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LAW COMMISSION OF INDIA

174TH REPORT

ON

"Property Rights of Women:

Proposed Reforms under the Hindu Law".

MAY, 2000

D.O. No.6(3)(59)/99-LC(LS)

May 5, 2000

Dear Shri Jethmalaniji,

I am forwarding herewith the 174th Report on "Property Rights of Women: Proposed Reforms under the Hindu Law".

2. In pursuance of its terms of reference, which inter alia, oblige and empower the Commission to make recommendations for the removal of anomalies, ambiguities and inequalities in the law, the Commission undertook a study of certain provisions regarding the property rights of Hindu women under the Hindu Succession Act, 1956. The Commission

had taken up the aforesaid subject suo motu in view of the pervasive discrimination prevalent against women in relation to laws governing the inheritance/succession of property amongst the members of a joint Hindu family.

3. 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 coparcenery property ownership merely by reason of their sex is unjust. The Commission has also taken into consideration the changes carried out by way of State enactments in the concept of Mitakshara coparcenery property in the five States in India, namely, Kerala, Andhra Pradesh, Tamil Nadu, Maharashtra and Karnataka. The Commission feels that further reform of the Mitakshara Law of Coparcenery is needed to provide equal distribution of property both to men and women. The recommendations contained in the Report are aimed at suggesting changes in the Hindu Succession Act, 1956 so that women get an equal share in the ancestral property.

4. With a view to giving effect to the recommendations, a Bill entitled "Hindu Succession (Amendment) Bill, 2000" is annexed with the Report as Appendix 'A'.

5. We hope that the recommendations in this Report will go a long way in attaining the objectives set out above.

With warm regards,

Yours sincerely,

(B.P. Jeevan Reddy)

Shri Ram Jethmalani,

Minister for Law, Justice & Co. Affairs,

Shastri Bhavan,

New Delhi

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CHAPTER - I

INTRODUCTION

1.1 SCOPE

Discrimination against women is so pervasive that it sometimes surfaces on a bare perusal of the law made by the legislature itself. This is particularly so in relation to laws governing the inheritance/succession of property amongst the members of a Joint Hindu family. It seems that this discrimination is so deep and systematic that it has placed women at the receiving end. Recognizing this the Law Commission in pursuance of its terms of reference, which, inter-alia, oblige and empower it to make recommendations for the removal of anomalies, ambiguities and inequalities in the law, decided to undertake a study of certain provisions regarding the property rights of Hindu women under the Hindu Succession Act, 1956. The study is aimed at suggesting changes to this Act so that women get an equal share in the ancestral property.

1.2 Issuing of Questionnaire and holding of Workshop

Before any amendment in the law is suggested with a view to reform the existing law, it is proper that opinion is elicited by way of placing the proposed amendments before the public and obtaining their views and if possible by holding workshops etc. The Commission thus decided to have the widest possible interaction with a cross section of society including judges, lawyers, scholars, Non-governmental Organizations (NGO'S) etc. by issuing a questionnaire. Their views were also elicited on several of the provisions introduced by certain State Legislatures regarding the property rights of Hindu women which had been brought about by way of an amendment to the Hindu Succession Act, 1956. The main focus/thrust of the questionnaire (annexed as Annexure I) was to elicit views on three issues namely:-

i) granting daughters coparcenary rights in the ancestral property; or to totally abolish the right by birth given only to male members;

ii) allowing daughters full right of residence in their parental dwelling house; and

iii) restricting the power of a person to bequeath property by way of testamentary disposition extending to one-half or one-third of the property.

1.2.1 The Commission received replies in response to the questionnaire. These replies have been analysed and tabulated and this is annexed as Annexure II.

1.2.2. Aiming at a wider and more intense interaction the Law Commission in collaboration with the ILS, Law College and Vaikunthrao Dempo Trust of Goa, organised a two day workshop on "Property Rights of Hindu Women proposed Reforms" in Pune on 28-29 August, 1999. At this Workshop the Chairman and members of the Law Commission held detailed discussions with eminent lawyers and NGO'S and teachers of ILS Law College, Pune. A Working Paper on Coparcenary Rights to Daughters Under Hindu Law along with a draft bill was circulated. This is annexed as Annexure-III.

1.2.3 The Law Commission has carefully considered all the replies and the discussion at the workshop at Pune before formulating its recommendations to amend the Hindu Succession Act, 1956 with a view to giving the Hindu women, an equal right to succeed to the ancestral property.

1.3 The Background

Since time immemorial the framing of all property laws have been exclusively for the benefit of man, and woman has been treated as subservient, and dependent on male support. The right to property is important for the freedom and development of a human being. Prior to the Act of 1956, Hindus were governed by Shastric and Customary laws which varied from region to region and sometimes it varied in the same region on a caste basis. As the country is vast and communications and social interactions in the past were difficult, it led to a diversity in the law. Consequently in matters of succession also, there were different schools, like Dayabhaga in Bengal and the adjoining areas; Mayukha in Bombay, Konkan and Gujarat and Marumakkattayam or Nambudri in Kerala and Mitakshara in other parts of India with slight variations. The multiplicity of succession laws in India, diverse in their nature, owing to their varied origin made the property laws even mere complex.

1.3.1. A woman in a joint Hindu family, consisting both of man and woman, had a right to sustenance, but the control and ownership of property did not vest in her. In a patrilineal system, like the Mitakshara school of Hindu law, a woman, was not given a birth right in the family property like a son.

1.3.2 Under the Mitakshara law, on birth, the son acquires a right and interest in the family property. According to this school, a son, grandson and a great grandson constitute a class of coparcenars, based on birth in the family. No female is a member of the

coparcenary in Mitakshara law. Under the Mitakshara system, joint family property devolves by survivorship within the coparcenary. This means that with every birth or death of a male in the family, the share of every other surviving male either gets diminished or enlarged. If a coparcenary consists of a father and his two sons, each would own one third of the property. If another son is born in the family, automatically the share of each male is reduced to one fourth.

1.3.3 The Mitakshara law also recognises inheritance by succession but only to the property separately owned by an individual, male or female. Females are included as heirs to this kind of property by Mitakshara law. Before the Hindu Law of Inheritance (Amendment) Act 1929, the Bengal, Benares and Mithila sub schools of Mitakshara recognised only five female relations as being entitled to inherit namely - widow, daughter, mother paternal grandmother, and paternal great-grand mother.1 The Madras sub-school recognised the heritable capacity of a larger number of females heirs that is of the son's daughter, daughter's daughter and the sister, as heirs who are expressly named as heirs in Hindu Law of Inheritance (Amendment) Act,1929.2 The son's daughter and the daughter's daughter ranked as bandhus in Bombay and Madras. The Bombay school which is most liberal to women, recognised a nunmber of other female heirs, including a half sister, father's sister and women married into the family such as stepmother, son's widow, brother's widow and also many other females classified as bandhus.

