required of the father to maintain and educate his daughters, and to give them in marriage before they attained puberty to suitable bridegrooms. On the death of the father, the duty devolves upon the brother or the then head of the family, whoever he might be (Sen 1984). She remained a burden as substantial amounts of money had to be spent on the occasion of her marriage and even if she were married, she had to be maintained in the case of the death of her husband or poverty.

In the event of her remaining unmarried she had to be provided for with the apportionment of a share in the family property and she also had to be guarded from going astray. The chastity of females had to be protected, being the highest virtue of a maiden. The duty of the father to secure the marriage of his daughter, in addition to that of protecting his daughter's virtue placed him in the position of great moral responsibility. Failure to fulfil it merited sanction if, for example, a man failed to give his daughter in marriage before the start of her menstruation cycle. According to

⁶⁹ AIR 1991 Cal 166.

⁷⁰ *Gotra* is the group to which a person belongs, tracing descent from a common principal sage, and in

Manu, such a father loses dominion over his daughter and any man who marries such a girl shall not pay anything to her father. Again, in a similar situation, a girl who was not married by her father at the right time becomes free to choose her own husband, although it was not encouraged in practice. Regarding a maiden's virtue, a father who had failed to protect his daughter's virginity is not liable to punishment only if he discloses such 'liability' at her wedding (Das 1993).

The duties of the father/male head of the family towards the daughter correspond to restraints placed upon the daughter. The very import and significance of these duties lie in the fact that they are postulated upon the total dependence of the female as wife, mother or daughter. *Manusmriti* declares that women are not expected to act independently, whether they be girls, in youth, or old aged women. They shall obey the commands of the fathers during their childhood, their husbands during their youth, and their sons after the demise of their husbands. They shall not depend on themselves (Subamma 1992). The characterisation of the daughter as a non-independent subject is also clear from the fact that the daughter was in fact treated as the property of her father until the age of marriage.

Within the context of the father's duty to secure his daughter's marriage, arose a multitude of rules governing the marriage of a daughter. For example, it was not in keeping with the grace and modesty expected of a daughter to choose her own husband, therefore she was discouraged from doing so even where the father was slow to discharge his duty of getting her married. More importantly, Manu did not allow girls who had chosen their husbands to take with them such ornaments as had

the case of non-brahmins, adopting the *gotra* of the brahmin priest.

been given to her by her father and brothers; if she did so, she was considered a thief (Das 1993). The idealisation of the daughter as a non-independent acting subject is again made clear by holding that form of marriage as the highest of the eight recognised forms, where the girl is a gift of the father, pure and simple⁷¹.

The result is the construction of a daughter's identity in terms of the father's duties towards her, premised upon the undesirability of her acting independently. Further, while such identity therefore takes account of her relations with her natal family, the focus upon her marriage and subsequent alienation from it makes such relation by its nature, very tenuous. The result, therefore, is an identity that is not secure or complete even in its definition by the factors that construct it. The temporary and transient nature of a daughter's membership within her maternal home as being a social fact, taken into account by contemporary Hindu law, and to that extent reinforcing her position, is reflected in the fact that in addition to the provisions of the HSA distinguishing between married and unmarried daughters, the Hindu Adoption and Maintenance Act 1956⁷² includes the married and widowed daughter as dependants, but excludes the married daughter as liable to be maintained.

2.1.2 The wife

The construction of the daughter, as a liability, with whom the parents' relation was to a great extent defined by their onerous responsibility to give her in marriage, is the precursor of her role as a wife. It is upon becoming a wife that a female assumes her

⁷¹ The *Brahma* form of marriage, is a gift of the girl to a man learned in the Vedas.

⁷² Section 21

ideal role, where she may fulfil her obligations to her husband, his family and society, and thereby live a virtuous life. In the relation of the wife to the husband, his family and wider society, it is possible to draw out three predominant aspects: the requirement of chastity, the predominance of duties and obligations in her relationship with her husband, extending to his family, and the possibility of sanction through supercession for non-fulfilment of her obligations.

2.1.2.1 Chastity

The chastity of the wife was of paramount significance, for in the words of Manu,

‘One must guard the wife against sensual contact, as the ruin of the wife involves the ruin of the family, ruin of the family involves the ruin of the line, the ruin of offerings involve the ruin of the soul, and ruin of the soul means the ruin of all things’ (Das 1993: 81)

However, the defects inherent in the nature of women, that

‘Women do not dwell on beauty nor is their attention fixed on age; simply for the fact that he is a man, they give themselves to the handsome and the ugly. Through their natural heartlessness, they become disloyal to their husband, howsoever carefully they may be guarded in this world’. These defects are inherent in their nature; for Manu says, ‘When creating them, the creator allotted to women a love of bed, of their seat of ornaments, impure desires, wrath, dishonesty, malice and bad conduct’ (Sen 1984: 227)

required that chastity had to be guarded by the husband

‘Women must particularly be guarded against evil inclinations, however trifling they may appear to be; for if they are not guarded, they will bring sorrow to both the families. Considering it the highest duty of all castes, even weak husbands must strive to guard their wives.....He who carefully guards his wife preserves the purity of his offspring, virtuous conduct, his family, himself and his means of acquiring merit’
(Das 1993: 81)

These comments have contemporary resonance, echoed in the comment by Sen, that the protection of women is necessary, for they are by nature weak and unable to bear the turmoil of the world and stand against its terrors and temptations without guidance and control (Sen 1984).

But this guarding is not to be done by force. It is not possible for the husband to guard their wives by force. Manu suggests three ways of doing this. Firstly, the importance of chastity must be inculcated in their mind so that they might themselves be their own guards. Secondly, they should be kept away from drinking, associating with wicked people, any tendency to keep away from the husband and rambling. Equally undesirable, were sleeping and residing at other peoples houses, because these things help to corrupt the mind of women and they come to lose all fear of their father-in-law and others as also the regard for public opinion. Thirdly, the husband should try to keep her engaged in the management of household affairs so that she may not have an idle moment to think or do any undesirable or shameful acts.

‘Let the husband employ his wife in the collection and expenditure of his wealth, in keeping everything clean, in the fulfilment of the religious duties, in the preparation of the food and in the looking after the household-utensils’

(Das 1993: 82).

The requirement for chastity is significant in any analysis of the position of a Hindu wife. While it is correct to note that the basic right of the wife to be maintained by her husband persists notwithstanding her unchastity, the pervasiveness of the religious prescriptions as normative and binding principles to be taken into account by law is evident from the implications of unchastity in contemporary law. The Hindu

Adoptions and Maintenance Act, 1956⁷³ nullifies the right of a Hindu wife to claim maintenance if she is unchaste, even if she may be living apart from her husband under any of the grounds recognised by the Act.

2.1.2.2 Duties and obligations

Starting with the principle that she is never to act independently, the foremost duty of the wife was to serve, obey and honour her husband, for it is her husband who gives pleasure to the wife in both the worlds (Sharma 1990). Manu says,

‘Him, to whom her father may give her or her brother with the father’s permission, she shall obey as long as he lives and when he is dead she must not insult his memory. A faithful wife who wishes to dwell in this as well as the next world must never do anything that might displease him who took her hand, whether he is alive or dead’ (Das 1993: 75)

A chaste wife must adore and worship him as god even if the husband is addicted to bad ways, debauched or lacks good qualities. Only by serving her husband can she attain an honourable place in heaven; the wife is not entitled to perform sacrifices, undertake fasts or other forms of worship for herself (Subamma 1992).

‘Even though destitute of virtue or seeking pleasure elsewhere or devoid of good qualities, yet a husband must be constantly worshipped as a god by a faithful wife. No sacrifice, no vow, no fast must be performed by the wife apart from her husband; if a wife serves her husband, she will, for that reason alone be exalted in heaven.’ (Das 1993: 74.)

⁷³ Section 18 (3).

Thus, the only means of salvation for a wife was in unquestioning and complete service towards her husband.

Manu also requires that the wife should not seek to become independent. In her youth she must not seek to separate herself from her husband, she must be under his control. By leaving him she would make both her own and his family despised in the society. When the husband is no more, her husband's relations would protect her; in their absence someone of her father's side shall be her protector and on the total extinction of both the families the king shall be her guardian (Das 1993).

In the course of everyday life, the specific duties of the wife included the duty to look after the household work. She was to manage the household in consultation with her husband on the general principle above that nothing must be done by a woman independently, even in the household. She must be talented in doing household work, keep the household articles clean and shall keep away from wasteful habits.

'She must always be clever in the management of the household affairs, careful in cleaning the utensils and economical in expenditures' (Subamma 1992: 65).

She is further required to avoid drinking spirituous liquor, associating with wicked people, separating from the husband, rambling about, sleeping at unusual hours and dwelling in others' houses. These are also the reasons for the ruin of the woman, contaminating the mind of the woman, and they come to lose all the fears of their father-in-law and others and also regard for public opinion. The result is that they are

easily led astray into the evil ways of life.

The duties of the wife towards her husband are a derivative of the primary rule that a wife must live with her husband. This plays a very significant role in various issues within Hindu law, such as restitution of conjugal rights, grounds for judicial separation and claims for maintenance by the wife in any circumstance, as her right to maintenance is based upon her residence with the husband. However, within such residence, the rules for the conduct of the wife within marriage and her duty of obedience and service to the husband also have a significant bearing upon her claim to maintenance. The court, while determining the amount of a claim for permanent alimony and maintenance under Section 25 of the Hindu Marriage Act, may take into account, amongst other factors, the conduct of the parties.

2.1.2.3 Supercession

The Manusmriti provides that in certain cases the wife may be deprived of her conjugal rights which were transferred to another wife taken by the man later on; for the forsaking of one wife and taking another. The conduct expected of the wife described above assumes the nature of binding obligations, upheld by sanction. While the specific directions regarding chastity or duties towards the husband are based upon the ideals of fulfilment in the next life, supercession presents a threat of an outcome in this life itself. The moral code, premised upon one's existence in the next life, is thus translated into a socially binding code, addressed to one's position in this society and world.

Supercession could not be possible so long as the wife was virtuous and was endowed with offspring. If, however, she was wanting in these two things, the man could take another wife. If the wife failed in her duties towards her husband and her family, or failed to be virtuous in her conduct and dealings with them, she was liable to be superseded. Manu lays great emphasis on the fact that the wife should not be quarrelsome or even harsh in speech. If she is quarrelsome none of the duties of the married life could be properly performed nor the pleasures of life be enjoyed in her company. Further, such behaviour on the part of the wife would result in the loss of peace in the family. Therefore, a sharp-tongued wife, speaking unpleasant things, was to be immediately superseded.

‘She, who drinks spirituous liquor, is of bad conduct, rebellious, diseased, mischievous or wasteful, may at any time be superseded by another wife’ (Das 1993: 85-95.)

Again, if a wife failed to bear sons, she could be superseded. However, if she was of a good nature and virtuous in her conduct, her consent could be sought for her supercession. Similarly, a barren wife also could be superseded.

Where a man justifiably decided upon the supercession of his wife, as in cases of her being of false conduct, diseased, mischievous, wasteful or habitually alcoholic, the wife does not have a choice but to accept her supercession. As a means of ensuring her acceptance Manu says,

‘A wife, who being superseded, in anger departs from her husband’s house must be instantly confined only for so long as she becomes free from anger and comes to her senses. But if it is not possible to control her through confinement, she is to be abandoned in the presence of the family’ (Das 1993: 87)

She is to ‘abandoned’ by her husband and his family, and in her maternal home, until her anger subsides and she has regained the ability to live peacefully in her husband’s home.

2.1.3 Widowhood

Having traced the position of the female as a daughter and wife, it is clear that she in fact occupies a totally dependent position, first to her parents, and thereafter to her husband and his family. It is upon the condition of widowhood, however, that the full force of the notions previously fostered come into play. On the issue of family relations, the separation from her natal family, completed at her marriage, continues. At the same time, although she assumes membership of her husband’s family, this is in fact never complete, and she continues to remain in many senses an outsider. The resulting fact is one of vulnerability and total alienation, where she can in fact no longer depend upon anyone, even though dependence is precisely the condition fostered in her from her earliest days. This isolation is in fact normalised in the writings of Manu. Self-denial and reclusivity become the ideals for widowhood:

‘...let her rather emaciate her body by living upon pure flowers, roots and fruits, but let her not, when her husband is dead, even to pronounce the name of another man, and longing for the unparalleled virtue of those who remain steadfast to one husband,

let her lead a life of austerity, strictly observing the rules of continence and foregoing all sensual pleasures until she dies'(Sen 1984: 277).

In this context, the central issue regarding widows becomes a question of their remarriage, for it is through marriage that she may become part of society again. The duties of a wife within marriage as contained within the Manusmriti precludes her from remarrying. Manu was opposed to widow remarriage, as is clear from his specific pronouncement that a second husband of a good woman is nowhere prescribed (Das 1993). The practice of widow remarriage is further discouraged by the assertion that a woman who violates her duty to remain faithful to her deceased husband brings upon herself disgrace in this world and loses her place with her husband in heaven.

Apart from the spiritual downfall, the practice of preventing widow-remarriage is sanctioned. Manu precludes the son of a remarried widow from being treated as an heir to his father, even in the absence of a legitimate son. In bearing upon the son, he provided that the son was only entitled to food and clothing. Most important of all, the father of such a son is also affected for he cannot derive any spiritual benefit from him (Das 1993). If, however, she remains true to her duty to be faithful to her husband,

'On her husband's death if a virtuous woman abides by the rules of celibacy, she goes straight to heaven though she be sonless....'(Das 1993: 110)

The reality of widowhood today is in fact more heinous than which may be gleaned from the discussion above. The practices and prejudices directed against widows once again are commonly drawn from a reading of religious texts and interpretations thereof. In short, the extreme isolation, rejection and vulnerability a widow faces is as great today, if not greater, in many communities in India (Dreze and Sen 1999)

This brings into focus another aspect that follows from the above. In enduring the difficulties of a life of widowhood, one of the mainstays of a woman's life becomes her relationship with her children, particularly a son (Mandelbaum 1970). As brought out earlier, a widow is doubly alienated, from her parents, as well as in-laws. In such a situation, her reliance is largely upon her children, for she becomes dependent upon their support, physical, material and emotional. In particular, it is the son she relies upon for, as we have seen earlier, the daughter's residence is only temporary and the parents cannot have any legitimate expectations of her after her marriage. It is the son, moreover, who has the spiritual obligation to maintain his parents in Hindu law, not the daughter. This is recognised in A. Venkappa Bhatta v. Gangamma⁷⁴ where the widow who sought a share her late husband's property is described as weak and without support as

'...an old lady in late sixties and literate, not well versed in the ways of the world...leading the sheltered life of a widow in an orthodox family...very much dependent...on the brother of her late husband...she had no sons or support to look to....'

