

Analysing Transfer of Property in Benefit of Unborn Person Under Transfer of Property Act 1882 Through the Lens of Feminist Jurisprudence.

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Abstract—Women’s property rights and reproductive autonomy are central to feminist jurisprudence, yet their intersection remains underexplored in Indian law, particularly under the colonial-era Transfer of Property Act, 1882 (TPA), where Section 13 conditions speculative transfers to unborn persons even unconceived on women’s procreation, tacitly enforcing compulsory maternity amid extensive scholarship on Hindu Succession Act reforms and Medical Termination of Pregnancy Act rights. This doctrinal analysis critiques Section 13 through feminist lenses of self-abnegation and adaptive preference formation (Jon Elster), contrasting it with TPA Section 6’s ban on uncertain interests, to expose subtle coercion via psychosocial pressures akin to historical queenly obligations or familial their expectations. Findings reveal patriarchal biases perpetuating gendered dependence, filling a critical research gap in TPA discourse. Implications call for judicial reinterpretation or amendment to affirm reproductive autonomy and gender-neutral property law.

Index Terms—Feminist jurisprudence, TPA Section 13, unborn persons, reproductive autonomy, self-abnegation, adaptive preferences, property rights.

I. INTRODUCTION

Property rights and reproductive autonomy are two distinct and broad themes, very often studied under feminist theory. The Indian socio legal scenario with reference to property rights of women primarily revolves around coparcenary rights, women labour force participation and equal pay etc. the reproductive autonomy of women in India are taken care of by the legislation named: the Medical Termination of

Pregnancy (MTP) Act, 1971. the interaction of these two themes where certain provisions pertaining to property and how they handle and shape women’s autonomy over reproductive decisions is unexplored.

The paper particularly addresses a very important research gap related to the mechanism under Section 13 of the Transfer of Property Act, 1882 (hereinafter referred as TPA or Transfer of Property Act or the Act) which governs the transfer of property for the benefit of an unborn person. This paper critically analyzes how such a legal provision tacitly assumes that every woman must procreate. Such a presumption, situating the effectiveness of a legal mechanism within the exclusive reproductive capacity of women, invites serious critique on the issues of gendered dependence and structural bias.

The meaningful engagement in this problem demands adopting a point of view by women with free will and agency who nevertheless come to feel constricted in their autonomy by the very rule of law that functions upon the assumption of compulsory maternity. Thus, this speaks more to a deeper tension between women’s reproductive autonomy and the legal constructs that inadvertently work to instrumentalize them.

Transfer of Property Act¹: Section 6 explains what may be transferred. Because the list of things that can be transferred is so large, the Act fundamentally provides a list of things that cannot be transferred. There are two key points:

- The chance of an heir apparent succeeding to an interest is not allowed to be transferred.² As it is merely a hope or a chance of getting that property in the future. There may be multiple conditions

¹ Transfer of Property Act, 1882, No. 4 of 1882, §§ 6, 13, *India Code* (2020)

² Transfer of Property Act, 1882, No. 4 of 1882, § 6(a), *India Code* (2020).

involved. For example, let's say a father has self-acquired property, his son or daughter cannot transfer the property before they get it. This is because:

- What if the father makes a will in favor of his friend?
- What if the father remarries and subsequently has additional children?
- What if the son dies before the father?
- Another type of property that is not allowed to be transferred is the right of maintenance.³ This right, of whatever nature, cannot be transferred. The reason is that these rights are personal in nature, and the purpose of maintenance is to support the person.

II. THE CORE PROBLEM

The Act provides for the provisions for the transfer of property in favor of an unborn person.⁴ It has created a mechanism that such an ultimate transfer must be preceded by a prior life interest. Therefore, the ultimate transfer depends upon whether that unborn child takes birth or not. Or, to put it in clear words, it depends on a woman's decision to give birth to a child or not.

We must also mention that "unborn person" not only includes a child in the womb, but also a child who is not yet conceived the child who is only a concept.⁵ This is special to TPA where there is transfer of property to unborn children. This can be demonstrated by the following example. There are two friends, 'A' and 'B'. A wants to transfer his immovable property to B but for the reason of his liquor addiction and his unstable nature. A wants to transfer the property to child B who is not yet born. In such a situation, A makes the mechanism that the property will be possessed by B till his lifetime and after his death, to the child of B. Now, in such a situation, if child B does not take birth the property reverts back to A. This entire mechanism's success or failure depends on the decision of whether she chooses to bear a child, or not. This issue has received limited scholarly attention

³ Transfer of Property Act, 1882, No. 4 of 1882, § 6(dd), *India Code* (2020).