1.3.4 The Dayabhaga school neither accords a right by birth nor by survivorship though a joint family and joint property is recognised. It lays down only one mode of succession and the same rules of inheritance apply whether the family is divided or undivided and whether the property is ancestral or self-acquired. Neither sons nor daughters become coparceners at birth nor do they have rights in the family property during their father's life time. However, on his death, they inherit as tenants-in-common. It is a notable feature of the Dayabhaga School that the daughters also get equal shares alongwith their brothers. Since this ownership arises only on the extinction of the father's ownership none of them can compel the father to partition the property in his lifetime and the latter is free to give or sell the property without their consent. Therefore, under the Dayabhaga law, succession rather than survivorship is the rule. If one of the male heirs dies, his heirs, including females such as his wife and daughter would become members of the joint property, not in their own right, but representing him. Since females could be coparceners, they could also act as kartas, and manage the property on behalf of the other members in the Dayabhaga School.

1.3.5 In the Marumakkattayam law, which prevailed in Kerala wherein the family was joint, a household consisted of the mother and her children with joint rights in property. The lineage was traced through the female line. Daughters and their children were thus an integral part of the household and of the property ownership as the family was matrilineal.

1.4 However, during the British regime, the country became politically and socially integrated, but the British Government did not venture to interfere with the personal laws of Hindus or of other communities. During this period, however, social reform movements raised the issue of amelioration of the woman's position in society. The earliest legislation bringing females into the scheme of inheritance is the Hindu Law of Inheritance Act, 1929. This Act, conferred inheritance rights on three female heirs i.e. son's daughter, daughter's daughter and sister (thereby creating a limited restriction on the rule of survivorship). Another landmark legislation conferring ownership rights on woman was the Hindu Women's Right to Property Act (XVIII of) 1937. This Act brought about revolutionary changes in the Hindu Law of all schools, and brought changes not only in the law of coparcenary but also in the law of partition, alienation of property, inheritance and adoption.3

1.4.1 The Act of 1937 enabled the widow to succeed along with the son and to take a share equal to that of the son. But, the widow did not become a coparcener even though she possessed a right akin to a coparcenary interest in the property and was a member of the joint family. The widow was entitled only to a limited estate in the property of the deceased with a right to claim partition.4 A daughter had virtually no inheritance rights. Despite these enactments having brought important changes in the law of succession by conferring new rights of succession on certain females, these were still found to be incoherent and defective in many respects and gave rise to a number of anomalies and left untouched the basic features of discrimination against women. These enactments now stand repealed.

1.5 The framers of the Indian Constitution took note of the adverse and discrimnatory position of women in society and took special care to ensure that the State took positive steps to give her equal status. Articles 14, 15(2) and (3) and 16 of the Constitution of India, thus not only inhibit discrimination against women but in appropriate circumstances provide a free hand to the State to provide protective discrimination in favour of women. These provisions are part of the Fundamental Rights guaranteed by the Constitution. Part IV of the Constitution contains the Directive Principles which are no less fundamental in the governance of the State and inter-alia also provide that the State shall

endeavour to ensure equality between man and woman. Notwithstanding these constitutional mandates/ directives given more than fifty years ago, a woman is still neglected in her own natal family as well as in the family she marries into because of blatant disregard and unjustified violation of these provisions by some of the personal laws.

1.5.1 Pandit Jawaharlal Nehru, the then Prime Minister of India expressed his unequivocal commitment to carry out reforms to remove the disparities and disabilities suffered by Hindu women. As a consequence, despite the resistance of the orthodox section of the Hindus, the Hindu Succession Act, 1956 was enacted and came into force on 17th June, 1956. It applies to all the Hindus including Buddhists, Jains and Sikhs. It lays down a uniform and comprehensive system of inheritance and applies to those governed both by the Mitakshara and the Dayabahaga Schools and also to those in South India governed by the the Murumakkattayam, Aliyasantana, Nambudri and other systems of Hindu Law. Many changes were brought about giving women greater rights, yet in section 6 the Mitakshara Coparcenary was retained.

1.6 The Law Commission is concerned with the discrimination inherent in the Mitakshara coparcenary under Section 6 of the Hindu Succession Act, as it only consists of male members. The Commission in this regard ascertained the opinion of a cross section of society in order to find out, whether the Mitakshara coparcenary should be retained as provided in section 6 of the Hindu Succession Act, 1956, or in an altered form, or it should be totally abolished. The Commission's main aim is to end gender discrimination which is apparent in section 6 of the Hindu Succession Act,1956, by suggesting appropriate amendments to the Act. Accordingly, in the next two chapters of this report the Commission has made a broad study of section 6 of the Hindu Succession Act, 1956, and the Hindu Succession State(Amendment) Acts of Andhra Pradesh (1986), Tamil Nadu(1989), Maharashtra(1994) and Karnataka(1994) and the Kerala Joint Family System (Abolition) Act, 1975. The Acts are annexed collectively as Annexure IV.

Foot notes

1. Mulla, Principles of Hindu Law (1998 17th ed by S.A. Desai), p. 168.

2. Ibid.

3. Mayne's, Treatise on Hindu Law & Usage, (1996 14th Edition, ed. by Alladi Kuppuswami) p.1065.

4. M. Indira Devi, "Woman's Assertion of Legal Rights to Ownership of property" in Women & Law Contemporary Problems, (1994 ed. by L. Sarkar & B. Sivaramayya) at p.174; also see section 3(3) of Hindu Women's Right to Property Act, 1937.

CHAPTER II

SECTION 6 OF THE HINDU SUCCESSION ACT - A STUDY

2.1 The Hindu Succession Act, 1956 (hereinafter referred as the HSA) dealing with intestate succession among Hindus came into force on 17th June, 1956. This Act brought about changes in the law of succession and gave rights which were hitherto unknown, in relation to a woman's property. However, it did not interfere with the special rights of those who are members of a Mitakshara coparcenary except to provide rules for devolution of the interest of a deceased in certain cases. The Act lays down a uniform and comprehensive system of inheritance and applies, inter-alia, to persons governed by Mitakshara and Dayabhaga Schools as also to those in certain parts of southern India who were previously governed by the Murumakkattayam, Aliyasantana and Nambudri Systems. The Act applies to any person who is a Hindu by religion in any of its forms or develpments including a Virashaiva, a Lingayat or a follower of the Brahmo Prarthana or Arya Samaj; or to any person who is Buddhist, Jain or Sikh by religion; to any other person who is not a Muslim, Christian, Parsi or Jew by religion as per section 2. In the case of a testamentary disposition this Act does not apply and the interest of the deceased is governed by the Indian Succesion Act, 1925.

2.2 Section 4 of the Act is of importance and gives overriding effect to the provisions of the Act abrogating thereby all the rules of the Law of succession hitherto applicable to Hindus whether by virtue of any text or rule of Hindu law or any custom or usage having the force of laws, in respect of all matters dealt with in the Act. The HSA reformed the Hindu personal law and gave a woman greater property rights, allowing her full ownership rights instead of limited rights in the property she inherits under Section 14 with a fresh stock of heirs under sections 15 and 16 of the Act. The daughters were also granted property rights in their father's estate. In the matter of succession to the property of a Hindu male dying intestate, the Act lays down a set of general rules in Sections 8 to 13.