⁷⁴ AIR 1988 Kerala 133

2.2 The significance of marriage

In considering the significance of marriage upon a woman in the philosophy of Manu and other Hindu authorities, it would not be an exaggeration to say that her entire life revolved around it; further, that it is as a householder, within marriage, that she performs her greatest function. The sacrament of marriage within Hindu law was founded upon the notion of a complete union of the spouses. However, the entry of the wife into this union is based upon her 'taking a new birth' as her husband's partner, and severing her membership with her maternal family, to become a member of his family (Sharma 1990).

Marriage is the third of the four stages ordained in the life of a Hindu, namely, that of being a student, a householder, a hermit and finally, a renunciate. In Manu's philosophy, the order of the householder, or *Grahasthasram*, is the most important and the most important sacrament. He comments on the indispensability of marriage and regards it as an individual, social and religious necessity. He calls it a *saria samskara*, a refining process, through which every man and woman must pass at the proper age and time (Das 1993). He says,

'As all living creatures subsist by receiving support from the air, so all Orders subsist by receiving support from the householder. Because the men of the three Orders are daily supported by the householder with sacred knowledge and food, therefore the householder's is the most excellent Order. The duties of this Order must be carefully observed by him who desires imperishable bliss in heaven and constant happiness in this life. The student, the householder, the hermit and the ascetic, these all spring from the Order of the householders. And in accordance with the Vedas the housekeeper is declared to be superior to all of them; for he supports all three. As all

rivers, both great and small find a resting place in the ocean, even so men of all Orders find protection with the householder' (Das 1993: 42)

Thus marriage, which gave rise to the household, was regarded as necessary and desirable for all. It was thought that marriage was a prime necessity, and it was marriage alone that could help a person discharge his religious and secular obligations (Mulla 1990). Most significantly for a female, marriage is the only sacrament prescribed for her in Hindu law.

As pointed out earlier, the life of an unmarried daughter in her father's home is one of waiting, where she is but a temporary member. It is upon marriage that she is transplanted into her permanent home, that of her husband. This process is one whereby she must marry and sever ties with her parental home and as result is unable to maintain a continuing relationship as a daughter. To this end, the sacred obligation of the parents to give their daughter in marriage ensures the compliance by the parents and the completion of the cycle. A daughter, on her part accepts her eventual transferral to another family and the transience of her relations within her natal family and the parents, on their part, endure the pain of severance of the daughter's ties upon her marriage on account of their duty.

The most significant aspect of the sacramental nature of a Hindu marriage, as Derrett points out,

'... is not that the notion would stand in the way of nullity (often it would not), but it makes the wife a full member of her husband's family, related to his parents and siblings exactly as if she had been born in the family, and it is this which is

indissoluble.....By contrast western marriages unite only the spouses and they can be, and not infrequently are, indifferent to the parents on both sides, let alone the sibling' (Derrett 1970: 160).

Within the marriage sacrament the daughter is 'given' by her father, and is only the passive party to the marriage. This is borne out by the fact that an essential part of the marriage ceremony entails '*Kanyadaan*' literally meaning, 'gift of the maiden'. As Mitter (1984) points out, under Hindu law, the man is the active agent and the woman the passive agent in the transaction, for a man is said to 'marry', whereas a woman is said to be 'given in marriage'. The doer of the act is the man, the act is the marriage, and the object of the act is the wife (Mitter 1984).

The interpretation of marriage as a process whereby the woman is transferred as a gift from one household to another, thereby acquiring new rights and responsibilities vis-à-vis her husband's kin, and relinquishing those in respect of her own kin, was rendered by the court in the case of Ashis v. D.C. Tewari⁷⁵. In this instance, both husband and the wife insisted on their obligation to stay with their family of orientation, and were reminded :

'Mrs Tewari and her mother must realise that after marriage the wife's home is where the husband lives and the husband's family has to be considered by her to be her family. Her mother must grasp this vital fact, taking it for granted that after the marriage the girl has to go and live with her husband. She must, therefore, adjust herself to the changed situation after her daughter's marriage. Similarly, Shri Tewari and his brother and mother have to face the new situation created by the marriage. The introduction of his wife in his family means that all the family members must

⁷⁵ AIR 1970 Del 98

welcome her with affection and they must help her in all respects to strengthen the roots in the family life of her husband. Mrs Tewari has to look upon her new mother-in-law as her own mother, who in turn must look upon her daughter-in-law as if she is her own daughter. The younger brother is also entitled to be looked upon as the child of the family' (emphasis added).

The existing statutory law on Hindu marriage, embodied in the Hindu Marriage Act, 1955 has introduced some changes in the traditional Hindu law of marriage. Thus, it establishes monogamy, provides for restitution of conjugal rights and divorce among others. However, it still remains true that the subject of Hindu marriage is 'more religious than secular' in nature (Jhabvala 1993). The operation of religious aspects at a deeper and more fundamental level that codified law on the issue of marriage is stated by the Supreme Court in Saroj Rani v. Sudarshan Kumar⁷⁶. According to the Court:

'In India it must be borne in mind that conjugal rights i.e. the right of the husband or the wife to the society of the other spouse is not merely a creature of the statute. Such a right is inherent in the very institution of the marriage itself'.

The judgement further reiterates the fact that as regards the family, it is the 'institution' and not the 'individual' which is of paramount significance.

An even more emphatic decision on the force of religious norms as opposed to those introduced by statute states:

⁷⁶ AIR 1984 SC 1562

‘Introduction of Constitutional Law in the home is most inappropriate. It is like introducing a bull in the China shop. It will be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and married life, neither Article 21 nor Article 14 have any place. In a sensitive sphere which is at once most intimate and delicate, the introduction of the cold principles of Constitutional Law will have the effect of weakening the marriage bond’⁷⁷.

Based upon the judgement, it would follow logically that ‘rights’ and ‘obligations’ within marriage must be determined in the context of the institution, which stands for the family that results from the marriage union, rather than the individual. The opposition framed by the court is clearly in these terms, for the named Articles of the Constitution address rights to the individual citizen. In giving this ruling the courts have not merely dealt with the applicability of Article 14 and 21 of the Indian Constitution, but have gone beyond to reaffirm certain cultural and traditional understandings of the institution of marriage. In doing so they have brought these traditional understandings within the realm of law. Though the Indian personal laws have many elements of religion and culture as explained in the introduction to this chapter, their strength and conviction have coloured the provisions of clearly stated statutory laws.

Moreover, the decision exemplifies the principle that areas of life hitherto governed and regulated by religion/socio-cultural norms must not be interfered with by statutory law, even if that law is the Constitution. Thus, notwithstanding the post-colonial adoption of new values within the entire legal framework including the Constitution, the above section brings out the recognition of, insistence upon and

⁷⁷ Harvinder Kaur v. Harmender Singh AIR 1984 Delhi 66

adherence to the religious and derivative socio-cultural norms that have traditionally defined roles and obligations.

2.3 Ownership of Property

Among the various modes of acquisition of property listed by Manu, such as inheritance, finding or friendly donation, purchase conquest, lending at interest, the performance of work, acceptance of gifts from virtuous men, inheritance is the most important means. Tracing the development of women's right to inherit from the Vedas, there is no single authority for the general position of women regarding inheritance. Various commentators have proposed different, often conflicting, opinions on the relevant portions of the Vedas (Mitter 1984).

Mitter argues that since sacrifices were very important in the Vedic age, and wealth was to be produced for the sake of sacrifices, so long as women were allowed to join in sacrifices, they could acquire property through the various means, including inheritance. However, when the right to participate in sacrifices later came to be denied to women, it may have been that wealth was sought to be diverted from passing to them through inheritance. During the period prior to that of the Manusmriti this would have been the position, as women were no longer held to be competent to recite the Vedas and join in the sacrifices (Mitter 1984).

Once the relatively equal position of women in the Vedic age had changed into a secondary one at the time of the *Manusmriti* the position regarding the acquisition

and ownership of property by females also changed. In this section I will deal expressly with those prescriptions or injunctions addressing the issue of females' right to own property.

2.3.1 The Daughter

As noted earlier, in Manu's philosophy, the primary obligation in respect of a daughter is towards her marriage, falling first upon the father, and in his absence, upon the brothers. On her part, she is entitled only to be properly looked after and maintained till she is married. Next, she is entitled to be given away in marriage in order that she fulfil her obligations. Further, upon marriage she becomes part of her husband's family, for she remains in her father's house only so long as she is not married; and as soon as the ceremony is performed she leaves her parents' home for her husband's.

The fact that a daughter is not a constituent member of her father's family is reflected in Manu's exclusion of the daughter in his dealing of paternal property. Manu does not mention daughters when considering the partition of paternal property, for he says,

‘ After the death of the father and of the mother the brothers assembled should divide amongst themselves in equal shares the paternal estate, for they have no power while the parents are alive’(Jalali 1994: 82).

Further, the absence of the daughter's right over paternal property becomes clear

when Manu states that the unmarried daughters must be given by the brothers a share of the latter's paternal inheritance. Manu says,

'But to the maiden sisters the brothers shall severally give portions out of their shares, each out of his share one-fourth; those who refuse to give it shall become outcaste'. (Jalali 1994: 83).

This statement, made in connection with the allotment of the shares to the unmarried daughters indicates that Manu does not recognise the right of the daughter in the paternal property, for had the position been the reverse, it would become meaningless. As Das notes, whenever the word 'giving' is used it only signifies that the recipient does not have a legal right or is not the owner of the property concerned (Das 1993). The words used further indicate that the giving of the one-fourth share to the sisters is more a moral duty of the brothers than a legal one. Further, another statement by Manu that the one-fourth share should be given only to the unmarried sisters, and nothing to the married ones, clarifies that the share given is an allowance for meeting the marriage expenses of the unmarried sisters, it is not a share on account of the daughters having any rights of inheritance in the property of the father.

Therefore the daughter is not legally entitled to any share in the property of her father, it is only the brothers who contribute severally parts of their individual shares to her. So in essence the daughter is entitled to share the transferred property of her father, when in the eyes of the law it has become the property of the brothers for all practical purposes. In Ajit Kumar Maulik v. Mukunda Lal Maulik⁷⁸ and Dharam

⁷⁸ AIR 1988 Cal 196

Singh v. Aso⁷⁹ the law was stated as envisaging and allowing for this understanding that a daughter was disentitled from property upon marriage⁸⁰. The disinheritance of daughters upon marriage was seen as a mark of natural dispensation of property, and being equivalent to sons having self supporting incomes in Khushbir Singh v. The State⁸¹.

However, even such property as is given by the brothers is not completely at the daughter's disposal. At best the daughter could be responsible for its safe custody until her marriage. In ordinary cases the shares given by the brothers could have been pooled together and put under the charge of a responsible person who was expected to arrange her marriage with that amount; and she was probably not permitted to take away to her husband's house the residue which would have been left after meeting the marriage expenses. Particularly, if the share had been inclusive of immovable property, it would not have been possible for her to take it away with her (Das 1993)

Even for the daughter who has no brothers, Manu does not give the right of inheritance or partition in her father's property. Conferring of spiritual benefit on the original owner of the property being the prime consideration, mere blood relationship does not suffice. Although the daughter is as much a blood relation of the parents as the sons, for the purpose of conferring spiritual benefits she is considered inferior to the sons. Crucially, the change of *gotra* which accompanies her marriage makes her unfit to offer *pindas* to her parents. The concept of a share in the property, according to Manu, is in essence a right to a portion of the property as a consequence of the

⁷⁹ AIR 1990 SC 1888

⁸⁰ See also, *Bhagwan Kaur vs. Chetan Singh* AIR 1988 P & H 198

ability and the fitness to confer spiritual benefits on the owner of the property (Das 1993). Therefore the incapacity of even a brotherless daughter to inherit the property of the father.

Thus, in case there are no sons but only daughters, Manu rules that a father shall appoint a daughter and declare, as a procedural formality, that the male child born of her shall perform his funeral rites. The male child in turn would perform the funeral rites, make spiritual offerings as a son, and become eligible to inherit the property. This provision makes it very clear that the sharer derives the title to the share from his or her capacity to confer spiritual benefits on the original owner of the property (Mukherjee 1978).

2.3.2 The Wife

Manu holds that the wife is not entitled to any share in the property of her husband during his lifetime. She has only the right of maintenance against her husband, which could not be denied to her even if she became unchaste, or an outcaste, or persisted in immorality. The wife, the son and the slave are declared by him to have no property, and the wealth earned by them belongs to him to whom they belong (Das 1993). He says,

‘...whatever is acquired by the wife belongs to the husband’ (Mitter 1984: 276)

⁸¹ AIR 1990 Del 59

Further, he states,

‘Women should never make a hoard from the property which is common to many nor from their own property without their husband’s permission.’ (Das 1993: 96)

2.3.3 The Widow

Along with other jurists preceding him, Manu does not recognise the widow as the heir to her husband’s property, even where he is sonless. He lays down that the property of a sonless man will devolve upon his father, then upon his brothers, then the closest male relative and when none of these is forthcoming, first a preceptor, then his disciple and finally the king. The widow is not mentioned in this order of persons. According to Das (1993), the reason for this is that if the property were to be allowed to devolve upon the widow, it would become part of her separate property and further devolved to her daughters, or others, not part of the deceased’s family. Thus, with the passing of the property of the deceased to others outside his family, no spiritual benefit could have accrued to the deceased from that property.

As regards maintenance, her right to maintenance out of her husband’s property is dependent upon the possession of her husband’s property by her husband’s heir. Amongst the persons who must be maintained even if the person whose duty it is to maintain does not possess any inherited or ancestral property, Manu does not include the widow (Mitter 1984) There is, therefore no absolute obligation to maintain a widow.

While later writers did grant that a widow should be maintained, it was conditional upon the chastity of the widow. Thus,

‘... let them allow a maintenance provided they keep unsullied the bed of their lord. But if they behave otherwise, the brother may resume that allowance..’(Mitter 1984: 421)

There have been instances in traditional Hindu society, prior to the Hindu Succession Act coming into force, wherein the woman has been presumed to have absolute ownership over certain kinds of property, like *Stridhana*. However, *Stridhana* was never seen in the context of women’s ownership of immovable property, rather as security against the husband’s or in-laws’ ill-treatment.

2.4 Stridhana

The gradual development of the status of women from being *Nirdhana* (incapable of holding property) during the period of the *Manusmriti* to being enabled to do so in later periods may be traced as commencing with the idea of *Stridhana* during the *Smriti* period itself. The term *Stridhana* is derived from *stri*, woman, and *dhana*, wealth, and according to Manu, covers:

‘What was given before the nuptial fire, what was given on a bridal procession, what was given in token of love, and what was received from her brother, mother or father..’(Mulla 1990: 157).

