

Chapter 1

Introduction

Hindu women in India have independent right of ownership to property under the law of succession.¹ However, during the last five decades of its operation not many women have exercised their rights under the enactment (Sharma, 1989; Agarwal, 1994; Devi, 1994; Brown et al., 2002). This book studies the construction of Hindu women's claim to independent land ownership within law in India.

For the predominantly rural population in India with subsistence agriculture as the mainstay in conditions of poverty, land assumes significance as the subject of 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 part of the rural population. In response to this reality statutory provisions have been introduced since independence to address various issues regarding equitable land ownership and distribution. On the particular significance of independent property rights for greater overall empowerment and improvement of women's status within society, the Hindu Succession Act explicitly overcomes the traditional exclusion of Hindu women from inheriting ancestral property which is overwhelmingly in the form of land. Land therefore assumes a primary significance in any critical evaluation of law aimed ostensibly at enabling Hindu women's rights to property ownership.

The right of Hindu peasant women in small and marginal farming households to own property independently is the narrower focus of this book. In these households, the minimal size of landholdings precludes the use of hired labour, and production is carried out through the work of family members including women. In overall conditions of poverty, the nature of agriculture within these households may be characterized as subsistence production, and women's active labour participation is a significant factor in the households' agricultural production. The issues regarding rights of 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. As such, the major issue for female landless labourers in the context of ownership is the right to benefit equally from any land redistribution programmes to endow the landless. In the absence of effective and equal land redistribution programmes, the foremost issues for female landless labourers are the right to minimum wages from the employer and equal remuneration as men for equal work. As the means of property acquisition and ownership, inheritance and succession become relevant for women within peasant households with some landholdings. The issue does not arise for landless agricultural labourers, where property acquisition depends upon transfers by the state.

1 The Hindu Succession Act, 1956.

The right to acquire land through inheritance and succession within the rural context is 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; Shah, 1993; Jacobs, 1996). 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.²

The discussion in this book addresses the issue of Hindu peasant women's ability to translate their statutory rights to succession into practice and assert ownership of their share in family land. It is based upon a critical analysis of law to highlight the significance of the socio-cultural and ideological context of legal rights and entitlements. In exploring the specific implications for gender based rights and entitlements, the discussion engages with recent feminist analyses of gender and the allocation of resources within the household/family. It highlights the ideological foundations of the existing legal right and explores the implications of including an analysis of the material factors affecting women's effective claim to land. Within the specific framework of the Hindu Succession Act, it proposes 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*. Such a construction based upon women's interests, would enable a more critical evaluation of legal entitlements currently formulated upon a particular subjectivity of women as 'Hindu'.

The work of many scholars on the interactions between gender, society and property in the Indian context has irrefutably established that women's status, as determined by both the material and ideological structures within society, is crucial both to our understanding of women's exclusion and for evolving possibilities for change. 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 (Agarwal, 1995, 1994; Moore, 1995; Jacobs,

2 In the global context, the focus of land rights debates addressed the parameters of state transfers of land through private/community control and the gender dimensions of such transfers. Although issues of inter-generational transfers through inheritance and succession, do not necessarily form the focus at this time, and do not assume the same importance for gender equality and access elsewhere as they do in India, they remain implicitly fundamental in the consideration of the continuity of policy reforms through state transfers. For an excellent discussion of the need to locate discussions of 'land rights' within specific historical, political, economic, legal and developmental contexts, see Razavi (2003).

2002).³ The ‘bargaining approach’⁴ has been particularly useful in highlighting the impact of factors such as gender, status and class upon the distribution of resources among individual members of a group such as the family, household or community. 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 works of Amartya Sen and Bina Agarwal are especially significant for their contribution to the development of this analysis, particularly in the context of South Asia.

The works of Sen (1983, 1987, 1990) on the impact of gender upon access to resources through negotiation and bargaining, and Agarwal’s application of this in relation to women and land ownership in India provide the conceptual basis for this book. Sen’s framework elaborates upon the bargaining approach to take account of perceptions affecting the legitimacy of the claim.⁵ 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.