2.3 DEVOLUTION OF INTEREST IN COPARCENARY PROPERTY

Section 6 of the HSA 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 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 devlove by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.
>
> Explanation 1.- For the purposes 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 his 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.

2.3.1 Before the commencement of the HSA, 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 coparcenar, devolved upon surviving coparceners in the family, according to the rule of devolution by survivorship.

2.3.2 Section 6 dealing with the devolution of the interest of a male Hindu in coparcenary property and while recognising 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 coparcener may make a testamentary disposition of his undivided interest in the Joint family property.

2.3.3 The rule of survivorship comes into operation only:- (1) 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 undivided 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 pre-deceased daughter; daughter of a pre-deceased daughter, widow of a pre-deceased son; son of pre-deceased son of a pre-deceased son; daughter of pre-deceased son of a pre-deceased son; widow of pre-deceased son of a pre-deceased son.

2.3.4 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 notional partition contemplated in Explanation 1 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.

2.3.5 It has already been pointed out above that 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 notional 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.

2.3.6 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 cases1 where the female relative happened to be a wife or the mother living at the time of the death of the coparcener. It is now not necessary to discuss this matter as the controversy has been finally set at rest by the decision of the Supreme Court in 1978 in Gurupad v. Heerabai2 and reiterated later in 1994 in Shyama Devi v. Manju Shukla3 wherein it has been 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.

2.3.7 The Supreme Court in Gurupad's case observed:

"In order to ascertain the share of heirs in the property of a 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 deemed to have received in the notional partition."4

2.3.8 Again in State of Maharashtra V. Narayan Rao5 the Supreme Court carefully considered the decision in Gurupad's case and pointed out that "Gurupad's case has to be treated as an authority (only) for the 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 notionally allotted to her, as stated in Explanation I to section 6 of the Act. But it cannot be an authority for the proposition that she ceases to be a member of the family on the death of a male member of the family whose interest in the family property devolves on her without the volition to separate herself from the family. A legal fiction should no 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."

2.4 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.

2.4.1 In the Hindu system, ancestral property has traditionally been held by a joint Hindu family consisting of male coparceners. 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 partrilineal 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.

2.5 Again, the patrilineal assumptions of a dominant male ideology is clearly reflected in the laws governing a Hindu female who dies intestate. The law in her case in 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.6 The provision of section 15(2) of HSA 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.

2.6 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."7 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.8 The Select Committee decided to make her share full and equal to that of a son.

2.7 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 damn the Bill by making it appear worse than it was.9

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

2.9 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?

2.10 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.10

2.11 However, the Supreme Court by its recent

judgment in Narashimaha Murthy v. Sushilabai11 held that a female heir's right to claim partition of the dwelling house of a Hindu dying intestate under section 23 of the HSA 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.

2.12 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 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, apply to Hindus except wills.

2.13 A rule firmly established before HSA 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.

2.14 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 HSA. 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.

2.15 According to Muslim law a person is restrained from giving away all his property by will. He can only will away a maximum of one-third of his property and the rest has to be divided among the agnatic and Koranic heirs. A person is, of course, not required to make a will.

2.16 The proviso to section 6 of HSA also contains another 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 HSA. The property of a male Hindu dying intestate devolves according to section 8 of the HSA, firstly, upon the heirs being the relatives specified in class I of the Schedule. However, there are only four primary heirs in the Schedule to 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 upto 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 pre-deceased son and grandson are class I heirs, but the husbands of a deceased daughter or grand-daughter are not heirs.12

FOOT NOTES

1. See Shiramabai v Kolgonda, 1964 Bom.263;
   Kanahaya Lal v Jamna, 1973 Delhi 160;
   Rangubai Lalji v Lakshman Lal Ji, 1966 Bom. 169;
   See also Ananda v Haribandhu, 1967 orissa 90;
   Vidyaben v Jadgish Chandra, 1974 Guj 23;
   Susheelabai v Narayanarao 1975, Bom.257

2. (1978) 3 SSC, p.383: AIR 1978 SC, 1239

3. (1994) 6 SCC, Pp. 342-343

4. Supra n.2 at Pp. 389-390 (para 13): at 1243

5. AIR 1985 SC 716, at p.721 (para 9)

6. Ratna Kapoor and Brenda Cossman, Feminist Engagements with law in India, Subversive

sites, 1996, p.134

7. The Constituent Assembly of India, (Legislative) Debates Vol.VI 1949 Part II,

8. Madhu Kiswar, "Codified Hindu Law Myth and Reality" Eco & Pol. Weekly, No.33 Aug 1994.

9. The Constituent Assembly of India (Legislative) Debates Vol.VI 1949 Part II, p.841

10. Status of Women in India, A Synopsis of the Report of the National Committee (1971-74) p.53-54

11. AIR 1996 SC, 1826.

12. Dr. Tahir Mahmood Hindu Law, (1986; 2nd ed) p.57.

CHAPTER - III

COPARCENARY: RELEVANCE AND ALTERNATIVES

3.1 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.

3.2 The New 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.

3.2.1 The concept of the Mitakshara coparcenary property retained under section 6 of the HSA has not been amended ever since its enactment. Though, it is a matter of some satisfaction that five states in India namely, Kerala, Andhra Pradesh, Tamil Nadu, Maharashtra and Karnataka1 have taken cognisance 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 famly. In fact, it has abolished the Joint Hindu family system altogether including the Mitakshara, Marumakkattayam, Aliyasantana and Nambudri systems. Thus enacting that joint tenants be replaced by tenants in common.

3.2.2 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 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.

3.2.3 These 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 by 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.

3.2.4 However, these four Hindu Succession (Amendment) Acts have been criticised 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.2

3.2.5 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"3

3.2.6 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 provides that partitions effected contrary to the Act after 25.3.89 will be deemed to be void. The Law Commission's questionnaire elicited public opinion in this regard and found that the majority were of the view that such transactions made just before the enactment of the proposed legislation should be declared invalid.

3.2.7 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 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 a discrimination appears to be unfair and illegal. A recent Supreme Court decisions lends support to this view. In Savita Samvedi v. Union of India5 it was held that the distinction between a married and an unmarried daughter may be unconstitutional. The observations made by Mr.Justice Punchhi are relevant; " The eligibility of a married daughter must be placed on par with an unmarried daughter (for she must have been once in that state), so as to claim the benefit....."6

3.2.8 The majority of the replies to the Law Commission's questionnaire are also of the view that equal rights should be conferred on married and unmarried daughters. This is also the view with regard to the dwelling house.7

3.2.9 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 HSA 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. Section 23 of HSA needs to be deleted altogether and there is great support for this from various sections of society while replying to the questionnaire.

3.2.10 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 accomodation after she has agreed to the sale of the dwelling house.

3.2.11 The HSA of 1956 give daughters as well as the widow of a deceased coparcener a share in the interest of the deceased male coparcenar. 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 dauthters; 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 increase then the interest of the

husband will decrease.