Thus, it is only gifts obtained by a woman from her relations, her ornaments and her apparel which constitute her *stridhana*. The only kinds of gifts from strangers included are presents before the nuptial fire and those made at the bridal procession. Neither gifts from strangers at any other time, nor her acquisitions by her labour and skill, constitute her *stridhana*.

Although it would be difficult to show that any Hindu caste or community gave women rights of acquiring, enjoying, and disposing of the property equal to those enjoyed without question by their male relatives, it is important to note that *stridhana* did constitute a concept that distinctly countenanced women's independent ownership. The whole subject, however, was a complex one both in terms of what in fact constituted *stridhana* as well as matters in relation to its disposal. Derrett (1970) makes the point that on the whole, customs tended to restrict the scope of *stridhana* to the ornaments and clothing actually given to them and inheritance from very near relatives. Further, there was a difference among the various schools on the question of the woman's right to dispose of her *stridhana*. The question whether the property she inherited could be counted as *stridhana* was ultimately determined by the colonial administration, which declared that the inherited property was, with a few exceptions, not *stridhana*, but subject to the limited estate (Derrett: 1970).

Under the present Act, *Stridhana* is part of the female's property, and loses its separate character. It is thus undifferentiated from any other kind of property which a Hindu female may have ownership over, and the rules regarding its devolution

through inheritance are those governing devolution of any property of a female Hindu dying intestate. While it is true that such a uniformity in the application of Hindu law is desirable, there remains a difficulty with the present scheme. In eliminating *stridhana* as a distinct concept, the law simultaneously abolishes the one aspect of independent ownership in respect of females which had hitherto been acknowledged and accepted within Hindu law. Hindu women's right to own property within contemporary society still continues to be practised as limited to movables and exclusive of land ownership except in some situations such as gifts. That this limited scope of females' ownership continues to be operative is evident from the increase in the practice of dowry, and the justification for the ultimate exclusion of females' ownership of land through inheritance, that it provides. Given that the right of females to own property, particularly immovable property, remains to be fully accepted within Hindu society, the inclusion of *stridhana* within the scheme of inheritance has the unfortunate consequence, in fact, of including even such ownership within the scope of that which is exclusionary for the Hindu female. Of course, the argument remains that the objective of the Act is in fact to effect the reverse: that all properties hitherto excluded from women's ownership are to be given the same scope for legitimacy as obtained for *stridhana*. However, the reality of women's continued, in fact increased, exclusion, in addition to the fact that exclusion was the predominant principle to which *stridhana* was the exception, therefore overweighs the reformative objective of establishing ownership for females, perhaps leaves the conclusion debatable.

3. Models, Roles and Identity

Thus far, I have dealt with specific aspects of women's roles and obligations within the Hindu Shastras which have formed the basis of law in the context of the development of Hindu law, both statutory and through judicial decisions. How do these understandings and analyses illuminate the reality that may constitute women's lives? To what extent can they be said to reflect the values and expectations, roles and obligations, of Hindu women in Indian society today, and therefore, to what extent does law reflect and perpetuate a certain identity of Hindu women? What can be said to be the predominant aspects of such identity? In this section, I shall attempt to address these issues by an analysis of some of the aspects of Hindu women's identity that is implicit in the legal framework.

The legal provisions under the HSA 1956 and the changes sought to be introduced therein are based upon a more individualistic notion of property, (Sharma 1990) both in terms of ownership of land by an individual rather than the corporate group of the joint Hindu family and in the underlying assumption that persons to whom rights are addressed can act as individuals separate from the family. In relation to women's position specifically under the Act, the women are addressed as the daughter in respect of her interest vis-à-vis the father, a sister in relation to her right in conjunction with the sons and the widow. Further, the relations posited within the scheme are based upon the following assumptions in respect of women's position and role as the daughter, sister and widow:

First, that as a daughter she continues to be a member, socially, culturally and factually, of her parents' family. Second, that as such a member of her parents' family she has an interest, both perceived and legitimate, in her parents' property. Third, that such interest is perceived in terms of her interest individually, exclusive of the social relations that may otherwise define her position, and finally that, as a sister, she has an interest in a claim that puts her in competition with her brother.

In this section I shall attempt to show that these assumptions are in fact not borne out in the social reality of women's lives, and that the framework of law promoting the principles as it does, in fact contributes to these effects. In discussing aspects of women's lives, I take recourse to analyses and discussion from fields other than law, for while judicial materials have much to add to the sociologist's understanding of Indian family and kinship, a comparative sociological approach can throw important light on the culture of modern Hindu family law in both its theory and practice (Uberoi 1995).

A Hindu woman's identity evolves out of the particulars of her life cycle and childhood, out of the daily experience of her relationships as daughter in her parents' family and as wife and daughter-in-law in her husband's family. It is equally affected by the universals of traditional ideals of womanhood absorbed by her from childhood onwards (Kakar 1996). Kakar further makes the observation that although in most societies a woman, more than a man, defines herself in relation and connection to other people, this is particularly true of Indian women: her identity is wholly defined by her relationships to others. First she is a daughter to her parents. Second she is a wife to her husband (and daughter in-law to his parents). Third she is a mother to her

sons (and daughters) (Kakar 1996).

A daughter's birth within the household is not welcomed traditionally, as the various references in the religious texts, highlighted in the previous section, show. Contemporary anthropological studies from different parts of India (Madan 1994; Mandelbaum 1970) and the available clinical evidence assure us that the traditional preference for sons is very much intact. At the birth of a son drums are beaten in some parts of the country, conch shells are blown in others and the midwife paid lavishly, while no such spontaneous rejoicing accompanies the birth of a daughter. Traditional households still perform ancient rites on the pregnant woman to elicit the birth of a male child. There is also sufficient evidence of the extremes that this preference can take, in the practices of female infanticide and the use of amniocentesis against the birth of a female child. (Krisnaswamy 1996; Patel 1996) These practices are very much an expression of the scriptural values, as Krisnaswamy notes, in response to the superiority of sons for religious rites, particularly the obligation and ability of only a son to perform ritual oblations for the soul of the deceased parents.

This explicit undesirability of a female child, at least in preference of boys, made clear to almost every girl in a Hindu household, where the effect is the cultural devaluation of girls, may in turn be internalised by the female through her experience. Kakar (1996) argues, from a psycho-social perspective, of the possibility that girls and women may transform the cultural devaluation into feelings of worthlessness and inferiority. Similarly, Nandy, taking the example of lower survival rate for girls than boys, suggests that it is a function of maternal neglect, a weird expression of woman's hostility toward womanhood and also, symbolically, toward her own self (Nandy

1996).

The feelings of inferiority generated in girls in comparison with boys within a family are compounded by the extension of an ideology of devaluation: where the daughter becomes a burden to her parents. Underlying this is the idea that a girl does not 'belong' to her parents' family; that she is a 'guest' only for a temporary period, and that her 'real' home is with her husband's family. Madan, in his study of the rural pandits in Kashmir, notes that an unmarried female (agnate) is always referred to as 'amanat', that is as someone held in trust on behalf of her lawful owners. A young girl's upbringing is completely overshadowed by the fact that she is to be married and sent away to live with her husband and parents-in-law (Madan 1994). Before marriage, her parent's home is her home too, and in the span of a few hours, after the marriage, she becomes a stranger to it and in fact the house of strangers, her in-laws' home, is supposed to become her home. In time it does as she begins to participate in the domestic life. At the same time, the position of the wife as a 'newcomer' or stranger never fully disappears, although it may be that she also acquires other positions as mother, mistress of the house, mother-in-law, etc. (Madan 1994; Mandelbaum 1970)⁸²

Marriage, therefore, bestows upon a woman the enduring status in her life. It requires of her to relinquish her emotional attachment and expectations that come naturally in respect of her parents' family and inculcate a similar sentiment towards her husband's

⁸² The case of *Chandania v. Gyan Chand* (AIR 1989 All. 75) highlights the reality and endurance of this alienation a Hindu wife in her husband's home. In this case, a man left only maintenance rights to his wife and all his property to his nephew under a will. Here, the court acknowledged that the property may be passed to a member of his 'own' family by a man through a will, to prevent its being passed on to his widow and members of 'her' family.

family (Mandelbaum 1970). The task is acknowledged to be difficult, and is brought out by the duty of a mother to teach the necessary virtues to her daughter, who must learn to be a good wife in order to be good woman. Srinivas writes of the women in Mysore:

‘...It is the mother’s duty to train her daughter to be an absolute docile daughter-in-law. The summnum bonum of a girl’s life is to please her parents-in-law and her husband. If she does not ‘get on’ with her mother-in-law she will be a disgrace to her family, and cast a blot on the fair name of her mother. The Kannada mother dins it into her daughter’s ears certain ideals which make for harmony (at the expense of sacrificing her will) in later life...’ (Srinivas 1942 in Kakar 1996: 51).

I have tried to show that a girl’s membership in her parents’ family is undesired at worst and temporary at best. The dominant role for the Hindu woman is that of the wife and her position as a wife and daughter-in-law is subservient and that of a stranger at least to begin with, but it assumes a permanence and in time the woman may well feel less an outsider.

A significant, related, aspect is that throughout her development, from childhood to marriage and after, the essence of a woman’s identity is to be traced in its relation to others. As said earlier, she is a daughter, wife, sister, mother and so on, particularly in relation to the male. The ideals of womanhood in each of these roles, and the achievement of these ideals, primarily through acquiescence and submissiveness, docility at the risk of sacrificing her own will and interest, are both aspects that reinforce and support one another. As Kakar points out,

'.... In addition to the 'virtues' of self-effacement and self-sacrifice, the feminine role in India also crystallises a woman's connection to others, her embeddedness in a multitude of familial relationships' (Kakar 1996: 51).

Chitnis notes (1996) that the ideology of personal freedom is new to both men and women in India, who have hitherto functioned under rigid hierarchies and learned to curb their freedom. Where they have conditioned themselves to suppress their needs, silence their senses and sublimate their selves in a philosophy of self-denial and self-effacement and service,

'...The challenge to feminism in India is to help Indian woman realise their self-hood, personal freedom and autonomy in full measure..' (Chitnis 1996: 94)

Finally, the precarious position of the wife in the husband's family, where she has to 'earn' her position and respect, bound by manifold duties and obligations, and strive to achieve the ideals inculcated in her for her 'happiness', leaves her dependent on her brothers in case of ill-treatment by her in-laws or desertion by her husband. The special relation between brothers and sisters, marked by the brothers' duty to protect his sister and the sister's special dependence on him to do so, is marked by millions of Hindu males and females every year in the festival of 'Rakhee'. The festival is the celebration of the brother-sister relationship, where the ritual consists of a sister tying a piece of thread on her brother's wrist as a symbol of lifelong affection, in return for which the brother is bound by a duty to always come to her protection.

4. Conclusion

To conclude, changes in the legal provisions affirming women's equal right to inheritance in the parents' property would require the existence of the following aspects of the cultural and social reality of Hindu women in India:

Firstly, the identification of her personhood independent of her relations to others in the family, secondly the continuing identity of a woman as a member of her parents' family even after marriage, and in which she can therefore have a legitimate expectation, and finally, the willingness of women, as sisters, to jeopardise their relations with brothers and the security they may expect thereby, by competing with brothers for the same interest in land.

I have tried to show that in fact, this is not the reality. The assumptions upon which the law is based continue to be unrealised and in this the law itself plays a significant part. The erasure of the daughter's claim as a necessary component of Hindu identity in the case of K. Devabalan v. M. Vijaykumari⁸³ is the clearest disjunction between Hindu women's identity, even as constructed by law, as their entitlement to hold property. The decisions noted earlier throw into question whether one can even assert the existence of a 'legal' entitlement even in the face of contradictory exposition of the legal provision by the courts. Where

'Ideology is, in part, a representational process whereby beliefs, images, attributions and explanations are constructed historically in conjunction with, and in relation to,

⁸³ AIR 1991 Ker 175

material and cultural conditions and power relations, but are presented as natural, inevitable and necessary in the current conjuncture' (Kline 1994: 451),

Hindu cultural ideology makes women's subservient, dependent and familial role normative to the extent that there is very limited scope for the emergence of women's interests as individuals and independent of relations to others. Although the reformative aspects in legal provisions are aimed at changing this to some extent, the legal provisions in fact operate to negative the impact, by incorporating and promoting those very aspects of women's position and social role that militate against it. The application of law by the courts reinforces this, in that it is often informed by the dominant conceptions of the family, or 'familial ideology', through which the ideas about what the family is, and what roles the people play within the family, are universalised and naturalised. (Kapur and Cossman 1998: 68)

'The family is presented both in law and popular culture as the basic unit in society, a sacred, timeless and so natural an institution that its definition is self evident'. (Gavigan 1988: 293)

Moreover, this dominant conception of the family also includes a set of assumptions about the roles and responsibilities of the family members, roles and responsibilities which are allocated strictly on the basis of gender. Women are allocated the role of wives and mothers - they are responsible for child care and domestic labour. The role of law in reinforcing these roles even as it institutes them as independent property holders is reflected in Parnam Balaji v. Bathina Venkataramayya⁸⁴. In this case, the

⁸⁴ AIR 1988 AP 250

court investigated the 'adult' position of a Hindu woman within the family under Hindu law, holding that she could not in fact occupy any adult role in a Hindu family, having no rights to adult status. Hindu cultural ideology has even laid down modes of behaviour, morals, duties and obligations specific to gender and the marital status.

Finally, in evaluating women's self interest in land ownership, it would be difficult to conclude, therefore, that the law, both in its statutory expression, as well as religious and cultural norms, fosters such an interest. While ostensibly the law is premised upon the existence of such interest, it in fact reinforces the ideology that excludes it. To the extent the changes introduced in the law to promote females' proprietary rights may be alien to a significant number of Hindu women,

'This leads to the perception of law as an imposition of alien values, and therefore makes the law ineffective in changing attitudes and values where the rightness of the law is questioned' (Parasher 1992: 31).

Further, insofar as religious and traditional values and principles continue to inform the life views and worlds of Hindu women,

'.... their replacement by any other values is bound to be resisted, particularly because, for the majority of women, issues of equal rights and feminism do not have any reality' (Parasher 1992: 35)

as Chapter Three and this chapter have attempted to bring out. To conclude, the introduction of females' equal rights to succession in Hindu law is inadequate to

strengthen Hindu women's bargaining position. The legal framework in fact strengthens the lack of females' individual self-interest to claim a share in parental property. To the extent that self-interest does exist to claim a share in the property of the marital family, such interest is effectively ignored within the legal framework. The resulting position is one where the law, although it seeks to enhance Hindu women's independent ownership of land, by its very framework ultimately serves to perpetuate women's inability to own land. Its emphasis upon Hindu religious norms leads to its construction of women's claim to land as addressed to 'Hindu' women and family property through succession. As such, it fails to establish a basis for their self-interest to a claim in land, so constructed.

