

## SUCCESSION UNDER HINDU LAW

The law of Inheritance deals with rules, which govern devolution of property on the death of its owner. In Hindu law, the concept of the joint family system came much earlier in point of time; the law of inheritance came later and applied only to the property belonging exclusively to a person as distinguished from property held by the joint family. In the primitive age, Women and children were alike. They were classed as chattels and possessed no right of property. In course of time, the son's right was recognized, then the right of other male kinsmen. At this stage of social evolution, women were still chattels. They had still no rights of their own. The recognition of woman's right of inheritance is of comparatively recent origin. Several difficulties and complications however came in the way owing mainly due to the differences in the law of inheritance amongst the two major school of Hindu laws viz. the Mitakshara and the Dayabhaga and the Matriarchal systems prevailing in some Southern parts of the country. Besides this, some more anomalies and some early inequitable rules of succession had come into existence partly due to historical reasons and partly due to the conservative approach of judicial interpreters. Conflicting pronouncement of the law courts added to the existing confusion and legal reform on the subject became the pressing need of the day.

### 2.1. POSITION BEFORE 1956

In early Hindu society, the whole Hindu Law of Inheritance is centered in a single word—*Sapindas*—who are a man's heirs. Prior to 1956, there used to be two major schools of Hindu Law viz. Mitakshara and Dayabhaga, which laid down different principles of succession. There was no uniformity in the rights of the Hindus following different schools to succeed to the property of a

Hindu who died intestate i.e., without leaving a will behind him. At that time, women had no legal status. The Hindu Law of inheritance had deprived women of the right to property (except the right to their *stridhan*) and, as a result, their economic security was completely dependent on the pleasure of the man—husband, father, brother, son. The movement to strengthen the position of women in society began from the second half of the nineteenth century. The earliest attempts may be traced back to 1865, with Act X of that year as the first step towards conferring economic security upon Indian women. The Indian Succession Act 1865 (Act X of 1865) laid down that ‘no person shall, by marriage, acquire any interest in the property of the person whom he or she marries nor become incapable of doing any act in respect of his or her own property which he or she could have done if not married to that person.’ (Act X of 1865, Section 4)

The Married Women’s Property Bill 1874 was a natural consequence of this Act. On 24 February 1874, the Council of the Government-General of India met at Government House to consider the Bill. The Bill was passed into Act III of 1874, which was the first law in modern times extending the scope of *stridhan*. It declared that the wages and earning of any married woman, any property acquired by her through the employment of her art and skill, and all savings and investments shall be her separate property, and that a married woman can file a suit in her own name in respect of her own property. This Act, though a radical one, did not create stir in Hindu Society because, until 1923, the Act applied only to Indian Christian Women. Married women belonging to Hindu, Mohammedan, Sikh and Jain communities were outside the purview of the Act. (Act III of 1874, Section I).

In 1923, the Married Women’s Property Act of 1874 was amended by Act XIII of 1923 so as to bring Hindu Women and others within its jurisdiction. On 15<sup>th</sup> February, 1923, on the motion of Kamath, the Select Committee’s report on the Bill to amend further the Married Women’s Property Act of 1874 was taken into consideration. Kamath’s Bill intended to provide a policy of insurance which would be for the benefit of the wife, or the

wife and children of the insurer. The Bill was finally passed into law in March, 1923.<sup>1</sup>

The year 1923 constitutes a landmark- this was the year that the Hindu Woman's independent right to property was recognized for the first time, although to a limited extent. No doubt, section 4 of the Widow Remarriage Act 1856 entitled the children widow to share of her husband's property; this right was limited in scope. So the attempt made in 1923 may be regarded as the first move to ensure that women's economic rights were honoured. The Married Women's Property Act of 1874, was further amended in 1927 by Act No. XVIII of 1927. Its aim was to safeguard the interests of husbands. James Crerar, the Home Member, moved the Bill, a part of which was meant to limit the liability of a husband when his wife had obtained a probate or letter of administration and was a trustee, executrix or administratrix either before or after marriage. The motion was adopted. Apart from safeguarding the interest of wives and husbands by the Act of 1923 and 1927, respectively, another Act was passed in 1929, which aimed at giving preference to some nearer degrees of female heirs over certain remoter degrees of male heirs. The seeds of this Act were sown in 1923 when, on 15 February of that year, besides Kamath, T.V.Sashagiri Ayyar, also moved a Bill in the Legislative Assembly to change the order of inheritance in the Hindu family so as to give priority to certain female members. What was sought to be done in this Bill was that in matters of inheritance, after the father's father and before the father's brother, the son's daughter, daughter's daughter, sister and sister's son be given preference over the father's brother. The Bill sought to ensure that the inheritance rights of female heirs were between those of the father's father and the uncle. The House agreed to refer Seshagiri's Bill to a Select Committee. After the Select Committee reported, the Bill again came up in the Legislative Assembly on 27 March 1923. J.N.Mukherjee of Calcutta suggested that before considering the report of the Select Committee, the Bill be recirculated so that more opinions could be voiced. In his view, opinions of competent men should be considered on the issue; because it was improper for individual members to suggest amendments without consulting the country. His objection to the Bill was that it stopped with the son's daughter and excluded the grandson's daughter. The father's

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<sup>1</sup> Mitra, N.N. (Ed.), The Indian Annual Register, 1923, Vol.II, pp. 265 and 296

sister had been also completely ignored, although these two heirs were very important in a Hindu family. Seshagiri argued that the principle of Hindu Law on property was based on three elements of *bandhus*—*atmabandhus*, that is, one's own descendants, *pitribandhus*, that is, the father's descendants and *matribandhus*, that is, the mother's descendants. The second principle of Hindu law was that the classes of *bandhus* should not go beyond three degrees, which meant that the grandson's daughter who was more than three degrees removed, did not come under the category of *atmabandhu*, the son's daughter and the daughter's daughter came within the three degrees and were within one's *atmabandhus*, and so they must be given preference over the sister, who was a *pitribandhu*. That was the principle upon which the order of succession of the Bill was based. When put to vote, - Seshagiri's motion for recirculation of the Bill was lost by a margin of eleven votes, and on 19 July 1923, when the Bill came up before the Council of States, it was postponed. Thus on the Hindu Law of Inheritance remained pending, though Seshagiri's Bill was kept in abeyance, the legislators continued their endeavour.

Sir Shanmukham Chetty again moved it in the Legislative Assembly on 12 February 1929. The Bill now laid down that if a person died leaving property not held in coparcenary and not disposed of by will, and if the last persons surviving were the father's brother and a son's daughter, the son's daughter, being the nearer relative, should have preference over the father's brother. That is, a son's daughter, a daughter's daughter, sister and sister's son, should in the order specified, be entitled to rank in order of succession, next after a father's father and before a father's brother. An interesting discussion followed the motion by Chetty. Siddheswar Prasad moved the amendment that the Bill be circulated for public opinion, while M.S.Aney supported the amendment on the ground that it was a question, which affected everyone who called himself a Hindu, so the opinions of Hindus must be ascertained. He asserted that the reformers had no right to force their views on them. This tendency of the reformers, he felt, amounted to showing disrespect to the dead, contrary to one of the radical beliefs of Hindu society, which was its duty to the dead. Because, according to Aney, many people did not make a will as they wanted the natural inheritance laws of the land to prevail in his own case. Laying down new rules of succession meant hurting that sentiment and faith of those dying intestate, while our age old tradition was based upon the duties of the living to the dead. This tradition would be in Jeopardy, Aney believed, if Chetty's motion was carried through. So, if

the amendment was not accepted, it would tantamount to striking at the very root of the Hindu people's faith in their *achaars*. Sir B.L.Mitter, the Law Member, said that the intention of the Bill was to be gathered from the Bill itself and not from the proceedings of the Council of States. He wanted to know whether the reservation after the death of the limited owners were to be protected or not. He elaborated his point by giving an example. If a man died leaving a widow but no children, the widow became a limited owner of his estate. After the widow's death, a nephew of the man might become the full owner, but one question was whether it would be in the interest of the nephew during the lifetime of the widow since it was only an expectation, a mere chance of succession if he survived the widow. B.L.Mitter questioned whether the expectant heirs were to be protected by accepting the amendment or was they to be placed in the same position as other expectant heirs. According to him, the Government would not take any part in such a controversy because, at any rate, the fundamentals of Hindu law were not questioned. The question was only how some nearer degrees of female heirs could be given preference over certain remoter degrees of male heirs.

Pandit Madan Mohan Malaviya was avowedly opposed to the Bill. He said that the Hindu Law of Succession was a personal law and the Government had promised not to interfere with such laws them. Hence, it was not right on the part of the legislators to alter the law. Eventually, 48 as against 14 votes in its favour rejected the amendment, when put to vote. Seshagiri's Bill received the assent of the Governor-General on the 21 February 1929, and became a law under the name of the Hindu law of Inheritance (Amendment) Act 1929 (Act II of 1929).

**The provisions of the Act introducing the Female heirs read as follows:**

A son's daughter, daughter's daughter, sister and sister's son shall, in the order so specified be entitled to rank in the order of succession next after a father's father and before a father's brother, provided that a sister's son shall not be included, if adopted after the sister's death (section 2).

This Act was very limited in its scope and did not make any radical change in Hindu Law in favour of women. By this Act neither daughters nor widow were provided with the right of Inheritance. The Act only emphasized that certain degrees of remoter male heirs should be post posed in favour of the nearer degrees of female heirs and nothing more. So the provisions of the Act were not particularly radical in support of women's right to property.

Further, Act II of 1929 was limited in the sense that it regulated succession only in the case of the separate property of a Hindu male dying intestate. Its aim was not to alter the law in respect of the property of a female, but only to ensure that when a husband succeeded to his wife's *stridhan* property, it descended in the same way as if it had belonged to the husband himself, after her death. If at such time, Act II of 1929 was in force, it was that Act which governed succession, and the property could not be deemed to be the property of a female.<sup>2</sup>

Thus, the legal position of women, according to Act II of 1929, was far from satisfactory. Realizing this, the legislators continued to fight for greater Inheritance Rights for women. On 26 September 1929, V.V.Jogia introduced another Hindu law (Amendment) Bill for the purpose of making better provisions for certain heirs, under Hindu law, especially with respect to women regarding their rights of inheritance. On the same day, Munshi Narayan Prasad Asthana introduced in the Council of States the Hindu Law of Inheritance (Second Amendment) Bill, the aim of which was to give some recognition to the rights of women related by marriage to the family of the deceased, for instance, a predeceased son's widow or brother's widow. This Bill, however, remained pending for consideration in the next session. Again on the same day, 26 September 1929, Raisaheb Harbilas Sarada introduced the Hindu Widow's Rights of Inheritance Bill to secure a share for Hindu widows in their husband's property, but to no effect. Sarada again introduced the same Bill on 21 January 1930. This time it was widely discussed. The principal clause of the Bill was:

Where the husband of a widow was at the time of his death a member of a Joint Hindu family property, the widow shall be entitled to such share of the

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<sup>2</sup> A. K. Bakshi, *Women's Right to Property*, Dacca, 1939, p.30.

Joint family property as her husband would have been. This share would become her absolute property. Under the Hindu law, a widow did not get any share in her husband's property as a son did. A widow's right of inheritance was very limited and this right was often interpreted in courts of law in a narrow sense and entitled her only to maintenance and residence in her deceased husband's house.

The 'Modern Review', a mouthpiece of public opinion, supported the object of Sarda's Bill. It said that all Hindu widows were not necessarily helpless or oppressed, nor were they arbitrarily placed. Undaunted by earlier failures, Harbilas Sarda moved another Bill entitled "The Hindu Widow's Right of Maintenance Bill" in the Assembly on 29 August 1936. He said that Hindu law gave widows the right of maintenance, since but there was no definite standard to guide judges in fixing the amount of maintenance; his Bill aimed at providing that measuring rod to the judges.

The Bill never came up again and, therefore, Sarda's Bill for the Hindu Widow's Right for maintenance met the fate of its predecessor. But his efforts did not go unrewarded, for his idea caught the imagination of the reformers and a few years later an Act was passed in 1937, which eventually recognized the rights of Hindu widows. The Bill to amend the Hindu Law, governing Hindu Women's Right to property was circulated for the purpose of eliciting public opinion on 17 April 1936. The Bill proposed no innovation, but was merely a measure of restoration. It was referred to a Select Committee on 15 October 1936 and on 4 February 1937 the Bill, as amended by the Select Committee was taken up for consideration. Replying to the arguments advanced by the Orthodox Hindus that women could not have the right to property, because they were dependent all their lives. Dr. Deshmukh said that extending the argument to India as a whole, it might as well be contended that because Indians for a thousand years had been dependent, no Indian had the right to hold property. The Bill, as it is emerged from the Select Committee, might not perhaps; mean material gain to a Hindu Widow, but it certainly represented moral gain inasmuch as it recognized her right of partition. From the Orthodox viewpoint, it was declared that it was not desirable to give a widow an unfettered right to have partition because she likely to come under the influence of her relatives, who might deprive her of whatever she obtained by partition. Sir N.N.Sarkar, from the progressive point of view, concluded by declaring that as an initial step in redressing

the wrong, this was a very substantial measure. Dewan Lalchand Navalrai, while agreeing to the need for reform, pleaded for caution. He reminded the House that educated women were few in India, and it was not right, therefore, to give them unrestricted right of partition. Dewan Lalchand Navalrai and Baij Nath Bajoria attempted a few amendments to the Bill but they were rejected and the House passed the Bill amidst cheers. The Act was called the Hindu Women's Right to Property Act (Act XVIII of 1937), the main provisions of which were:

1. When a Hindu governed by the Dayabhaga school or by any other school of Hindu law died intestate leaving separate property, it would devolve upon his widow along with his lineal descendants, if any, in the manner as it devolved upon a son.

Provided that the widow of a predeceased son would inherit in like manner as a son. Provided further that the same provision should apply *mutatis mutandis* to the widow of a predeceased son of a predeceased son.

2. When a Hindu governed by any school of Hindu law, other than the Dayabhaga School, died intestate having at the time of his death an interest in a Hindu Joint family property, his widow would have in the property the same interest as he himself had.

3. Any interest developing on a Hindu Widow would be limited interest known as 'Hindu Widow's Estate', provided, that she would have the same right of claiming partition as a male owner.

Act II of 1929 was the first to amend the Hindu law of inheritance and Act XVIII of 1937 was the second. The Act of 1929 made no provision for helpless widows, for whom the legislature had to make better provisions by the Act of 1937. But this Act of 1937 was criticized on several grounds. R.N.Sarkar has pointed out some of its defects:

First, according to this law, when a Hindu died intestate, his property would devolve upon his widow along with his lineal descendants, if any, in the like manner, as it devolved upon a son. Now the term 'lineal descendants' was a comprehensive term, which meant direct descendants like sons, daughters,

grandsons and grand daughters by son and daughters, and so forth. Consequently, the property of a Hindu dying intestate would be liable to be divided into an infinite number of shares. As such, the interest a widow would get could never be deemed to be better than what perhaps the Act intended it to be, as she would merely get a share equal to that of each of the numerous lineal descendants, instead of a share equal to that of a son.

Therefore, a Bill was subsequently introduced in 1938 for the amendment of the Act of 1937. In Calcutta Weekly Notes the defects of the Act of 1937 were pointed out. Sir N.N.Sircar said that by 'lineal descendants' the Legislators did not mean to give rights to innumerable inheritors of the man dying intestate but only to three types of widow: (i) his own widow, (ii) the widow of his deceased son and, (iii) the widow of his deceased son's deceased son.

The language, however, he admitted, was ambiguous and needed to be corrected. He also clarified another controversial point of the Act, that is, whether a daughter-in-law's right depended upon whether her mother-in-law was alive. He said that it was not the intention of the Act that a Woman's right should be influenced by the existence or otherwise of a widowed mother-in-law. He also corrected another ambiguous point of the Act and made it perfectly clear that if there were more than one widow, say, two widows, both would jointly get the share equal to that of a son. The Amendment Bill of 1938 was therefore passed on 18 March 1938. The Act was called the Hindu Women's Right to Property (Amendment) Act, 1938 (Act No. XI of 1938).

A significant defect of this Act was that it gave undue rights to a predeceased son's widow, who got more concrete rights than those of the widow of the deceased owner. Whereas the interest conferred upon the deceased person's own widow was expressly subject to the provision of sub-section (3) which meant that the interest would be known as 'Hindu Woman's Estate', there was no such limitation in respect of the interest conferred on the predeceased son's widow. Besides, under section 2 of the Widow Remarriage Act 1956, the widow of a deceased Hindu would forfeit the property on

remarriage, but it could not be concluded that widows other than the widow of the predeceased owner would also be divested of the property vested in her on remarriage. The Act of 1937 was not specific as to what would happen if a man died leaving a son and a predeceased son's widow and her son. Would she inherit one-third and the son and the grandson get one-third each? Or would the son get half and the widowed daughter-in-law and her son inherit one-fourth each? Another serious defect of the Act was that it affected the daughters. The Hindu lawgivers expressly laid down that the maiden daughter's maintenance till her marriage, and her marriage expenses were to be paid out of her father's estate. By the Act of 1937 and its amendments, a predeceased son's widow was placed before the daughter in order of succession; but she was not liable to pay any amount to anybody out of the estate, which devolved on her. Consequently, the maiden daughter could not enforce her claim to maintenance or her marriage expenses from the predeceased son's widow. In fact, there was no justification in placing predeceased son's widow and the widow of a predeceased son of the predeceased son before the maiden daughter. Any of these widows might turn the daughter out into the street, since her rights were not protected in the Act or its amendments.

In view of the above shortcomings of the Act, a series of private Bills came up. The first Amendment Bill was moved by Akhil Chandra Dutta, Member, Legislative Assembly on 18 February 1939. It was followed by a number of other Bills, such as:

- (i) (Amendment) Bill presented by A.N.Chattopadhyay.
- (ii) The Hindu Women's Right to Property Bill introduced by N.V.Gadgil.
- (iii) The Hindu Women's Estate Bill put up by Dr.G.V.Deshmukh.

Forced with such a barrage of private Bills, the Government appointed a small Hindu Law Committee known as the Rau Committee with B.N.Rau, a judge of the Calcutta High Court as its Chairman and three other lawyers as its

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members.<sup>3</sup> They were D.N.Mitter, ex-judge of Calcutta High Court; Gharpure, Principal, Law College of Poona; and Rajratna Vasudev Vinayak Jochi, a lawyer of Baroda. The Committee advocated a Hindu code- a blend of the finest elements of various schools of Hindu law. On the basis of the various private Bills on property, the Committee evolved a common law of Intestate succession for all Hindus in British India. The Code recognized the equality of status of men and women before law with appropriate obligations as well as rights.