3.2.12 The HSA of 1956 dithered in not abolishing the very concept of coparcenary which the Act should have done. But the Hindu Succession (State Amendment) Acts have confered 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 women are influenced by their husbands and their families, men are no less influenced by their wives and their families.

3.3 Kerala Model

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 suporting 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."8

3.3.1 The Kerala Joint Family System (Abolition) Act, 1975 (hereinafter known as the Kerala Act) in section 4(i) 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 law 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 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.

3.3.2 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.

3.4 In 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.

3.5 Recent reports in some newspapers reveal that the Centre has asked all the states to carry out suitable amendments in the HSA 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 HSA, 1956 to give daughters their due share of coparcenary right"9 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 HSA "does not operate" in that State.

3.6 The subject matter of the laws of succession fall in entry 5 of the Concurrent List of the Seventh Schedule to the Constitution. Therefore, Parliament as well as the State Legislatures are 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.

FOOT NOTES

1. 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
For text of these Acts, See Annexure - IV

2. B.Sivaramayya, "Coparcenary Rights to Daughters; Constitutional and interpretational Issues," (1997) 3 SCC (J), P.25
3. Lok Sabha Debates p.8014(1955)
4. Infra, Chapter IV, Para 4.10
5. JT (1996) 1 P.680
6. Id, at PP. 683-684 Para 7
7. Infra, Chapter IV, Para 4.7
8. M.P.V. Kane, History of Dharamsastra, (Ancient and Medieval Religious and Civil Law) (1946) Vol.III, p.823
9. PTI, "Centre asks States to amend Hindu Succession Act", The Observer 7.2.2000; see also The Tribune, 22.3.2000.

CHAPTER - IV

4.1 Questionnaire and its responses

A questionnaire was issued by the Law Commission to elicit the views of the public regarding giving of rights to a daughter in the Mitakshara property of a Hindu undivided family. This questionnaire consisted of three parts having 21 questions.1 Sixty-Seven respondents have replied to the questionnaire. 30 respondents are from the profession of law and the rest comprise sociologists, NGOs etc. The responses received relating to various issues of the questionnaire have been analysed and tabulated in Annexure II. A brief synopsis of the more salient issues is set out.

4.2 Mitakshara Joint Family to be retained or not and reasons for doing so?

Out of the 67 respondents, the majority opposed retention of the Mitakshara Coparcenary. The two main reasons indicated for this opposition were, the coparcenary system discriminates against women and the legislative changes have already eroded the utility of the coparcenary system. The few who

favoured its retention were of the view that it protects the financially weaker members of the family, gives better rights to males and helps in agriculture and business activities of the family.

4.3 Steps to be taken to remove gender discrimination

However, the majority of the respondents suggested that, even if, the Mitakshara Coparcenary is retained, though it would be better if it were done away with the gender bias in HSA should be removed. Consequently, they wanted a daughter to be given the right by birth to become a coparcener like the son.

4.4 Daughter becoming a Karta in the Joint Family in case Mitakshara Joint Family is retained.

About half the respondents wanted the daughter to become a Karta in the Joint Family if the Mitakshara Joint Family is retained.

4.5 From what period should the Act (when passed) be applicable?

Opinion on this issue was clearly divided and only 11 respondents favoured giving retrospective effect, from 10 to 15 years prior to the passing of the Act; 14 were for providing protection to the purchasers who had bought the property in good faith; 12 respondents were in favour of not affecting the vested rights and some respondents did not answer the querry.

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4.6 Should the right of coparcenary be confered on the mother by the proposed legislation?

The majoirty of the respondents favoured conferring coparcenary right on the mother.

4.7 Should attempts to defeat the proposed legislation immediately before its enactment by partition or sales be declared invalid?

The majority of the respondents answered the question in the affirmative declaring that such transanctions ought to be totally invalid.

4.8 Right to residence or partition of the Dwelling House by a daughter

The majority preferred that the law be amended to provide that partition can be sought by the female heirs also even if there was only one ancestral home. On the issue whether married daughters be given a right of residence

in the dwelling house, the majority favoured equal treatement for married and unmarried daughters and some also suggested deletion of section 23 of HSA altogether.

4.9 Widows right to residence or forbidding sale of the dwelling house.

A large majority of the respondents, that is, 61 have expressed themselves in favour of giving a special protection to a widow's right to reside in the dwelling house. Other alternative suggestions made were to declare that the family dwelling house cannot be alienated without the widow's consent or without providing an alternative accommodation to her after she had agreed to the sale of the dwelling house, or to confer `Homestead' rights on the wife/widow like in U.S.A., Canada.

4.10 Inheritance Certificate on death of an individual by all heirs indicating their share in the property

The majority wanted that Inheritance Certificates should be issued but watnted that to be issued at the lowest rung, i.e. by Munsif's Courts. They also favoured the establishment of `Itinerary Courts' for achieving the said purpose.

4.11 Model to follow for bringing the proposed legislation

(a) Kerala Model, 1976
(b) Andhra Model, 1986
(c) To amend and recast Section 6 of HAS
(d) To omit Section 6 altogether and add an explanation to Section 8.

The Commission solicited opinion on the important question as to which model should be followed if it were to recommend a new legislation for the purpose of conferring rights on daughters. Out of 67 respondents 24 favoured the Andhra Pradesh model and 22 favoured the Kerala Model. Some, however, favoured the recasting of Section 6 of HSA, and few others suggested that section 6 be omitted altogether.

4.12 Placing restriction on the right of testamentary disposition

The majority favoured imposing restriction

on the right of testamentary disposition. 22 respondents suggested to limit it to one half of the share in the property and an equal number suggested to limit it to 1/3rd of the same.

Chapter V

CONCLUSIONS AND RECOMMENDATIONS

5.1 Conclusions

To suggest suitable reforms to any law, it is necessary to know the existing provisions of the law and the mischief sought to be remedied. In the previous chapters provisions of section 6 of HSA and the various inequities emerging therefrom have been discussed. In this chapter the conclusions of our study are enumerated and thereafter we have made some suggestions.