⁴ Transfer of Property Act, 1882, No. 4 of 1882, § 13, *India Code* (2020).

⁵ Relevant case law

The current legal scholarship has the literature gap regarding this issue. While ample literature is available on women's property rights and their reproductive autonomy, it has neglected the provisions pertaining to transfer to unborn persons. This paper has adopted a critical way of understanding the impact of this provision on the feminist perspective on autonomy.

III. AUTONOMY AND FEMINIST LEGAL THEORY

Autonomy is the concept and right to make decisions free from any coercion or other restriction. Therefore, the decision to give birth to a child is so intimate and at the core of a person's privacy. The mechanism where the property transfer depends on such a decision is, in a subtle way, a restriction on autonomy.

At its core, the mechanism of transfer of property to unborn person is rendered contingent on the success or failure of a woman to give birth to a child. Apart from psychosocial pressure, such mechanisms also give rise to stakeholders who either support or oppose the transfer. This has led to environments in which the autonomy of decision-making is restricted in an indirect way.

One interesting point is how feminists think about legal theory. They believe that most conventional legal theory claims to be gender-blind, but it neglects or even disregards the position of women. In the words of Raymond Wacks, in his book on Jurisprudence, this "condemns them, and their experience to oblivion."⁶ TPA was enacted during colonial times which is marked with prejudices against women. Gender oppression has been recorded in texts like the book "Stri purush tulna" by Tarabai Shinde.⁷ She has noted "men had gained a 'new range of powers' under the British which made them conceited as they tried to confine women to their houses depriving them of such benefits, shackling them in a rigid religious culture for

⁶ Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* 56 (6th ed. 2020).

⁷ Tarabai Shinde, *Strree Purush Tulana* [The Comparison Between Women and Men] 4 (Shivaji Press 1882).

which they had no regard.”⁸ While section 6 of the Act explains non-transferable rights, if the same logic had been drawn, property transferred to the unborn should have been impossible. Still s. 13 while ostensibly neutral, reinforces the patriarchal norms that had influenced colonial law making. Section 6 which has prohibited the transfer which heavily depend on speculations like “chance of an heir apparent succeeding to an estate” or a “kinsman’s chance of succession”, S. 13 mechanism which transfers property to unborn has presupposed that every woman will procreate. The drafters were very careful while framing Section 6, which excludes all speculative transfers. Yet, they chose to retain Section 13, which is itself speculative in nature. This overlooks the fact that a woman may decide to remain childless

This linkage between property transfers and reproduction exacerbates the research gap in legal scholarship, where extensive work exists on women’s property rights (e.g., post-2005 Hindu Succession Act amendments making daughters coparceners)⁹ and reproductive autonomy (e.g., under the Medical Termination of Pregnancy Act)¹⁰, but little examines the hidden provisions¹¹ of TPA Section 13’s impact on women.

By conditioning the transfer upon birth, the law indirectly curbs autonomy—the freedom to make decisions without coercion or external constraints—as the core of the paper’s argument goes. Bearing a child, an intimate act and central to personal privacy, became a pivot of property success or failure, which also reflected the Deferential Wife’s prioritization of her husband’s desires over her own in the patriarchal

family.¹² This creates a situation whereby there is an atmosphere of competing interests: while some stakeholders (e.g., in-laws or transferors) may want the transfer to succeed to ensure lineage, thereby putting psychological or social pressure on the woman to procreate, some others might be opposed to it and further complicate her choice. Even assuming the mechanism allows a reversion when there is a failure to give birth, it has assumed reproduction, silencing any coercion of women to assume positions of self-sacrifice, similar to the Angel who “shines” in “the difficult arts of family life.”¹³

IV. SELF-ABNEGATION AND ADAPTIVE PREFERENCE FORMATION

Self-abnegation is the important issue in feminist legal theory.¹⁴ Constant sacrificing of self-interest and choices for the other has been seen as critics from the side of feminist. Andrea Westlund observes that the Angel resembles Thomas Hill’s well-known example of the Deferential Wife.¹⁵

“She buys the clothes he prefers, invites the guests he wants to entertain, and makes love whenever he is in the mood. She willingly moves to a new city in order for him to have a more attractive job, counting her own friendships and geographical preferences insignificant by comparison. She tends not to form her own interests, values, and ideals, and when she does, she counts them as less important than her husband’s”.

