Land tenure rights in India: an analysis of the failure of amendments to the Hindu Succession Act

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The right to a minimum standard of living as a basic human right is recognized internationally. As Hernando DeSoto argues in his book, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, a clear, legal definition of property rights is essential in an owner's realization of return to their capital [1]. This would enable an individual in a developing country to raise their standard of living, thus contributing to the recognition of the right to property as a basic human right [2]. The implementation of property rights has become a priority for governments, NGOs, and international development agencies in many countries. While the right to property legally applies to both sexes, it is not extended to women in practice. Amendments to section 6 of the Hindu Succession Act in 2005 legitimized land ownership and inheritance for Indian women [4]. However, the 2006 Agricultural Census indicates that only 10.7% of Indian landowners are women [5]. The failure of implementation of legal changes regarding property rights and women can be attributed to cultural and religious opinions of women, traditional land tenure systems established before British colonial rule, and government bias within legislation. The Indian government must consider preexisting cultural norms and de facto property rights in the employment of new legislations, as they may impose costs on women. In order for changes in legislation to be effective, they must be inclusive of all women of different religious backgrounds, and simultaneous changes across government sectors must be enacted.

The recognition of international human rights is the basis for enacting development policy in developing countries. Generally, it is believed that all people have the inherent right to a minimum standard of living. While the idea that everyone should have an equal opportunity to prosperity is not a new concept, the idea of property rights as a means to achieving this equality has only recently developed. In his book, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, Hernando DeSoto argues that the key to international development is the revival of "dead capital" through increased investment by the poor [1]. A clear, legal definition of property rights, which is either non-existent or unrecognized in most countries and communities, adds value to capital, and allows landowners to borrow money for investment, using their property as collateral. These investments would allow property owners to capture the full value of their capital, thereby increasing income and welfare for many citizens of developing countries. Formalization of property rights thus results in the potential to realize the return of an individual's capital and enables the individual to raise his or her standard of living. Therefore the right to legally defined property is now accepted internationally as a basic human right [2]. Governments, NGOs, and international development agencies have prioritized the implementation of property

rights regimes in many countries. This right to property theoretically applies to both men and women, though in some developing countries, it is not extended to the latter in practice. Hence, gender mainstreaming, the "application of a gender analysis to policy and legislation", is often adopted by governments in developing countries in an attempt to create gender equality in society [3].

PROPERTY RIGHTS IN INDIA

The various institutions of India, including families, governments, religious groups, employment, and education, are traditionally very patriarchal. Historically, women's rights have not been recognized in India, culturally or legislatively. Specifically, women have not been able to acquire, hold claim to, alienate, or inherit land, as it was never written in legislation. Thus, such claims to property rights of land were not supported by the legal system of India. Recent amendments to section 6 of the Hindu Succession Act in 2005 made it legally legitimate for Indian women to own and inherit land. Daughters are officially recognized in these amendments as coparceners with rights and responsibilities to land tenure equivalent to those of a son [4]. However, this amendment of legislation has failed for a number of reasons. Merely formalizing gender equality does not necessarily correspond with practiced gender

equality. According to the Indian Agricultural Census database, a mere 10.7% of landowners in India are women [5]. The FAO has observed that though women legally have the right to inherit and own property, land is only inherited by a woman in the absence of sons, and it is considered shameful for a woman to uphold a legal claim to land in court [6]. Cultural and religious opinions of women, traditional land tenure systems established before British colonial rule, and government bias within legislation have all contributed to the failure of implementation of new legislations regarding property rights and women. Preexisting cultural norms and de facto property rights regimes hinder the employment of new legislations and may actually impose costs on women. In order for property rights legislation to be effective for Indian women, the government must consider all women of different religious backgrounds in India, and enact simultaneous changes across government sectors.