5.2 Under the Mitakshara system, joint family property devolves by survivorship within the coparcenary. Mitakshara Law also recognises inheritance by succession but only to property separately owned by an individual male or female. (Para 1.3.3)

5.3 Dayabhaga school neither accords right by birth nor by survivorship though a Joint family and its coparcenary is recognised. It lays down only one mode of succession and the same rules of inheritance apply whether the family is divided or undivided and whether the property is ancestral or self-acquired. Sons and daughters become coparceners only on the death of the father and get equal rights in the family property. (Para 1.3.4)

5.4 The framers of the Indian Constitution took note of the adverse and discriminary position of women in society and took special care as per articles 14,15(2)and (3) to prevent discrimination against women. Part IV of the Constitution through the Directive Principles of State Policy further provides that the State shall endeavour to ensure equality between man and woman.(para 1.5)

5.5 Despite the Constitution guaranteeing equality to women there are still many

discriminatory aspects in the law of succession against a Hindu woman under the Mitakshara system of Joint family as per section 6 of the HSA as only males are recognised as coparceners. (Para 2.4)

5.6 The States of Andhra Pradesh, Tamil Nadu, Maharashtra and Karnataka have amended the provisions of HSA effecting changes in the Mitakshara coparcenary of the Hindu undivided family. These four states have declared the daugher to be coparcener. The state of Kerala, however, has totally ablished the right by birth and put an end to the Joint Hindu Family instead of tinkering with the coparcenery. The consequence of this de-recognition of the members of the family, irrespective of their sex, who are governed by Mitakshara Law is that they become tenants in common of the joint family property and become full owners of their share.(paras 3.2 & 3.3.1)

5.7 Recommendations

As a first reaction the Law Commission was inclined to recommend the adoption of the Kerala Model in toto as it had abolished the right by birth of males in the Mitakshara coparcenary and brought an end to the Joint Hindu Family. This appeared to be fair to women as they did not have any right by birth; but on further examination it became clear that if the joint Hindu family is abolshed as on date and there are only male coparceners, then only they would hold as tenants in common and women would not get anything more than what they are already entitled to by inheritance under section 6 of HSA. So the Commission is of the view that it would be better to first make daughters coparceners like sons so that they would be entitled to and get their shares on partition or on the death of the male coparcener and hold thereafter as tenants in common. We recommend accordingly.

5.7.1 The Andhra Model does not do full justice to daughters as it denies a daughter, married before the Act came into force, the right to become a coparcener. Obviously, this was based on the assumption that daughters go out of the family on marriage and thereby cease to be full members of the family. The Commission wanted to do away with this distinction between married and unmarried daughters, but after a great deal of deliberation and agonizing, it decided, that it should be retained as a married daughter has already received gifts at

the time of marriage which though not commensurate with the son's share is often quite substantial. Keeping this in mind the distinction between daughters already married before the commencment of the Act and those married thereafter appears to be reasonable and further would prevent heart-burning and tension in the family. A daughter who is married after the commencement of the Act will have already become a coparcener and entitled to her share in the ancestral property so she may not receive any substantial family gifts at the time of her marriage. Hopefully, this will result in the death of the evil dowry system.

5.7.2 The Kerala Act abrogated the doctrine of pious obligation of the son whereas the Andhra Model and others which conferred coparcenary rights on unmarried daughters are silent in this regard except that the daughter as a coparcener is bound by the common liabilities and presumably can become a karta in the Joint family. We recommend the abrogation of the doctrine of pious obligation and that the daughter be a coparcener in the full sense.

5.7.3 Consequently, as above indicated, we have recommended a combination of the Andhra and Kerala Models. We are of the view that this synthesis is in keeping with justice, equity and family harmony.

5.7.4 We are also of the view that Section 23 of HSA which places restrictions on the daughter to claim partition of the dwelling house should be deleted altogether. We recommend accordingly.

5.7.5 As noticed earlier quite often fathers will away their property so that the daughter does not get a share even in his self-acquired property. Apart from this, quite often persons will away their property to people who are not relatives, thus totally depriving the children and legal heirs who have a legitimate expectation. Consequently, there has been a strong demand for placing a restriction on the right of testamentary disposition. But after due deliberation the Commission is not inclined to the placing of any restrictions on the right of a Hindu deceased to will away property.

5.8 Accordingly, we have drafted a Bill called the Hindu Succession (Amendment) Bill, 2000 so that the recommendations made by us are hopefully implemented with speed by the government. This Bill has been annexed as

Appendix 'A'

(JUSTICE B.P. JEEVAN REDDY)(RETD)
CHAIRMAN

(MS JUSTICE LEILA SETH)(RETD) (DR.N.M.GHATATE) (MR.T.K. VISHWANATHAN)
MEMBER MEMBER MEMBER - SECRETARY

DATED: 4.5.2000

(Appendix A)

THE HINDU SUCCESSION (AMENDMENT) BILL, 2000

A

Bill

further to amend the Hindu Succession Act, 1956.

BE it enacted by Parliament in the Fifty-first Year of the Republic of India as follows:-

1. Short title extent and commencement.- (1) This Act may be called the Hindu Succession (Amendment) Act, 2000.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2 . Substitution of new section for section 6 of Act 30 of 1956.- In the Hindu Succession Act, 1956, (hereinafter referred to as the principal Act) for section 6 the following section shall be substituted, namely:-

"6. Daughter's right to be coparcener by birth and devolution of interest in coparcenary property.- (1) On and from the commencement of the Hindu Succession (Amendment) Act, 2000, in a joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,-

(a) by birth become a coparcener;

(b) have the same rights in the coparcenary property as she would have had if she had been a son;

(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:

Provided that nothing contained in this sub-section shall apply to a daughter married before the commencement of the Hindu Succession (Amendment) Act, 2000.

(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, as property

capable of being disposed of by her by will or other testamentary disposition.

(3) When a male Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2000, 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 this 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, no court shall recognise 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 the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2000, 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 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, 2000 had not been enacted.

Explanation.- For the purposes of clause (a), the expression "son", "grandson" or "great-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 2000.

(5) Nothing contained in this section shall apply to a partition which has been effected

before the date of the commencement of the Hindu Succession (Amendment) Act, 2000".

3. Omission of section 23 of the principal Act.- In the principal Act, section 23 shall be omitted.

ANNEXURE - II

ANALYSIS OF THE QUESTIONNAIRE OF LAW COMMISSION

The Law Commission's questionnaire is divided into three parts. Part I deals with information about the respondent; part II elicits respondent views on issues relating to various aspects and impact of coparcenary and lastly part II invites comments from the respondents. The respondents were asked to answer in yes and no and were given several choices. Sixty Seven respondents had replied to the questionnaire. 30 respondents were mainly from the Department of Law and rest were either advocates, sociologists or NGOs etc.

The responses are indicated below:

1. Mitakshara Joint Family to be retained or not?

Out of the 67 respondents, 49 opposed its retention and 17 favoured it and one did not reply (vide Q.1).

2. Reasons favouring retention of Mitakshara Coparcenary

The respondents favouring retention have done so mainly for the reason that it protects the financially weaker members and gives better rights to males as per parts(b) and (a) of Q.2.

3. Reasons negativating the retention of Mitakshara Joint Family

The respondents were asked to give any of the following grounds as per Q.3 in case they chose to negative the retention of Mitakshara System - (a) the changes would affect harmony in the Family; (b) that legislative changes have already eroded the utility of the coparcenary system; (c) that it would have a detrimental effect on the running of family business; (d) that idle members of a joint family prosper at the expense of the hard working members and (e) that coparcenary system discriminates against women.

33 respondents preferred part(e); 21 part(b); 12 part(a); 8 part(d) and 29 favoured more than one part.

4. Steps to be taken to remove gender discrimination

The Law Commission suggested two alternative choices in Q.4 to remove gender discrimination.