CHAPTER SIX

WOMEN'S WORK, PERCEIVED CONTRIBUTION AND ACCESS TO LAND

1. Introduction.
2. Cultural ideology and perceptions of women's contribution
3. Evaluating women's work in agriculture
 - 3.1 Issues in conceptualising and enumerating women's work
 - 3.2 What is women's work?
 - 3.2.1 Measuring women's work
 - 3.2.2 Women's work in rice cultivation
 - 3.3 The case of Orissa: women's role in agriculture
4. Land to the tiller: women and land reforms in India
5. Conclusion

1. Introduction

In the previous chapters I have explored the construction of women's claim to land by law within religious ideology. In analysing the basis upon which such a claim may be constructed, which is the objective of this thesis, I have argued that women's claim to land ownership must be constructed not only in ideological terms, but also the material bases. Towards this, the bargaining approach, particularly as developed by Sen, provides a framework where women's claim to land is affected not only by ideological factors affecting perceptions of self-interest, but also material factors, particularly perceptions of their contributions. The bargaining approach therefore,

enables us to expand the construction within law, shown to be ideologically biased, and includes perceptions of women's work and contribution as a factor affecting claims to resources. This section discusses women's work as it affects their claim to land and addresses the second aspect of the 'dichotomy' in constructing women's claim to land - as addressed to peasant women, within the household, affected by their work and contribution to agricultural production.

In this chapter I shall discuss the relation between women's access to land and perceptions of women's contributions to income from land. In the specific context of the class of small and medium farming households within the agricultural sector, which has been my focus for the field work, I shall analyse the extent to which law recognises women's contribution in production, and thereby promotes their ability to negotiate access to land. As we have seen in the previous chapter, Hindu women's right to individual shares through inheritance is statutorily guaranteed, although such right does not in fact resonate with the cultural ideology, or women's lived realities, identities and interests. While I have argued that Hindu women's right to ownership does not correspond to the socio-cultural reality upon which the law seeks to and does operate, in this chapter I shall argue that, in addition, law also does not reflect the socio-economic reality of women's lives, that they are significant actors in agricultural production.

In conceptualising women's effective access to land as an outcome of negotiating and bargaining, I am concerned, in this section, to analyse the extent to which the legal framework does or does not take account of women's contributions to production

from land. To draw out the relations between work contribution and bargaining power over resources, I rely on work and literature drawn from the fields of economics and development policy. Whereas the focus of writers within these fields has often not included law, they provide useful frameworks and analysis relevant for analysis of law. I rely particularly on the bargaining approach as developed by Sen (1987, 1985). In his analysis of gender and co-operative conflicts, Sen has argued that the informational base of the bargaining problem has to be widened to include perceptions of legitimacy and desert. Whereas the exclusive focus on individual interests and the assumption of clear and unambiguous perceptions of these interests are limited, missing crucial aspects of the nature of gender divisions within and outside the family, the bargaining approach must take account of:

‘.....The sense of appropriateness (that) goes hand in hand with ambiguities of perceptions of interests, and with certain perceived notions of legitimacy regarding what is ‘deserved’ and what is not.’ (Sen 1987: 17).

Sen further explains that the impact of ‘perceived contribution response’ may have been associated with acquiring food from outside. The fact that the sexual division of labour allocates tasks based upon social constructions of gender, and that such construction typically allows males to do the work of ‘acquiring’ food, while females are involved in other activities, may not in fact weaken the *perception of special importance of bringing the food home* (emphasis added; Sen 1987) This seems to have been supported by Boserup’s observation that women fare relatively better in societies where they play a major role in bringing food from outside (Boserup 1970). Again, studies of women’s role in the paid labour force, particularly in agriculture, have been

based on the understanding that a woman's role in providing for the family from external means, and not from work within her own household, has increased visibility and therefore greater impact on her status as provider (Bardhan 1985). The underlying assumption is that since women have an income, they have control over certain economic resources which they may then manipulate in negotiating their socio-economic status within the household. This assumption has been summed thus:

'Whether one views the increase in female agriculture labourers as an indicator of growing rural poverty or as a positive sign that more agricultural work is available for women, its effect in terms of our third criterion (i.e. decision making) should be examined separately. Evidence suggests that the increased paid employment outside the home may actually improve the women's bargaining position within the family' (Bennett 1989 in Bagchi and Raju 1993: 180).

The conditions of subsistence and overwhelming dependence on land as the means of livelihood that is pertinent to small and medium farming households have to be kept in mind. The evidence from a vast number of studies in India shows that families live in near-poverty, and land is the resource that provides the maximum security against absolute poverty. In this context, ownership of the scarce resource that is land is fraught with contestations and the social legitimacy of a claim is related to cultural norms as well as economic realities. It has to be remembered that the 'family' addressed within the HSA is also, for most cases, the unit of subsistence production, the 'household'. While I have not distinguished between the family and the household precisely for this reason, what I am pointing out here is that in fact, there is a distinction in the ordering principles of the family and the household as the locus of subsistence production. Whereas gender ideology biased against the female can operate pervasively across both, the operation of gender ideology in subsistence

production is predicated, in addition to culturally defined gender relations, upon relations of production.

Although the relations of production in the subsistence level within a capitalist framework has implications for the value assigned to such production as pointed out by (Beneria and Sen 1981; Mies 1980; Sharma 1986; Omvedt 1994; Elson and Pearson 1981) and, in the case of India, particularly for home based workers for export (Mies 1981) and landless labourers in agriculture, what is relevant for my purposes is the separation of the family from productive processes, as a separate, private sphere, as opposed to the public. Further, the sexual division of labour within most societies predicates that women are located within this 'domestic' sphere, while men go out of it to do 'productive work' (Harris: 50). In the particular case of women in household or home based production, the issue becomes more difficult due to location of the productive sphere as well as the family within the same physical space, leading to a submersion of women's productive role within their role as the nurturer. This exacerbates the non-visibility of women's role in income creation or contribution to the family's survival and sustenance.

Where the issue of land ownership is sought to be determined by law on the basis of gender, the legitimacy of such a law must not only be based on cultural norms and values, but also relations of production. The social legitimacy of a claim must be based on both these aspects in order to improve a person's bargaining position. On this issue the framework provided by Sen, taking account of women's role in production and the need to enhance perceptions of their contribution to

production/income, provides a strategy that may be developed through appropriate policy. Agarwal (1994) argues that although enhancing perceptions of women's contributions may be achieved the outcome may cease to be positive if the legitimacy of a claim is based upon need rather than contributions, the problem being amplified where culturally defined notions of needs may also be gender-biased.

Although this is a valid point, particularly in societies such as India where culturally defined gender identities may be deep rooted among most people, it does not, in my view, lessen the significance of the role that perceptions of contributions do play in ascribing legitimacy. Further, Agarwal's argument is perhaps also relevant to a subsequent stage in policy analysis after perceptions of women's role in production have in fact been enhanced, since, as I shall bring out in the following sections, we do not yet have a policy focus on women's contribution with the aim of enhancing perceptions of the same.

The issue of land ownership and control has two very different implications in the context of women in agriculture. First, the relationship to land for those who do not own any land, but work on it as wage labourers for others, is characterised by the absence of ownership over any land. Here the issue is one of redistribution or allocation of land through land reform policies establishing ownership and control for sections of the agricultural producers that hitherto had no land. Second, once land comes to be owned by an individual, ownership may then be transmitted to heirs including females, through succession. Women's work in agriculture may be classed according to the two contexts: women working as hired labourers primarily where

they themselves do not have access to land for their own cultivation, or at least, not sufficient land, and women working as cultivators on their own land, or that owned by their husbands/fathers. My focus is the evaluation of women's work as cultivators, on land owned by themselves or their husband/fathers.

Here the question of women having independent ownership and control over their lawful share becomes an issue of intra-household bargaining and negotiation, being affected by gender relations within the household and notions of legitimacy, including perceived contribution. My focus is on the issue of women's effective ownership and control over the land where they have a legal right to own the land; for instance where the land is owned by a member of the family, of which the woman is a member and on which land she works. It is for this category of women that problems regarding evaluation of their work, and therefore their role in the agricultural production, is heightened. Firstly, the classification of their work becomes a problem, as to whether it is domestic work, household work, leisure work or economically productive work in agriculture? Secondly the evaluation of their work is ambiguous, in so far as determining the necessity of their work to the level of agricultural productivity and income for the household. Thirdly, there is no specific remuneration that may provide an index of the cost/benefit to the family.

2. Cultural ideology and perceptions of women's contribution

Although research on working women, or women with an access to an income, links employment to a higher status in terms of female welfare and autonomy, Ahmed-Ghoush argues to the contrary, that gender hierarchy is so rigid within the household

that mere wage labour of women does not guarantee a shift of balance in power relations between genders (Ahmed-Ghosh 1993). Sharma's study of Punjab and Himachal Pradesh makes a similar point that the women's wage labour in itself is controlled by household members and not by the women themselves. She explains:

'In theory we might certainly expect to find that women who work for wages (and even women who work as family labourers) have a greater say in the household matters women than women who perform their domestic work only, and this is an assumption that has often been made both by anthropologists and others. But the female labourer usually earns wages which are too small and sporadic to lend her any special leverage in household politics, and the work of the female family labourers does not give women any particular control over the products of their labour' (Sharma 1980:196).

The research on women's work has exposed the dialectical link between women's work and the cultural context within which it exists (Agarwal 1994; Mencher 1993; Bardhan 1985; Mazumdar and Sharma 1990; Gleason 1991). Gender relations are so defined by the cultural ideology to construct women's subordinate position to the extent that their resources in terms of labour, time and productivity are controlled by males (Sharma 1985; Bardhan 1985)

Cultural ideology determines not only the perception of others regarding the women's work and contribution, but also that of the women themselves. Although Sen's framework focuses on the former, Agarwal points out that the perceptions of women themselves are also relevant to determine the basis of legitimacy of a claim. What emerges from the discussions in my field work with the respondents on issues relating to women's employment pertains not only to the social and cultural constraints created

by a male dominated society, but also to their own acquiescence to a subordinate role.

The effect of others' perceptions, based upon the prevailing cultural ideology, on the perceived legitimacy of a claim by women themselves is such that while women do have a conviction and perception of themselves as equal workers and contributors, this does not enhance the legitimacy of their individual claim. Women belonging to households at subsistence level do not distinguish between 'productive' labour and household work and claim that 'all the work that they do is for the family' (Ahmed Ghosh 1993: 192)⁸⁵. However they do consider themselves to be workers equal to men in providing for the family. The reasons for this have been aptly stated by Bhattacharya who asserts that the asset base of the households at subsistence level is so small that most of the production is for household consumption. Bhattacharya maintains that:

'because total production work input of the household members will be much less in such [subsistence] households as compared to that in the households having larger asset bases, the contribution of women members of the households as participants in generating the non -marketed products can only be small in absolute size, however crucial it might be to the survival of the household. The separate identity of this marginal work, which in major cases is performed only intermittently together with women's other work of housekeeping, is more often likely to be lost in reckoning. In effect the work becomes 'invisible' (Bhattacharya 1985: 200).

Mencher (1993) explores women's involvement in rice cultivation in India, focusing on the data from two of the southern states, (Kerala and Tamil Nadu), and one state in the east (West Bengal) and explores the concept of 'hard work' in the context of south

⁸⁵ As I have discussed in Chapter Four, the responses of women in my field research were in identical terms, where they do not conceptualise their work in individual terms, but as being 'for the family'.

Asian agriculture. The question she raises is: how has it come about that women's work is regarded as easier than men's work, both by the workers themselves and by many social scientists who study them? Who is doing the defining and what are the criteria being used? Taking the lead from Bina Agarwal (1988b), she looks at the dialectical relationship between the material context of women's relationship to agriculture and the land on one hand, and gender ideology, (here related to the valuation placed on what work they do in agriculture), on the other.

She points out that for both males and females actual participation in manual field work has always been culturally considered to be degrading, and withdrawal from fieldwork has always been associated with higher socio-economic class. Further, tasks in field work have always been segregated by gender in South Asia. For example, although, in addition to the many tasks they perform in rice cultivation, women may also plant vegetables and work the soil manually, they have rarely been considered worthy to plough the fields.

Her study also brings out women's belief that because ploughing has to be done with sanctity, or by those who are sacred, only men can plough, as those who menstruate pollute the earth (Mencher 1993). In my study, notwithstanding women's acknowledged role as workers of equivalent significance, the respondents justified men's primary position on the ground that only they could do ploughing, which was 'most difficult work', 'too difficult for women', which 'women could never be able to do'⁸⁶.

⁸⁶ I have discussed women's responses in my field study, particularly their attitudes and understanding of 'work', the value placed on such work and other issues previously, in Chapter 4.

In many areas where only women are expected to transplant, most men will not do this work even if there is no other work for them. They will explain carefully that only the women know how to do it or that it is 'women's work' or easy work - even though in another region the task may be classed as 'men's work' or as gender neutral. Giving the example of pulling seedlings in Tamil Nadu and Kerala, Mencher points out that pulling the seedlings for transplantation is considered to be 'hard work' where men do it in Tamil Nadu, but 'easy work' in Kerala, where it is women who do it.

The value placed on women's work in agriculture, as well as other sectors, bears a relation to the visibility of such work that is mutually reinforcing. In its negative operation, as in the case of agricultural workers and cultivators in India, work that is not valued within the social framework remains invisible as it is not taken into account, and its invisibility perpetuates underestimation and undervaluation (Beneria 1988). Taken together, this has a direct effect on perceptions of women's contribution and the ultimate effect is one where the contribution made by women by virtue of their unrecognised and undervalued activities is also perceived to be very low or non-existent.

3. Evaluating Women's Work in Agriculture

Agriculture accounts for 37% of India's Gross National Product (GNP) and employs four-fifths of all economically active women. The past two decades have seen a dramatic increase in women's share of agricultural employment. Despite this

increased dependence on women's economic productivity, they are less endowed with resources in terms of health, education and most importantly the productive resources, like ownership to land. Therefore at one end of the policy spectrum we see the pervasive lack of human resource endowment and at the other we see the women not having ownership of land due to the predominantly traditional, religious and social requirement for patrilineal transmission of property. Hence the situation is of subsistence requiring a high work participation, but with the absence of control over the means of subsistence, namely land.