The Rau Committee reported in June 1941 that the Hindu Code Bill should be taken up by compartments:

- (a) Hindu Marriage,
- (b) Hindu Succession,
- (c) Hindu Minority and Guardianship,
- (d) Hindu Adoption and Maintenance.

It was essential to reduce the law relating to each part to a statutory form, and then consolidate the various acts into a single code.

On 24 March 1943, the Hindu Code Bill relating to intestate succession came up before the assembly for discussion. The salient features of the Bill were-

that it embodied a common law of intestate succession for all Hindus in British India;

that it removed the sex disqualification by which Hindu Women in general had been precluded from inheriting property, and;

that it abolished the Hindu Women's limited estate and converted it into an absolute one.

Sir Sultan Ahmed, the law Member, discussed the background of the Bill and said that, due to the defects of the Act of 1937 and of the Amending Act of 1938, a full revision of the Acts had become an urgent necessity. Bhai Parmananda, opposing the Bill, criticized the Government for taking upon itself

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<sup>3</sup>Rishindra Nath Sarkar, *Hindu Women's Right to Property Act*, S.C.Sarkar and sons, 1938,

the task of framing a Code for Hindu society, particularly when there was no demand for change among the people, under the circumstances, the Bill was likely to interfere with Hindu religion, destroy the family structure and lead to fragmentation of property. Babu Baij Nath Bajoria, leader of the opposition to the Bill, argued that if simultaneous heir ship of the daughter was recognized as in the Bill, the moral obligation felt by the brother to maintain and marry off his sisters would vanish. K.C. Neogy, of Bengal, pointed out that the measure had evoked a great deal of controversy in the province of Bengal at least. In so far as it had made a departure in essential particulars from the laws of inheritance prevailing in other parts of India. Dayabhaga was itself the result of a reformative movement. He argued that people who were governed by the Dayabhaga School should be the last persons to take exception to the process of reform going on according to modern ideas to suit modern conditions. Unfortunately, however, the opinion in Bengal was mostly opposed to the Bill.

Lalchand Navalrai raised an objection regarding the right of a married daughter who would get a share from her husband's side and also a share in her parental house. Therefore, she would get two shares whereas the son would get only one. He, however, overlooked the fact that the sons enjoyed shares brought by their wives from their parental homes. Amarendra Nath Chattopadhyaya of Bengal welcomed the Bill and said that men and women should have equal rights. He fully appreciated the idea of codification of Hindu law by which Hindu society would be brought into harmony all over the country. Govind V. Deshmukh supported the Bill and refuted the argument that it would lead to the breaking up of Hindu society, contending that the society was a living organism, which could exist and did exist by adapting to the circumstances that cropped up from time to time. Renuka Ray felt that the denial of property rights to women was based on an old, obscure text, which had, in any case, been misrepresented. Refuting the contention that the Bill would lead to disintegration of property, Rau remarked that the suggestion

seemed to be that when a man had eight or ten sons and each of them inherited a share of the property, no disintegration took place; but when a man had a son and a daughter, and the daughter got a share, only then disintegration followed. She hoped that the Bill, if passed, would mark the beginning of a new era of social reform in India. However, the Bill, she felt, was quite a conservative measure as the Rau Committee only reframed what was already laid down in Hindu law. She argued that in the Vedic and post-vedic periods women had a great measure of equality, even in law, as supported by the texts of Jamini and Upasthmba. Later, due to a multitude of causes, Woman lost her position in society and this was reflected in the law. By the time the British came, women's right had been further curtailed because the pandits and priests who expounded the laws gave the laws a most reactionary interpretation. Moreover, at that time, British common law did not allow women the right to hold property, so the British Jurists did not think it strange that Hindu Women possessed no such rights righter. In that process, not only were the Hindu women deprived of their rights, but Hinduism was deprived of some of its finest and most progressive elements. The Rau Committee sought to restore some of these features of Hindu law, not by any revolutionary reform but by attempting to revive the old glory of Hindu law.

Sir Sultan Ahmed, the Law Member, replying to arguments in the debate said that if there was any need, he was prepared to choose two or three experts, particularly from Bengal, who might be of help to the Joint Committee. The Joint Committee consisted of Members of both Houses of Parliament while the Select Committee comprised a number of members of one House of Parliament whose task was to examine special issues and then submit a report before the House.

The Modern Review expressed the opinion: The great benefit of the Bill is that it provides a uniform code for all India... Orthodox opposition is intelligible but there is not much in it. The opposition of people who profess advanced views in politics and even in social matters can only be treated as proceeding from interested motives or from mere factiousness.

Atul Ch. Gupta pointed out that the Bill contemplated bringing into force one unified law of inheritance for Hindus throughout India. He felt that the consequences of the Bill had a far-reaching effect on the whole Hindu Community in that everyone who professed to be a Hindu in India would be guided by it. He emphasized that, to all intents and purposes, the law of succession had nothing to do with religion as much and he failed to understand why one's religion would receive a setback if a daughter was to inherit as in the case of the mother and the brother. The industrialization of India demanded the mobility of capital stagnating in the system of common ownership of the family property. The breaking up of this system was a historical necessity and the Act had done it admirably.

According to R.N.Sarkar, the unification of laws was unjustified. The Code, in his view, failed to unify the Hindu law as the Central Legislature under the Government of India Act, 1935, possessed no power of legislate on agricultural land. That power was to be exercised by provincial legislatures, and therefore, no unification could be expected. Moreover, the proposed change was to undermine seriously the Mitakshara Joint family system; and repealing Joint family meant denouncing co-operation.

By attacking Joint family, the Code condemned co-operation while co-operation and united allied action in the form of League of Nation and United Nations had been long recognized as a durable basis for everlasting global unity. Even Women's position was not adequately safeguarded by the Code as the mother was placed after son, grandson, great grandson, widow, daughter, and even daughter's son. Similarly, predeceased son's widow was also deprived of the right given under the Hindu Women's Right to Property Act of 1937. On the submission of the report of the Joint Committee, the Government of India issued on 21 January 1944, a notification reviving the Hindu Law Committee with B.N.Rau as Chairman to complete the codification of other parts of the Hindu Code Bill. On the occasion of the debates on the Bill, Dr. Ambedkar said that the Bill was 'no revolutionary measure, nor even a radical measure'. He did not appreciate the criticism that shares to daughters meant

disruption of the family property. 'If we want to stop fragmentation we would have to do something else, not by the law of inheritance but by some other law', he said. The Bill as recommended by the Rau Committee was referred to a Select Committee on 9 April 1948. It came up for discussion in the Legislative Assembly on 24 February 1949. A Letter published in the Statesman stated the Hindu Code was a measure, which interfered with the religious and socio-religious life of the Hindus and protested that when there was no Code for Muslims, Christians and other communities, there was no reason why Hindu society should be made an exception, especially in opposition to the vast majority of Hindus. This violated, it said, all principles of secularism and democracy – the two guiding principles of our National Government.

Letters denouncing the Bill were also published in 'The Hindu'. Expressing the view that the provisions relating to marriage, adoption, etc., could, with slight modifications, be made acceptable to Hindu society, they protested that when it came to the right of property, both the framers of the Bill and the members of the Select Committee seemed to have run amuck with their proposals. Rich families could afford to give shares of family properties to all the members alike, but ninety percent of the people of India lived by agriculture. The fragmentation system neither fruitful nor useful. What would become of a family of eight daughters and six sons, with a landed property of fifteen acres?

One letter, however, was favour of the Bill and it said that the notion that these reforms were not needed by Hindu society merely because some of the proposed reforms were western in character, and some of those responsible for such reforms happened to be 'saturated with western education', should be given up. Western or Eastern, any idea that would be useful to India should be fully exploited and applied to our conditions. After all, an English educated great man had brought for the reform of Sati and people were happy about that.

The Hindu Code relating to succession received the assent of the President and became the law of the land on 17 June 1956. The Law was

named The Hindu Succession Act 1956 (Act No. XXX of 1956). It provided a share to a female even in property owned by a Joint Hindu family of the Mitakshara type, and gave a solution to strong divergent views regarding a Hindu Woman's position in order of succession without disrupting the Mitakshara coparcenary.<sup>4</sup>

## 2.2. POSITION UNDER THE HINDU SUCCESSION ACT 1956

The Hindu Succession Act of 1956 enacted a new principle. The Hindus were governed by two systems of law – the Mitakshara and the Dayabhaga. According to Mitakshara, the property of a Hindu was not his individual property but belonged to what was called a coparcenary, which consisted of father, son, grandson and great-grandson. On the death of any member of this coparcenary, the property passed on by survivorship to members who remained behind and did not pass to the wife and children of the deceased. The Act adopted the Dayabhaga system, under which the property was to be held by the wife and children as personal property with an absolute right to dispose it of.

That was the fundamental change, which this Act made, in addition to which the Act sought to introduce four changes. One was that the widow, the daughter, and the widow of the predeceased son all got the same rank as the son in the matter of inheritance, and the daughter was also given a share full and equal to that of the son in her father's property. The second change which the Act made so far as the female heirs were concerned was that the number of female heirs recognized was greater than that prescribed by either Mitakshara or Dayabhaga. The third change made by the Act was that under the Old law, discrimination was made among female heirs as to whether a particular female was rich or poor, whether she was with issue or without issue. All these discriminating points were now abolished by this Act. The last change related to the rule of inheritance in the Dayabhaga. Under the

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<sup>4</sup>D.H.Chaudhuri, *The Hindu Succession Act 1956*, Preface Calcutta, Eastern Law House,

Dayabhaga system, the father succeeded the son in preference to the mother; under the present Act, the position was altered so that the mother came before the father.

Regarding '*Stridhan*' the Act made two changes. One was that the *Stridhan* of different categories would be considered as one under the rule of succession. Secondly, the son was also given a right to inherit the *stridhan*, equal with the daughter. The Select Committee made another alteration of the existing rule where the husband of a woman in the case of succession came much later under the Hindu law – a provision included in the original Rau Committee. The Select Committee brought the husband in the line of other *stridhan* heirs. Regarding the question of "Women's estate" under Hindu law, a woman earlier inherited what was called a 'life estate' when the property passed after the death of the women to the reversioner of her husband. The Act now introduced two changes. It converted the woman's limited estate into an absolute estate; and secondly, it abolished the right of the reversioners to claim the property after the widow's death or remarriage. An important provision in this Act also related to dowry. The property given to a girl as dowry on the occasion of her marriage should be treated as a trust property, which the woman would be entitled to claim when she reached to the age of 18, so that neither her husband nor any relative of her husband would have any interest in that property.

The object of Hindu Succession Act, 1956, is to evolve a fairly uniform system of law for all Hindus with respect to intestate succession. It removes inequalities between male and female with respect to rights in property and evolves a list of heirs entitled to succeed on intestacy based on natural love and affection rather than religious efficacy.

Thus the main object may be enumerated as under:

(i) To evolve a fairly uniform system of law for all Hindus with respect to Intestate Succession- i.e., succession to property in respect of which

the deceased person has not made a will.

(ii) To give a right of inheritance to daughter which previously under all systems of pure Hindu law was not available to them.

(iii) To evolve a list of heirs entitled to succeed on intestacy based on natural love and affection rather than on religious efficacy.

(iv) The law should be administered as it is found on the statute book and the customs ought not be hamper or alter statute law.

The scope of the Act has been widened to include every citizen of India who is not a Muslim, Christian, Parsi or Jew by religion. This position has been made clear by section 2 of the Act, which defines the persons to whom the Act applies. It lays down that the Act applies to any person who is a Hindu by religion in any of its forms or developments including a *virashaiva*, a *lingayat* or a follower of the *Bramho*, *Prarthana* or *Arya Samaj* and to any other person who is not a Muslim, Christian, Parsi or Jew by religion. The differences prevailing up to this in Mitakshara and Dayabhaga schools of Hindu law have been removed and now the followers of both the schools are to be governed by the same simple statute law.

Section 4 of the Act describes the overriding effect of the Act. It lays down that all existing laws; texts, customs and usages, which are inconsistent with the Act, are repealed by the act. The customary rules of succession according to primogeniture have been abolished by the Act. However, the Hindu law where no provision is made in the act, as found immediately before the commencement of this Act shall remain in force.

Thus section 4 abrogates only those provisions of Hindu law and rules which are inconsistent with the provisions of this Act and cannot be said to have abrogated all the rules of Hindu law which are not touched by this enactment. This Act is a codifying enactment. It supersedes prior law and lays down the whole of the law of succession in the form of a Code. It does purport to abolish custom in the abstract. The scheme of the Act in the matter of succession to the property of a Hindu dying intestate, after the coming into force of the Act, is to lay down a set of general rules of succession to the

property of a male Hindu in sections 8 to 13 including rules relating to ascertainment of the shares and portions of various heirs. Sections 14 to 16 prescribe General Rules regarding succession to the property of a female dying intestate. Sections 17 to 28 specify general provisions relating to succession and lay down rules which are supplementary to the provisions laid down in sections 5 to 17 of the Act. Two systems of inheritance to the separate or self-acquired property and coparcenary interest of a male intestate as prevailed have been substantiated by a uniform system under section 8. The three recognized classes of heirs viz, *Sapindas*, *Samanodakas* and *Bandhus* cease to exist and under the Act now there are four classes of heirs viz., (i) heirs in class I of the schedule (ii) heirs in class II of the schedule (iii) Agnates and (iv) Cognates.

The Hindu Succession Act, 1956, bases its rule of succession on the basic Mitakshara principle of propinquity,<sup>5</sup> i.e., preference of heirs on the basis of proximity of relationship. The Mitakshara limited the effect of the principle by the twin rules of exclusion of females and of agnatic preference. The rule of exclusion of females has been done away with, while the rule of agnatic preference has been considerably modified so far as it is concerned with the nearer relations. The Dayabhaga principle of religious efficacy has been abrogated. The Modern Hindu law of succession is essentially a secular law, as religious or spiritual considerations do not figure anywhere.

A person, so long he lives, is free to deal with his property the way he likes. He is free to make will and lay down his own scheme of distribution of his property after his death. If he dies without a will, it is the purpose of the law of inheritance to determine the persons who will take his property. The law of testamentary succession is concerned how best the effect could be given to the wishes of the testator (i.e., the person who made the will); what are the rules relating to making of a will and allied and subsidiary matters. The testator enjoys full freedom of bequeathing his property. The law of intestate succession is concerned with the matters such as: who are the persons entitled

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<sup>5</sup> Paras Diwan, *Modern Hindu Law*, Allahabad Law Agency, (1997), p.339

to take the property, i.e., who are the heirs; what are the rules of preference among the various relations; in what manner the property is to be distributed in case a person has more than one heir; what are the disqualifications of heirs and the allied and subsidiary matters.

## **2.2. (i). SUCCESSION TO MALE DECEASED**

The Hindu Succession Act, 1956 deals with the inheritance to: (a) the separate properties of Mitakshara male, (b) to the separate and coparcenary properties of a Dayabhaga male, and (c) to the undivided interest in the joint family property of a Mitakshara coparcener, who dies leaving behind a widow, mother, daughter, daughter's daughter, son's daughter, son's widow, grandson's daughter, grandson's widow or daughter's son.

Sections 8 to 13 of the Hindu Succession Act 1956 specify the rules for the succession to the property of a male. Section 8 of the Act specifies general rules while sections 9 to 13 describe and provide details for the rules laid down in section 8 of the Act. Section 8 of the Act provides that property of a male Hindu dying intestate devolve according to the provisions laid down in this connection. Section 8 divides the heirs of a male for the purposes of inheriting the property into four classes. Viz.,

1. The heirs being the relatives specified in class I of the schedule.

These are as follows:

- (i) Son.
- (ii) Daughter.
- (iii) Widow.
- (iv) Mother.
- (v) Son of predeceased son.
- (vi) Daughter of a predeceased daughter.
- (vii) Son of a predeceased daughter.
- (viii) Daughter of a predeceased son.
- (ix) Widow of a predeceased son.
- (x) Son of a predeceased son of a predeceased son.

(xi) Daughter of a predeceased son of a predeceased son.

(xii) Widow of a predeceased son of a predeceased son.

2. Secondly, if there is no heir of class I, then upon the heirs being the relatives specified in class II of the schedule. Viz.

(i) Father

(ii) A. Son's daughter's son

B. Son's daughter's daughter

C. Brother

D. Sister

(iii) A. Daughter's son's son

B. Daughter's son's daughter

C. Daughter's daughter's son

D. Daughter's daughter's daughter

(iv) A. Brother's son

B. Sister's son

C. Brother's daughter

D. Sister's daughter

(v) Father's father; father's mother

(vi) Father's widow; brother's widow

(vii) Father's brother; father's sister

(viii) Mother's father; mother's mother

(ix) Mother's brother; mother's sister

3. Agnates

4. Cognates

Agnates and cognates are not enumerated heirs, and no exhaustive enumeration can possibly be made. The rule for determining who are agnates and cognates are the same, so are the rules relating to distribution of property among them. However, agnates are as a rule preferred over cognates—howsoever remote an agnate may be, he will be preferred over cognates.

*Illustrations:*

(1) A, a male Hindu dies leaving surviving heir a son S, a father F and a

mother M and a daughter D. The son, the daughter and the mother will inherit to the exclusion of the father, who is an heir of Class II, whereas the former are heirs of class I.

(2) A, a male Hindu dies leaving surviving him a widow W and a son of a predeceased son S, sister FD and a brother's son BS. W and S will succeed to the exclusion of FD and BS.

(3) A, a male Hindu dies leaving surviving him a brother FS and FSSS brother's grandson. FS will exclude FSSS as the former is mentioned in class II and the latter is an agnate of class III category mentioned in the section.

(4) A, a male Hindu dies leaving surviving him brother's grandson FSSS and brother's daughter's son BDS. The first is an agnate and the second is cognate. So the first will exclude the second.