Agarwal (1994) who provides a rich and detailed analysis of the position of women in relation to independent land ownership in the context of existing normative and institutional factors adopts and extends Sen’s analysis. However, she contests his conceptualization of and importance given to ‘self-interest’ in determining women’s welfare as the outcome of bargaining. Further, she 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). 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. In addition to the social legitimacy

3 See Jackson (2003) for a thesis questioning whether land rights for women have the transformative potential for gender relations that may ideally be hoped for.

4 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.

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

of the claim and women's access to economic and social resources outside the existing support systems, law is one of the factors that would determine women's ability to bargain for land (Agarwal, 1994, 66). Whereas existing laws regarding ownership of land by women are relevant for establishing the legal legitimacy of the claim, women's knowledge of their rights and access to legal machinery and public bodies administering land are significant for effective access.

The development of the bargaining approach enables clearer analyses of resource allocation and distribution among individuals within a group. Within the family, in particular, it allows 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 thus clearly brought out by the bargaining approach.

This book develops the bargaining approach from a legal perspective to engage in a critical evaluation of the social and economic context of law. 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. It argues that the existing formulation of women's right to land within regimes of religious law asserts a monolithic construction both of women's identities as well as their interests. Such a law denies the existence of women's subjective identification with the role of peasant and worker in addition to that of being Hindu women. The simultaneously multiple and intersecting identities of women as Hindu, individual, wife, worker, mother or other are completely overlooked by this simplistic and ultimately problematic, construction within law. A law which does not account for the varying and complex subject positions misleads in its account of what it has legitimated. It obscures the inherent conflict we each embody to the extent that different values and aims inform different aspects of our subjectivity. It further obscures the problem of making choices and resolving the inherent conflicts in pursuing our lives.

An approach which analyses and critiques law 'from within and below' needs necessarily to account for the competing claims and interests to which an individual is subject. Bargaining and negotiation are integral to these final 'choices' or resolutions which we as individuals make. The view of law from such a subject-orientated perspective is not one of a coherent, single value system, but a complex and often contradictory mix of values. As Sinha, speaking of a polycentric approach to law suggests:

We face conflicting values both in personal life and in the community life. It is an inaccurate representation of common life experience to suggest that these conflicting values are reconcilable under one truth, rather than poised for bargaining and give-and-take, that they are resolved into one absolute, rather than subject to multiple evaluations and multiple judgements in the context of their contingent factors ... (1995: 44).

The specific social, religious and material context of Hindu peasant women are probed in this study to generate a deeper understanding of their concrete, lived realities and the choices generated therefrom. While enabling a clearer analysis of

Hindu women's constraints and powers in making choices affecting their ownership of land, the bargaining approach contributes towards furthering the study of law in its social context through a critical analysis of the guaranteed legal rights which frame such choices.

By critically evaluating the significance of religious and traditional norms, which are in opposition to the rights established by law, this book seeks to further the discussion of Hindu law within the broader constitutional framework. The specific issue of women's right to own property under the law of succession provides the basis 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.

The discussion and analysis in this book have been drawn from field research conducted in Western Orissa. This research was conducted in three villages in the period 1995–1998. Based upon discussions with Hindu peasant women from small and marginal farming households, it builds upon their perceptions of the ideological foundations of Hindu women's exclusion from property, and the inexorable links between gender identity, religious ideology and land ownership in their lives.

The Research Setting: Asking the Questions and Identifying the Issues

Field research was conducted in the villages of Sahaspur, Ekatali and Karamdih in the two western districts of Sundargarh and Jharsuguda in Orissa. 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. My affinity and familiarity with the region made this area a natural choice to conduct my research. 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 caste structure that is predominantly located in this geographical region. These districts in particular are predominantly rural, far out balancing the urban areas both in organization and population. Females constitute an overwhelming proportion of marginal workers and conversely, a disproportionately small number of main workers. Although women constitute an insignificant group among cultivators, their numbers grow substantially in proportion to male agricultural labourers.

The people in the districts speak a dialect of Oriya, known as 'Sambalpuri Oriya',⁶ 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 number

6 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 (Gazetteer, 1971, 79).

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 many refer to Sambalpuri Oriya as a dialect, it is distinctly different from the official Oriya.