This absence of women as independent providers/workers, has been the result of a lack of identification and acknowledgement of the corresponding work participation, at the same time it has determined the way in which they have characterised their work. This is further deepened by reinforced ideas of women as 'dependants' or supplementary to family subsistence requirements. Moreover, this cycle has led to women's own underestimation, not to mention the gross underestimation and invisibility of the women's work in official and other studies. Studies during the last decades have brought to light the nature and extent of women's work participation in subsistence and agricultural labour (Bardhan 1985; Sardamoni 1988; Mies1986; Bagchi 1993). It is important to affirm that this remains true today, and that in fact women's involvement in agricultural labour is increasing. (Statistical Profile of Women Labour, 1993; Table 1 Appendix). To quote Mencher:

'....women perform a very large part of the heavy manual work in rice cultivation in India. This is important to note because as compared to the African and South East Asian women in agriculture, the involvement of Indian women in the field has often

been ignored (Mencher 1993: 99).

That there still exists this gap in recognising women's work for what it is may be brought out by how their work has been classified or understood, in the policies and plans of the state. Maria Mies (1986) brings out the point that development programmes for women focus on women not as peasants or wage workers, but as property-less petty commodity workers. Whether they hold land, or have the potential to do so by law and individual circumstances, essentially makes no difference to how women work, and therefore characterised, since the fact remains that by and large they do not control the land. In my own study in Orissa, I was given a puzzled look by the District Commissioner of Sambalpur when I asked if there were any programmes for women *as cultivators or peasants*. The response was to list the various programmes 'for the development of women', such as milch cattle development, milk co-operatives, basket making and the like, and again the concept of women working in agriculture was clearly *not* as cultivators but petty commodity producers or in allied activities. In this section I shall draw upon the issues around women's work in agriculture: what constitutes 'work' as performed by women; the activities that have been documented as work done by women; and the process of statistical enumeration whereby women's 'work' comes to be defined.

3.1. Issues in conceptualising and enumerating women's work

The population that has the ability and willingness to work constitutes the labour force. However, who actually gets included in the work force would very much

depend upon how 'work' is defined in such accounting. In evaluating work done by women in the process of agricultural production, I will attempt to bring out some of the issues raised by the means through which women's work is presently enumerated and evaluated in official studies. This includes the manner in which women's work is first of all conceptualised as predominantly 'domestic', and therefore unproductive, and secondly, the translation of this limited understanding into under-enumeration and under representation of women's work in official statistics and data collection through exclusion of large areas the work women undertake. I will analyse the existing data in the context of the proposition and understanding that the work and contribution of women, particularly in agricultural production, does not get reflected through the existing data, where the more 'economic' and traditionally technical parameters of measurement have been used.

The result is a logical exclusion of all activities outside the market mainstream as 'peripheral' and 'non-economic' (Beneria 1988). Since most of the pre-harvest and post-harvest operations in which women participate are carried out at home, a large number of self employed women are excluded from the count. In addition allied agricultural activities, such as dairy and poultry farming, along with the survival tasks of firewood/fodder collection and procurement of water are not considered work if they are for self-consumption.

In India, the National Sample Survey Organisation (NSSO), as compared to the Census, has been more sensitive in its attempt to capture women's contribution to work by adopting multiple approaches to define economic activities. For example, its

32nd, 38th, and 43rd rounds (conducted in 1977-8, 1983, 1987-8) introduced innovative measures such as inclusion and division of domestic workers into two categories: first, those engaged in 'domestic duties' only (activity code no. 92) and the second, those who 'attend domestic duties and [were] also engaged in free collection of goods (vegetables, roots, firewood, cattlefeed etc.), sewing, tailoring, weaving etc. for household use' (activity code no. 93) (Raju 1993; Sen and Sen 1985). For this an exclusive set of probing questions for those who were categorised as 'usually engaged in household duties' was adopted to elicit information on their participation in certain specific activities for household consumption⁸⁷. By including the latter category, the female labour participation rate not only comes closer to that for the men, but the variation in female labour force participation across the Indian states also becomes considerably smaller (Sen and Sen 1985).

However, apart from cooking, cleaning, childcare and looking after the aged and the sick, which may fall within the 'pure' domestic sphere, Krishnaraj (1989) has identified several categories of work which are predominantly performed by women in rural and urban India which clearly have components that are not 'pure' domestic work. They are: a) self-employment in cultivation for own consumption, b) subsistence dairying and livestock rearing, fishing, hunting, and cultivation of fruit and vegetable gardens, c) fetching fuel, fodder and water, repair of dwellings, making of cow dung cakes, and food preservation. In addition, women's work in 'informal' health care is particularly invisible in official statistics.

⁸⁷ These activities were: maintenance of kitchen garden, orchards etc., work in household poultry and dairy, free collection of fish, small game etc., free collection of firewood, husky paddy, preparation of jaggery, grinding of food grains, preparation of cow-dung cakes to be used as fuel, sewing and tailoring, tutoring of children, bringing water from outside the household premise and outside the village (Raju 1993; Sen and Sen 1985).

According to the Statistical Profile on Women Labour, Fourth Issue, 1993, Labour Bureau, Ministry of Labour, Government of India, which has been compiled on the data collected in the 1991 Census, the term 'Worker' defines a person whose main activity was participation in any economically productive activity. Such participation could be physical or mental in nature. Work involved not only actual work but also effective supervision and direction of work. It also includes unpaid work on the farm or family enterprise. However the workers were further categorised as 'main' and 'marginal', depending on whether they had worked for a total of six months or more in a year. This can lead to certain anomalies in the rural context since the agricultural work is very often seasonal and may not require six months or more for crop production.

The definition of 'work' determines who is counted as a 'worker' (Gleason 1991; Agarwal 1985). In the case of census data the example of definitional effects can be seen in the sharp decline of women's labour force participation in 1971 as compared to 1961. The reference period by which status as a worker was determined varied and in 1971 respondents were asked to identify their 'main activity'. This, given the nature of women's work, would often elicit the response of 'housewife' (Raju 1993), resulting in the said decline in female participation rates in 1971 (Mathur 1994).

In 1981 and 1991 the 'usual status' approach was adopted, where the question asked, was have you 'worked any time at all last year?' In the case of an affirmative answer, the respondents were asked what their main activities were. Those who worked for at

least 183 days (six months) in the preceding year were treated as main workers and those who did not work for this period were treated as marginal workers. Nevertheless, the definition of 'Work' in the 1991 Census does not take into consideration the household work done by the women, providing an example of how definitions can substantially alter the identification and recognition of the work done by women. The World Bank study on Gender and Poverty in India (1991) notes that there is a 'statistical purdah' imposed by the existing methods of measuring labour force participation which renders much of the women's work invisible. The lack of precision in defining and measuring what is meant by 'subsistence or household production' and 'domestic' work has led to very different answers to the question of where Indian women are working. In the specific context of agricultural work this was echoed by the Report of the Committee on the Status of Women in India, (1975: 162):

'While Census data classifies agricultural workers into only two categories, namely, cultivators and labourers, this classification does not, in fact, reflect the realities of the agricultural community.'

Within the conventional labour force participation indices figures show (World Bank report, 1991) that there is a far higher percentage of women (66% to 37% of men) who fall outside the labour force. Table 1 in the Appendix seems to suggest that the percentage of women who are working in the rural areas is only 27% as compared to the men at 52.43. However, if we extend the idea of work to include conventional domestic activity, then the picture changes and we find that almost 75% of women are working as compared to 64% of the men (see Table 2 in the Appendix).

The published data on female labour is dogged with the problems of under-enumeration and conceptual flaws, as well as inconsistent and inadequate measurement frameworks. This invisibility in the data is actually a reflection on misplaced societal perception of female labour as of secondary consequence and the male as the primary bread-winner, despite conflicting evidence (Gleason 1991; Agarwal 1985; Bagchi and Raju 1993). Maria Mies in her study of the lace-makers of Narsapur points out this fact, that definitions of women's work tend to obscure the amount, the intensity and the productivity of female work (Mies 1982). There are aspects of women's work which can come under conventional categorisation but there is substantially a lot more which does not. And this work done by the women, though seemingly unrelated to the conventional understanding, has a direct correlation to the agricultural productivity, and the total income, of the household.

The various studies undertaken in the past three decades identifying and highlighting the whole range of tasks done by the women and the need to include that as 'productive work', has resulted in the growing sensitivity towards female contribution in non-wage activities. For example, the Indian census in 1991 has attached an explicit rider in the identification of workers to include 'unpaid work on the farm or in family enterprise'.

However, the problems of enumeration and statistical accounts to encompass the range of activities carried out by women in agriculture as 'work' are indeed a reflection of the difficulties in conceptualising what constitutes 'work' as done by women. Indeed, as Ginwala, et al (1990) point out, the reasons why women's work

‘vanishes’ in economic and policy analysis are the ignorance and undervaluation that are prevalent as regards women’s work. Statistical exclusion leads to the undervaluation, through under-enumeration, while this process is reinforced by ignorance of the daily tasks and activities that women in fact carry out. As Bardhan notes:

‘The underestimation of peasant women’s economically productive work is more than a statistical problem that concerns planners and policy makers. It reflects and legitimises the devaluation of female labour in the household economy of peasants, helping the process of male-controlled accumulation’ (Bardhan 1985: 2214).

In the next section, I will highlight studies that have drawn out the range of women’s tasks and the need to include these within women’s ‘work.’

3.2. What is women’s work?

Traditionally, the definition of work is oriented towards capturing some form of remuneration or profit in return for labour and includes those who are engaged in a) wage and salaried employment, b) self-employment outside the household for profit, and c) self-employment in cultivation and household industries for profit (Gleason 1991; Raju 1983; Banerjee 1988). Unpaid activity, where a significant proportion of goods and services are produced for self consumption, results in the exclusion of the wide range of activities not geared towards exchange and market but for self consumption particularly at the subsistence level from the definition of ‘work’ (Bardhan 1985; Banerjee 1988; Gleason 1991; Bgachi and Raju 1993; Mukhopadhyay 1985). To counteract this the Indian census counts cultivation of crops as ‘work’ even

if it is for self consumption. However, the gulf between male and female participation rates continues because even in agriculture much of the related activity resulting in produce for self-consumption, primarily undertaken by the women, is invisible and cannot be captured by the existing concept of work.

Suggestions to increase the consideration of 'work' to include women's participation include the counting of all household work such as cooking, cleaning, tailoring, child and elderly care as economic activities. This would be on the basis that all these have a price in that they can be substituted for goods and services which would otherwise be paid for (Gleason 1991; Bagchi 1993). However Bagchi also remarks, that while it would make the role of women in the economy visible,

'...it (would) also cloud the real issues and a certain complacency may ensue because female labour would then no longer be invisible' (Bagchi: 1993: 5)

As understood in the above section the conventional definitions of economic activity would suggest that most Indian women are 'housewives' but if the definition is expanded and the methods of measurement become more precise the picture becomes clearer. For example according to the 1981 Census, only 14% of the women in India are in the labour force; however with the broadened definition work and more intensive methods of survey used by the NSS, this percentage increased to 39% (Gender and Poverty in India 1991) (see table 4, Appendix). Yet even this figure is acknowledged to miss a significant portion of women's gainful economic activity in the subsistence sector.

Further if the subsistence factor is also taken into account then the percentage of women participating in work goes even higher to 50.97%, that is, if it was to include activities such as maintenance of kitchen gardens, orchards etc., work in poultry or dairy, sewing, tailoring, weaving etc. for household use, water collection and tutoring of children (See table 6 Appendix).

3.2.1 Measuring women's work

Even after the use of the expanded concept it is unlikely that any large scale survey can actually reflect the complex pattern of the 'gainful activity' by which women and many men in poor families earn a livelihood. For that it is important to rely on micro level studies (Mies 1987). In such a context, the most reliable means of capturing women's work pattern is a time allocation study, because it does not depend on any prior definition of work. Such data which determines the actual time involvement in the expanded economic activities and conventional domestic activity alone can reflect the actual participation of women in work.

Sen (1987) has argued that the perception of contribution has to be distinguished from the time actually spent. The correlation is often absent that more work is necessarily perceived as valuable work, hence in studying perceptions, the disjunction has to be taken into account. Time allocation studies are useful to demonstrate precisely this issue: while facts show that women work longer than men, it is simply not accounted for as work. As has been found in other such time use studies carried out in South Asia, women spend more time working than men.

In their study of villages in two Haryana districts, Malit Kaur et al found that the average working day for women works out to be 13.2 hours. Farm work took up the maximum time, with an average of 2.6 hours, and food preparation and kitchen related work took up an average of 2.4 hours. The main activities within this were cooking and fetching water. Cleanliness of the house took up an average of 2.1 hours a day, and looking after animals 1.8 hours on average. Laundry, sewing etc., child care and processing of foodgrains for cooking took up 1.4 hours, 1.4 hours and 1 hour respectively. In this study about 59.1 % of the respondents said that they did not get any leisure time.(Malit Kaur, et al, 1988) Similar results are found in another study of Haryana by S. Munjal, et al. (1988).

K. Saradmoni has presented data on women cultivators and labourers in Kerala, Tamil Nadu and West Bengal. It is typical to find that the cultivators supervised work both within and outside the home. Apart from 'domestic' work, they also work along with labourers in the field, looking after their employment and payment of wages when the husband was not present. Those who had very little land worked on others' farms as wage labour in addition to this in order to supplement their income (Saradmoni 1988) Further, there are various supplementary tasks that women perform towards the process of agricultural production. In preparing food for the workers, taking food for other family members who may be in the fields, recruiting labourers and negotiating their terms, women are directly involved in the entire process.

Women's time allocation patterns in a study of two villages in Andhra Pradesh once

again affirm that women actually spend more hours in work than males. Studying time allocation patterns for various activities such as crop production, animal husbandry, building and construction work, trading, marketing, transportation, domestic work, fuel gathering, food processing and all other social and religious obligations for each worker in the household, it was found that in all categories, women worked longer hours daily than males (Sudha et al 1993). Maria Mies, in her study of some villages in Andhra Pradesh, again brings out the fact that in one of the villages, which had a mix of women agricultural labourers and cultivators, 96% of the women workers were engaged in agricultural work, while the corresponding figure for men was 65% (Mies 1987).

These studies bring out the unreliability of official data, and in most cases the actual level of female participation in agriculture is higher. A number of studies indicate that the available macro-level data, even that of the NSS, seriously underestimates the role of women in India's household-based, semi-subsistence agriculture. One such study, by the ILO, shows that by expanding from the narrower definition (see Table 6, Appendix) and using a simplified activity schedule instead of the standard 'yes' or 'no' questions, the labour force participation rates for the same sample of rural women in central India varied from 3% to 90% (Anker et al. 1993). This strongly suggests that there are very few rural women in India who are not in some sense 'farmers', that is working as wage labourers, unpaid workers in the family farm enterprise, or some combination of the two.