#### **Order of Succession among the Heirs in the Schedule:**

According to Section 9 heirs in class I of the Schedule are to succeed simultaneously, in other words, they form one group of heirs and succeed in a body. Heirs mentioned in Class II are excluded so long as there is even a single heir in Class I. He succeeds in preference to all others mentioned in Class II. For instance, if a male dies intestate, leaving only a daughter and father surviving him, the daughter shall succeed in preference to the father in entry I of class II. Section 9 of the Act lays down:

“Among the heirs specified in the schedule those in class I shall take simultaneously and to the exclusion of all other heirs, those in the first entry in class II shall be preferred to those in the second entry, those in the second entry shall be preferred to those in the third entry and so on in succession.”

#### **Distribution of property among heirs in class I of the schedule:**

As per section 10 of the Act the property of a Hindu dying intestate shall be divided among the heirs in class I in accordance with the following rule.

**Rule I:** The intestate's widow or if there are more widows than one, all the widows together shall take one share.

Illustration: A dies leaving his widow Y, two daughters M, N and one son Z. Here Y being an heir of class I will take one share along with other heirs of class I. Hence Y shall get  $\frac{1}{4}$ . If there are two widows then each shall get  $\frac{1}{8}$ th.

**Rule 2:** The surviving sons and daughters and the mother of intestate shall each take one share.

Illustration: A dies leaving behind his mother M, widow W, two sons S1 and S2 and three daughters D1, D2, D3. Here all will take one share each i.e.,  $\frac{1}{7}$ th each.

**Rule 3:** The heir in the branch of each predeceased son or each predeceased daughter of the intestate shall take between them one share.

**Rule 4:** The distribution of the share referred to in Rule 3:

(1) Among the heirs in the branch of predeceased son shall be so made that his widow (or widows together) and the surviving sons and daughters get equal portions and the branch of his predeceased sons get the same portion

(2) Among the heirs in the branch of the predeceased daughter shall be so made that the surviving sons and daughters get equal portions.

*Illustration:*

(1) A dies leaving a widow W, a son S, a daughter D, three sons of a predeceased son S1 and two daughters of a predeceased daughter D1. The property will be divided in 5 equal shares- W, son S and daughter D will get  $\frac{1}{5}$ th each. Three sons of S1 will take  $\frac{1}{5}$ th jointly and each one of them will get  $\frac{1}{15}$ ; the two daughters of D1 will jointly take one share i.e.,  $\frac{1}{5}$  and each one of them will get  $\frac{1}{10}$ th.

(2) The surviving heirs of A are a son, S, a daughter D, great grandson S3 by a predeceased son S1 and a grand daughter D1 by another predeceased son. Here each gets one share S, D, S3 and D1 will get  $\frac{1}{4}$  shares each.

**Division of property among heirs in class II of the schedule:**

If there is no heir in class I of the schedule property of a male Hindu dying intestate shall devolve upon the heirs in class II of the schedule. As regards the order of succession among the heirs of class II, section 11 of the Act lays down that the property of an intestate shall be divided between the heirs specified in any one entry in class II of schedule so that they share equally. One entry shall exclude the next entry. Thus when there is only one heir in a particular entry, he or she alone take the whole of the estate but when there are more heirs than one in the entry then all such heirs shall take equally.

*Illustration:*

(1) The surviving heirs are father, brother and sister's daughter. Here father will get the whole property as an heir in entry (I) of class II to the exclusion of two others who fall under entries II and IV.

(2) The surviving heirs are brother, sister, father's brother, mother's mother. The last two will get nothing. The first two will get the estate simultaneously and in equal shares being the heirs in the entry II rather than other two heirs of entry VII and VIII respectively.

**Order of succession among agnates and cognates:**

Section 12 of the Hindu Succession Act lays down rules of preference determining the order of succession among agnates and cognates. These rules are as follows:

**Rule 1:** Of two heirs, the one who has fewer or no degrees of ascent is preferred.

**Rule 2:** Where the number of degrees of ascent is the same or none that heir is preferred who has fewer or degrees of descent.

**Rule 3:** Where neither heir is entitled to be preferred to the other under Rule 1 or Rule 2 they take simultaneously.

In this connection Section 13 of the Hindu Succession Act lays

down rules about computation of degrees as follows:

(1) For the purposes of determining the order of succession among agnates and cognates, relationship shall be reckoned from the intestate to the heirs in terms of degrees of ascent or degrees of descent or both, as the case may be.

(2) Degrees of ascent and degrees of descent shall be computed inclusive of the intestate.

(3) Every generation constitutes a degree either ascending or descending.

## 2.2. (ii) SUCCESSION TO FEMALE DECEASED

Before the commencement of the Hindu Succession Act, 1956 a female Hindu possessed two kinds of property:

1. Stridhana
2. Hindu Women's Estate

Over the *Stridhana*, she had full ownership and on her death it developed on her heirs. Even as regards property in which she acquired Hindu Women's Estate, her position was that of owner but her power of alienation was limited and on her death, the property devolved on the next heir of the last full owner and not on her heir. But now Section 14 of the Hindu Succession Act has abolished the Hindu Women's Limited estate and confers on the woman the absolute ownership over all her property howsoever acquired. The provision laid down in Section 14 of the Act is as follows:

(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

**Explanation:** In this sub-section "Property" includes both movable and immovable property acquired by a female Hindu by inheritance or device or at a partition or in lieu by maintenance or arrears of maintenance or by gift

from any person whether a relative or not, before, at or after her marriage or by her own skill or exertion or by purchase or by prescription or in any other manner whatsoever and also any such property held by her as Stridhana immediately before the commencement of this Act.

(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property.

The effect of Section 14 of the Act is that it confers absolute ownership on a female Hindu i.e., the widow of the last male holder in respect of all properties left by a male Hindu which was in her or their possession on the date of the commencement of this Act, even though the husband or the male Hindu had died long before the commencement of the Act.

From a plain reading of Section 14 (1) it is clear that the estate taken by a Hindu female under that provision is an absolute one and is not defeasible under any circumstances. The ambit of that estate cannot be cut by any text rule or interpretation of Hindu law. It has been held by the Supreme Court<sup>6</sup> that Section 14 clearly says that the property possessed by a female Hindu on the date when the Act came into force whether acquired before or after the commencement of the Act shall be held by her as full owner thereof. Thus Section 14 of the Act is retrospective in effect.

The word 'Property' as used in Section 14 (1) of the Act, as per its explanation, includes both movable and immovable property acquired by a female Hindu. The property may be of the following description as property acquired:

- (i) by inheritance or device; or
- (ii) by a partition; or

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<sup>6</sup> *Commissioner of I.T. vs Kokali Devi* AIR 1970 SC 1730

- (iii) in lieu of maintenance or arrears of inheritance; or
- (iv) by a gift from any person whether a relative or not, before at or after her marriage; or
- (v) by her own skill or exertion; or
- (vi) by purchase or by prescription; or
- (vii) in any other manner whatsoever and
- (viii) also any property held by her as *Stridhana* immediately before the commencement of this Act.

Section 14 of the Hindu Succession Act is a very important and crucial section in the Act and it has brought about fundamental and radical changes in the position and status of the Hindu females. The reason for including this provision was to ensure to women equality of status and of opportunity with men in relation to title to and enjoyment of property. Now the position is that the Hindu female will no longer hold the property as a limited owner rather she is as an absolute owner. The reversioner's rights are entirely abrogated by the Act with regard to the properties held by a Hindu female. The reversioner cannot have any *locus standi* to challenge the right of the Hindu female. However a reversioner has a right to challenge a transfer of property made by a widow before the enforcement of this Act on the ground that the transfer was made by the widow without any legal necessity or lawful authority. Such an action would be maintainable even after the enforcement of the Act.<sup>7</sup>

The object of the Hindu Succession Act was to improve the legal status of Hindu women enlarging their limited interest in property inherited or held by them to an absolute interest provided that they were in possession of the property when the Act came into force and therefore they have been in a position to take advantage of the provisions. It was held by the Supreme Court that the reversioners have disappeared because the limited estate of a Hindu widow has been enlarged by the enactment of the Hindu Succession Act 1956

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<sup>7</sup> *Radha Rani Bhargava vs Hanuman Prasad Bhargava* AIR 1966 SC 216

and that is now her absolute property.<sup>8</sup> She is now full owner thereof with absolute rights of disposition. The property of a Hindu woman devolves on her death on her heirs as per section 13 and 16 of the Act. But as regards those properties, which were alienated before 1956, the reversioners still exist and in that respect section 14 has no application and it has no retrospective effect in those matters.

Thus the position may be summed up as under:

1. Section 14 does not apply to women's estate over which the Hindu female has no possession when the Act came into force. In such a case old Hindu law continues to apply. For the application of the present Act possession by woman on the date when Act came into force is essential.

2. Section 14 has qualified retrospective application and converts only that estate into full estate over which she has possession when the Act came into force. The possession may be actual or constructive.

The principle of enlargement of limited estate right of widow was recognized by the Supreme Court in the case of *S.C. Shukla vs. Maharaj*<sup>9</sup>

“Where the idol was installed by a P in his house which later became the temple of the deity and performed Sevapuja of the deity so long as he was alive and it was performed thereafter by his wife A and by his will he dedicated his entire property to the deity and made his wife and Mohatmin Shebait without any power to transfer any property; however he had not any disposition regarding Shebaiti right in his will whereby he created the endowment and no custom or usage to the contrary has been pleaded, the widow of ‘P’ could be said to have been succeeded to the Shebait right held by him on his death as a limited owner and the right has become enlarged into the Succession Act 1956 and therefore she could transfer that right by a will in favour of a person who was not a non-Hindu and who could get the duties of Shebait performed either by himself or by any other suitable person.”

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<sup>8</sup> *Krishna Behari vs. Gulab Chand*, AIR 1971 SC 1041.

## GENERAL RULES OF SUCCESSION TO THE PROPERTY OF A FEMALE DECEASED

The general rules of succession to the property of a female Hindu have been laid down in Section 15 of the Act as follows:

(1) The property of a female Hindu dying intestate shall devolve according to the rules set out in Section 16.

- a] Firstly, upon the sons and daughters (including the children of any predeceased son or daughter and the husband );
- b] Secondly, upon the heirs of the husband;
- c] Thirdly, upon the heirs and father;
- d] Fourthly, upon the heirs of the father; and
- e] Lastly, upon the heirs of the mother.

(2) Notwithstanding anything contained in Sub-section (1):

a] any property inherited by a female Hindu from her father or mother shall devolve in the absence of any son or daughter or the daughter of the deceased (including the children of any predeceased son or daughter) not been the other heirs referred to in sub-section (1) in the order specified therein but upon the heirs of the father;

b] any property inherited by a female Hindu from her husband or from father-in-law shall devolve in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the heirs referred to in sub-section (1) in order specified herein, but upon the heirs of the husband.

**ORDER OF SUCCESSION AND MANNER OF DISTRIBUTION AMONG HEIRS OF A FEMALE DECEASED:**

The provision relating to order of succession and manner of distribution among heirs of a female Hindu have been prescribed in Section 16 of the Act as follows:

The order of succession among the heirs referred to in section 15 shall be, and distribution of the intestate's property among those heirs shall take place according to the following rules viz.,

**Rule- 1:** Among the heirs specified in sub-section (1) of Section 15, those in one entry shall be preferred to those in any succeeding entry, and those included in the same entry shall take simultaneously.

**Rule- 2:** If any son or daughter of the intestate had predeceased the intestate leaving his or her own children alive at the time of the intestate's death, the children of such son or daughter shall take between them the share which such son or daughter would have taken if living at the intestate's death.

**Rule- 3:** The devolution of the property of the intestate on the heirs referred to in clauses (b), (d) and (e) of such sub-section (1) and in such sub-section (2) of section 15 shall be in the same order and according to the same rules as would have applied if the property had been the father's or mother's or the husband's as the case may be, any such person had died intestate in respect thereof immediately after the intestate's death.

**Illustrations:**

1] The surviving heirs of a Hindu woman are three sons, two daughters and the husband. Each takes one-sixth share.

2] The surviving heirs are a son, a daughter, a predeceased son's son and a predeceased daughter's son and another predeceased's daughter. Each takes one-fifth share.

3] The surviving heirs are a son and husband's brother. The son gets the whole estate to the exclusion of the husband's heirs.

4] The surviving heirs are husband's brother and the mother and the father. The husband's brother excludes the father and the mother.

5] The surviving heirs are mother, father and father's mother. The first two take in equal share to the exclusion of the third.

6] The property was inherited from father. The surviving relations are husband's heir. No heir of the father survives the deceased. The property will go to the Government by escheat and not to the heirs of the husband.

7] The property was inherited from her husband. No heirs of the husband survive her. It goes to the Government and not to persons or the heirs of the parents of the deceased.

## **2.2.(iii). GENERAL RULES OF SUCCESSION**

General provisions relating to succession have been laid down in Hindu Succession Act 1956 in Section 18 and onwards and the same may be described as under:

1. **FULL BLOOD PREFERRED:** As per section 18 of the Hindu Succession Act full blood is preferred to half blood. Section 18 lays down that heirs related to an intestate by full blood shall be preferred to heirs related by half blood, if the nature of the relationship is the same in every other respect.

Heirs descending from the common ancestor by the same wife are

to be preferred to those who are descended from the same common ancestor but by different wives. Thus the full sister's daughter shall be preferred to half brother's son.

2. DEVOLUTION PER CAPITA: As per Section 19 of the Hindu Succession Act if two or more heirs succeed together to the property of an intestate they shall take the property.

- (a) Save as otherwise expressly provided in this Act, per capita and not per stripes; and
- (b) Succession to the estate of the deceased shall be individual and not joint.

Each heir shall take his or her share individually and not branch wise. The heirs shall not succeed the estate of the deceased jointly but take their individual shares simultaneously finishes off the joint family system, which was the backbone of Hindu society in good olden days.

3. RIGHT OF CHILD IN WOMB: Section 20 of the Hindu Succession Act provides about the right of a child in womb. It lays down that a child who was in the womb at the time of the death of intestate and who is subsequently born alive shall have the same right to inherit to the intestate as if he or she had been born before the death of the intestate, and the inheritance shall be deemed to vest in such a case with effect from the date of death of the intestate.

A child in womb at the time of intestate's death has been given the right to share the property of the deceased if it is born alive subsequently. The inheritance in such a case shall be deemed to vest in the child with effect from the date of the death of intestate. If however a child is born he or she will divest the shares allotted to other heirs and there will have to be a re-adjustment of the shares.

If however the other heirs upon whom the property might have vested belong to class II of the Schedule then they will be completely divested and excluded from their shares and there after born child whether a son or a daughter shall alone inherit the entire property.

#### 4. PRESUMPTION IN CASE OF SIMULTANEOUS DEATHS:

Section 21 of the Hindu Succession Act lays down that where two persons have died in circumstances rendering it uncertain whether either of them and if so which survived the other, then, for all purposes affecting succession to property, it shall be presumed until the contrary is proved, that the younger survived the elder.

For example, a father F, and a son S die in air-crash. In this case S (being younger to F) is presumed to have survived F. In another case a testator and his wife (who was younger to him in age) died simultaneously of gunshot wound. The court held that the wife should be presumed to have survived the husband testator.<sup>10</sup>

5. REMARRIAGE BY WIDOW: Section 24 of the Hindu Succession Act provides that certain widows remarrying may not inherit as widows. It lays down that any heir who is related to an intestate as the widow of a predeceased son, the widow of a predeceased son of a predeceased son or the widow of a brother shall not be entitled to succeed to the property of the intestate as such widow, if on the date of succession she has remarried. In a case,<sup>11</sup> it has been held by the Supreme Court that a mother cannot be divested of her interest in the property on the ground of remarriage.

The essential condition for the exclusion of these widows from their shares of inheritance is that they have remarried before the death of the intestate. Remarrying will be a disqualification if it takes place before the succession opens i.e., before the death of the intestate but if once the succession has opened out and property has vested in such widows then their subsequent remarriage will not have the effect of divesting them of their shares of the property of the deceased which they have inherited as absolute owners.

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<sup>10</sup> AIR 1963 Punjab 66

6. Under the Present Act Unchastity is no ground for exclusion from inheritance.

7. **MURDERER DISQUALIFIED:** Section 25 of the Hindu Succession Act lays down that murderer is disqualified from inheritance. It lays down that a person who commits murder or abets the commission of murder shall be disqualified from inheriting the property of the person murdered, or any other property in furtherance of the succession to which he or she committed or abetted the commission of the murder.

Thus any person found guilty of the murder or abetment of murder of the deceased intestate shall forfeit his or her right to succeed to the property of the deceased. In a case,<sup>12</sup> it was held by the Privy Council that upon principles of equity, justice and good conscience the murderer should be disqualified from succeeding to the estate of the person whom he has murdered and he would not be regarded as a fresh stock of descent but should be regarded as non-existent.

8. **CONVERT'S DESCENDANTS DISQUALIFIED:** Section 26 of the Hindu Succession Act specified that where before or after the commencement of this Act, a Hindu has ceased or ceases to be a Hindu by conversion to another religion, children born to him or her after such conversion and their descendants shall be disqualified from inheriting the property of any of their Hindu relatives unless such children or descendants are Hindus at the time when the succession opens.

Thus conversion of an heir is not a bar to succession. But the children of a Hindu convert to a non-Hindu religion cannot inherit. But if such children or descendants are Hindu at the time when succession opens then they can succeed. Thus offspring also become disqualified to inherit the property unless they become reconverts to Hinduism at the time of intestate's death.

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<sup>11</sup> *Smt. Kasturi Devi vs D.D.C.*, AIR 1976 SC 2105

9. DISQUALIFIED HEIRS: Thus as per discussions held above following are disqualified from inheriting the property of the deceased intestate.

- i) Certain widows remarrying before death of intestate
- ii) Murderer
- iii) Convert's descendants.

But following are not disqualified from inheriting the property of the deceased intestate:

- i) Unchaste woman
- ii) Convert heir
- iii) Heir suffering from disease
- iv) Widows remarrying after the death of the intestate.

10. DISEASE DEFECT ETC. NOT TO DISQUALIFY: Section 28 of the Hindu Succession Act clarifies that no person shall be disqualified from succeeding to any property on the ground of any disease, defect or deformity or save as provided in this Act, on any other ground whatsoever.

11. SUCCESSION WHEN HEIR DISQUALIFIED: Section 27 of the Hindu Succession Act lays down that if any person is disqualified from inheriting any property under this Act, it shall devolve as if such person had died before the intestate. Moreover, such offspring of disqualified heirs (who are entitled to succeed) mentioned in Sections 25 and 26 shall succeed to the estate of the intestate as if their father-disqualified ancestor predeceased the intestate when the succession opened.