Culture and religion

The belief that Indian women are of lower status in society than Indian men is based largely on religious doctrines and texts. The vast majority of Indians, approximately 80.5% according to the 2001 census, practice Hinduism [7]. The prominence of the Hindu religion in India largely impacts legislation and heavily influences Indian culture. Women are portrayed in religious texts as dangerous, seductive, and valuable solely because of their fertility [8]. Specifically, the Manusmriti, a pseudo religious legal text, outlines the position of various social groups in Indian society based on Hindu doctrines. The Manusmriti extensively describes the impurity of women and their rightful place in society below men [3]. Due to the importance of Hinduism in Indian culture, these descriptions of women in religious texts are commonly accepted and applied. Such classifications lead to negative perceptions of women, as well as to the idea that women are of lower status than men. This logic prompts the rest of Indian society, particularly Hindu men, to believe that women are not intrinsically entitled to basic human rights as men are. As a result of this attitude, men are able to justify discrimination toward women in the workforce, the home, and until recently, most legislation. The widespread practice of Hinduism in India thus has restrictive implications for Indian women, regardless of their religion.

Women have been oppressed sexually, socially, and economically, and subordination continues through the structure of marriage. Historical practices such as *sati* (widow's suicide on her husband's cremation pile), arranged marriages with female children, and dowries (a mandatory gift to the groom's family for accepting their daughter as a bride) illustrate the vast difference between the distinction of men and the worth of women perceived by most members of Indian society. Though these practices are now outlawed, they still occur frequently, illuminating the historical ineffectiveness of legislative change for women's rights [3].

Despite changes in legislation, the cultural view of women remains the same, making the implementation and actual practice of new legislation very difficult. For this reason, legislation mandating women's rights to property ownership in India has, in most cases, failed.

Persistent traditional land tenure systems

The British period of colonization, lasting almost 200 years, was a period of drastic legislative, cultural, and economic changes in India. Despite these changes, traditional systems of land tenure remained intact and the British government's infrastructure reform had no impact on some of the property rights regimes that had been in place prior to reorganization [9].

The British implemented a land tax in India, which contributed 60% of their total government revenue in 1841 [9]. Banerjee and Iyer found that while the government restructured basic land tenure structure in order to collect revenue efficiently, the traditional de facto regimes were still held at a micro level [9]. New land revenue systems included landlord systems, individual cultivator-based systems, and village-based systems. Both the individual cultivator-based systems and the village-based systems allowed individuals and families to maintain the de facto structure of property rights that previously existed. Revenue was collected from villages as a whole instead of individually under the village-based system. Villagers divided the responsibility of the tax among themselves based on preexisting land tenure regimes. These regimes were congruent with either the pattidari system or the bhaiachara system. The pattidari system was established during the period of Sikh rule in Punjab from 1708-1769. Under pattidari, land was transferred through male inheritances, excluding women from land ownership [10]. Similarly, the bhaiachara system, established in Northern India, transferred land rights through lineages of male relatives and was known for its impenetrability and resistance to change [11].

Under the British government's individual-based system, landowners paid the government directly and likely maintained their traditional patriarchal land tenure system [9]. Both individual-based and village-based land tenure systems specifically excluded women and did not change for the entire duration of British rule. The fact that the British government, who altered so much of India's structure and culture, had almost no effect on preexisting micro-level land regimes exemplifies the persistency and resilience of the patriarchal land tenure systems of India. For this reason, amendments to legislation regarding women's property rights, with no other governmental change, have failed. Amendments alone have no effect on the practice of the property rights regimes that have been observed for centuries.

Government bias within legislation

One of the biggest changes in legislation to date, the amendment of the Hindu Succession Act section 6 gave

rights to women as coparceners, and ultimately the right to hold land titles [4]. However, this legislative change applies only to women of the Hindu religion. Approximately twelve percent of India's population identifies with the Muslim religion [12]. Thus, while this amendment in the Hindu Succession Act was intended to influence land titling for Hindu women, it is not applicable to Muslim women and has no power in altering their property rights.