Further the time use method reveals that housework is important for all women in all economic groups. At the aggregate level, 58% of the women's time is spent in

conventional domestic activities. In the top two economic groups housework absorbs 96% and 79% of the women's work time, respectively. For the middle income groups, women's input into agricultural production as unpaid wage labour assumes major importance, absorbing about 50% of the women's time. This tapers off amongst the marginal farmer groups and drops steeply in the two lowest economic strata until it accounts for only 5% of the women's work time among landless wage labourers household. As expected, when one considers the 'outside' and work for wages, the opposite pattern emerges; substantial wage work (absorbing 16% and 38%, respectively, of their total work time) is found only in the two groups least endowed with land. (Gender and Poverty in India 1991).

3.2.2 Women's work in Rice Cultivation

In order to fully understand the exact nature and extent of women's work participation in rice cultivation, which is relevant to my area of study, it is helpful to consider the division of tasks in the range of operations. It is generally true to say that where there are operations to be carried out using machines or animals, these are done by men, and most work which requires direct manual labour is done by women. There are few tasks performed by both men and women in the same way.

Men are responsible for preparing the field by ploughing and then levelling the field. They are also responsible for digging of wells and the small irrigation canals that run between the fields. They must also make the bunds around the fields. Women 'help'

with this by putting the mud from the canals on the bunds, or removing stones and the like from the fields. Men also irrigate the fields before and after transplantation by drawing water from the wells with animals, or with the help of a simple lever system using a long bamboo shaft with a tin container usually attached at the end.

Women have to fertilise the fields with cow and buffalo dung before the actual planting of the seeds. This is done by the women manually as they also clear the seed beds of stones etc. When the rice plant has grown to its required height, transplantation is done. This process requires that each individual sapling be handled separately and is the most labour intensive part of rice cultivation. Weeding is also done exclusively by women and like transplantation involves no tools but is completely manual. The work in transplanting and weeding is particularly strenuous as it involves bending down to do the work for the entire time.

Though harvesting is done by both men and women, men do the threshing by driving animals over the rice, while women do the winnowing by fanning the grain to remove the husk. The drying, cleaning and processing of the grain is also done by women. This includes parboiling and drying of paddy and responsibility for storage and preparation for the next year's planting. They also prepare rice as storables in the form of puffed and flattened rice consumed throughout the year. In addition, women perform the 'supportive' tasks such as taking meals for other family members to the fields and the preparation of meals for hired labour.

Notwithstanding this large and varied amount of work done by women, the idea that it

is the men who do the 'harder' jobs remains. Ploughing, irrigation and work involving physical strength is considered more difficult in this division, and consequently, men are understood to do the more valued work. This is brought out by Mies (1986) as well as in responses in my field study.

4. Land to the tiller: Women and land reforms in India.

India, like most Asian countries, is characterised by a high population density and small farm size in the agricultural sector. The average farm size is between 2 and 4 hectares, and, despite redistributive land reforms, the distribution of farm lands is severely unequal. Farms exceeding 10 hectares occupy about 25 percent of the land. The rationale behind agrarian reform, as in many other countries, has been the desire to give the ownership of land to the tiller. In the search for ways to make the land more productive and the rural economy dynamic, it was sought, in addition to removal of intermediaries, to confer ownership rights to tillers who did not hitherto have ownership.

In considering land reform, I am concerned mainly with land distribution. Land distribution includes the distribution of land from households with landholdings higher than a stipulated upper limit to households owning little or no land, as well as the granting of ownership rights to current tillers. The literature dealing with the merits, success and failure of land reforms in India is vast. While it is true to say that it has been largely a story of the failure of land reforms, (Appu 1996; Padhi 1997; Jannuzi 1994) others argue for renewing the case for land reforms in South Asia

(Quibria 1995).

In this section I take the case of land reform policy in India in order to illustrate the absence of a recognition of women as workers and contributors to agricultural production in their own right in policies of the state. Hitherto, I have detailed problems regarding enumeration of women's work in statistical data, and argued that such problems are based upon a limited conception of what constitutes women's 'work'. I have further detailed aspects of women's activities gathered from time allocation studies with a view to bring out the discrepancies in official data and the reality of women's activities that constitute 'work'.

The case of land reforms policy illustrates the very process I have attempted to highlight. Although land reforms were based on principles of redistributive justice (no concentration of land in the hands of a few), empowerment (control to workers over the productive asset- land) and economic justice (control over means of production to reduce severe indebtedness and poverty of a majority of the agrarian population), the principle of gender equity was not integrated. The consideration of who constituted the subject group of 'farmers' or 'tillers' or 'tenants' was premised upon the male as the active worker/ producer, upon ignorance of the nature and extent of women's work, and lastly, of their contributions to the family's survival as a result of such work. Further, where women are taken into account, they are again treated mainly as 'dependants' or non - contributors to family income (Agarwal 1994, 1995).

The economic basis for the reforms has been the purported higher productivity of

smaller plots of land. This higher productivity is a direct consequence of the intensive use of family labour on small farms, where there is a differential in costs in using family labour and hired labour within a dual labour market arising out of the prospect of unemployment for the latter (Quibria 1995). As studies in the previous section have documented, women's role, particularly in supervision of tasks on family farms is significant. Agarwal (1994) also argues that supervision of hired labour is so important that it is entrusted only to family members. Even if large and small farms have families of equal size, the small farms clearly have more supervisors per acre, and hence can engage more profitably in labour - intensive cultivation. This labour input, as the various studies discussed earlier have shown, comes largely from women.

All the above notwithstanding, gender issues within land reforms have been virtually ignored. As Quibria flatly acknowledges,

‘.....We know very little about the impact of land reform on (the) issue, a fact that ought to give us pause.....faced by a lack of research directed specifically at the status of women under regimes of land reform, we are led to speculate on the status of women in peasant societies....’(Quibria 1995: 142).

An analysis of land reforms from a gendered perspective clearly shows that women are absent as the target of desired goals and objectives. Although officials with whom I spoke on the issue assured me that all leases and allocations under the land reform regulations presently were issued jointly to both spouses, men appear to continue as beneficiaries in greater number than women. In Sundargarh district as of the end of 1995, for example, while only 11 women had been granted leases under the Orissa

Land Settlement Act 1959, the number for men was more than double at 29. Similarly, 35 women, as opposed to 72 men, were allocated land under the Orissa Land Reforms Act 1962 within the period 1990-1995⁸⁸.

Further, land ceiling laws in many states explicitly overlook and ignore women as beneficiaries, in fact treating the female as a 'dependent', without entitlement to consideration as an independent unit. For example, in determining the fixation of ceiling for a 'family', the persons taken into consideration are the cultivator, his/her spouse, minor sons and unmarried minor daughters (Agarwal 1995; 1994). Moreover, adult sons receive special consideration, either allowing additions to be made to the total land to be owned by the household, or, as entitled to hold a specified amount of land in their own right. As Agarwal notes,

'.....Underlying the ceiling specification is clearly the assumption that those who are recognised either as part of the family unit or separately (as with adult sons) will be maintained by the land allowed...Under these enactments we thus have the extraordinary situation where most states do not give any consideration, when fixing ceilings, for the maintenance needs of unmarried adult daughters and married minor daughters, while giving consideration to all sons, whatever their age or marital status....' (emphasis added) (Agarwal 1994: 219; 1995: A46).

Clearly, the inclusion of only unmarried minor daughters is based upon the presumption that a daughter who is married is to be considered within her husband's household. But what of the adult daughter who remains unmarried? What is the allocation of land for her maintenance? In addition to a gross inequality being created, the result is also the perpetuation of notion that the daughter is a 'burden' to her

⁸⁸ Official communication received from Tehsildar of Sundargarh district.

parents, while the son maintains the resource-total, (or indeed, causes addition to it), of the family. The non-consideration of females within land reform laws is again explicit in the manner in which land is assessed for the ceiling. In most cases, the holdings of both the spouses, (where the wife also holds separate title to land), are aggregated in the assessment, while typically, it is in consultation with the husband alone that the decision is made as to whose portion of the aggregate will be declared surplus.

In considering law as culture, where law enshrines, legitimates and reinforces basic societal values, and in its reforming aspect where it is an agent for spearheading cultural change, the land reform laws may be seriously brought into question on the issue of increasing gendered access to land. If one considers the potential of law to engender new values, and generate changed expectancies and attitudes (Baxi 1986), land reform laws at best entirely missed the opportunity to foster more gender equitable values, ideas and symbols and at worst, deepen the already deep-rooted notions of women as unproductive persons who play no significant role in the family or nation's economy as producers or workers in agriculture; as dependants liable to be 'maintained' by the husband's resources and, ultimately, burdens to their parents if unmarried.

5. Conclusion:

That women's role in agricultural production is overlooked and undervalued in the legal framework is only a reflection of the situation in official and public accounts and

policy. The necessity to detail the extent of women's work in this area, and therefore to attempt an understanding of the major role that they play in the agricultural production, arises from the fact that most women do not actually control the land. The problem therefore is that the control over land by women must be increased in order that they are considered in policy as major actors in agricultural production, not merely 'supportive' ones.

It is apparent from various studies that there is gross underestimation of women's work participation, especially in agriculture, where they in fact play a significant role. This is especially true of wage labourers who, generally being the poorest section of the society, are often the mainstay of their family's welfare, and of small and marginal peasant women, whose work is particularly difficult to evaluate in terms of the contribution to family income and resources. In the case of landless labourers, women's income is a major contribution to household income - essential for survival - even where wage rates for women are lower than for males. This fact cannot be emphasised enough because the conventional development theory often assumes that even when Indian women work in agriculture, their income is largely supplementary to that of the males in the households (Mencher 1993).

Nonetheless, all the studies also point out that women in fact lack any control over the inputs to agricultural production such as land, institutional credit, education and training in farming methods. The first step in my view is to recognise that women are in fact significant contributors in agricultural production. Enhancing and supporting

women in this role will allow for better access to the necessary inputs for growth. This in turn will provide the basis for women to negotiate control of the primary resource, land, by enabling a starting point from which women can in fact make decisions regarding resource allocation within their families due to increased recognition of their contribution and hence increased legitimacy of their demands.

It has also been argued (Basu 1990) that in order to analyse the agrarian structure and its role in development, it is necessary to take into account other non-economic factors such as interpersonal beliefs that prevail in the community, the nature of land tenure and the structure of property rights. Speaking of the role of interpersonal esteem in society, Basu points out that how hard people work, and whether they try and innovate, must be understood in terms of the social status accorded to those activities in a particular society.

The invisibility of home-based work is tied to a general neglect of the household economy and a narrow definition of work which precludes its inclusion in official statistics. Considerable overlap may exist between the household and extra-household work, the former expanding to use up extra-household work time during special or crisis occasions, and the latter expanding to encroach upon household work time during peak agricultural periods. The household work sphere also expands whenever needed to include extra-household work that is income substitution, referred to as 'status production work' (Sharma and Singh 1993). Recognition of women's 'work' as inclusive of the range of women's tasks is therefore central to the dominant conception of 'work', gender roles within the society and the cultural ideology which

determine such roles.

In the case of women and ownership of land within the agrarian sector, a gendered access to land requires law to create a basis of legitimacy on two counts: cultural as well as socio-economic. A gender equitable land reform policy could endow hitherto landless female agricultural labourers with ownership of land, as well as consolidate the ownership of those with titles to land. However, once the land is legally within a woman's right to ownership, the land is likely to fall within the resource base of the household collectively, and the issue then becomes one of women's ability to bargain for the resource within the household.

The perceptions of legitimacy, based upon perceptions of contributions of women working in agriculture, by both women as well as society at large, are crucial therefore in two aspects. Firstly, a recognition of the work and contribution of women in agriculture, and as producers in their own right, not merely dependants, or in supportive roles, would have the direct effect of greater gender equality within land reforms. Secondly, such recognition, in the policy framework of the state in its developmental policies generally and the legal framework in particular, can lead to the greater effectiveness of law in its effort to create new values and ideas, in particular that of Hindu women's ownership of land. The effect of gendered land ownership, sought to be achieved in particular through the Hindu Succession Act, is dependent in part on the creation of a new basis of legitimacy through recognition of women's contribution to and role in agriculture. At the same time that the hitherto entrenched cultural ideology that excludes women must be replaced by new values.

CONCLUSION

‘We cannot speak of helping women to stand on their own feet if we do not think of ways women can have access to and control over money, land and house. The first step is to reject the gift system and ask for a share in the family property. A women should overcome the feeling that the home she shares with her husband is not hers. Secondly, legally speaking she should inherit and also be the joint owner of her husband’s property because she too puts in her labour’ (The Rural Women’s Liberation Movement in Gandhi and Shah 1992: 243).

It is widely acknowledged in India that legal rights guaranteed to Hindu women have by and large not been exercised by them (Devi 1994; Agarwal 1994; Sharma 1989). This thesis has attempted to provide a deeper understanding of the factors that may contribute to this. It has argued that a clearer understanding of the specific beliefs, ideologies, material and social structures which inform women’s life-worlds and constitute their particular location, would be the starting point for a critical evaluation of law’s effectiveness.

I have argued that, in order to address Hindu peasant women’s ability to claim land, the analysis of law must take account of their particular locations and the constitutive realities of their lives. I have further argued that this means, in the context of Hindu peasant women, the need to address them both as Hindu women *and* peasant women. Whereas the legal regime establishes their claim to independent ownership as a right, I have argued for the need to take account of their interests as the basis for establishing their claim to land ownership. Further, insofar as the institution of the ‘right’ focuses on their identity as Hindu women and locates their claim within the family, the parameters of such a right are constructed by principles within religious ideology both

by statute and judicial pronouncements, as well as in the normative understandings which inform Hindu women's lives in rural areas. I have argued that, in addition, addressing them as peasant women, whose claim to land ownership is located within the household, enables us to take account of their role as workers and producers in agricultural production as a constitutive aspect of their lives as peasants. This provides the basis upon which we can evaluate their interest in land ownership and the analyse the particular ways in which such interest is impacted upon by the constitutive aspects of their lives as Hindu peasant women in rural India.

I have argued that the bargaining approach, particularly as developed by Sen and Agarwal, provides us with a framework that enables us to take account of the norms and processes that affect women's access to resources. In addition, it allows for the analysis of the interaction between the ideological and material conditions that impact upon such access. The bargaining provides a broader perspective to address rural women's claim to land ownership within their realities as Hindu peasant women in small farming households. From this starting point, I have evaluated their ability to negotiate for land within the existing legal framework. Drawing upon responses from Hindu peasant women gained through field research in Western Orissa, I have addressed two aspects as they operate to determine their bargaining position: perceptions of self-interest (particularly in the interest to own land independently) and perceptions of contributions (through work and production in agriculture). I have evaluated the existing legal framework to the extent that it incorporates and reflects women's perceptions in the field.