12. FAILURE OF HEIRS-ESCHEAT: Section 29 of the Hindu Succession Act lays down that if an intestate has left no heir qualified to succeed to his or her property in accordance with the provisions of this Act

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<sup>12</sup> *Kenchava vs Grimallopu*, (1924) 51 IA 364

such property shall devolve on the Government; and the Government shall take the property subject to all obligations and liabilities to which an heir would have been subject.

13. WILL: The present Act make important changes with regard to the disposition of the property by will. A male Hindu coparcener, as per section 30 of the Act, has been empowered to dispose of his Mitakshara coparcenary interest by will. Thus a Hindu, whether governed by Dayabhaga Law or Mitakshara Law, can dispose of his separate property as well as the interest in the Mitakshara coparcenary property. This power is intended to prevent unneccessary disruption of joint family property.

14. DWELLING HOUSE- RIGHT OF FEMALE HEIRS: In order to preserve joint family property, Section 23 of the Hindu Succession Act provides that a female Hindu although she may be entitled to live in a family dwelling house wholly occupied by the members of the family, cannot ask for partition unless the male-heirs themselves choose to divide the property and take away their restrictive shares.

15. RIGHT OF PRE-EMPTION-PREFERENTIAL RIGHT: Section 22 of the Hindu Succession Act embodies the law which is more or less analogous to the law of pre-emption as it is understood under the Mohammedan Law. It confers upon the heirs of Class I of the Schedule a preferential right to acquire an interest which any other heir of the same class may be contemplating to transfer to an outsider. This will be known Right of pre-emption with regard to sales has been extended with scope to all kinds of transfers including sales, mortgages, gifts and leases etc. It has been further extended by including immovable property along with business.

**The provisions are as follows:**

Where after the commencement of this Act an interest in:

1. any immovable property or
2. any business carried on by him or her whether solely or in

conjunction with others:

i) devolves upon two or more heirs specified in class I of the

Schedule; and

ii) any one of such heirs proposes to transfer his or her interest in the property or business the other heirs shall have a preferential right to acquire the interest proposed to be transferred.

Sub-section (2) of Section 22 provides that the consideration for which any interest in the property of the deceased may be transferred in the absence of any agreement between the parties be determined by the Court on application made for the purpose and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs or of incidents to the application.

Sub-section (3) of Section 22 of the Act lays down that if there are two or more heirs specified in Class I of the Schedule proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred.

In the case of *Nagannal vs Nanjammal*,<sup>13</sup> Mr Justice Natisan of Madras High Court said Section 22 embodies two fold aspects of Right of pre-emption viz. (i) the primary and substantive right to have an offer made; and (ii) the secondary or remedial right of the co-heirs if the property is sold without being first offered to him to take it from the purchaser. This right is personal and is not attached to the property.

#### **2.2.(iv) SPECIAL PROVISIONS UNDER MARUMAKKATTAYAM, NAMBUDRI AND ALIYASANTANA LAW:**

Uniformity of law in the matter of succession is one of the purposes of this enactment and sections 6 and 7 speak of in that direction. While the former provision deals with the law of Mitakshara coparcenary, the

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<sup>13</sup> (1970) MLJ 358.

later with *Aliasantana*, *Marumakkattayam* and *Nambudri*, laws as defined in clauses (b), (h) and (I) of Section 3. Both the provisions come into play on the death of the holder of an interest in a coparcenary or a *tarwad* etc., as the case may be, but not before that. In other matters, the joint families in question are governed by their respective laws with which the Act has no concern. There is however one important difference in the two provisions. Under section 6 the Application of this Act is subject to the condition that certain heirs mentioned in the proviso must exist on the date of death of the intestate. But section 7 is without any such condition and the present Act will govern the devolution of interest there under in all circumstances, irrespective of the survivors.<sup>14</sup>

The joint families, which inhabit the South and West Coast of India and together constitute the Malabar joint family system are governed by the *Aliasantana*, *Marumakkattayam* and *Nambudri* laws. The feature, which is common to these laws, is that they are basically matriarchal and descent is traced to a common ancestress. In spite of this distinguishing feature which is not to be found in any other school of Hindu law, the present Act has been made applicable to persons belonging to the Malabar Joint family in matters of testamentary and intestate succession in order to prescribe, as far as possible, a uniform pattern for the whole of India in these matters. Section 17, it should be noted, does not refer *illom* and as such, this Act would apply to a *Nambudri* joint family in an unqualified form.

***Tarwad, Tavazhi, Kutumba, Kavaru and illom:***

The head note refers to five institutions, namely, *tarwad*, *tavazhi*, *kutumba*, *kavaru* and *illom*. The institutions are not defined in this Act and for that purpose one has to look to the respective laws applicable to them. *Tarwad* and *tavazhi* refer to *marumakkattayam* law, *kutumba* and *kavaru* to *aliyasantana* law and *illom* to *nambudri* law. *Tarwad* is a sort of family corporation, every member therein having equal rights in the property by

<sup>14</sup> See, M.R.Mallick, Ray's Commentaries on the Hindu Succession Act 1956, Pg.65.

reason of his or her birth in the *tarwad*. Every *tarwad* consists of a mother and her children, both male and female, having joint rights in the property. Under the customary law, the interest of a deceased member devolved by survivorship. A *tarwad* consists of two or more branches known as *tavazhis*, each *tavazhi* again consisting of one of the female members of the *tarwad*, her children and all her descendants in the female line. *Kutumba* and *illom* are parallel matriarchal joint families under *aliyasantana* and *nambudri* laws respectively, like *tavazhi*, are a branch of *kutumba*.

Sub-section (3) of section 7 relates to *sthanam* property. *Sthanam* is an offshoot of *Marumakkattayam tarwad*. The literal meaning of the word is status and attendant property of the rulers. The ancient rulers of the Malabar Coast possessed *sthanams* and granted the same to their subsidiary chieftains or public officers. The holder of a *sthanam* is called *sthani* or *sthanamdar*. The incidents of the *sthanam* were that seniormost member of the family became the *sthanamdar* who was usually a male member but instances of senior most female member becoming the *sthanamdar* were not rare. The *sthanamdar* had a limited interest in the properties of the *sthanamdar* but so long he held the office, he was entitled to the income of the property in his absolute right. The *sthanam* is comparable to an impartible estate devolving, on death, on successive holders of the office.

Sub-section (1) of section 7 of the Hindu Succession Act relates to the *Marumakkattayam* and *Nambudri* laws. It contains a provision similar to that in Section 6 and Explanation. The words *tarwad*, *tavazhi* and *illom* were defined in the relevant provisions mentioned in the definition clauses in Section 3 and such provisions are now eclipsed by the operation of section 4 of this Act.

The interest of a deceased member in the property of a *tarwad* would now, devolve under this sub-section of the Act and not according to *Marumakkattayam* or *Nambudri* law. It must follow that the heirs of such deceased member cannot form a *tarwad* with the rest of its members and the resulted position would not be that of a newly constructed *tarwad*. In such a case, it has been held; no suit can be brought for possession by any co-owner

against the other. The surviving members and the heirs of the deceased members would hold the family properties as tenants-in-common until a partition takes place.

Section 7 (1) does not affect the rights of parties before a partition. Section 43 of the Travancore Kshatriya Act, in unambiguous terms, confers a right of partition upon all the members of a Kshtriya Tarwad since the date the Act come into operation. The Right to partition without the concurrence of others is a valuable right in property which must be available for attachment and sale by the person to whom a debt was due by the deceased member of the *tarwad*.<sup>15</sup>

Sub-section (2) of section 7 relates to the *Aliyasantana* law. It gives an enactment parallel to that in Section 6 and Explanation I to the same. The expressions '*Kutumba*' and '*Kavaru*' were defined in the relevant provision mentioned in the definition clause in Section 3 of this Act and which enactment is now ineffective by operation of section 4 of this Act.

In *Sundari vs Laxmi*,<sup>16</sup> the Supreme Court referred to the salient features of the *Aliyasantana* law and examined the scheme of the present Act in the matter of succession generally and particularly in the context of the present sub-section and section 17 of the Hindu Succession Act. The sub-section makes it abundantly clear that the provisions relating to succession in the Act would apply in case of succession to *Aliyasantana* Hindus. It was accordingly held in the aforesaid case, the Supreme Court observed that when a Hindu governed by the *Aliyasantana* law dies possessed of a life-interest, after his death the property devolves under the present Act and not the *Aliyasantana* Act of 1949. It was also held that the undivided interest of the deceased in the property of the *Kutumba* or *Kavaru* would be deemed, by the virtue of the Explanation of the sub-section, to have been allotted to him on partition, as his absolute property.

The Karnataka High Court observed that the surviving members of the

<sup>15</sup> *Bank of India vs S.P.Pannamma*, AIR 1961 Ker 105 (FB)

family and the heirs of the deceased undivided member would hold the family properties as tenants-in-common until partition takes place and their rights inter se and against each other would be similar to those of the co-owners.<sup>17</sup>

A brief survey of the customary *Aliyasantana* law regarding succession, partition and devolution of shares will be found in a full bench decision<sup>18</sup> of the High Court of Mysore and other decisions stated there. The present Act has brought about some important changes in the customary *Aliyasantana* law as modified by the Madras Aliyasantana Act 9 and 1949, as pointed out in the *Ratnamala vs State of Mysore*<sup>19</sup> and *Gummanna vs Naagaveniamma*<sup>20</sup> decisions of the High Court of Mysore.

Neither under the customary law nor under the Aliyasantana Act 1949, could the interest of a coparcener in an *Aliyasantana Kutumba* have been disposed of by a will. In that regard a definite change in the law is made by the Explanation to section 30 of the present Act with the result that now a member of an individual *Aliyasantana Kutumba* can dispose of his interest in the *Kutumba* properties by a will. However, this does not mean that otherwise the rights of a divided member have been enlarged. In a case<sup>21</sup> decided by a full Bench of the Mysore High Court *Kutumba* properties were partitioned and under the preliminary decree, A, a *nissanthathi kavaru*, obtained a share in the same. Under Section 36 (3) of the Madras Aliyasantana Act 1949, A got a life interest in the properties allotted to him. By a will executed by A, he purported to bequeath the same. The contention that the interest obtained by A under the preliminary decree stood enlarged by the operation of Section 30 (1) of the present Act was held to fail. In *Jalaji vs Lakshmi*<sup>22</sup>, the Supreme Court agreed with the view taken by the Full bench.

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<sup>16</sup> AIR 1980 SC198

<sup>17</sup> *C. Hengsu vs R. Bontra* AIR 1974 Kant 35

<sup>18</sup> *Bhagirathi vs Darakke* (1965) 2 Mys LJ 796 (FB)

<sup>19</sup> AIR 1968 Mys 216

<sup>20</sup> AIR 1967 SC 159

<sup>21</sup> *Sundara vs Girija* AIR 1962 Mys 72 (FB)

Sub-section (3) of section 7 of the Hindu Succession Act relates to *Sthanam* property and devolution of such property on the death of a *sthanamdar*. The Act does not define the expression '*sthanam*,' which means<sup>23</sup> the status and attendant property of senior Rajas. In Moore's Malabar Law and Custom, it is defined as a station, rank or dignity. The holder of a '*sthanam*' is referred to as a *sthani* or *sthanamdar*. The ancient Rulers of the Malabar Coast possessed *sthanams* and it may be taken that the lands, which they held as Rulers, were regarded as being *sthanam* in character. Rulers granted *sthanams* to their subsidiary chieftains and public officers. The grant of a *sthanam* to a subsidiary ruler or public officer was usually accompanied by a grant of land for the maintenance of the dignity. In Sundara Ayyar's work, a chapter is devoted to this subject and it is pointed out that in addition to the families of Princes and chieftains there were other families possessing *sthanams* without any particular dignity attached to them. In ancient days when a family became opulent and influential, the members of the *tarwad* sometimes agreed to set aside for the karnavan certain property in order that he might keep up his social position and influence and this property descended to the next head of the family.<sup>24</sup>

The incidents of the *sthanam* were that the senior most member of the family became the *sthanamdar* who was usually the male member; but there were instances where the senior most female member became the *sthanamdar*. Separate properties belonged to each *sthanam* and were vested in the holder of the office for the time being and descended to the successors in office. One important feature was that a *sthanamdar* ceased to have any interest in the property on his death and the members of his *tarwad* had in their turn only reversionary rights to the *sthanam* property. The *sthanamdar* had a limited

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<sup>22</sup> AIR 1973 SC 2685

<sup>23</sup> Under Malabar and Aliyasanthanam law

<sup>24</sup> Satyajeet Desai (ed), *Mulla Principles of Hindu Law*, (18th ed), Butterworths India, Pg 327

interest in the sense that he could encumber or alienate the sthanam property only for a legal necessity like any limited owner but otherwise he was absolutely entitled to the income accruing during his tenure of office. His position was analogous to that of a holder of an impartible estate. His successor had no interest in it and the right of the successor was nothing more than a spes successionis.

Now operation of this Act will gradually liquidate all the sthanams. The present sub-section regulates the devolution of the sthanam property held by a sthanamdar who dies after the commencement of this Act. The effect of it is that sthanams continue till the death of the sthanamdar and thereafter the sthanam property devolves upon the members of the family to which he belonged and his personal heirs. The division is to be per capita on the basis of a national partition having taken place immediately before his death. The effect as pointed out by the Supreme Court in *Balakrishna Menon vs Asst. Controller of Estate Duty*<sup>25</sup> is brought about by the legal fiction enacted in the sub-section. The legal fiction, however, has to be confined for the purpose for which it is enacted and not to be extended further so as to include an actual division or partition having been effected in the lifetime of the sthanamdar with the result that there was a division or partition for all purpose.

#### SPECIAL PROVISIONS RESPECTING PERSONS GOVERNED BY MARUMAKKATTAYAM AND ALIYASANTANA LAWS:

The provisions of Section 17 of the Hindu Succession Act are applicable to the separate or self-acquired property of a person governed by *Marumakkattayam* or *Aliyasantana* law, subject to the modifications contained in this section. The modifications comprise amendments to sections 8 and 15 laying down the general rules of succession in respect of males and females respectively and omission of section 23, which restricts the rights of a female heir to the family dwelling house. But, it should be noted, section 17 has no

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<sup>25</sup> AIR 1971 SC 2392

application to the separate or self-acquired property of a person governed by the *Nambudri* law and as such, the provisions of this Act apply to such property without any modification. The provisions of this Act were made applicable to the joint family properties of persons governed by the *Marumakkattayam* and *Aliyasantana* laws by section 7 of the Act.

The *Aliyasantana* and *Marumakkattayam* laws have been defined in clauses (b) and (h) of section 3 of this Act.

Section 10 was intended to be modified by a clause in this section in the Draft Act but that was not ultimately done. In section 17, as it now stands, reference to section 10 are without any purpose and should therefore be omitted.

**Succession in respect of Male intestate:** Clause (i): The general rules of succession in section 8 will regulate the devolution of property on the death of a male intestate who was governed by the *Marumakkattayam* or *Aliyasantana* law subject to the modification in this clause. As a result, there is no change in respect of class I and class II heirs and to that extent the law is uniformly applicable to all Hindus, irrespective of the particular school to which they might belong. The change effected by this clause is confined to the agnates and cognates who are grouped in a single class instead of the agnates taking precedence over cognates in Section 8. Under this clause which substitutes one sub-clause for sub-clauses (c) and (d) of section 8, failing the heirs in classes I and II, the agnates and cognates will inherit together the property left by a Hindu male who was governed by the *Marumakkattayam* or *Aliyasantana* law. In all other matters relating to succession, the provisions of this Act would apply to succession, the provisions of this Act would apply to persons belonging to these two schools like any other Hindu.

**Succession in respect of Female intestate:** Clauses (ii) and (iii): The *Marumakkattayam* and *Aliyasantana* Schools of Hindu law being based on matriarchal systems, more extensive modifications to the general rules of

succession in the case of females contained in section 15 have been sought to be made by these two clauses than in case of males. By clause (ii), the order of succession in sub-section (I) of section 15 has been substantially changed and as a result, the property of a female intestate who was hitherto governed by the *Marumakkattayam* or *Aliyasantana* law will devolve on her death in the following order according to the rules set out in section 16.<sup>26</sup>

a] Firstly, upon the sons and daughters (including the children of any predeceased son or daughter) and the mother;

b] Secondly, upon the father and the husband;

c] Thirdly, upon the heirs of the mother;

d] Fourthly, upon the heirs of the father; and

e] Lastly, upon the heirs of the husband.

This may be compared with the general order of succession in sub-section (1) of section 15:

a] Firstly, upon the sons and daughters including the children of any predeceased son or daughter and the husband;

b] Secondly, upon the heirs of the husband;

c] Thirdly, upon the mother and father;

d] Fourthly, upon the heirs of the father;

e] Lastly, upon the heirs of the mother.

As a result of the comparison between male and female, the following changes are noticed:

(i) Mother and husband have exchanged their positions, the former coming up from the third entry to the first entry and the later going down from the first entry to the second entry.

(ii) The heirs of the husband have been relegated from the second entry to the last;

(iii) The father's position has improved from the third entry to the

<sup>26</sup> M.R.Mallick, Roy's Commentaries on The Hindu Succession Act, 1956, Kamal Law

second; and

(iv) The order of succession among the heirs of the husband, father and mother has been reversed.

Except that the order of succession has been changed and the heirs have been regrouped in some cases, there is no other change brought in by section 17. The number of entries is five as in section 15 and no new heir has been added to the list under the general law.