The social reform debate at the beginning of the 20th century spurred major legislative changes for Muslim women in India. Increasing pressure from the west to create more gender equal legislation induced the government to pass the Muslim Personal Law (Shariat) in 1937 [12]. This is the unifying piece of legislation that Muslims in India follow. The Muslim Personal Law outlines the rights of possession that Muslim women have, but explicitly excludes agricultural land [13]. This deliberate exclusion induced objection and protest from many NGOs and women's rights groups, eventually leading to the elimination of the phrase, "save questions relating to agricultural land" (S.2 [13]) by a few state governments [12, 14]. However, the majority of Indian states still include this phrase, which excludes women from agricultural land rights, in their legislature. This ensures that both legally and in practice, Muslim women are unable to own land. Not only is this ineffective in creating gender equality for Muslim women, but this piece of legislation renders the efforts of the Indian government to grant property rights to all women a failure. Due to the religious bias of the government, 12% of all Indian women do not have the same legal rights as the others, having the potential to severely impact the treatment of Muslim women [12].

NEGATIVE CONSEQUENCES OF THE APPLICATION OF GENDER-EQUAL LAND TENURE LEGISLATION

In many cases, legislation regarding women's rights to land ownership is not effectively implemented and not widely practiced. Specifically in the case of India, pre-existing cultural norms, de facto property rights regimes, and bias within legislation contributed to the failure of the Hindu Succession Act amendment in 2005. However, in the rare case that legislative change is successful, the sudden acquisition of the right to property may actually have detrimental effects on the welfare of women. According to Kerry Rittich, the effects of transforming land rights via formalization, individualization, and commodification often have more negative consequences for women than for men [2]. Similarly, Rao's research indicates that complex gender asymmetry in Indian society affects the division of labour in households. Specifically, Rao found that, increased land ownership among Indian women led to increased workload, without higher personal returns [15]. These negative consequences may result in economic and social restrictions leaving women worse off than before the enactment of legislation. The consideration of potential negative consequences of the implementation of new legislation regarding gender-specific rights is necessary in order to

identify other complimentary changes. These complimentary changes may be essential in successfully creating beneficial, equitable land tenure policy

Negative effects of formalization and individualization

Kerry Rittich identified three transformations of property rights central to policy reform. Two of these transformations, formalization and individualization, legally define property rights for individuals rather than communities or groups of people [2]. These transformations have the potential to allow landowners to invest in their land, and also offer incentives to efficiently use their resource. While this could improve the welfare of a woman in any given household due to the increase in bargaining power in both the household and on the market, a decrease in welfare is often observed.

First, formal ownership does not necessarily equate control. A woman's name may be written on a land title, but her husband, brother, or father could still control the land. Second, traditional women's roles in households worldwide are already demanding and often involve the care of others in addition to economic labour. Particularly in developing countries such as India, where women have a lower status in society than men, it is unlikely that the men in the household would take on any additional tasks to lighten a woman's burden. The additional responsibility of land of their own may be too much responsibility for most women to undertake. The added stress could contribute to poor health, decreased care for dependents, and failed economic endeavors. In addition, increased responsibility may further jeopardize food security for women. According to Rao, Indian women are the most vulnerable in terms of food security in rural households [15]. Added responsibility and increased workload require additional calories, which may not be available to women. As Rao's research states, an increased workload does not necessarily result in an increase in personal return (i.e. income, food, status) [15]. Finally, the existing de facto property rights structure may actually be benefiting women.

Formalization and individualization could nullify the investment of time and energy into the land that a woman had previously claimed. The results of formalization and individualization can have detrimental impacts on women if consideration of the other factors affecting women's lives does not occur.

Negative effects of commodification

The third transformation identified by Kerry Rittich is the commodification of property rights [2]. This transformation has the potential to increase the commercial value of the land through the ability to invest in more productive economic activity, or the ability to alienate the land on a larger market. However, a decrease in welfare for women is once again observed with commodification.