In the field study, women have unambiguously expressed their reluctance, as Hindu women, to substantiate their claim to parental property through succession. Their identification with their roles as mothers, daughters and sisters is informed by the Hindu religious ideology to which they subscribe. Their roles as mothers, sisters and daughters is predicated upon the identification of their interest with their (husband's) family on the one hand, and separation from the natal family on the other. The consequence of this is the preclusion of their individual self-interest, where such preclusion is reinforced due to the acknowledged non-membership of a Hindu female within her natal family. Further, while there is a separation of their interest from their natal family, the very separation is predicated upon religious ideology positing females' exclusion from independent property ownership. In this case, therefore, the existence of an interest separate from the natal family does not lead to an expression of that interest in terms of independent property ownership of their share through succession. Independent ownership of land through succession to parental property therefore does not form part of self-interest in the case of the Hindu peasant women with whom I conducted my field research.

Analysis of the legal framework promoting their right to land, particularly through the HSA, shows the extent to which law in fact reflects these ideological standpoints. This may be seen in two respects. First, both an evaluation of the statute and judicial decisions on various aspects of Hindu Law establish that law reaffirms constitutive aspects of Hindu women's roles and identities which exclude their claim to land. Second, insofar as the right to Hindu women's ownership of property is a change introduced by the law, which in fact contravenes their role and position which

predicates their exclusion from property, there appears to be a co-existence of contradictory propositions established by law. In this, the right to ownership is effectively overcome by law's simultaneous reaffirmation of Hindu women's traditionally constituted roles.

The ideological background of the legal framework in post-independent India reveals the construction of 'Hindu' women and their right to ownership through succession within religious discourse. To the extent that Hindu law has been, and remains, founded upon the dominance of religion as the organising principle to a significant extent, the efforts to address the particular issue of females' property rights have been bound by the tension to retain, embody and reflect the overall structure and premises of traditional Hindu law, as well as the attempt to change particular aspects within it, particularly by introducing females' shares to parental property through succession.

The HSA embodies this tension. The retention of the Mitakshara coparcenary reiterates the fundamental division drawn within traditional Hindu law between males and females in respect of property rights. The continuance of this is antithetical to females' proprietary rights, yet this is precisely where the law attempts to locate its introduction of females' right to independent ownership of property. The responses of women in the field, presented in Chapter Three, clearly reflect their lack of acceptance of females' rights to parental property within the traditional family structure. To the extent this structure corresponds to the underlying framework of the Hindu family upheld by the law, it overrides the effect of the introduced changes.

In evaluating women's self interest in land ownership, it would be difficult to conclude that the law, both in its statutory expression, as well as religious and cultural norms, fosters such an interest. Changes in the legal provisions affirming women's equal right to inheritance in the parents' property are premised on the existence of the following aspects of the cultural and social reality of Hindu women in India:

Firstly, the identification of her personhood independent of her relations to others in the family. Secondly, the continuing identity of a woman as a member of her parents' family even after marriage, and in which she can therefore have a legitimate expectation. Thirdly, the willingness of women, as sisters, to jeopardise their relations with brothers and the security they may expect thereby, by competing with brothers for the same interest in land.

The assumptions upon which the law is based continue to be unrealised and in this the law itself plays a significant part, reinforcing the ideology that excludes such self-interest. Hindu cultural ideology establishes the normative force of women's subservient, dependent and familial role. The internalisation of the norms by women, combined with the perpetuation of Hindu norms in law and the courts, strengthen their operation to the extent that there is very limited scope for the emergence of women's interests as individuals and independent of relations to others. Although the reformative aspects in legal provisions are aimed at changing this to some extent, the legal provisions in fact operate to negative the impact, by incorporating and promoting those very aspects of women's position and social role that militate against independence. As I have shown in Chapter five, the application of law by the

courts reinforces this.

The introduction of females' equal rights to succession in Hindu law is inadequate to strengthen Hindu women's bargaining position. The legal framework in fact strengthens the lack of females' individual self-interest to claim a share in parental property. The resulting position is one where the law, although it seeks to enhance Hindu women's independent ownership of land, by its very framework ultimately serves to perpetuate women's inability to own land.

I have argued that the context of law must take account of the material aspects of women's lives in addition to the ideological, where analysis of gender and property have shown the two to be inextricably intertwined. The development of scholarship on legal pluralism in recent times, particularly on Scandinavian polycentricity and as applied to gender and law issues in Africa, provides a broader framework in which to analyse the scope of law's domain, allowing both for the evaluation of the impact of religious norms upon women's lives, as well as the expansion of legal analysis within the household and the workplace. The breadth afforded by this application of this form of legal pluralism to take account of the totality of structures and processes, informed by a variety of norms, is strengthened by its insistence on the need to contextualise law and take account of women's lives as they are actually lived.

Whereas the issue of Hindu women's right to property has been framed by law in exclusively ideological terms, the bargaining approach drawn from within economic analysis enables us to expand the framework of law by allowing the incorporation of

the material aspects of women's lives within the analysis. This allows for a more complete evaluation of the factors that affect women's ability to access property, and therefore to evolve an understanding of law which has a broader frame of vision. Broadening the scope of analysis to incorporate Hindu peasant women's role in agricultural production, I have addressed their material realities as workers and producers as the basis of their interest in land ownership. In addition to an evaluation of their self-interest, as it is determined by religious ideology and law's perpetuation of the same, I have evaluated the effect of perceptions of their contribution upon their ability to claim land ownership and the impact of law in reflecting such perceptions.

Whereas the liberal principles of the legal and constitutional framework enable formal guarantees of equality, they also operate to exclude actual inequalities from the realm of the law. I have argued that there is a division maintained between family/work, analogous to the public/private distinction implicit within liberalism. This serves on the one hand, to reinforce the operation of religious ideology in women's lives, (within the 'private'), and to exclude from the purview of law the work that peasant women are engaged in (within the 'family').

The case of land reforms in India provides an example of law's non-recognition of women outside the 'private' sphere and in the 'public' domain. It illustrates law's unwillingness to recognise women's lives as determined not by religious ideology alone, but by their material conditions within subsistence agriculture as well. Although land reforms were based on principles of redistributive justice, empowerment and economic justice, these principles were deemed by law makers not

to apply to women. In instituting a policy to transfer control of productive assets to the workers in order to alleviate the severe poverty of sections of the agrarian population, the assumption was that males constituted the subject group of 'farmers'. This was premised upon the assumption that the male is the active worker/producer and ignorance of the nature and extent of women's work.

The undervaluation of women's role in agricultural production in the legal framework is a reflection of the situation in official and public accounts and policy. The necessity to highlight women's role in agricultural production arises from the fact that most women do not actually control the land. The problem becomes circular: insofar as women are not considered to be significant to agricultural production, they are not given control over land, the productive asset; and to the extent they remain outside the category of landholders, they fall outside the purview of agricultural policy. A consideration of women as major actors in agricultural production, not merely 'supportive' ones, within policy requires increased recognition of women's contribution to agriculture and greater control over the productive assets.

A precondition for the correction of the problem, therefore, is to make this work visible through research and publications in order to help mobilise social and legislative action. In the event legislation does exist, as in the HSA and land reforms, the basis for creating new attitudes and expectations, both on the part of women themselves and society in general, must be created in order to give effect to changes envisaged within the legislative efforts. Thus, access to land must be given primacy in applying the HSA, while the land reform laws must fully address and include women.

The role of women themselves in making this effective must be highlighted through education and information.

The preceding discussions in the thesis have included a consideration of both the ideological and material realities of Hindu peasant women's lives which affect their effective claim to land. The field research conducted among Hindu peasant women in rural Western Orissa has brought out the operation of socio-cultural values, which construct and define their particular roles and position as Hindu women, in their lives. That the normative force of these values, derived from religion, results in an ideological framework which excludes them from having a claim upon land, particularly that belonging to the parents, is clearly expressed by the women themselves.

The situation with regard to property belonging to the husband, however, was quite different. They identify their interest with that of their (husband's) family. In fact, they express such interest as totally subsumed within that of the family. However, whereas their membership within the husband's family is granted by Hindu norms, their interests are conceived as legitimate only in terms of the community of the marital family. To this extent it precludes their legitimate individual self-interest to independent ownership of any valuable resource, particularly land. However, their awareness of the tenuous nature of their position within the husband's family also forms the basis for the emergence of an alternative understanding, that their independent interests, and substantiation of these through property ownership, *should* be accorded legitimacy. Thus, they have argued that they should be entitled to a share

in their husbands' property not only as widows upon the husband's death, but during the entire period while the marriage subsists. Although they acknowledge that under prevalent religious norms they do not have a legitimate claim to independently own a share in their husband's property, they would *argue* for the legitimacy of such a claim. This brings out the need for law to incorporate this and develop a regime of marital property. There is a growing recognition of the need for such a regime in India but at present the debate is being structured by the needs and interests of women with access to formal labour markets, particularly as professionals.

To what extent can their significant role within the material structures of subsistence production and survival strategies provide the basis for a legitimate claim? Given that these women are fully aware of their role and contribution to agricultural production, through what processes may this be translated into establishing effective means to promote their claim to land?

In the case of women and ownership of land within the agrarian sector, a gendered access to land requires law to create a basis of legitimacy on two counts: cultural as well as socio-economic. Perceptions of women's contributions, in that they affect perceptions of legitimacy of women's claim to land, are crucial in two aspects. Firstly, a recognition of the work and contribution of women in agriculture, as producers in their own right, not merely dependants or in supportive roles, would have the direct effect of greater gender equality within land reforms. Secondly, such recognition, in the policy framework of the state in its developmental policies generally, and the legal framework in particular, can lead to the greater effectiveness of law in its effort to

create new values and ideas, in particular that of Hindu women's ownership of land. The effect of gendered land ownership, sought to be achieved, in particular through the Hindu Succession Act, is dependent in part on the creation of a new basis of legitimacy through recognition of women's contribution to and role in agriculture. At the same time that the hitherto entrenched cultural ideology that excludes them must be replaced by new values.

The cultural and social matrix within which they are located, and with which they identify, does not allow Hindu women qua Hindu women to exercise their right, albeit protected by law. There is a significant gap between their lived understandings and perceptions and those promoted by law; a gap that effectively negates any significant intersection and interaction. Where there may be an intersection, it would most likely be through challenges brought to the courts, where the law in fact provides a site for subverting challenges to the normative socio-cultural order and understandings (Basu 1999). However these would be the exceptions rather than the rule; moreover they are indicative of the power of law being used to defeat its expressed objective. On the other hand, to the extent that law may be powerful in setting up norms, ideologies and meanings in society, it may be seen to be reinforcing precisely those norms and frameworks that are based upon the exclusion of women.

A critical evaluation of law in terms of its effectiveness may begin and end with an analysis of its internal structure, form and the content of its particular provisions. The basis for critical evaluation here is the inherent logic of statute, decision or other legal instrument; analysis is made of its logical coherence and ultimate validity.

Loopholes/fallacies within it may be identified from and addressed to the logical structure which the law sets up. Such an analysis undoubtedly furnishes us with a critical insight into the potential limitations of law in achieving its objective. In other words, such an analysis allows us to expose gaps in the law's actual form, so as to ultimately raise questions about its content. Thus, a formal evaluation of the Hindu Succession Act brings to light the inconsistencies within its provisions. In bringing these to light within the law, we are able to discuss the possible impact of these inconsistencies upon the goal of protecting women's equal rights under succession. This in turn enables us to raise issues regarding its ultimate achievement/fulfilment of its objective and purpose.

We may, however, advance our understanding of law's impact by adding to such a study the analysis of the social context and reality within which the legal provisions are meant to be applied. We supplement formal analyses by asking of legal provisions what their social implications, causes or effects are (Harris 1997). This thesis has attempted to go beyond a formal/institutional understanding of law by evaluating it within its specific socio-cultural context. It evaluates law's potential to be relevant to Hindu women's lives by a discussion of the social, cultural and material structures of their lives, and the way in which these affect the impact of law.

The discussion of Hindu law as it has been constituted by colonial engagement, on one hand, and as it operates to reinforce the normative force of religious principles in women's lives on the other, has significance for arguments towards a Uniform Civil Code ('UCC') in India. Whereas there has been much discussion and demand for the

enactment of a UCC, it must be asked, in the light of conclusions resulting from this thesis, what may be the content of such a Code? Where the purpose of the Code would be towards removing religion as the basis of law (Parasher 1997), the question is whether this would in fact be a realistic foundation of law? Insofar as rural women continue to be located within social, economic, political and cultural structures where these are founded upon precepts derived from religion, can a presumption to the contrary by law be valid? Can law presume the non-existence of the normative force of religion and yet be reflective of and pertaining to women's lives? To what extent can law ignore such realities and yet be effective?

On the other hand, this thesis has shown the difficulties of law adhering to religious principles while at the same time attempting to reform certain aspects within them, without establishing a basis that is meaningful to the people it addresses (Bilgrami 1997; Smith 1963). Again, where such a Code could provide the starting point for the disengagement of law from active engagement with religion, particularly in the multi-religious context of India, perhaps we need to explore further other principles that are relevant to people's lives (Thapar 1985; Gandhi and Shah 1992). We need to explore norms and values which simultaneously form part part of people's decision making in their everyday lives, but which may not be based upon religious ideology.

For example, whereas the 'religious' aspect of parents' relationship to their daughter may be based upon their (religious) duty to secure her marriage, and separation from her subsequent to her marriage, perhaps the content of the 'duty' may be explored to the extent which it could include the provision of basic endowments such as education

and health. Or, whereas married women must, of necessity of their religious beliefs, take account of their honour and modesty and be constrained in independent action, perhaps we could explore to what extent their action within a group of women could foster independent action without a violation of their beliefs.

On the issue of independent ownership, women clearly believed they were entitled to a share of a husband's land not only as a widow, or upon separation while he may be alive, but also while the marriage was subsisting. In such a situation, we need to explore means of establishing women's claim and entitlement to such property without necessitating a formal separation or institution of women's independent ownership. Thus, whereas the property could be held jointly by both husband and wife, or singly by the husband alone, the wife could be recognised as having a charge over it (to the extent of her share) for the purposes of transfer through sale, credit or gift. Where the claim of the creditor, buyer or transferee has to be realised, her independent ownership/title could be effected for such purpose.