Imagining the scenario where a wealthy grandfather is the testator for the significant property. He transfers the property to his son as a prior life interest holder and

⁸ Sneha Roy, “A Comparison Between Women and Men and Its Relevance in Locating Feminism as a Movement in Colonial India,” *The Daak* (Aug. 31, 2023), <https://thedaak.in/2023/08/31/a-comparison-between-women-and-men-and-its-relevance-in-locating-feminism-as-a-movement-in-colonial-india/>.

⁹Hindu Succession (Amendment) Act, 2005, No. 39 of 2005, § 3 (available at [https://prsindia.org/files/bills_acts/acts_parliament/2005/the-hindu-succession-\(amendment\)-act-2005.pdf](https://prsindia.org/files/bills_acts/acts_parliament/2005/the-hindu-succession-(amendment)-act-2005.pdf))

¹⁰ The Medical Termination of Pregnancy Act, 1971, No. 34 of 1971, § 3 (available at https://www.indiacode.nic.in/bitstream/123456789/15389/1/the_medical_termination_of_pregnancy_act%2C_1971.pdf).

¹¹ Transfer of Property Act, 1882, No. 4 of 1882, § 13, *India Code* (2020).

¹² Andrea C. Westlund, *Selflessness and Responsibility for Self: Is Deference Compatible with Autonomy?*, 112 *Phil. Rev.* 483, 495 (2003).

¹³ Virginia Woolf, *Professions for Women, in The Death of the Moth and Other Essays* 235, 237 (Harcourt, Brace & Co. 1942).

¹⁴ Natalie Stoljar, *Feminist Perspectives on Autonomy*, *Stan. Encyclopedia of Phil.* § 2 (Summer 2024), <https://plato.stanford.edu/archives/sum2024/entries/feminism-autonomy/>.

¹⁵ Andrea C. Westlund, *Selflessness and Responsibility for Self: Is Deference Compatible with Autonomy?*, 112 *Phil. Rev.* 483, 485–86 (2003).

transfers to his son's first unborn child as absolute interest. If a wife assumes a subordinate role at the cost of her own aspirations and chooses for her motherhood, she is acting as a differential procreator. TPA's s. 13 requires most personal decisions which is reproduction be subordinate to the success and failure of transfer. The Guardian noted the pressure to give birth to a child as "For the women of Purabgaon, in the Amethi district of Uttar Pradesh, expectations had always been clear. Get married young, then have back-to-back pregnancies"" Some of the older women in Purabgaon talked candidly about the relentless pressure they were put under to give birth. I had five children in quick succession, my mother-in-law kept saying she wanted a grandson."¹⁶

While Indian society is already characterized by relentless pressure to have children, its effect is further exacerbated by the mechanism laid down by s. 13 of TPA. Indian society already has this compulsive social construct that every couple must have a child. One of the critics noted that having children is a socio-religious obligation for couples in India. All participants of the study, including the fathers and the grandmothers, expressed views to support the cultural emphasis on having children. For the mothers, "becoming pregnant was seen as an accomplishment; a fulfillment of their social roles".¹⁷ This conditioning has been further solidified through the legal mechanism while modern laws and policies have granted women autonomy over her reproductive decisions through right of abortions, The TPA provision remains largely unaddressed in judicial and academic discourse, which indirectly and subtly be there that legislates the womb as an economic tool. It considers women's bodies as a joining link between prior interest holders and the transfer to unborn children.

¹⁶Amrit Dhillon, 'We No Longer Die in Childbirth': How Indian Villages Saved Their Mothers, Guardian (June 12, 2018), <https://www.theguardian.com/world/2018/jun/12/we-no-longer-die-in-childbirth-how-indian-villages-saved-their-mothers>.