First, as the commodification of land rights results in higher land value, men may be less likely to allow women to

control their land at all. Women will likely labour more and benefit less than before from their increased efforts. Second, it is likely that the more powerful people in a woman's life will gain rights to parcels of land before they do, especially if the land in question has the potential to generate large economic benefit. Thus, women would be unable to actually exercise their rights to land and would be no better off than before. Finally, as it is unlikely that women's household duties would decrease despite the increased responsibility of land tenure, women may be more likely to fail at an economic endeavor. They would likely bear the burden of a loan themselves, and would have to rely on their own labour to pay off their debt. This added responsibility may again be too much for one woman without support, and her "only source of economic security" would be repossessed.

RECOMMENDATIONS

Gender mainstreaming, specifically in regards to legislative land rights, does have the potential to empower women and generate equality in society. However, there are other factors that must be considered alongside changes in legislation. These include the traditional role of women in the household, the perception of women in society, the limited alternative market options for women, the existing property rights structures, and the pre-existing socioeconomic conditions of women. Because of these factors, governments must be wary of the fact that land tenure reforms intended to empower their populations can actually have detrimental effects on women. Legislative changes must be phrased very carefully and, where applicable, complimentary legislations or programs should be created.

In addition, other interactions with policy must be considered. Interactions with property rights-related structures such as financial institutions and markets can decrease the benefits that women can derive from land ownership. If amendments or new legislation are the sole changes that are made within government, and discrimination within other institutions remains, it is unlikely that any amendments will successfully empower women. Governments must scrutinize systems related to the implementation of a formal property rights regime and recognize where discrimination exists within. Simultaneous changes in these related systems must then be made to ensure that there are no legislative contradictions preventing the application of women's property rights.

In India's case, the government must target other sources of discrimination toward women in legislation and in society. In order for amendments regarding women's rights to be respected, there must be consistency in gender equality across all forms of legislation. Specifically, the Indian government needs to address policies regulating women's access to legal and financial institutions, markets, and employment. Furthermore, programs such as seed distribution and agricultural education should reflect changes in legislation. It may be necessary for the Indian government

to work with NGOs to develop programs that are accessible to women and that will promote the actual employment of land rights legislation.

Finally, the Indian government must recognize that, while the majority of the population of India practices Hinduism, there is a minority population that is Muslim. In order for legislative change to impact all Indian women, revisions must be uniform throughout all pieces of legislation. Amendments should be made to the Muslim Personal Law, and the government should take India's diverse culture and belief systems into consideration for future changes.

CONCLUSION

The formalization of land tenure in developing countries has capacity to improve landowners' welfare through potential for investment and realization of the returns to capital [1]. Because of this, governments and NGOs have made it a priority to legally structure and apply a formalized property rights regime. Land rights reforms, particularly those that legally define property rights for women, have the potential to empower women and to recognize their basic human rights [3]. However, the application of new legislation is not always successful. The Indian government's amendments to the Hindu Succession Act in 2005 legally defined the property rights of Indian women, but they were not successfully applied in society. They failed to achieve gender equality in India, as the majority of Indian women still do not have land rights. Of total landowners in India, only 9.5% of them are women [5]. The failure of these amendments can be attributed to the historical and religious perception of women in Indian society, pre-existing property rights regimes, and bias toward the Muslim religion in legislative changes. The government of India should support policies and programs that reflect legislative changes in women's rights and the diverse religious background of Indian society.

Governments must carefully approach legislative property rights changes, as they can impose costs on women and leave them worse off than before the change. In particular, an assessment of women's household roles, the perception of women in society, existing property rights regimes, alternative market options, and preexisting socioeconomic conditions of women is necessary to determine the effects that may hinder proper implementation of policy. Governments must also be aware of interactions between property rights systems and other institutions, and should maintain consistency throughout related policies. For countries recognizing women's rights to land in legislation for the first time, an essential first step to achieving gender equality is to recognize women's rights in all legislation.

Gender inequality is an international issue that has no immediate solution. Governments, world leaders, and global organizations will unite in the struggle to grant basic human rights to women worldwide for years to come. A fundamental beginning to the struggle to attain equality for

all is the formation of effective, culturally sensitive legislation that unconditionally recognizes women as having basic human rights.

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