By clause (iii) of section 17, the special order of succession in sub-section (2) of section 15 has been made simpler inasmuch as the only change effected is the omission of clause (a) of the said sub-section. The result is that the special order of succession is confined to the case where a female intestate inherits property from her husband or father-in-law and dies without any issue (including the children of any predeceased son or daughter). In that case, the property would go to the husband's heirs and not to other heir. Clause (a) of sub-section (2) having been omitted, no special order of succession is prescribed in respect of property, which a female intestate inherits from her father or mother and then dies without leaving any issue (including the children of any predeceased son or daughter). The devolution of such property will be according to the general order of succession in sub-section (1) as amended by section 17. Clauses (ii) and (iii) of section 17 have to be read not only with section 15 but also with the rules in section 16 prescribing the order of succession and the mode of distribution of shares among the heirs of a female Hindu. The said rules apply to all Hindu females dying intestate and those hitherto governed by *Marumakkattayam* and *Aliyasantana* laws are no exception. Rule 3 of section 16 applies, to clauses (b), (d) and (e) of sub-section (1) of section 15. By the same logic, the rule shall apply to clauses (c), (d) and (e) of section 17 which correspond to the said clauses of section 15. In *Balkrishna vs. Gopal* case a Hindu female governed by the *Marumakkattayam* law died intestate leaving only heirs of her mother who died before 1956. The fiction in rule 3 of section 16 was applied and the Kerala High Court held that the mother whose heirs were to succeed would be presumed to have died

after the death of the intestate.<sup>27</sup>

Effect of Kerala Joint Hindu Family System (Abolition) Act, 1975 on section 17 of the Act—In the matters relating to succession of the persons governed by *Marumakkattayam* law, section 17 fixes up the devolution that is the legal heirs or persons who would have been governed by *Marumakkattayam* law as if this Act had not been passed. Therefore, the persons who are so governed either on 18.6.1957 and were so governed till 30.1.1976 when the Kerala Joint Hindu Family System (Abolition) Act, 1975 came into force are one identifiable group and their succession was fixed according to the mode prescribed in section 15. Section 17 does not allow succession to be decided with reference to any personal law, but itself fixes the mode of devolution in the particular manner. The section only deals with the question of identification of a group of persons who would have been governed by the *Marumakkattayam* law as mentioned in section 3 (h) of the Hindu Succession Act. The fiction in section 17 is limited to ascertain the group of persons who would have been governed by *Marumakkattayam* law had the Hindu Succession Act, 1956 not been passed. Obviously there will be people governed by *Marumakkattayam* law till 1.12.1976 when the laws, statutory and customary, were repealed by the Kerala Joint Family System (Abolition) Act, 1975. Therefore, it could not be said that after the enactment of section 7 (2) of the Kerala Act of 1975 there would be no *Marumakkattayam* law and no person governed by it. On the passing of Kerala Joint Hindu Family System (Abolition) Act, 1975, section 17 of the Hindu Succession Act does not become inoperative in respect of group of persons who were living on 18.6.1956 when the Hindu Succession Act came into force and who died on or after the commencement of the Kerala Joint Family System (Abolition) Act, 1975. It also does not become inoperative in respect of the group of persons who were born on or after 18.6.1956 but before 1.12.1976 and who died on or after the

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<sup>27</sup> ILR (1973) 1 Ker 149

commencement of the Kerala Joint Family System (Abolition) Act, 1975. Section 17 of the Hindu Succession Act will govern the law of succession on the death of males and females who were governed by the *Marumakkattayam* law system if such persons:

i) Living as on 18.6.1956 when the Hindu Succession Act came into force and who died on or after 1.12.1976, that is, when the Kerala Joint Family System (Abolition) Act, 1975 came into force.

ii) Living as on 18.6.1956 when the Hindu Succession Act came into force and who died on or after 1.12.1976 when the Kerala Joint Family System (Abolition) Act, 1975 came into force.

iii) Born on or after 18.6.1956 when the Hindu Succession Act came into force and who died before 1.12.1976 when the Kerala Joint Family System (Abolition) Act, 1975 came into force.

iv) Born on or after 18.6.1956 when the Hindu Succession Act, came into force, but before 1.12.1976 and died on or after 1.12.1976 when the Kerala Joint Family System (Abolition) Act, 1975 came into force.

However, section 17 of the Hindu Succession Act will not govern the law of succession of males or females if such persons were born on or after 1.12.1976 and died thereafter. Succession to them would be governed by the provisions of the Hindu Succession Act, 1956 other than the provisions applicable to those governed by the *Marumakkattayam* system.<sup>28</sup> However, P.Krishnamurthi, J. has rendered a contrary decision. According to him a provision like section 17 of the Act regarding succession shall have application only on the death of a person and not before and if that be so, the changes made in the *Marumakkattayam* law by any other statute till the death of a person have to be taken note of and section 17 applied accordingly, that section 17 applies to persons governed by *Marumakkattayam* law and if on the date of death of

<sup>28</sup> *Chellamma vs Narayana* AIR 1993 Ker 146 (FB)

such person that law is completely abrogated by Kerala Joint Family System (Abolition) Act, 1975, then section 17 can have no application for he or she is not a person governed by *Marumakkattayam* law on the date of his or her death and that section 17 of the Act has, therefore, become inoperative and ineffective after the coming into force of the Kerala Joint Family System (Abolition) Act, 1975 with effect from 1.12.1976 and no person dying after that date will be governed by section 17, but only by the general provisions contained in the Hindu Succession Act.

However, the majority view is that section 17 would not govern the law of succession of males or females who were born prior to the abolition of the Kerala Joint Family System (Abolition) Act, 1975, but were born on or after 1.12.1976 when the Kerala Act came into force and died thereafter.

Therefore, the majority view is that section 17 will stand abrogated only in respect of the persons whose parents were governed by *Marumakkattayam* law, but who was born after the law stood abolished by the Kerala Act with effect from 1.12.1976. The Full Bench by majority over-ruled the earlier decision in *Saraswati Amma vs Radhamma*.<sup>29</sup>

#### **Omission of section 23: Clause (iv):**

Section 23 makes special provision regarding family dwelling-houses and restricts the rights of female heirs of class I, to claim partition of such dwelling-houses. The effect of omission of section 23 is that the female heirs specified in class I of an intestate who was hitherto governed by *Marumakkattayam* or *Aliyasantana* law will be free to claim partition of their share in the family dwelling-house.<sup>30</sup>

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<sup>29</sup> AIR 1991 Ker 86

<sup>30</sup> Supra Note 26 at 73

SECTION 6 OF THE HINDU SUCCESSION ACT- A STUDY  
(DEVOLUTION OF INTEREST IN COPARCENARY PROPERTY):

Section 6 of the Hindu Succession Act dealing with devolution of interest to coparcenary property states:

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 in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act.

Provided that, if the deceased had left him surviving of 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 property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

Explanation I: For the purpose of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

Explanation 2: Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein. Before the commencement of the Hindu Succession Act, codifying the rules of succession, the concept of a Hindu family under Mitakshara School of law was that it was ordinarily joint not only in estate but in religious matters as well. Coparcenary property, in contradistinction with the absolute or separate property of an individual coparcener, devolved upon surviving coparceners in the family, according to the rule of devolution by survivorship. Section 6 dealing with the devolution of interest of a male Hindu in coparcenary property and while recognizing the rule of devolution by survivorship among the members of the coparcenary, makes

an exception to the rule in the proviso. According to the proviso, if the deceased has left him surviving a female relative specified in class I of Schedule I, or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession under this Act and not by survivorship. Further, under section 30 a coparcenary may make a testamentary disposition of his undivided interest in the joint family property.

The Rule of Survivorship comes into operation only:

- i) Where the deceased does not leave him surviving a female relative specified in class I, or a male relative specified in that class who claims through such female relative and,
- ii) When the deceased has not made a testamentary disposition of his individual share in the coparcenary property.

The Schedule to the Act read with section 8 provides the following twelve relations as class I heirs son; daughter; widow; mother; son of a pre-deceased son; daughter of a pre-deceased son; son of a pre-deceased daughter; daughter of a pre-deceased son; son of a pre-deceased daughter; daughter of a pre-deceased daughter; widow of a pre-deceased son; daughter of a pre-deceased son of a pre-deceased son; widow of pre-deceased son of a pre-deceased son.

Section 6 contemplates the existence of coparcenary property and more than one coparcener for the application of the rule of devolution by survivorship. The head note of the section reads "Devolution of interest in coparcenary property." The language of the main provision to the effect that "his interest in the property shall devolve by survivorship upon the surviving members"... indicates that the devolution by survivorship is with reference to the deceased coparcener's interest alone; this coupled with the national partition contemplated in Explanation I in this section for the ascertainment of

the interest of the deceased coparcener in a Mitakshara coparcenary property indicates that there is no disruption of the entire coparcenary. It follows that the other coparceners, would continue to be joint in respect of the other coparcenary property till a partition is effected.

Since the main provision of this section deals with the devolution of the interest of a coparcener dying intestate by the rule of survivorship and the proviso speaks of the interest of the deceased in the Mitakshara coparcenary property. Now, in order to ascertain what is the interest of the deceased coparcener, one necessarily needs to keep in mind the two Explanations under the proviso. These two Explanations give the necessary assistance for ascertaining the interest of the deceased coparcener in the Mitakshara Coparcenary property. Explanation I provides for ascertaining the interest on the basis of a national partition by applying a fiction as if the partition had taken place immediately before the death of the deceased coparcener. Explanation II lays down that a person who has separated himself from the coparcenary before the death of the deceased or any of the heirs of such divided coparcener is not entitled to claim on intestacy a share in the interest referred to in the section.

Under the proviso if a female relative in Class I of the schedule or a male relative in that class claiming through such female relative survives the deceased, then only would the question of claiming his interest by succession arise. Explanation I to section 6 was interpreted differently by the High Courts of Bombay, Delhi, Orissa and Gujarat in the cases<sup>31</sup> where the female relative happened to be a wife or the mother living at the time of the death of the coparcener. The matter was finally set at rest by the decision of the Supreme Court in 1978 in *Gurupad v Heerabai*<sup>32</sup>. The Supreme Court in *Gurupad*'s case observed:

“In order to ascertain the share of heirs in the property of a

<sup>31</sup> *Shirambai v Kolgonda*, AIR 1964 Bom 263; *Kanahaya Lal v Jamna*, AIR 1973 Delhi 160; *Ananda v Haribandhu*, AIR 1967 Orissa 90; *Vidyaben v Jagdish Chandra*, AIR 1974 Guj 23.

<sup>32</sup> (1978) 3 SCC 383; AIR 1978 SC 1239.

deceased coparcener it is necessary in the very nature of things, and as the very first step, to ascertain the share of the deceased in the coparcenary property. For, by doing that alone one can determine the extent of the claimant's share. Explanation I to section 6 resorts to the simple, expedient, undoubtedly a fictional partition, that the interest of a Hindu Mitakshara coparcener 'shall be deemed to be' the share in the property that would have been allotted to him if a partition of that property had taken place immediately before his death. What is, therefore required to be assumed is that a partition had in fact taken place between the deceased and coparceners immediately before his death. That assumption once made is irrevocable. In other words, the assumption having been made once for the purpose of ascertaining the share of the deceased in the coparcenary property one cannot go back on that assumption and ascertain the share of the heirs without reference to it ... All the consequences which flow from real partition have to be logically worked out, which means that the share of the heirs must be ascertained on the basis that they had separated from one another and had received a share in the partition which had taken place during the lifetime of the deceased. The allotment of this share is not a processual step devised merely for the purpose of working out some other conclusion. It has to be treated and accepted as a concrete reality, something that cannot be recalled just as a share allotted to a coparcener in an actual partition cannot generally be recalled. The inevitable corollary of this position is that the heir will get his or her share in the interest which the deceased had in the coparcenary property at the time of his death, in addition to the share which he or she received or must be needed to have received in the national partition."<sup>33</sup>

In *Shyama Devi v Manju Shukla*<sup>34</sup>, it was held that the proviso to section 6 gives the formula for fixing the share of the claimant and the share is to be determined in accordance with Explanation I by deeming that a partition had taken place a little before his death which gives the clue for arriving at the share of the deceased. Again in *State of Maharashtra v Narayan Rao*<sup>35</sup> the Supreme Court carefully considered the decision in Gurupad's case and pointed out that "Gurupada's" case has to be treated as an authority (only) for the

<sup>33</sup> AIR 1978 SC 1243.

<sup>34</sup> (1994) 6 SCC 342-343.

<sup>35</sup> AIR 1985 SC 716 (721).

position that when a female member who inherits an interest in joint family property under section 6 of the Act files a suit for partition expressing her willingness to go out of the family she would be entitled to both the interest she has inherited and the share which would have been nationally allotted to her, as stated in Explanation I to section 6 of the Act. But it cannot be an authority for proposition that she ceases to be a member of the family whose interest in the family property devolves on her without the volition to separate her from the family. A legal fiction should not doubt ordinarily be carried to its logical end to carry out the purposes for which it is enacted but it cannot be carried beyond that. It is no doubt true that the right of a female heir to the interest inherited by her in the family property gets fixed on the date of the death of a male member under section 6 of the Act but she cannot be treated as having ceased to be a member of the family without her volition as otherwise it will lead to strange results which could not have been in the contemplation of Parliament when it enacted that provision and which might also not be in the interest of such females.

Inequalities and Anomalies Discriminating women despite the Constitution guaranteeing equality to women, there are still many discriminatory aspects in the Hindu law in the sphere of property rights. In our society maltreatment of a woman in her husband's family, e.g., for failing to respond to a demand of dowry, often results in her death. But the tragedy is that there is discriminatory treatment given to her even by the members of her own natal family. In the Hindu system, a Joint Hindu family consisting of male coparceners has traditionally held ancestral property. Coparcenary as seen and discussed earlier in the present work is a narrower body of persons within a Joint family and consists of father, son, son's son and son's son's son. A coparcenary can also be of a grandfather and a grandson, or of brothers, or an uncle and nephew and so on. Thus ancestral property continues to be governed by a wholly patrilineal regime, wherein property descends only through the male line as only the male members of a Joint Hindu family have an interest by birth in the Joint or coparcenary property. Since a woman could not be a

coparcener, she was not entitled to a share in the ancestral property by birth. A son's share in the property in case the father dies intestate would be in addition to the share he has on birth.

Again, the patrilineal assumptions of a dominant male ideology are clearly reflected in the laws governing a Hindu female who dies intestate. The law in her case is markedly different from those governing Hindu males. The property is to devolve first to her children and husband; secondly, to her husband's heirs; thirdly, to her father's heirs, and lastly, to her mother's heirs.<sup>36</sup> The provision of section 15 (2) of Hindu Succession Act is indicative again of a tilt towards the male as it provides that any property she inherited from her father or mother should devolve, in the absence of any children, to her father's heirs and similarly, any property she inherited from her husband or father-in-law, to her husband's heirs. These provisions depict that property continues to be inherited through the male line from which it came either back to her father's family or back to her husband's family.

The question is whether the Hindu Succession Act actually gave women an equal right to property or did it only profess to do so? Significantly, the provisions regarding succession in the Hindu Code Bill, as originally framed by the B.N.Rau Committee and piloted by Dr. Ambedkar, was for abolishing the Mitakshara coparcenary with its concept of survivorship and the son's right by birth in a joint family property and substituting it with the principle of inheritance by succession. These proposals met with a storm of conservative opposition. The extent of opposition within the Congress or the then Government itself can be gauged from the fact that the then Law Minister Mr. Biswas, on the floor of the house, expressed himself against daughters inheriting property from their natal families. Sita Ram S. Jajoo from Madhya Bharat, identified the reason for the resistance accurately, when he stated: "Here we feel the pinch because it touches our pockets. We male members of this house are in a huge majority. I do not wish that the tyranny of the majority may

be imposed on the minority, the female members of this house".<sup>37</sup> However, the tyranny of the majority prevailed when the Bill was finally passed in 1956. The major changes brought were:

1. Retention of the Mitakshara coparcenary with only Males as coparceners;
2. Coparcener's Right to will away his interest in the joint family property. (This provision was unexpectedly introduced by an amendment by the then Law Minister Mr. Pataskar in the final stages of the clause-by-clause debate when the Bill was to be passed, in 1956. It was widely perceived and pro-claimed, even in the contemporary press, to be a capitulation by Government.);
3. Removal of exemption of Marumakkattayam and Aliyasantana communities, that is, virtual destruction of the only systems in which women were the equivalent of full coparceners; and
4. Alteration of original provision that a daughter would get a share equivalent to half the share of a son in self-acquired property of the father who died intestate. The Select Committee decided to make her share full and equal to that of a son.<sup>38</sup>

When Dr. Ambedkar was questioned as to how this happened in the Select Committee he said: "It was not a compromise. My enemies combined with my enthusiastic supporters and my enemies thought that they might down the Bill by making it appear worse than it was".<sup>39</sup>

The retention of the Mitakshara coparcenary without including females in it meant that females couldn't inherit ancestral property as males do. If a joint family gets divided, each male coparcener takes his share and females get

<sup>36</sup> Ratna Kapoor and Brenda Cossman, *Feminist Engagements with law in India*, Subversive Sites, 1996, p. 134.

<sup>37</sup> The Constituent Assembly of India, Legislative Debates, Vol. VI 1949 Part II.

<sup>38</sup> Madhu Kiswar, "Codified Hindu Law Myth and Reality", *Eco & Pol Weekly*, No. 33 Aug. 1994.

<sup>39</sup> The Constituent Assembly of India, Legislative Debates, Vol. VI Part II, P. 841.

nothing. Only when one of the coparceners dies, a female gets a share of his share as an heir to the deceased. Thus the law by excluding the daughters from participating in coparcenary ownership (merely by reason of their sex) not only contributed to an inequity against females but has led to oppression and negation of their right to equality and appears to be a mockery of the fundamental rights guaranteed by the Constitution.

Another apparent inequity under the Hindu Succession Act as per Section 23 is the provision denying a married daughter the right to residence in the parental home, unless widowed, deserted or separated from her husband and further denying any daughter the right to demand her share in the house if occupied by male family members. This right is not denied to a son. The main object of the section is said to be the primacy of the rights of the family against that of an individual by imposing a restriction on partition. Why is it that this right of primacy of family is considered only in the case of a female member of the family?

The National Report on the status of women in India recommended that this discrimination in asking for a partition be removed so that a daughter enjoys a right similar to that of a son.<sup>40</sup>

However, the Supreme Court by its judgment in *Narashimaha Murthy v Sushilabai*<sup>41</sup> held that a female heir's right to claim partition of the dwelling house of a Hindu dying intestate under section 23 of the Hindu Succession Act will be deferred or kept in abeyance during the lifetime of even a sole surviving male heir of the deceased until he chooses to separate his share or ceases to occupy it or lets it out. The idea of this section being to prevent the fragmentation and disintegration of the dwelling house at the instance of the female heirs to the detriment of the male heirs in occupation of the house, thus rendering the male heir homeless/ shelterless.

A similar instance of inequity created by law was the establishment of the new right to will away property. The Act gave a weapon to a man to

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<sup>40</sup> Status of Women in India, A synopsis of the Report of the National Committee (1971-74).

deprive a woman of the rights she earlier had under certain Schools of Hindu law. The legal right of Hindus to bequeath property by way of will was conferred by the Indian Succession Act, 1925. None of the Clauses of 1925 Act applies to Hindus except wills.