¹⁷ *Developmental Psychology* 3 (UNC World View Feb. 2018), https://worldview.unc.edu/wp-content/uploads/sites/433/2018/02/DevelopmentalPsychology_PSY241_FTCC_3R2.pdf.

V. ADAPTIVE PREFERENCE FORMATION

The adaptive preference formation is another important factor in evaluation of autonomy by the feminist.¹⁸

The adaptive preference formation will be distinguished between preference change due to learning and other processes.¹⁹ In the adaptive preferences the person is unconsciously turning away from preference to avoid unpleasant cognitive dissonance.²⁰ In the case of that woman where her decision of giving birth to a child is attached with the success of the transfer mechanism there are high chances of her thinking to ensure success of the transfer along with her relatives.

Elster describes adaptive preferences as an unconscious process where agents adjust their desires to avoid cognitive dissonance, a "blind psychic process operating 'behind the back' of the person".²¹ By making property transfers dependent on a woman's "success or failure" in childbirth, the law fosters adaptive preferences. This subtle coercion is not overt but operates through societal and psychological pressures, as the user notes, where stakeholders' desires for or against the transfer's success create an environment that curtails autonomy. The TPA assumes every woman will give birth, embedding reproductive expectations within legal frameworks. Side by side it internalizes the operation of the thing that every woman must procreate.

It may feel sometimes that the subject is autonomously working with their own mind like the concept of veil in Islam, where many women may put the claim that they are autonomously doing it. But the result is it hampers their educational and economic

¹⁸ Natalie Stoljar, *Feminist Perspectives on Autonomy*, Stan. Encyclopedia of Phil. §§ 2 (Summer 2024), <https://plato.stanford.edu/archives/sum2024/entries/feminism-autonomy/>.

¹⁹ Jon Elster, *Sour Grapes: Studies in the Subversion of Rationality* (Cambridge Univ. Press 1983).

²⁰ Jon Elster, *Sour Grapes: Studies in the Subversion of Rationality* (Cambridge Univ. Press 1983).

²¹ Jon Elster, *Sour Grapes: Studies in the Subversion of Rationality* 16 (Cambridge Univ. Press 1983).

opportunity.²² And when they claim that they autonomously do it, we have to check in absence of all the psychological factors and social forces, would they have done it or not.

In ancient or medieval polities, succession of the kingdoms was ordinarily patrilineal. Leaving exceptional situations aside, male heir of the king was considered to be next king. In such a situation, the fate of the kingdom was dependent on the birth of male child. While this mechanism seems neutral to the administration of affairs of the realm, the ignored factor is the position of the queen. As she is married to the king, her reproductive outcome becomes the central issue for continuity of the kingdom.

Therefore, the queen's marriage is not an exclusive domain of personal choice but is attached with systematic expectation. Her autonomy is restricted by the expectations of her producing an heir. Consider a hypothetical scenario where her early life decision to remain child free would be almost impossible once she accepts this institutional framework. The opposite argument might be that "she need not have married if she wished to be child-less ignores how this very existence of such socio-political structure is a threat to freedom of choice. The very design perpetuates the innermost domain of decision making.

In Arundhati Roy's book *God of Small Things*,²³ There are certain terms like love laws. The novel discusses Love Laws, "the laws that lay down who should be loved, and how and how much"²⁴ These are the rules that Ammu and Velutha break. They both know exactly how these laws work, and what will happen if they break them, but they never let that stop them.

VI. CONCLUSION

The intricate interplay between section 13 of TPA and reproductive autonomy of the women, this paper has explored the subtle autonomy restricting architecture of section 13 of the Act. the woman's intimate biological choice by assuming it as a condition precedent for vesting of property has an unfavorable effect on autonomy. TPA through section 6 invalidated the speculative transfers to the contrary,

²² Uma Narayan, *Minds of Their Own: Choices, Autonomy, Cultural Practices and Other Women*, in *Gender and Culture* 418–21 (2002).

s.13 retains highly speculative transfers. The issue has been studied through specific concepts of self-abnegation and adaptive preference formation. The silence around section 1 in academic discourse must end.

²³ ARUNDHATI ROY, *THE GOD OF SMALL THINGS* 50 (Random House 1997).

²⁴ ARUNDHATI ROY, *THE GOD OF SMALL THINGS* 33 (Random House 1997).