The research was conducted partly through discussions with a total of 42 women from three villages: Sahaspur, Karamdihi and Ekatali. Drawn from landowning castes and labourers, with predominantly small and marginal landholdings, participants included both married and unmarried women aged between 20 and 66 years. It was important to draw participants from this wider group towards exploring the link, if any, between the legitimacy of women's claim, their culturally constructed gender roles and their work contribution in cultivation. The contribution of women's work to household production is generally most significant among marginal landholding households. Here, the landholdings are generally not large enough to require hired labour and moreover, the family income of such households is not large enough to pay for hired labour.

Ranging around the key issues for consideration, discussions were held with participants in groups and based upon reflexive interviewing, using mainly non-directive questions and a few directive questions. This was a productive method for eliciting participants' views and opinions to the maximum possible extent. The issue of women's right to inherit property was addressed through a discussion of related questions including: (a) the legitimacy or otherwise of women's claim to land ownership and the basis of such legitimacy; (b) the effect of a legal change upon the question of legitimacy of women's claim; (c) the willingness of participants to enforce their legal right to parental property and reasons for the same; (d) willingness of participants to claim a share of husband's property and reasons for the same. On the link between legitimacy, work contributions and land ownership, relevant issues which were discussed included: (a) the enumeration of 'work' by women; (b) women's evaluation of their own work in comparison with that of male family members; (c) others' evaluation of their work, as perceived by the women themselves; (d) entitlements/privileges, if any, resulting from work roles and contribution; and (e) the link, if any, between legitimate property rights and work contribution.

Access and Interaction: Between 'Insider' and 'Outsider'

I was privileged to have relatively easy access to the women. My position was privileged in that I am a member of the *Agharia*⁷ sub-caste, and therefore *prima facie*, not an 'outsider' for many of the women who were of the same caste. In two of the villages, many women with whom I had discussions were related kin, given that within a relatively small caste group such as the *Agharias*, 'everybody can

7 This is the predominant agricultural group in the area. Although relatively low in the traditional caste hierarchy, they are nevertheless among the more powerful groups due to the fact that they are usually landholders of small and medium farms and do not usually engage in wage labour on others' farms.

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 (Gupta, 1979; Abu-Lughod, 1993; 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 and their immediate family 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 culture⁸ 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 25, 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' 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 scandalized 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 and foremost, one of them. *Jati*⁹ affiliation was the primary binding factor, upon which the differences in class background could operate. I was very conscious of these differences since, as my own previous experience of growing up in that context had shown on many occasions, external markers of 'difference' can minimize the scope for identity of interests based upon gender. However, I found that the differences were taken as a given by the women. Moreover, it was because of their knowledge that I could not fully understand their

8 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.

9 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.

lives, that they embarked upon discussions, which were seen by them as a chance to 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 was crucial. 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.

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 to successfully complete the research.

Organization of Chapters

The framework of analysis upon which the book builds, explaining the components of the bargaining approach, and discussing its relevance for a gendered analysis of access to resources is discussed in Chapter 2. In particular, I highlight conceptualizations of the household that it has enabled. The bargaining approach has made prior assumptions about the unitary nature of the household problematic, that

it is characterized 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.

In Chapter 3 I discuss 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. This chapter 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. The chapter 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.

The clarity with which women analyse their own experiences as 'Hindu' women within peasant households with marginal landholdings is revealing and demands

recognition. Chapter 4 presents 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 their access and ownership to land. On the issue of right to land ownership, it explores their perceptions of legitimacy and explores notions of self-interest to acquire land through succession and inheritance. It brings out the crucially important divergence between their own perceptions and valuations of their work and others' perceptions of their work and contributions within their households.

In Chapter 5 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 3. 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.

The issue of work contributions as it affects women's claim to land ownership is discussed in Chapter 6. Progressing from the evaluation of the religious and ideological context of law in Chapter 5, 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 are 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 under-valuation. The ideological basis of such under-valuation 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 under-valuation 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.

Throughout this book, I explore the impact of gender relations upon legal guarantees and entitlements. In the specific context of Hindu peasant women in small farming households, such impact 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. It addresses Hindu women's claim 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.