The majority that is, 35 respondents, favoured part(b) which stated that Mitakshara Coparcenary should be retained but the gender bias to remove by conferring upon daughters the right to become a coparcener like a son; 22 respondents favoured part(a), that is, to abolish the coparcenary right by birth.

5. Daughter becoming a Karta in the Joint Family.

33 respondents preferring the daughter to become Karta in the Joint Family of Mitakshara Joint Family is retained; 10 respondents negativated it and 8 did not reply as per Q.5.

It may be noted that this question is directly relevant to Q.No.1, where only 17 respondents favoured the retention of Mitakshara system whereas it may be seen that 33 respondents have preferred the daughter becoming Karta in the Joint Family if Joint Family is retained.

Several choices are listed in Q.6 for negativating the daughters becoming a Karta such as - (a) women are incapable of managing properties or agriculture; (b) they are incapaable of running a business; (c) once married they move away from their families; and (d) they are susceptible to the influences of the husband or his family; (e) other reasons.

11 respondents opted for part(c); 5 for part(d) and 13 did not reply to this question.

6. Conferring equal rights upon married & unmarried daughters.

36 replies favoured the view that married daughters should have equal rights in coparcenary property as per Clause(b); 14 opted for Clause (a) by limiting this right in favour of unmarried daughters at the time of passing or enforcing of the enactment and 8 respondents did not reply as per Q.7.

7. From what period should the Act (when passed) be applicable?

21 respondents did not reply; 10 favoured choice in part (a) that is to give retrospective effect from 10 to 15 years prior to the passing of the Act; 15 for part(b) for providing protection to buyers of property in good faith; 12 respondents were in favour of part(c) for not affecting the vested rights and 11 opted for part(a) of Q.8.

8. Should coparcenary right be confered on the mother of the coparcenary by the proposed legislation?

51 out of 67 respondents answered in the affirmative; 5 in the negative and 11 did not respond to Q.9.

9. The Commission vide Q.10 pointed out that there may be attempts to defeat the provisions of the proposed legislation by effecting partitions or by sales. Should such transactions be declared invalid before the enactment of the proposed legislation?

The respondents were asked to choose between yes or no. The majority, that is, 58 respondents answered the question in the affirmative; and 7 were against it; and 9 did not reply.

10. On the question of preference of abolition of special rules discriminating against daughters for devolution of agricultural interests.

The majority that is, 54 respondents answered Q.11 in the affirmative and only 7 were against it, 6 did not reply.

11. Dwelling House

43 respondents preferred amendment of law to provide that partition can be sought by the female heirs also even if there was only one

ancestral home, as in part(a) of Q.13. On the issue whether married daughters be given a right of residence in the dwelling house. 39 respondents expressed themselves in favour of this cause of action and 24 were against it. Further, 27 respondents favoured the deletion of section 23 of HSA altogether and 26 opted for course of action mentioned in part(b), namely making section 23 inapplicable to dwelling house belonging to Hindu female intestates in respect to Q.14 and others did not reply.

The majority of the respondents, that is, 61 have expressed themselves in favour of special protection to widow's right to reside in the dwelling house as per Q.15. ; 26 respondents have opted for the course of action in part (b) of Q.16 by declaring that family dwelling house cannot be alienated without widow's consent or without providing an alternative accommodation to her after she had agreed to the sale of the dwelling house; 29 respondents opted for part(a), to confer `Homestead' rights on the wife/widow like in U.S.A., Canada , and few have not replied to the question.

12. Inheritance Certificate on death of an individual by all heirs indicating their share in the property

In answer to Q. No. 17, the majority of the respondents that is 55 favoured the taking of an inheritance certificate by all heirs.

Question of authority to be conferred, upon the issue of `Inheritance Certificate'

50 respondents stated that `District Munsif's Courts' should alone be conferred the authority to issue such Inheritance Certificates and in response to Q.18, all the 49 respondents have favoured the establishment of `Itinerary Courts' for achieving the said purpose as per Q.19.

13. Model to follow for bringing the proposed legislation

(a) Kerala Model, 1976
(b) Andhra Model, 1986
(c) To amend and recast Section 6 of HSA
(d) To omit Section 6 altogether and add an explanation to Section 8.

The Commission solicited opinions on the important question as to which model should be followed if it were to recommend a new

legislation for the purpose of conferring rights on daughters. Out of 67 respondents 23 respondents favoured the Andhra Pradesh model; 22 respondents favoured the Kerala Model; 6 respondents favoured the recasting of Section 6 of HSA as per part(c) and 7 favoured part(d) for omitting section 6 altogether as per Q.20.

14. Placing restriction on the Right of Testamentary disposition

44 respondents favoured imposing restrictions on the right of testamentary disposition but only 21 stated to limit it to one half of the share and 22 to 1/3; and 19 respondnets did not favour imposing restrictions on such a right vide Q.21.

The last question invited the comments from the respondents

Any other comments

1. Only 35 respondents made general comments in response to Q.22. Their general view was that the concept of Hindu Mitakshara was not acceptable because it discriminated between males and females. If females were made part of Mitakshara Coparcenary, it would reduce gender inequality to a considerable extent. For this purpose, Section 6 of the HSA should be amended by Parliament and so amended should be implemented uniformly throughout India.
2. Stpes must be take to protect the interests of a wife/widow.
3. Restrictions on testamentary disposition should be imposed at least to the extent of half of the property.
4. A few respondents also suggested the formulation of a Uniform Civil Code.

One of the respondents asked the Commission to make an empirical study of the issue and not to lightly decide to discard the existing system of Hindu Joint Family/HUF which was based on mutual love, affection and compassion and family as a means of fulfilling physical and economic needs. According to this respondent, there was no gender bias against females under section 6 of the HSA. In fact, female inherits from the fathers's family as well as husbands family under Sections 6 and 14 of HSA. She inherited from two families in four capacities. Compared to this, the male inherited only from one family and in one capacity i.e. as a son (or grandson or great grandson). Thus the bias is in favour of the female.

Annexure - III

WORKING PAPER ON
COPARCENARY RIGHTS TO DAUGHTERS UNDER THE HINDU LAW

Under ancient Hindu Society, a woman was considered to be of low social status and treated as a dependent with barely any property rights. As per the text of Baudhayana, women had no place in the Hindu scheme of inheritance and "Females were devoid of powers and incompetent to inherit." But by virtue of special texts specified female heirs were given the right to inherit.

The Dayabhaga law and the Benaras and Mithila sub-schools of Mitakashra law recognized five females relations as being entitled to inherit namely, widow daughter, mother, paternal grandmother, and paternal great-grandmother and the Madras and Bombay sub-schools recognised the heritable capacity of a larger number of female heirs.1

Sometimes the laws themselves discriminated against women. This was particularly true in the sphere of family laws in India which are "Personal Laws", that is the law applicable to a person on the basis of his/her religion. Some of these personal laws exhibit strong features of discrimination against women.