A rule firmly established before Hindu Succession Act was that a Hindu cannot by will bequeath property, which he could not have alienated by gift *inter-vivos*. A coparcener under Dayabhaga law, however, could by gift dispose of the whole of his property whether ancestral or self-acquired, subject to the claims of those entitled to be maintained by him. However, a coparcener under Mitakshara law had no power to dispose of his coparcenary interest by gift or bequest so as to defeat the right of the other members. The coparcenary system even restricted the rights of the *Karta* to alienate property, thereby safeguarding the rights of all members of the family including infants and children to being maintained from the Joint family property.

Although many powers were vested in the *Karta* or male head of the family, who was supposed to administer the property in the interests of all members, yet decisions regarding disposal of the family property were to be taken collectively. Each male had an equal share in the property, but the expenditure was not to be apportioned only to males but also to females. The right to will away property was traditionally unknown to Hindus. It was introduced into the Statute by virtue of section 30 of the Hindu Succession Act. According to the said section any Hindu may dispose of by will or other testamentary disposition any property capable of disposition (this includes his undivided interest in a Mitakshara coparcenary property as per the Explanation) in accordance with the provisions of the Indian Succession Act, 1925. This is ironical as this testamentary right, right of his daughter by succession. It can also defeat a widow's right. There is thus a diminution in the status of a wife/widow.

The proviso to section 6 of Hindu Succession Act also contains another

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<sup>41</sup> AIR 1996 SC 1826.

gender bias. It has been provided therein that the interest of the deceased in the Mitakshara coparcenary shall devolve by intestate succession if the deceased had left 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. In order to appreciate the gender bias it is necessary to see the devolution of interest under section 8, Hindu Succession Act. The property of a male Hindu dying intestate devolves according to section 8 of the Hindu Succession Act, firstly, upon the heirs being the relatives specified in class I, namely, mother, widow, son and daughter. The remaining eight represent one or another person who would have been a primary heir if he or she had not died before the propositus. The principle of representation goes up to two degrees in the male line of descent; but in the female line of descent it goes only up to one degree. Accordingly, the son's son's son and son's son's daughter get a share but a daughter's daughter's son and daughter's daughter's daughter do not get anything. A further infirmity is that widows of a predeceased son and grandson are class I heirs, but the husbands of a deceased daughter or granddaughter are not heirs.<sup>42</sup>

#### COPARCENARY: RELEVANCE AND ALTERNATIVES

It is apparent from the study of the previous chapter that discrimination against a woman is writ large in relation to property rights. Social Justice demands that a woman should be treated equally both in the economic and the social sphere. The exclusion of daughters from participating in coparcenary property ownership merely by reason of their sex is unjust. Improving their economic condition and social status by giving equal rights by birth is a long felt social need. Undoubtedly a radical reform of the Mitakshara law of coparcenary is needed to provide equal distribution of property not only with respect to the separate or self-acquired property of the deceased male but also in respect of his undivided interest in the coparcenary property.

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<sup>42</sup> Tahir Mahmood, *Hindu Law*, 1986, p.57.

## 2.2.(V). COPARCENARY UNDER STATE ACTS: (ANDHRA MODEL)

The idea of making a woman a coparcener was suggested as early as 1945 in written statements submitted to the Hindu Law Committee by a number of individuals and groups; and again in 1956, when the Hindu Succession Bill was being finally debated prior to its enactment an amendment was moved to make a daughter and her children members of the Hindu coparcenary in the same way as a son or his children. But this progressive idea was finally rejected and the Mitakshara joint family was retained.

The concept of the Mitakshara coparcenary property retained under section 6 of the Hindu Succession Act has not been amended even since its enactment. Though, it is a matter of some satisfaction that five States in India namely Kerala, Andhara Pradesh, Tamil Nadu, Maharashtra and Karnataka<sup>43</sup> have taken cognizance of the fact that a woman needs to be treated equally both in the economic and the social spheres. As per the law of four of these States (Kerala excluded), in a joint Hindu family governed by Mitakshara law, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son. Kerala, however, has gone one step further and abolished the right to claim any interest in any property of an ancestor during his or her lifetime founded on the mere fact that he or she was born in the family. In fact, it has abolished the Joint Hindu family system altogether including the Mitakshara, *Marumakkattayam*, *Aliyasantana* and *Nambudri* systems. Thus enacting the Joint tenants be replaced by tenants in common.

The approach of the Andhra Pradesh, Tamil Nadu, Maharashtra and Karnataka State legislatures is, strikingly different from that of Kerala and these States instead of abolishing the right by birth strengthened it, while broadly removing the gender discrimination inherent in Mitakshara

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<sup>43</sup> The Kerala Joint Family System (Abolition) Act, 1975  
 The Hindu Succession (Andhra Pradesh Amendment) Act, 1986  
 The Hindu Succession (Tamil Nadu Amendment) Act, 1989  
 The Hindu Succession (Maharashtra Amendment) Act, 1994  
 The Hindu Succession (Karnataka Amendment) Act, 1994

Coparcenary. The broad features of the legislations are more or less couched in the same language in each of these Acts. The Amending Acts of Andhra Pradesh, Tamil Nadu and Maharashtra add three sections namely, 29A, 29B and 29C but Karnataka numbers them as sections 6A, 6B and 6C of the Act.

The State enactments provide equal rights to a daughter in the coparcenary property and contain a nonobstante clause. In these four States:

a) the daughter of a coparcener in a Joint Hindu Family governed by Mitakshara law, shall become a coparcener by birth in her own right in the same manner as the son and have similar rights in the coparcenary property and be subject to similar liabilities and disabilities.

b) on partition of a Joint Hindu family of the coparcenary property, she will be allotted a share equal to that of a son. The share of the predeceased son or a predeceased daughter on such partition would be allotted to the surviving children of such predeceased son or predeceased daughter, if alive at the time of the partition.

c) this property shall be held by her with the incidents of coparcenary ownership and shall be regarded as property capable of being disposed of by her will or other testamentary disposition.

d) the State enactments are prospective in nature and do not apply to a daughter who is married prior to, or to a partition which has been effected before the commencement of the Act.

However, these four Hindu Succession (Amendment) Acts have been criticized as they have given rise to various difficulties in their working and application. These four Amending Acts have considerably altered the concept of the Mitakshara Joint Family and coparcenary by elevating a daughter to the position of a coparcener. Once a daughter becomes a coparcener she naturally continues to be a member of the natal joint family and after marriage she will

also be a member of her marital Joint family.<sup>44</sup>

In this connection, it is relevant to notice the observations of Mr. Pataskar made while participating in the Parliamentary Debate at the time the Hindu Succession Bill, 1955 was moved. He said: "To retain the Mitakshara Joint Family and at the same time put a daughter on the same footing as a son with respect to the right by birth, right of survivorship and the right to claim partition at any time, will be to provide for a joint family unknown to the law and unworkable in practice".<sup>45</sup>

It was noticed that in the State of Tamil Nadu, many properties were partitioned between the coparceners before the Tamil Nadu (Hindu Succession Amendment) Act, 1989 came into force with a view to defeat the daughter's right to become a coparcener. These were by and large "fraudulent partitions" which were pre-dated so that no coparcenary property was available to the daughter. This malpractice has to be checked thoroughly otherwise the very objective of the Act, which is to remove discrimination inherent in the Mitakshara coparcenary against daughters, stands defeated. Therefore, though the Tamil Nadu Act received the President's assent on 15.1.1990 and was published in the official gazette only on 18.1.1990, the Act after 25.3.1989 will be deemed to be void. The Law Commission's questionnaire elicited public opinion in this regard and found that the majority was of the view that such transactions made just before the enactment of the proposed legislation should be declared invalid.

Another infirmity of these State enactments is that they exclude the right of a daughter who was married prior to the commencement of the Act, from the coparcenary property, though; the right is available to a daughter who is married after the coming into force of the said Amendment Acts. As a result a married daughter continues to have her interest in the joint property of her paternal family, if her marriage has taken place subsequent to the enactment

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<sup>44</sup> B. Sivaramayya, "Coparcenary Rights to Daughters; Constitutional and Interpretational Issues", (1997) 3 SCC (J) 25.

<sup>45</sup> Lok Sabha Debates p.8014 (1995)

while the daughter who got married before the enforcement while the daughter who got married before the enforcement of the law gets no right at all in the joint property of her parental family. Such discrimination appears to be unfair and illegal. A Supreme Court decision in *Savita Samvedi v Union of India*<sup>46</sup> lends support to this view. In this case it was held that the distinction between a married and an unmarried daughter might be unconstitutional. The observation made by Mr. Justice Punchhi is relevant: "The eligibility of a married daughter must be placed at par with an unmarried daughter (for she must have been once in that state), so as to claim the benefit...."<sup>47</sup>.

It is further felt that once a daughter is made a coparcener on the same footing as a son then her right as a coparcener should be real in spirit and content. In that event section 23 of the Hindu Succession Act should be deleted. Section 23 provides that on the death of a Hindu intestate, in case of a dwelling house wholly occupied by members of the Joint family, a female heir is not entitled to demand partition unless the male heirs choose to do so; it further curtails the right of residence of a daughter unless she is unmarried or has been deserted by or has separated from her husband or is a widow.

There is also a need for special protection of a widow's right to reside in the dwelling house. The family dwelling house should not be alienated without the Widow's consent or without providing her an alternative accommodation after she has agreed to the sale of the dwelling house.

The Hindu Succession Act of 1956 give daughters as well as the widow of a deceased coparcener a share in the interest of the deceased male coparcener. However, the four Hindu Succession (State Amendment) Acts i.e., Andhra Pradesh, Tamil Nadu, Karnataka and Maharashtra have conferred equal coparcenary rights on sons and daughters; thus preserving the right by birth and extending it to daughters also in the Mitakshara coparcenary. This has the indirect effect of reducing the widow's successional share. This is because if the number of coparcenars increases then the interest of the husband will

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<sup>46</sup> JT (1996) I P. 680

decrease.

The Hindu Succession Act of 1956 dithered is not abolishing the very concept of coparcenary which the Act should have done. But the Hindu Succession (State Amendment) Acts have conferred upon the daughter of a coparcener, the right to become a coparcener like a son, which may affect the brother-sister relationship. It further appears that even where daughters have been made coparceners there is still a reluctance to making her a Karta as the general male view is that she is incapable of managing the properties or running the business and is generally susceptible to the influence of her husband and his family, if married. This seems to be patently unfair as women are proving themselves equal to any task and if their husbands and their families influence women, their wives and their families no less influence men.

The State of Kerala has abolished the concept of coparcenary following the recommendation of the Hindu Law Committee—B.N.Rau Committee (which was entrusted with the task of framing a Hindu Code Bill). The Kerala Model furthers the unification of Hindu Law and P.V. Kane supporting the recommendation of the Rau Committee stated: “And the unification of Hindu Law will be helped by the abolition of the right by birth which is the cornerstone of Mitakshara school and which the draft Hindu Code seeks to abolish”<sup>48</sup>

The Kerala Joint Family System (Abolition) Act, 1975 in section 4 (1) of the Act lays down that all the members of a Mitakshara Coparcenary will hold the property as tenants in common on the day the Act comes into force as if a partition had taken place and each holding his or her share separately. The notable feature of the Kerala Joint Family System (Abolition) Act is that it has abolished the traditional Mitakshara Coparcenary and the right by birth. But in Kerala, the Marumakkattayam, Aliyasantana and Nambudri systems were also present, some of which were matrilineal and these joint families were also

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<sup>47</sup> Id at 683-684 Para 7.

<sup>48</sup> M.P.V. Kane, *History of Dharmasastra*, (Ancient and Medieval Religious and Civil Law) (1946) Vol. III P. 823.

abolished. The Kerala Model probably results in maintenance of greater family harmony and appears to be a fair decision as in Kerala both matrilineal and patrilineal Joint families existed. If the joint family was abolished today in the other States then a deemed partition would take place and women not being coparceners would get nothing more. Whereas if they are made coparceners, then they become equal sharers.

However, one common drawback of both the Kerala model and the Andhra model is that it fails to protect the share of the daughter, mother or widow from being defeated by making a testamentary disposition in favour of another, or by alienation. This criticism of course against testamentary disposition can be also used to disinherit a son. The question whether a restriction should be placed on the making of testamentary disposition as in some of the personal laws is another matter in issue.

The order to provide women with some better property rights, four States have dealt with the matter by virtue of the Hindu Succession (State Amendment) Acts and Kerala has dealt with it by abolishing the Hindu Joint Family altogether. This has resulted in two different models being in existence i.e., the Andhra model and the Kerala model.

Recent reports in some newspapers reveal that the Centre has asked all the States to carry out suitable amendments in the Hindu Succession Act to confer property rights on women in a joint family. "The Department of Women and Child Development has requested various States and Union Territories to draw up necessary legislature proposal to amend section 6 of the Hindu Succession Act, 1956 to give daughters their due share of coparcenary right"<sup>48</sup> as already done by States like Andhra Pradesh, Karnataka, Maharashtra and Tamil Nadu. It is also indicated therein that the Kerala Government has taken a stand that in view of the Kerala Joint Family System (Abolition) Act, 1975, section 6 of the Hindu Succession Act "does not operate" in that State.

The Preamble of the Andhra Pradesh Act states: "Whereas the

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<sup>48</sup> The Observer, Feb 7, 2000 and The Tribune, March 22, 2000.

Constitution of India has proclaimed equality before law as a Fundamental Right; whereas the exclusion of the daughter from participation in coparcenary ownership merely by reason of her sex in contrary thereto”.

This suggests that the State legislatures (as also Kerala) subscribe to the view that “laws in force” in Article 13 (1) of the Constitution include personal laws<sup>50</sup> and the personal laws are subject to Fundamental Rights, especially Article 14. In this context it may be noted that the Apex Court is yet to give its opinion on this issue.

In the case *State of Bombay v Narasu Appa Mali*<sup>51</sup>, the Bombay High Court took the view that the term “law in force” includes only laws passed or made by legislature or other competent authority and does not include personal laws. They observed that personal law was not included in “Laws in force” as defined in Article 13(3)(b). The Supreme Court in *Sant Ram v Labh Singh*<sup>52</sup>, on the other hand rejected the above view. There the validity of a customary right of pre-emption based on vicinage was in question. It was contended that, even though a statutory right of pre-emption, based on vicinage was invalid, as offending the Constitution, a customary right could not be held invalid under Article 13 of the Constitution. Disagreeing with the contention the Supreme Court observed:

“There are two compelling reasons why custom or usage having in the territory of India the force of the law must be held to be contemplated by the expression ‘all laws in force’. Firstly to hold otherwise would restrict the operation of first clause (of Article 13) in such way that none of the things mentioned in first definition Article 13(3) (a) would be affected by fundamental rights. Secondly, it is to be seen that the second clause speaks of ‘laws’ made by the State and custom or usage is not made by the State”.

Strictly viewed the decision can be construed as involving custom and,

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<sup>50</sup> Article 13(1): All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this part, shall to the extent of such inconsistency, be void.

<sup>51</sup> AIR 1952 Bom 84.

<sup>52</sup> AIR 1965 SC 314.

therefore, it alone comes within the scope of Article 13. Can the reasoning of *Sant Ram* be construed as equally applicable to personal laws? Prima facie, it is so applicable, though such a view will be seriously contested.

In this context it may be pertinent to refer to an obiter of Sen, J. in *Shri Krishna Singh v Mathura Ahir*<sup>52</sup> that runs counter to the above view. In this case, among other issues, the question before the court was whether a Shudra was entitled to hold the office of a Matadhipati (head of a Mutt). The trial court as well as the High Court upheld the claim of the plaintiff Shudra to be Matadhipati. The view was that after the Constitution the rule that a Shudra is disentitled to hold the office would be invalid under Article 14.

The Supreme Court held that the Sampradaya or custom of the Mutt and should govern the matter not by the Shastric law. To the view that after the Constitution the rule of Shastric law was no longer valid under Article 14, Sen, J. responded thus:

“In our opinion, the learned Judge failed to appreciate that Part III of the Constitution does not touch upon the personal laws of the parties, he could not introduce his own concepts of modern times but should have enforced the law derived from recognized and authoritative sources of Hindu law...”

Justice Sen did not refer to *Sant Ram*, nor did he adduce any reason for his obiter. Further, while side-stepping the Constitutional issue and upholding the right of a Shudra to hold the office of a Matadhipati on the basis of customs, he did not clarify whether custom accepted by personal law should be considered as custom per se or personal law for the purposes of application or otherwise of Part III of the Constitution.

Justice Sen's obiter made Justice Dhanuka of Bombay High Court to refer the question to a Division Bench thus:

“With all respect it appears to me to be too obvious that the case before the Supreme Court *Krishna Singh v Mathura Ahir*<sup>53</sup> was not decided on the basis that personal laws were not

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<sup>52</sup> (1981) 3 SCC 689.

<sup>53</sup> Ibid.

subject to fundamental rights, but was decided on the basis that the traditional law could not operate in view of established customs and usage to the contrary”<sup>54</sup>.

The prevailing Judicial position thus leaves the following alternatives: (1) to reconcile the decision in *Sant Ram* and the obiter in *Krishna Singh*, and to conclude that while custom is governed by Fundamental Rights, a personal law is not so subject to; and (2) to hold that both custom and personal law are within the ambit of Fundamental Rights.

Acceptance of the first alternative may entail problem of the four major personal laws, viz., Hindu, Muslim, Christian and Parsee laws, the last two are statutory laws. Hindu law is partly statutory and partly non-statutory. This would imply that Fundamental Rights would govern statutory laws and Part III will not govern statutory portion of personal laws while non-statutory portions. In so far as Muslim law is concerned the Shariat Act, 1937 made the law of Sharia applicable to Muslims, overriding the application of customary law, that too with respect to non-agricultural properties (subsequently some States extended them to agricultural properties also). So Muslim law also is part of statutory law and as such to be governed by the Constitution.

The second alternative namely, to interpret “laws in force” as including personal laws is on a sound basis. Seervai’s views seem to accord with this view. He writes:

“We have seen that there is no difference between the expression ‘existing law’ and ‘law in force’ and consequently, personal law would be ‘existing law’ and ‘law in force’. This consideration is strengthened by the consideration that custom, usage and statutory law are so inextricably mixed up in personal law that it would be difficult to ascertain the residue of personal law outside them”<sup>55</sup>

The second interpretation will also be in consonance with the Convention on the Elimination of All Forms of Discrimination against

<sup>54</sup> AIR 1992 Bom 214 (221).