The same principle could also be extended to the daughter's share in parental property. This would make unnecessary the active assertion of her claim to her share by the daughter, and perhaps also mitigate the fear of endangering good relations with her family. Given that land is very rarely bought or sold in rural areas, the value of the land is greatest as a source of credit and, arguably, would fulfil a significant need in the case of cultivators. In this situation, creating a lien over the property, which need not be demarcated in title and ownership until a transfer is to be effected, leads to a greater potential for its use by women. Both daughters and wives could use their

(residuary) right to a share in the property fare more effectively than when required, as at present, to assert their claim in opposition to sanctioned beliefs and norms by which they live and to which they are subject.

On the issue of recognising women's work, we have a concrete lead to follow from the women themselves. They believe that their work and contribution to agricultural production is significant, and argue for the recognition of their role as such. This leads us to explore the ways through which such recognition may be given. We need to explore the facilities that may be generated to women as workers and identify the areas in which this may be done. We need to explore and identify the means through which recognition of women's role in agriculture may be made and institutions and functionaries through whom action may be taken. A starting point could be the provision of rural credit on the basis of work participation by various agencies. This could be worked in conjunction with the earlier point made regarding land titles. We also need to explore the training and development programmes addressed to women as workers within agriculture.

One of the areas to consider is the regime of land reforms operative in India today. We need to address in greater depth the foundations of such a regime, and acquire deeper insights into the ways gender may form an integral part of our understanding. We need to address the assumptions underlying land reform policy regarding the nature of the family/household to whom land is allocated, according to which the interest of the wife is subsumed under that of the husband. Although officials with whom I spoke on the issue assured me that all leases and allocations under the land reform regulations

presently were issued jointly to both spouses, men appear to continue as beneficiaries in greater number than women. In Sundargarh district as of the end of 1995, for example, while only 11 women had been granted leases under the Orissa Land Settlement Act 1959, the number for men was more than double at 29. Similarly, 35 women, as opposed to 72 men, were allocated land under the Orissa Land Reforms Act 1962 within the period 1990-1995.

Although a consideration of these measures may indeed lead us to a consideration of structures and operations outside the realm of formal law, perhaps, it would also lead to an acceptance of the limits of law in affecting people's lives. On the other hand, the policy framework set out by law is a very powerful framework for inducing change and supporting change in other areas of state policy. The role of law in moving away from setting up religion as the basis of people's actions, could lead to an emphasis, even the encouragement, of addressing other fundamental values by which people live. By taking account of women through land reforms, for example, a framework is established which legitimises the recognition of women's work for other frameworks. Law can spearhead this process. The challenge that exists is to develop ways in which law may do so.

The issue of land ownership is a difficult one even when one considers only two factors such as caste and class in the Indian society. To introduce the gender aspect makes it far worse, since the entire gamut of economic, social, cultural, religious and political forces that make up the patriarchal ideology are brought into play. However in my view, though land ownership is the issue where gender biased ideology comes

into play, it is possible to separate the issue of economic empowerment from empowerment in socio-cultural and political terms as the starting point of the analysis in law's approach to the question. It is not possible to separate actual empowerment into these spheres as the outcome in reality. However, precisely because of the overwhelming power of land issues to exacerbate other issues of gender bias, it is necessary to find a starting point in law that includes a focus on land issues in their economic as well as ideological aspect.

By drawing upon analyses developed from disciplines other than law, in particular the bargaining approach as developed by Sen and Agarwal, the depth of legal analysis becomes enriched. On the issue of gender and access to resources, the fields of anthropology, economics and development policy has generated a wealth of understanding of the various factors and processes that affect women's access to resources at various levels and in different spheres. In this discussion of rural women's claim to land in India, the insights from these disciplines have broadened the scope of law's purview. They have brought within the legal framework the possibility for analysis of women's claim to land as not only ideologically constructed, but materially affected. In this, legal analysis comes closer to encompassing the totality of factors that affect the subjects to who it is addressed. Where rural women's claim to land may be brought within legal analysis to address them not only as 'Hindu' women but also peasant women; where their claim may be seen to arise not only within the structure of the 'family' as ideologically constructed, but in the household as affected by their work and contribution to agriculture, a legal framework may yet be created which constructs rural women's claim to land ownership effectively.

APPENDIX

<i>POPULATION/ WORKERS</i>		<i>PERSONS</i>	<i>MALE</i>	<i>FEMALE</i>
	<i>TOTAL</i>			
POPULATION		836,605,522	433,791,705	402,813,817
WORKERS		314,903,642	223,506,153	91,397,489
% OF WORKERS		37.64	51.52	22.69
	<i>RURAL</i>			
POPULATION		621,267,297	320,062,940	301,204,357
WORKERS		249,330,072	167,822,985	81,507,087
% OF WORKERS		40.13	52.43	27.00
	<i>URBAN</i>			
POPULATION		215,338,225	113,728,765	101,609,460
WORKERS		65,573,570	55,683,168	9,890,402
% OF WORKERS		30.45	48.96	9.73

Table No. 1 Total workers in India as of 1991

The data excludes the state of Jammu & Kashmir where the 1991 Census was not conducted.

Note: Workers include both main workers and marginal workers.

Source: Census of India 1991 - Paper 3 of 1991 - Workers and their distribution, (Statement 3.1).

<i>TYPES OF WORK</i>	<i>MALE</i>	<i>FEMALE</i>
REGULAR PAID WORK	11.72%	2.00%
CASUAL WORK	16.05%	11.43%
SELF EMPLOYED	26.72%	7.72%
UNPAID FARM LABOUR	8.29%	12.71%
EXPANDED DOMESTIC	0.49%	13.90%
CONVENTIONAL DOMESTIC	0.42%	24.76%
EDUCATION	22.82%	11.35%
OLD AGE/OTHERS	13.49%	15.03%

Table No. 2

Source: World Bank Report of Gender and Poverty in India 1991.

STATES		TOTAL WORKERS	CULTIVATORS %	AGRICULTURAL %	HOUSEHOLD INDUSTRY WORKERS %	OTHER WORKERS %
ALL INDIA	TOTAL	314,903,642	38.75	26.15	3.63	31.47
	MALE	223,506,153	40.01	20.90	3.33	35.76
	FEMALE	91,397,489	34.55	43.56	4.63	17.26
STATES ANDHRA. P.	TOTAL	30,038,082	27.76	40.76	5.04	26.44
	MALE	18,647,921	30.65	30.55	4.42	34.38
	FEMALE	11,390,161	22.39	59.66	6.20	11.75
ARUNACHAL P.	TOTAL	407,362	61.06	4.90	0.64	33.40
	MALE	250,062	47.69	4.82	0.67	46.82
	FEMALE	157,300	83.99	5.03	0.58	10.40
ASSAM	TOTAL	8,108,785	51.24	12.89	2.51	33.36
	MALE	5,827,087	51.20	12.72	1.90	34.18
	FEMALE	2,281,698	51.41	13.49	4.66	30.44
BIHAR	TOTAL	28,111,596	43.41	37.21	2.69	16.69
	MALE	21,649,718	45.81	33.02	2.66	18.51
	FEMALE	6,461,878	31.54	57.92	2.86	7.68
GOA	TOTAL	411,633	14.77	9.20	3.38	72.65
	MALE	293,871	12.28	6.66	3.38	77.68
	FEMALE	117,762	22.18	16.75	3.38	57.69
GUJRAT	TOTAL	16,950,692	33.46	22.98	2.18	41.38
	MALE	11,561,200	34.12	17.62	2.09	46.17
	FEMALE	5,389,492	30.84	44.38	2.55	22.23
HARYANA	TOTAL	5,031,198	39.38	19.53	2.99	38.10
	MALE	4,171,877	38.44	18.89	3.08	39.59
	FEMALE	859,321	47.28	24.81	2.23	25.68
HIMACHAL P.	TOTAL	2,160,353	65.19	3.52	2.14	29.15
	MALE	1,273,149	56.49	4.06	2.62	36.83
	FEMALE	887,204	86.43	2.21	0.97	10.39
KARNATAKA	TOTAL	18,744,445	34.36	28.75	2.81	34.08
	MALE	12,316,261	37.82	20.32	2.73	39.13

	FEMALE	6,428,184	26.01	49.06	3.01	21.92
KERALA	TOTAL	9,305,143	12.38	25.66	3.92	58.04
	MALE	6,803,607	14.38	22.61	2.77	60.24
	FEMALE	2,501,536	5.74	35.76	7.76	50.74
MADHYA. P.	TOTAL	28,238,537	51.87	23.50	3.08	21.55
	MALE	17,859,104	52.25	17.70	2.95	27.10
	FEMALE	10,379,433	50.98	37.33	3.40	8.29
MAHARAST RA	TOTAL	33,737,036	32.81	26.91	3.07	37.21
	MALE	21,168,498	29.85	18.75	3.27	48.13
	FEMALE	12,568,538	38.87	43.59	2.65	14.89
MANIPUR	TOTAL	758,118	57.10	9.28	7.09	26.53
	MALE	443,949	56.19	6.73	2.92	34.16
	FEMALE	335,715	58.40	12.89	12.98	15.73
MEGHALA YA	TOTAL	758,118	56.25	13.33	1.00	29.42
	MALE	443,949	50.76	12.58	1.01	35.65
	FEMALE	314,169	64.61	14.47	0.97	19.95
MIZORAM	TOTAL	338,724	60.89	3.73	1.25	34.13
	MALE	193,912	52.59	3.96	1.24	42.21
	FEMALE	144,812	73.83	3.38	1.25	21.54
NAGALAND	TOTAL	537,314	68.23	4.73	1.51	25.53
	MALE	312,667	57.84	4.49	1.42	36.25
	FEMALE	224,647	82.81	5.07	1.65	10.47
ORISSA	TOTAL	11,826,915	44.21	28.85	3.47	23.47
	MALE	8,588,073	48.35	22.96	3.02	25.67
	FEMALE	3,238,842	26.03	54.73	5.42	13.82
PUNJAB	TOTAL	6,348,325	32.83	23.31	2.93	40.93
	MALE	5,704,804	33.89	23.41	2.73	39.97
	FEMALE	643,521	17.71	21.90	5.75	54.64
RAJASTHA N	TOTAL	16,911,475	59.18	10.13	2.84	27.85
	MALE	11,253,729	56.73	8.06	2.98	32.23
	FEMALE	5,657,746	68.92	18.33	2.25	10.50
SIKKIM	TOTAL	215,738	58.22	8.01	1.75	32.02
	MALE	115,733	51.94	8.13	1.94	37.99
	FEMALE	100,005	70.18	7.78	1.37	20.67

TAMIL NADU	TOTAL	24,555,559	24.94	34.16	4.66	36.24
	MALE	16,087,046	26.59	25.98	3.84	43.59
	FEMALE	8,468,513	21.33	52.02	6.44	20.21
TRIPURA	TOTAL	860,752	38.04	23.53	1.95	36.48
	MALE	669,753	38.12	22.02	1.75	38.11
	FEMALE	190,999	37.66	30.70	2.91	28.73
U.P.	TOTAL	44,860,976	52.84	19.23	4.38	23.55
	MALE	36,481,225	53.81	16.86	4.20	25.13
	FEMALE	8,379,751	46.38	35.13	5.59	12.90
WEST BENGAL	TOTAL	22,009,040	28.42	24.53	4.98	42.07
	MALE	18,213,097	30.16	22.64	3.01	43.29
	FEMALE	3,795,943	16.53	37.50	12.24	33.73

Table No. 3

Source: Census of India 1991 - Paper 3 of 1991 - Provisional Population Table.

The data above excludes the state of Jammu & Kashmir.

INDUSTRIAL CATEGORY	1971		1981	
	MALE	FEMAL E	MALE	FEMAL E
TOTAL MAIN WORKERS	100.00	100.00	100.00	100.00
CULTIVATORS	45.90	29.84	43.70	33.20
AGRICULTURAL LABOURERS	21.54	50.86	19.56	46.18
LIVESTOCK, FORESTRY & FISHING	2.24	1.91	2.34	1.85
MINING & QUARRYING	0.54	0.40	0.62	0.36
SUB TOTAL PRIMARY SECTOR	70.22	83.01	66.22	81.59
HOUSEHOLD INDUSTRY	3.42	4.24	3.18	5.59
OTHER THAN HOUSEHOLD INDUSTRY	6.70	2.77	8.92	3.55
CONSTRUCTION	1.36	0.65	1.81	0.80
SUB TOTAL SECONDARY SECTOR	11.48	7.66	13.91	8.94
TRADE AND COMMERCE	6.37	1.78	7.33	2.04
TRANSPORT AND STORAGE	2.86	0.47	3.32	0.38
OTHER SERVICES	9.07	7.08	9.22	7.05
SUB TOTAL TERTIARY SECTOR	18.30	9.33	19.87	9.47

Table No. 4

Note: Figures Exclude the state of Assam

Sources: Census of India 1971, General Economic Tables, Series I, India, Part II B and Census of India 1981, Series I, India Part II, special report and tables based on 5% sample data.

REGION/STATE	MAIN WORKERS	MAIN MARGINAL AND
EASTERN REGION		
ASSAM	8.15	13.94
BIHAR	17.53	27.49
ORISSA	26.79	34.69
WEST BENGAL	11.16	22.95
SOUTHERN REGION		
ANDHRA PRADESH	46.63	53.60
KARNATAKA	37.58	46.50
KERALA	23.87	37.11
TAMIL NADU	43.81	51.89
CENTRAL REGION		
MADHYA PRADESH	43.22	51.60
UTTAR PRADESH	17.01	29.88
WESTERN REGION		
GUJARAT	35.14	43.48
MAHARASHTRA	47.16	51.87
NORTHERN REGION		
HARYANA	18.30	31.18
PUNJAB	7.00	32.08
HIMACHAL PRADESH	46.03	52.61
JAMMU & KASHMIR	4.53	29.14
RAJASTHAN	40.40	53.87
ALL INDIA	28.85	39.06

Female Labour Force Participation, By States for 1983 (IN %)

Table No. 5

Source: 1983; NSS 38th Round; Sarvekshana, Vol. IX, Nos. 4, April 1986, Table 1.

Work Participation Rates in Rural India, 1983/84 (Conventional and Expanded Concepts)

LABOUR FORCE CONCEPT	MALE	FEMALE
CONVENTIONAL	63.22	38.74
EXPANDED	63.83	50.97

Table No. 6

Source: Kalpagam, 'Women in the Labour Forces: An analysis of NSS Data', 1988.

Female Activity Rates under different Labour Force Measures (Based on key word questionnaire and activity schedule)

LABOUR FORCE CONCEPT	KEY WORD	ACTIVITY
PAID LABOUR FORCE	3.1	12.7
MARKET LABOUR FORCE	6.6	31.8
ILO LABOUR FORCE	15.7	88.3
EXTENDED LABOUR FORCE	15.8	90.9

Table No. 7

Source: Ankar, Khan and Gupta (1988), Tables 4.2&4.5

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