During the British period social reform movements raised the issue of amelioration of women's position in society. The earliest legislation bringing females into the scheme of inheritance is the Hindu Law of Inheritance Act, 1929. This Act, conferred inheritance rights on three female heirs i.e. son's daughter, daughter's daughters and sister (thereby creating a limited restriction on the rule of survivorship). During this period another landmark legislation conferring ownership right on a woman was the Hindu Women's Right to Property Act XVIII of 1937. This Act brought about revolutionary changes in the Hindu Law of all schools, and affected not only the law of coparcenary but also the law of partition, alienation of property, inheritance and adoption.2

The Act of 1937 enabled the widow to succeed along with the son and to take the same share as the son. This widow is not a coparcener even though she posses a right akin to coparcenary interest in the property and is a member of the Joint Family. However, under the Act, the widow was entitled only to a limited estate in the property of the deceased with a right to claim partition. A daughter had virtually no inheritance rights at all. But, both enactments largely left untouched the basic features of discrimination against women and were

subsequently repealed.

The framers of our Constitution were aware of the low position of a woman in society and they took special care to ensure that the state takes positive steps to give her equal status. Articles 14, 15(2) and (3) and 16 of the Constitution of India not only inhibit discrimination against women but in appropriate circumstances provide a free hand to the State to provide protective discrimination in favour of women. These provisions are part of the Fundamental Rights guaranteed by the Constitution.

Part IV of the Constitution contains the Directive Principles which are no less fundamental in the governance of the State to ensure equality between man and woman such as equal pay for equal work. Despite these provisions for ensuring equal status, unfortunately a woman is still not only neglected in her own natal family but also the family she marries into because of certain laws and attitudes.

After the advent of the Constitution, the first law made at the central level pertaining to property and inheritance concerning Hindus was the Hindu Succession Act, 1956 (hereinafter called the HSA). This Act came into force on 17th June, 1956. The HSA lays down a uniform and comprehensive system of inheritance and aplies inter-alia to persons governed by Mitakshara and Dayabhaga Schools as also to those in certain parts of southern India who were previously governed by the Murumakkattayan, Aliyasantana and Nambudri Systems of Hindu Law. The Act applies to any person who is a Hindu by religion in any of its forms or developments or a follower of the Brahmo Prarthana or Arya Samaj or to any person who is a Budhist, Jain or Sikh by religion. In the case of a testamentary disposition this Act shall not apply and the interest of the deceased would be governed by the Indian Succession Act, 1925.

There is no doubt that it reformed the Hindu personal law and gave women greater property rights, allowing women full ownership rights instead of limited rights in the property they inherited from their husbands under Section 14 with a fresh stock of descent under sections 15 and 16 of this Act. Daughters were also granted property rights in their fathers' estate. The attempt to bring about reforms and a comprehensive codification of Hindu Law was resisted by the orthodox sections of Hindus. However, the then Prime Minister Pt. Jawaher Lal Nehru who was unequivocally committed to carry out these reforms suggested, in order to blunt the edge of opposition, that piecemeal legislation be undertaken to substantially remove the disparities and disabilities suffered by the Hindu women. Consequently it was possible to bring into force, the Hindu Marriage Act, 1955; the Hindu Adoptions and Maintenance Act, 1956, the Hindu Minority and Guardianship Act, 1956; and The Hindu

Succession Act, 1956.

Under the HSA if a Hindu male dies intestate, all his separate or self-acquired property devolves in equal shares on his sons, daughters, widow and mother as specified class I heirs.

However, the devolution of interest to coparcenary property is set out in section 6 -

Section 6 of the HSA dealing with devolution of interest to coparcenary property states-

"When a male Hindu dies after the commencement of this Act, having at the time 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 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 devlove by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

Explanation 1.-- For the purposes 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 the his death, irrespective of whether he was entitled to claim partition of or not.

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

The provision above noted indicates when a male Hindu dies having at the time of his death an interest in a Mitakshara coparcenary property and is survived by a female relative specified in class I of the Schedule of the Act or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coaprcenary property shal devolve by testamentary or intestate succession and not by survivorship. In the absence of this event his interest would have devolved by survivorship on the living members of the coparcenary.

The Act lays specific emphasis on the "interest of the deceased" and provides 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 the property had taken place immediately before his death. The Supreme Court in Gurupada v. Heerabai3 reaffirming in State v. Narayanaro4 had examined Section 6 of the HSA and is of the view above expressed.

Section 6 of the HSA contemplates the existence of a coparcenary consisting of male members who have an interest by birth in the joint family property. At no time before partition can it be predicted that he is entitled to so much share (one half or one fourth or one third) in the joint family property. Nor can he say that such and such items of property belong to him, even if the properties are in the possession or use. Until partition takes place this is an unpredictable and fluctuating interest which may be enlarged by deaths and diminished by births in the family. According to the noted Hindu Law Jurist Mayne, every coparcener has a right to be in joint possession and enjoyment of the joint family property and this is expressed by saying that there is both community of interest and unity of possession.

Every coparcener has a right to be maintained including a right to marriage expenses being defrayed out of the joint family funds and every coparcener is bound by the alienation made by the Karta for legal necessity or benefit of the estate and by legitimate acts of management of the Karta; every coparcener has a right to object to and challenge alienations made without his consent or made without legal necessity; and every coparcener has a right of partition and survivorship.5

A widow or daugher on the death of her husband/ father cannot claim to be a survivor as she is not a coparcener recognised under the Act.

Desipte constitutional guarantee for not only ensuring equality to women, we find that in the sphere of property rights granted to Hindu women as wives/widows and daughters, there are still many discriminatory aspects in the law. When a Woman is maltreated in her husband's family or there is a demand of dowry, there is huge hue and cry as the instances of killing by in laws/bride burning are not unknown in our society.

But the issue here is regarding the discriminatory treatment given to her even by the members of her own natal family. In Hindu System, ancestral property has traditionally been held by a joint Hindu family consisting of male coparceners. Coparcenary is a narrower body of persons within a joint family and consists of father, son's son's and son's son's son. A coparcenary can consist of a grandfather and grandson, or brothers, or an

uncle and nephew and so on. Thus ancestral property continues to be governed by a wholly partrilineal 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 women could not be coparceners they were not entitled to any share in the ancestral property by birth. A son's share in the property of his intestate father would be in addition to the share he acquired at the time of birth whereas the share of a daughter/mother/wife, would only be out of the interest the deceased had in a coparcenary on his death.

Secondly, the patrilineal assumptions of dominant male ideology is also reflected in the laws governing a Hindu female who dies intestate, laws that are markedly different from those governing Hindu males who die intestate.6 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. The provisions of section 15(2) attempt to guarantee that property continues to be inherited through the male heir from which it came either back to (her father's family or back to her husband's family.

The report on the Status of Women in India (1971-74) reveals that the Hindu Code Bill, 1948, as amended by the Select Committee had in fact suggested abolition of the coparcenary i.e. the male right to property by birth, and its conversion to the the Dayabhaga system where the daughters get equal shares with the brothers as there is no right by birth for the sons. But the traditional resistance was too strong. Further, the case for a daughter's share is often turned down on the ground that there is hardly a case of a daughter claiming equal rights to parental family property in view of the over-weighing consideration of amity with the family and social disapproval of such a claim.