<sup>55</sup> H.M.Seervai, *Constitutional Law of India, 1991*, P. 677.

women<sup>56</sup> adopted by the General Assembly of the United Nations on 18-12-1979, which was signed by India on 30-07-1980. It was ratified on 09-07-1993 subject to two reservations. (One of which pertains to its policy of non-interference in the personal affairs of any community without its initiative and consent.)

Notwithstanding this, one is not sure about the Judiciary's courage to accept the second alternative. It is pertinent to note that the Supreme Court is yet to decide the validity of the Muslim Women (Protection on Rights on Divorce) Act, 1986. There is nothing to prevent the Supreme Court to interpret the Constitution fearlessly. It has in *Minerva Mills v Union of India*<sup>57</sup>, held that Article 14 constitutes a Basic feature of the Constitution. The Court can reiterate that position.

Even if we restrict ourselves to the narrow issue of the Constitutional validity of Mitakshara coparcenary, it is clear that the classical Mitakshara Coparcenary can no longer be considered as Constitutionally valid. For, Kerala abolished the right by birth itself; in the States following Dayabhaga like West Bengal, Orissa (barring areas of Southern Orissa), Assam and Tripura do not recognize the right by birth; and the States of Andhra Pradesh, Tamil Nadu, Maharashtra and Karnataka while retaining Mitakshara coparcenary substantially removed its discriminatory feature by conferring equality on daughters who are not married when the respective Acts came into force. As has been pointed out earlier, these four legislations emphatically state that the exclusion of daughter from "coparcenary ownership" is contrary to Article 14. If Courts were hold that the classical Mitakshara right by birth restricted in favour of males alone is valid, it would tantamount to one Department of State contradicting another in as much as the Judiciary, the Legislature and the Executive constitute State under Article 12 of the Constitution.

The new Amendments to the Hindu Succession Act in the Southern States considerably alter the concepts of Mitakshara Joint Family and

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<sup>56</sup> Multilateral Treaties Deposited with the Secretary General, status as at 31-12-1994.

coparcenary. Once a daughter becomes a coparcener she will continue to be member of the natal Joint family and will be so even after marriage in the natal family and as also in the marital Joint family --- a unique feature hitherto unknown in matrilineal or patrilineal Joint families in India.

Do these new Amending Acts in trying to correct the discrimination against daughters, introduce a concept of Joint family "unknown to law and unworkable in practice" affect the vires under the Constitution?

The decisions in cases like *Kunhikoman v State of Kerala*<sup>59</sup> indicate that it may. In this case, the Supreme Court invalidated the Kerala Agrarian Relations Act, 1961. The Act among other things, defined "family" as meaning husband, wife and their unmarried children or such of them as exist. The Court declared the Act as invalid. Referring to the definition of the family in the Kerala Act, the Court pointed out that the Act adopted an artificial definition and that it did not correspond to any of the three types of families, viz., the Joint Hindu family, the family under the Marumakkattayam law or the Aliasantana law. The feature, among others, was held to violate Article 14 of the Constitution. A Full Bench decision of the Punjab and Haryana High Court also in *Sucha Singh Bajwa v State of Punjab*<sup>60</sup> held that the statutory definition of 'family' of the Punjab Land Reforms Act, 1973 was Constitutionally invalid.

Constitutional validity of the provisions may be questioned in the following situations:

Where there was partial partition with respect to some coparceners, the interests of undivided coparceners may suffer significant reduction in the value of their shares because of the introduction of daughters (other than those married at the time of the passing of the respective enactments) as coparceners. This may give rise to questions of Constitutional validity. Such question can also arise in a situation where a father having a daughter by his first marriage dies leaving the daughter and second wife alive. On the demise of the father,

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<sup>58</sup> (1980) 2 SCC 591.

<sup>59</sup> AIR 1962 SC 723.

<sup>60</sup> 76 PLR 273 (FB) (1974)

the daughter as a coparcener is entitled to act as Karta of the joint family in preference to her stepmother though she may lack experience being young and belong to another family on her marriage. This is because "coparcenership is a necessary qualification for managership of a Joint Hindu family" as held by the Supreme Court in *C.I.T. v G.S.Mills*<sup>61</sup>. The above position holds good equally in the case of a mother and her daughter, and an elder sister, who became a coparcener and her brothers.

Thus the Amending Acts are liable to be challenged under Articles 14 and 21. It may be questioned as to how a challenge is possible after 44<sup>th</sup> Amendment to the Constitution, which deleted clause (f) of Article 19 (1). This is answered by pointing out that the right to acquire, hold and dispose of property as was guaranteed in Article 19 (1) (f) is very much a "personal liberty" in Article 21 and as such, it should be possible to challenge the validity of the provision under Article 21 even after the 44<sup>th</sup> Amendment.

It should be noted that the new coparcenary is not without its parallels in the Shastric Hindu Law. On the rights of unmarried sisters at a partition to a fourth share, Mayne states:

"On the question whether unmarried sisters were sharers with their brothers or were only entitled to an amount sufficient for their marriage, there has been an acute difference of opinion from early times amongst Commentators. Asahaya, Medhatithi, Vijnaneswara, Nilkantha and Mitramistra combat the view that the provision is only for an amount sufficient for marriage expenses, the Mitakshara going farthest and declaring that 'after the deceased of the father an unmarried daughter is a participant in the inheritance'. Bharuchi, Apararka, the Smiriti Chandrika, Jimutavahana, and his followers, the Madhyaviya, the Sarasvathi Vilasa, the Vivada Ratnakara, and the Vivada Chintamani all take the view that the mention of a definite fourth only meant, that an amount must be allotted to each daughter as would be sufficient for her marriage. But the extreme position in the Mitakshara that an unmarried sister in inheritance had probably no foundation in usage nor has modern usage been in accordance with it".<sup>62</sup>

<sup>61</sup> AIR 1966 SC 24.

<sup>62</sup> Mayne's *Hindu Law and Usage* (A.Kuppuswami edi.) (Thirteenth edition, 1991) P.728.

Pawate, a scintillating scholar of Hindu Law, interpreting the Mitakshara, put the rights of women on a higher pedestal. He says:

“The position according to the Mitakshara theory as developed by Vijaneshwara seems to be this, that a wife gets rights of ownership of her husband’s separate and joint family property from the moment of her marriage and a daughter from the moment of her birth. But Vijnaneshwara does make a distinction between males and females and says that females are asvatantra or unfree. If we are to translate his notion into the language of the coparcenary, I think we can state that women are coparceners. But unfree coparceners.”<sup>63</sup>

Thus these Amendments cannot be seriously challenged on the ground that they contemplate a coparcenary novel in law. On the other hand as noted previously, the Constitutional validity of Mitakshara coparcenary, which recognized the right by birth in favour of males alone, is open to question. However, as will be noticed later, a widow has been relegated to a secondary position.

Distinction between a daughter ‘by birth’ and ‘by adoption’ section 29-A of the Acts (6-A of the Karnataka Act) says: “Notwithstanding anything contained in this Act: (1) in a joint Hindu Family governed by Mitakshara law, the daughter of a coparcener shall by birth become a coparcener in her own right...”

The above language of the Acts gives rise to the following questions: (i) Is the phrase ‘by birth’ a condition precedent for the acquisition of the coparcenary right by a daughter? (ii) If so, whether the distinction between a natural-born daughter and an adopted daughter can be upheld as a reasonable classification?

A prima facie reading of Section 29-A or 6-A of the Karnataka Act suggests that the words ‘by birth’ were intended as a condition precedent. The dictionary meaning of ‘by’ is “through, means or causation of, or owing to”. If

the phrase 'by birth' is omitted, still the Legislative intention of conferring on daughters the coparcenary rights is in no way affected. This suggests that birth is regarded as a prerequisite for a daughter for the acquisition of a coparcenary right.

To the contrary it may be argued on the basis of Section 12 of the Hindu Adoption and Maintenance Act, 1956 deeming adoption child to be the child of adoptive father or mother for all purposes<sup>64</sup> that an adopted child is entitled to exercise all rights including the coparcenary rights. But this argument may not hold water as section 12 makes it also clear that an adopted child's rights in the adoptive family will accrue from the date of adoption. Thus is case of an adopted daughter, the conferment of coparcenary rights in the adoptive family will be from the date of adoption and in the natural family also she will be having a vested coparcenary right by birth. This situation must not have been intended by the legislature. Therefore, the better view seems to be that the Amending Acts do not envisage the conferment of coparcenary right on an adopted daughter.

Is there any ostensible reason for the exclusion of adopted daughter? While non-application of mind on the part of the legislature cannot be ruled out, one can only speculate the reasons, if any exist. First, adoption of daughters is not common, as yet. Second, the adopted daughter's rights seriously affect the rights of other heirs, especially that of a wife.

The further question is whether the differentiation between a natural born and an adopted daughter is valid. The conventional perception is that ties of blood are stronger than those of adoption. Under the Shastric law the rights of an adopted son suffered diminution in the presence of an after born natural son. But the policy of Hindu Adoption and Maintenance Act is to treat an

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<sup>63</sup> I.S.Pawate, *Daya-Vibhaga or the Individualization of Communal Property and Communalization of Individual Property in Mitakshara Law*, (Second edition, 1975) P.297.

<sup>64</sup> Section 12. Effects of adoption: An adopted child shall be deemed to be the child of his or her adoptive father or mother, for all purposes with effect from the date of adoption and from such date all ties of the child in the family of his or her birth shall be deemed to be served and replaced by those created by the adoption in the adoptive family.

adopted son and an after born natural son on an equal footing. The Courts may, it is felt, hold the distinction between an adopted and natural born son as reasonable classification.

### **JOINT FAMILY:**

In some respects the new Amendments introduce far-reaching changes in the law of Joint family. Section 29-A (Section 6-A of Karnataka Act) says that a daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as a son and have the same rights in the coparcenary property as she would have had if she had been a son.... And shall be subject to the same liabilities and disabilities in respect thereto as a son.

Turning to her rights as a son, she will be entitled to be a Karta of the Joint family, and will by virtue of that position exercise the right to spend the income for joint family purposes and alienate the joint family properties for legal necessity or benefit of the estate. In popular perception as well as under the Shastric law, a daughter on marriage ceases to be a member of the parental family; but the Amending Acts change that position and a daughter will not only continue to be a member of her parental family, but also can be the head of the family.

It needs mention, that though alien to Hindu patriarchal notions, under some of the customary laws in Nigeria, an eldest daughter even after her marriage has a right to be the head of her natal joint family. Even in India, mothers acted as guardians of their minor sons, and as a de facto managers of the Joint families on their husbands death. Though her position as de facto manager is recognized the *de jure* conferment of the right eluded her.

### **LIABILITIES**

Daughter as a coparcener will be bound by common run of liabilities well settled under the Hindu law. But the question whether a daughter would be governed by the doctrine of pious obligation as in the case of a son has not

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been answered clearly by legislation.

The Kerala Legislation by a special provision abrogated the doctrine of pious obligation of a son<sup>65</sup>. But the legislations of other States, which confer coparcenary rights on daughters, are silent in this aspect. There are sufficient reasons to exclude daughters from the operation of this doctrine. Some are as follows: First, however, many legal and moral obligations were entertained in classical Hindu law, according to contemporary concepts the doctrine represents a moral obligation ripening itself into a legal obligation. Secondly, as pointed out by Kane<sup>66</sup> the doctrine was altered in some material respects under the Anglo-Mitakshara law. This even in the case of a wife who belongs to the same family, and is regarded as half of her husband, the view had been expressed that she is not bound by the doctrine of pious obligation<sup>67</sup>. In *Keshav Nandan v Bank of Bihar*<sup>68</sup> the Patna High Court observed that the doctrine of pious obligation cannot apply to the wife and she, therefore, cannot be liable to the creditors on the principles applicable to the sons. The Karnataka High Court in *Padmini Bai v Aravind Purandhar Murabatta*<sup>69</sup> took the same view.

Section 29-A gives rise to at least three other questions. First, if the joint family has properties in two States, one that is governed, will it result in two Kartas? Once a daughter and other a son? Territorial application of the Amending Act and the *lex situs* principle would suggest such a situation.

The second question is whether a reunion of a brother and sister who were coparceners is possible. Reunion is still a feature of Shastric Hindu law. The Text of Brihaspati<sup>70</sup>, on which the law is based, says: "He, who, once being separated dwells again through affection with his father, brother or paternal uncle is termed reunited with him.

<sup>65</sup> Section 5, the Kerala Joint Hindu Family System (Abolition) Act, 1976.

<sup>66</sup> P.V.Kane, *History of Dharmasastra*, Vol 3 (Second edition, 1973) P. 450.

<sup>67</sup> Mulla, *Principles of Hindu Law*, (15<sup>th</sup> edition, 1982) P. 387.

<sup>68</sup> AIR 1977 Pat 185.

<sup>69</sup> 1988 (I) Karn LJ 291.

<sup>70</sup> Brihaspati XXV 7.

In *Ram Narain v Pan Kuer*<sup>71</sup>, the Privy Council held that in a Hindu family governed by Mitakshara a valid reunion is possible only between a father and son, brother and brother and paternal uncle and nephew, and only if it is between parties to the original partition. But according to Vyavahara Mayukha, which is a paramount authority in Gujarat, the island of Bombay and in Northern Konkan and Vivada Chintamani, which is authoritative in Mithila, the text of Brihaspati is illustrative and not exhaustive. Thus Vyavahara Mayukha expressly states that a reunion may take place even with a wife, a paternal grandfather, a brother's grandson, a paternal uncle's son and the rest.

The above regional differences may give rise to an impression that a reunion with a sister is quite possible under Section 29-A in Maharashtra. However, this view needs to be examined with reference to a question of some Constitutional nicety. That is, the law of reunion pertains to uncodified Hindu Law; on the other hand the Amending Act seeks to amend the Hindu Succession Act as passed by Parliament and to which amendment, the consent of the President is required under Article 254 (2) of the Constitution and which had been secured, will be operative with respect to that matter. Therefore, Section 29-A can be operative only on a matter within the scope and intendment of the Hindu Succession Act. The topic of reunion does not fall within the scope and intendment of the Hindu Succession Act and traverses for beyond it.<sup>72</sup>

The third aspect that needs consideration is: What is the impact of section 29-A of the Amending Acts (6A of the Karnataka Act) on section 23 of the Hindu Succession Act? Section 23 of the Hindu Succession Act provides that on the death of Hindu intestate in case of a dwelling house wholly occupied by members of the joint family, a female heir is not entitled to demand partition unless the male heirs choose to do so; and second it curtails even the right of residence of a daughter by stating that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling house

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<sup>71</sup> (1935) 62 IA 16.

only if she is unmarried or has been deserted by or has separated from her husband or is a widow.<sup>73</sup>

When considering whether these restrictions will be operative in the case of female coparceners, we have to focus on the interpretation of the words Hindu intestate and heirs occurring in Section 23. Under Mitakshara law unobstructed heritage (Apratibandhadaya) devolves by survivorship and obstructed heritage (Sapratibandhadaya) by succession and both the phrases viz., Hindu intestate and heirs exclude coparceners and coparcenary interests from their scope. Section 6 of the Hindu Succession Act retains by survivorship in spite of the significant change introduced in it. There is a second ground, which buttresses this view. Section 23 applies to both the male and female intestates and its applicability to the latter indicates that coparceners and coparcenary interests were outside the scope of section 23. Thus it is submitted that female coparceners are not bound by the restrictions contained in the section.

Apart from these Constitutional and interpretation issues, these legislations give rise to a policy issue of substantial importance overlooked by the legislatures. That is, the preserving of right by birth and its extension to daughters undermines the position of the wife, especially in States governed by the Dravida sub-school of Mitakshara law. First, her successional share is reduced; second, making a testamentary disposition can defeat her share; third as noted earlier, she cannot be the Karta of the jointfamily, even if her children are minors. This is indeed a sad diminution in the status of a wife whom the Shastras referred to as *Ardhangini* (half of her husband) and the English phrase refers to as the better half.

To elaborate the first in the Dravida School following *Smriti Chandrika* as the authoritative work, the practice of allotment of shares to female members like wife and mother of the father at a partition had become absolute. Thus in Andhra Pradesh, Tamil Nadu and in the region comprising of erstwhile Mysore

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<sup>72</sup> *Gram Panchayat v Malwinder Singh*, (1985) 3 SCC 661, 668-70.

State in Karnataka, under National Partition envisaged by Section 6 of the Hindu Succession Act shares are allotted to father and his sons only.

To illustrate, a joint family consists of father F, his wife W, two sons S-1 and S-2 and unmarried daughters D-1 and D-2. The family possesses joint family properties worth three lakhs of rupees. Prior to the Amendment on the death of F, F's interest under the National Partition would be one-third, that is Rs. 1,00,000 that would be divided among the five Class I heirs. Thus W's share would be Rs. 20,000. After the Amendment, if F dies, his share under the National Partition will be one-fifth. (the deceased is a coparcener along with his two sons and two daughters) that is, Rs. 60,000. If this is distributed, among the Class I heirs, the share of W will be Rs. 12,000.

If the law applicable in Maharashtra, prior to the Amending Act, governs the family because of the allotment of shares to the wives at a partition (the shares being F, W, S-1 and S-2) the share of A will be Rs. 75,000. The successional share of W will be Rs. 15,000 and in case W files a suit for partition expressing her willingness to go out of the joint family she would be entitled to get both the interest she has inherited and the share, which would have been Nationally, allotted to her.<sup>74</sup> Thus her share would be Rs. 75,000 + Rs. 15,000 = Rs. 90,000.

But after the Amendment in 1994 in Maharashtra and also in Northern Karnataka (part of erstwhile Bombay Province, after the Karnataka Amendment came into force), if W who inherits an interest on the joint family property under section 6 of the Hindu Succession Act files a suit for partition expressing her willingness to go out of the family, she would be entitled to get both the interest she has inherited and the share which would have been Nationally allotted to her.

The share of F on National partition will be Rs. 50,000. On F's death this will be divided among the five Class I heirs, each getting a successional portion of Rs. 10,000. In case W files a suit for partition, she would be entitled

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<sup>73</sup> Proviso to Section 23, The Hindu Succession Act, 1956.

to Rs. 60,000 (Rs. 50,000 as per share under National partition plus Rs. 10,000 as successional share).

But F can defeat the successional share of W or of any other heir, by making a testamentary disposition of his undivided interest.<sup>75</sup> If that happens, it will have disastrous effect on the position of W in States of Andhra Pradesh, Tamil Nadu and in Mysore region of Karnataka, where her right will be reduced to that of getting maintenance only.

All these regional Amendments tend to defeat the goal of uniform Hindu law envisaged by Parliament during the years 1955-56. The State Amendments have the effect of dividing the Mitakshara law into the following sub-schools:

- (a) Mitakshara law in which daughters have a right by birth in coparcenary properties under the Dravida School.
- (b) Mitakshara law, which recognizes right by birth of daughters in coparcenary under the Bombay School.
- (c) Mitakshara law, which recognizes right by birth in favour of sons, (the term son being understood in its wider sense) as per the traditional view; and
- (d) Mitakshara law, which abolishes the right by birth altogether, as in Kerala.

The last mentioned approach is in consonance with the recommendations of Rau Committee and sub serves the goal of uniformity. If that approach has been coupled with the imposition of restraints on testation as under the continental laws and Muslim law that would have achieved better results than the present Amendments which confer the coparcenary rights on unmarried daughters.<sup>76</sup>

The subject matter of the laws of succession falls in Entry 5 of the

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<sup>74</sup> *State of Maharashtra v Narayan Rao*, (1985) 2 SCC 321 at 330 (para-6)

<sup>75</sup> Section 30 of the Hindu Succession Act, 1956.

<sup>76</sup> B.Sivaramayya, "Coparcenary Rights to Daughters: Constitutional and Interpretational Issues", (1997) 3 SCC (Jour) 25.

Concurrent List of the Seventh Schedule to the Constitution. Therefore, Parliament as well as the State Legislatures is competent to enact laws in this area. In case another State brings some third model of legislation in this field, there is a likelihood of having still more diversity in the law. This would result in the Directive Principles of State Policy not being adhered to which require the State to endeavour to secure a Uniform Civil Code throughout the territory of India. If we cannot have that for the present we should at least have uniformity amongst Hindus. Accordingly, there is need to have a Central law enacted by Parliament under Article 246 of the Constitution. In such a situation the law made by these five States would stand repealed to the extent of repugnancy, unless expressly repealed.

### **2.3. THE HINDU SUCCESSION (AMENDMENT) BILL, 2004**

The initial Bill introduced in the Rajya Sabha on 20 Dec 2004 was based on the 174<sup>th</sup> Law Commission Report. Prior to that report, the Law Commission had sent questionnaires to many individuals and organizations.

In pursuance of the rules relating to the Department Related Parliamentary Standing Committees, the Chairman, Rajya Sabha referred<sup>77</sup> the Hindu Succession (Amendment) Bill, 2004 as introduced in the Rajya Sabha on 20<sup>th</sup> December 2004 for examination and report. The Committee considered the Bill in five sittings held on 3<sup>rd</sup> & 17<sup>th</sup> February 19<sup>th</sup> & 27<sup>th</sup> April and 10<sup>th</sup> May 2005.

The Hindu Succession (Amendment) Bill, 2004 seeks to make two major amendments in the Hindu Succession Act, 1956. First, it is proposed to remove the gender discrimination in section 6 of the original Act. Second, it proposes to omit section 23 of the original Act, which disentitles a female heir to ask for partition in respect of a dwelling house, wholly occupied by a joint family, until the male heirs choose to divide their respective shares therein.

Clause 2 of the Hindu Succession (Amendment) Bill seeks

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<sup>77</sup> Rajya Sabha Parliamentary Bulletin Part II (No. 41884) dated the 27<sup>th</sup> December 2004.

to substitute section 6 of the Hindu Succession Act, 1956 with a new section. The table below reproduces the aforesaid section of the Act, alongwith the amendments as introduced by the Bill:

The Hindu Succession Act, 1956	The Hindu Succession (Amendment) Bill, 2004
<p>6. Devolution of interest in coparcenary property—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 in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:</p> <p>Provided that, if the deceased had left him 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 property shall devolve by testamentary or intestate succession, as the case may be and not by survivorship.</p> <p>Explanation 1. —For the purpose of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death.</p>	<p>2. For section 6 of the Hindu Succession Act, 1956 (hereinafter referred to as the principal Act), the following section shall be substituted, namely:—</p> <p>‘6. (I) On and from the commencement of the Hindu Succession (Amendment) Act, 2004, in a joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,—</p> <p>(a) also by birth become a coparcener in her own right; the same manner as the son here;</p> <p>(b) have the same rights in the coparcenary property as she would have had if she had been a son;</p> <p>(c) be subject to the same liabilities and disabilities in respect of the said coparcenary property as that of a son, and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter:</p> <p>Provided that nothing contained in this sub-section shall apply to a daughter married before the commencement of the Hindu Succession (Amendment) Act, 2004.</p>

irrespective of whether he was entitled to claim partition or not.

Explanation 2. —Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein.

(2) Any property to which a female Hindu becomes entitled by virtue of sub-section

(1) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act or any other law for the time being in force in, as property capable of being disposed of by her by will or other testamentary disposition.

(3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2004, his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under the Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and,-

(a) the daughter is allotted the same share as is allotted to a son;

(b) the share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter; and

(c) the share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, as such child would have got

had he or she been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or a pre-deceased daughter as the case may be.

Explanation. - For the purpose of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

(4) After the commencement of the Hindu Succession (Amendment) Act, 2004, no court shall recognize any right to proceed against a son, grandson or great grandson for the recovery of any debt due from his father, grandfather or great grandfather on the ground of the pious obligation under the Hindu law, of such son, grandson or great-grandson to discharge any such debt.

Provided that in case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2004, nothing contained in this sub-section shall affect—

(a) the right of any creditor to proceed against the son, grandson or great-grandson, as the case may be; or

(b) any alienation made in respect of or in

	<p>satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner and to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2004 had not been enacted.</p> <p>Explanation- For the purposes of clause (a), the expression “son” “grandson” shall be deemed to refer to the son, grandson or great-grandson, as the case may be, who was born or adopted prior to the commencement of the Hindu Succession (Amendment) Act, 2004.</p> <p>(5) Nothing contained in this section shall apply to a partition, which has been effected before the commencement of the Hindu Succession (Amendment) Act, 2004.’</p>
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This section seeks to make the daughter a coparcener by birth in a joint Hindu family governed by the Mitakshara law, subject to the same liabilities in respect of the said coparcenary property as that of a son. Proviso to section 6 (I) states that nothing contained in this sub-section, i.e., making daughter coparcener in the Mitakshara Hindu joint family property, shall apply to a daughter married before commencement of the Hindu Succession (Amendment) Act, 2004. As stated in the Background Note furnished by the Legislative Department, it is proposed to give benefit of the proviso of this Bill to married daughters, only after the commencement of the proposed amending legislation.

The Committee was of the view that Hindu Succession (Amendment) Bill, 2004 is a step in the right direction. Laws reflect the face of society and its evolution over the time. To respond to the needs of a dynamic social system, laws have to be changed and amended, at regular intervals. In this context, the Committee feels that the aforesaid Bill, brought forth after nearly fifty years of enactment of the Hindu Succession Act, 1956, has a historical relevance and can go a long way in establishing gender parity in the property laws, governing the Hindu society.

At the same time, the Committee takes note of the fact that the joint family system is a unique feature of the Indian society. Though not impervious to various inadequacies and anomalies, the joint family system has been in existence since time immemorial and is continuing, with many changes in its structure and ideology, to keep pace with the changing need of the time. While noting the concern regarding discrimination against women in the patrilineal, patriarchal joint family set up, the Committee comprehends that strong public sentiment is attached with the joint family system. Moreover, it is beyond the scope of the present Bill to consider any step regarding abolition of the joint family system in the Hindu households.

As far as the basic objective of the Bill to remove gender discriminatory practices in the property laws of the Hindus, the Committee welcomes the amendment in section 6 of the Bill, whereby daughters have been given the status of coparceners in the Mitakshara joint family system. However, the Committee feels that the position of other Class I female heirs should not suffer as a result of this move.

Amended Section 6(3) as proposed by the Bill seeks to lay that after commencement of the proposed legislation, if a male Hindu dies, his interest ('notional' share) in the property of a joint Hindu family governed by the Mitakshara law shall devolve by testamentary or intestate succession, as the case may be, as per the provisions of the Hindu Succession Act, 1956 and not by survivorship.

Section 8 of the Hindu Succession Act, 1956 lays down general rules of

succession in case of a Hindu male dying intestate, whereby his interest would devolve firstly to the relatives specified in Class I of the Schedule, and in the absence of Class I heirs to the Class II heirs, thereafter to the agnates and lastly to the cognates. Class I heirs include twelve categories of relatives, of whom there are only four primary heirs, namely, mother, widow, son and daughter. The remaining eight represent one or the other person who would have been a primary heir, if he or she had not died before enactment of the Bill. Of these, the son's son's sons and son's son's daughters have been included as Class I heirs, but a daughter's daughter's sons and daughter's daughter's daughters have been placed as Class II heirs. This aspect of the Hindu Succession Act has been criticized as a source of infirmity and gender discrimination.

The Committee agrees with the observation made by the Law Commission in this regard that this sub-section of the Bill contains gender bias, whereby the principle of representation among Class I heirs goes up to two degrees in the male line of descent, but in the female line of descent, it goes up to only one degree.

In view of the foregoing, the Committee recommends that the Schedule to section 8 of the Act should be amended accordingly, to endorse the principle of gender justice and equality. The Schedule may be re-drafted as below:

1. Son;
2. Daughter;
3. Widow;
4. Mother;
5. Son of a pre-deceased son;
6. Daughter of a pre-deceased son;
7. Son of a pre-deceased daughter;
8. Daughter of a pre-deceased daughter;
9. Widow of a pre-deceased son;
10. Son of a pre-deceased son of a pre-deceased son;
11. Daughter of a pre-deceased son of a pre-deceased son;
12. Widow of a pre-deceased son of a pre-deceased son;

13. Son of a pre-deceased daughter of a pre-deceased daughter;  
and
14. Daughter of a pre-deceased daughter of a pre-deceased daughter.

Further, the Ministry should examine whether the four categories of heirs mentioned in Class II, i.e., (i) son's daughter's son (ii) son's daughter's daughter (iii) daughter's son's son and (iv) daughter's son's daughter, can be identified as Class I heirs.

The Committee is of the view that the proposed change would take care of the anomalies mentioned in the aforesaid proviso and remove grievances of a large section of the people who has been pointing out that this proviso is a major source of infirmity.

Amended section 6(4) as proposed by the Bill seeks to abrogate the concept of pious obligation. It states that the right to proceed against a son, grandson or great-grandson for the recovery of any debt due from his father, grandfather or great-grandfather, on the ground of pious obligation, will not be recognized by any court after commencement of the Hindu Succession (Amendment) Act, 2004.

The Committee observes that the Hindu Undivided Family system is a unique feature of the Indian society and the concept of pious obligation acts as a thread, which binds the family together and prevents it from disintegration. However, the Committee is conscious of the changing socio-economic scenario whereby nuclear families have become a viable alternative in the context of urbanization. Mobility of the population due to the needs of the present day, such as for education and employment, cannot be overlooked. The concept of joint family no longer involves joint residence. Similarly, the concept of pious obligation, whereby son, grandson and great grandson were responsible to fulfill their responsibilities towards the joint family, can be done away with. Instead, a much more practical concept would be to make all the primary heirs liable/ responsible to fulfill all such duties. The Committee feels that section

6(I)(c), which states that daughter who have been made coparceners, will be subject to the same liabilities in respect of the said coparcenary property, as that of a son, would take care of the concern of the Committee.

Subject to above, Clause 2 is adopted.

**Clause 3** of the Hindu Succession (Amendment) Bill, 2004 seeks to omit section 23 of the Hindu Succession Act, 1956. Section 23 of the Act reads as under:

“Section 23. Special provision respecting dwelling houses: - Where a Hindu intestate has left surviving him or her both male and female heirs specified in Class I of the Schedule and his or her property includes a dwelling house wholly occupied by members of his or her family, then, notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling house shall not arise until the male heirs choose to divide their respective shares therein; but the female heir shall be entitled to a right of residence therein:

Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling house only if she is unmarried or has been deserted by or has separated from her husband or is a widow.”

According to Mulla:

“The object of the special provision is to prevent female heirs and, particularly a daughter of the intestate, from creating a situation in which partition of the family house may entail a forced sale of it or otherwise cause hardship to the son or sons of the intestate where it may not be possible for the son or sons to buy off the share of the female heir who insists on actual partition of it... It would seem that the right of a female heir to demand partition may be deferred and remain in abeyance under this section till the lifetime of the male heirs enumerated in Class I of the Schedule or the last survivor of them, unless a partition of the dwelling house is sought by any one of them

before such time.”<sup>78</sup>

The Law Commission while examining the aforesaid section of the Act in its 174<sup>th</sup> Report, commented as below:

“Another apparent inequity under the Hindu Succession Act as per Section 23, is the provision denying a married daughter the right to residence in the parental home unless widowed, deserted or separated from her husband and further denying any daughter the right to demand her share in the house if occupied by male family members. This right is not denied to a son. The main object of the section is said to be the primacy of the rights of the family against that of an individual by imposing a restriction on partition.”

The Law Commission, in its 174<sup>th</sup> Report, stated that once a daughter is made a coparcener on the same footing as a son, her right as a coparcener should be real in spirit and content. To quote from the Report:

“We are also of the view that Section 23 of the Hindu Succession Act, 1956, which places restrictions on the daughter to claim partition of the dwelling house, should be deleted altogether. We recommend accordingly.”

The Committee feels that this amendment will remove one of the major anomalies in the inheritance rights, as propounded by the Hindu Succession Act, 1956. It will make the daughters, who have been made coparceners in the joint Hindu family system, equal claimant in respect of dwelling house. Objection has been raised in certain quarters that if the proposed amendment is enacted, it would give rise to fragmentation in the joint family property. The Committee feel that such apprehension is unfounded and endorses inequality between the sexes. If restriction on partition is to be imposed by giving primacy to the rights of the family, against that of an individual, it should be applicable to both the sons and daughters alike. Thus omission of the section 23 of the aforesaid Act is in keeping with the changing needs of the time.

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<sup>78</sup> Mulla, Principles of Hindu Law, (edited by Satyajeet A. Desai), Butterworths, 2001, Vol II, P 450.

**Clause 3 is adopted without any change.**

While deliberating on the Bill, the Committee considered the Principal Act, i.e., the Hindu Succession Act, 1956 and suggested modification to section 4 (2) of the Act.

This section states as below:

“For the removal of doubts it is hereby declared that nothing contained in this Act shall be deemed to affect the provisions of any law for the time being in force providing for prevention of fragmentation of the agricultural holdings or for the fixation of ceiling or for the devolution of tenancy rights in respect of such holding.”

One of the memoranda submitted to the Committee argued that agricultural land is the most important form of rural property in India; and ensuring gender-equal rights in it is important, not only for gender justice but also for economic and social advancement.

The Committee feels that in the present day circumstances, where legislations have been undergoing progressive changes, there is no need to retain this sub-section, which becomes a barrier in establishing gender equality. Keeping in view the above-mentioned facts, the Committee recommends that Government may consider to incorporate this amendment in the present Bill, deleting section 4(2) from the original Act.

#### **2.4. The Hindu Succession (Amendment) Act 2005**

The Parliament on 29<sup>th</sup> August 2005 passed the Hindu Succession (Amendment) Bill giving Hindu women equal rights in inheritance of property, with Lok Sabha approving the legislation by a voice vote. Rajya Sabha passed this Bill on 16<sup>th</sup> August 2005.

Winding up a brief discussion on this landmark Bill, Law and Justice Minister H R Bhardwaj said it would remove gender bias giving equal rights to daughters as sons have. He said since rights over agricultural land were part of the State subject, the Centre would soon write to State Governments in its endeavour to bring a consensus on the matter.

The major achievements of the Hindu Succession (Amendment) Act 2005 are at least two major changes and some smaller ones. First, by deleting section 4(2) of the 1956 Hindu Succession Act, the 2005 amendment has removed gender inequalities in the inheritance of agricultural land, and made Hindu women's land rights legally equal to men's across States. Before this, the inheritance of agricultural land was subject to State-level tenurial laws, which were highly gender unequal in six States –Delhi, Haryana, Himachal Pradesh, Jammu and Kashmir, Punjab and Uttar Pradesh. These inequalities adversely affected millions of women. We tend to forget how many women are farmers, critically dependent on agriculture for survival.

Second, making daughters, especially married daughters, coparcener in joint family property is of huge importance both economically and symbolically. Economically, it provides women security by giving them birthrights in joint family property that cannot be willed away by fathers. Symbolically, it signals that daughters and sons are equally important members of the parental family. It undercuts the notion that after marriage the daughter belongs only to her husband's family. It creates a permanent link with her parental family. This will enhance women's self-confidence and social worth.

## **2.5. RESUME**

Despite the enactment of the Hindu Succession Act, 1956, establishing the inheritance right of women equally with men and abolishing life estate of female heirs, the retention of Mitakshara coparcenary (joint family) with its attendant inequality between female and male heirs continues (Under this system property rights were given to male heirs only). That is, in the case of a joint family, a daughter gets only a smaller share than the son. While sharing of father's property between brother and sister is equal, the brother—in addition – is entitled to a share in the coparcenary from which the sister is excluded. Further, if the family owned a dwelling house, the daughter's right thereon is confined only to the right of residence.

A very progressive development in this context is the enactment of the

Hindu Succession (Andhra Pradesh) Amendment Act, 1985. According to this law, the rights of the daughter are absolutely equal to that of the son even in cases of application of Mitakshara system. The rationale of the law has been explained in terms of Mitakshara system being violative of the fundamental right of equality before law, apart from leading to the pernicious dowry system.

Actually five States amended the Hindu Succession Act, 1956. First Kerala abolished joint family property altogether, making the inheritance of all property, including land, equal for sons and daughters. Tamil Nadu, Karnataka, Andhra Pradesh and Maharashtra followed, but they retained the Mitakshara coparcenary system, making only unmarried daughters coparceners. They left out married daughters and agricultural land. The Current Amendment, the Hindu Succession (Amendment) Act 2005, passed as a Central Government Act, will also benefit women in these four States in context of agricultural land and dwelling house.