Thus the law by excluding the daughters from participating in coparcenary ownership (merely by reason of their sex) not only contributed to discrimination against females but has led to oppression and negation of her fundamental rights guaranteed by the Constitution. As such, the State has failed to bring about a suitable legislation as required by the Constitution. It is law that can contribute to overcoming this oppression by creating a legal order that treats females on equal footing. Legislation that on the face of it discriminates between a male and a female must be made gender neutral. Thus, there is little doubt that radical reform of the Mitakshara law of coparcenary is required so that and there should be equal distribution of property not only with respect to the separate or self-acquired property of the deceased male but also with respect to his undivided interest in the coparcenary property. This should be distributed equally among his male and female heirs,

particularly his son and daughter. This will go a one way in eradicating the evils of the dowry system prevailing in our society and award a status of honour and dignity to a daughter at least in her family of birth.

It is a matter of satisfaction to note that five states in India, namely, Kerala, Kanataka, Tamil Nadu, Andhra Pradesh and Maharashtra have taken cognisance of the fact that social justice requires a woman should be treated equally both in the economic and social sphere. Consequently these states being of the view that the exclusion of daughters from participating in coparcenary ownership merely by reason of their sex was unjust, brought about a change in respect of Mitakshara coparcenary property and extended the right by birth in coparcenary property to the daughters also. Improving their economic conditions and social status by giving them right by birth equal to that of sons was a long felt social need as it would eradicate the baneful system of dowry by positive measures. The practice of dowry has emerged as a major social evil in contemporary India. The gravity of the social evil is reflected all over in our country. The Dowry Prohibition Act of 1961 passed with the ostensible idea of checking the evil has almost proved to be an ineffective legislation.

As per the law passed by four of these states, (Kerala law being different) in a Joint Hindu Family governed by Mitakshara Law, the daughter of a coparcener by birth becomes a coparcener in her own right in the same manner as the son and has the same rights in the coparcenary property as she would have had if she had been a son, inclusive of the right to claim survivorship, and is subject to the same liabilities and disabilities in respect thereto as the son. Of course, this change in the law is prospective and daughters married prior to the coming into force of the law have been excluded. A list of the legislation passed by the five states is set out below and the legislation is annexed as Annexed `IV'.

(1) The Joint Hindu Family System (Abolition) Act, 1975, Kerala.

(2) The Hindu Succession (Andhra Pradesh Amendment) Act, 1986
(3) The Hindu Succession (Tamil Nadu Amendment) Act,1989.
(4) The Hindu Succession (Karnataka Amendment) Act,1994.
(5) The Hindu Succession (Maharashtra Amendment) Act, 1994

One redeeming feature of these State enactments is that they are more or less couched in the same language, though the Kerala model is different. The Kerala Joint Hindu Family System (Abolition) Act, 1975 abolished the right of birth of males under the Mitakshara as well as

the Marumakkattayam law, following the Report of the Hindu Committee in connection with the Hindu Code Bill Section 3 of the Kerala Act States that after its commencement, a right to claim any interest in any property of an ancestor, during his or her life time founded on the mere fact that the claimant was born in the family of the ancestor, shall not be recognised. Thus the Act is wholly prospective and fails to confirm rights on daughters in the existing coparcenary property unlike the Andhra model legislation. Section 4(i) of the Kerala 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.7 The major drawback in the legislation is that it fails to protect the share of the daughter from being defeated by the making of a testamentary or other disposition.

The approach of the other State Legislature is strikingly different. It elevates a daughter to the position of a coparcener in a Mitakshara coparcenary i.e. succession by survivorship.

The above mentioned state amendments to the Hindu Succession Act 1956, thus considerably altered the concept of the Mitakshara coparcenary. Once a daughter becomes a coparcener she continues to be member of the natal joint family even after her marriage. This has introduced a far reaching change in the law of a joint family. Section 29-A of the Andhra Pradesh, Tamil Nadu and Maharashtra Acts and Section 6A of the Karnataka Act states that 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 a son and have the same rights in the coparcenary property as she would have had if she had been a son inclusive of the right to claim by survivorship; and shall be subject to the same liabilities and disabilities in respect thereto as a son.

Under the Amending Acts the eldest daughter like a son 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. However, under the Shastric Law, a daughter on marriage ceases to be a member of the parental family, but the Amending Acts have changed her position, which is quite alien to Hindu patriarchal notions. Though her position as defacto manager was recognized when mothers acted as guardians of their minor sons after the death of their husbands, the dejure conferment of the right eluded her.

The aspect of succession and joint family fall under the concurrent list entry 5 contained in the Seventh Schedule of the Constitution and both the Centre as well

as the States can legislate in this field. It is also noted that the five States mentioned above have passed their enactments with the assent of the President. In fact, it would appear to us that instead of having piecemeal legislations for effecting amendments in the Hindu Succession Act by the states, there is a strong case for a uniform civil code in this area governing atleast Hindu Society and providing equality in the family the child is born into, irrespective of the sex. Our suggestion would tackle not only the evils of dowry but also the longing for a son and would promote the small family norm and check the population explosion.

However, the State Amendments to the HSA have given rise to various questions which need to be answered before a uniform law is brought for all the States. First, the Amendment has excluded the right of a daughter from the coparcenary property, who was married prior to the commencement of the amending Act. The provision is similar in all the Acts and the Karnataka provision is set out as under:

6(d) "Nothing in clause (b) shall apply to a daughter married prior to or to a partition which had been effected before the commencement of Hindu Succession (Karnataka Amendment) Act, 1994."

The reasons for exclusion of the already married daughter appear to be sociological and the fact that dowry might have been given at the time of marriage. This dowry might in some cases have included immovable and movable property apart from jewellery. But there may be many cases where nothing has been given and there does not appear to be any cogent reason for discriminating between a married and an unmarried daughter. Excluding a daughter married before the date of commencement of the Amending Acts is wrong in our opinion as all daughters must be treated equally, and at par with sons. By denying a married daughter equal rights in coparcenary property, a large number of females are getting left out of the benefit.

A recent Supreme Court decision in Savita Samvedi v. Union of India8 lends support to the view that a distinction between a married and an unmarried daughter will be unconstitutional. The Supreme Court held that the circular in fettering the choice of a retiring employee to nominate a married daughter is "wholly unfair, unreasonable and gender biased" and liable to be struck down under Article 14 of the Constitution. Referring to the distinction drawn by the circular between a married and an unmarried daughter, Punchhi, J. observed: "The eligibility of a married daughter must be placed at a par with an unmarried daughter (for she too must have been once in that State) so as to claim the benefit....."

The Preamble to the Amending Acts indicates the

objective as the removal of discrimination against daughters inherent in the mitakshare coparcenary and the eradication of the baneful system of dowry by positive measures thus ameliorating the condition of women in the human society. This is only a subsidiary or collateral objective and it cannotg be said that the classification drawn by the Amending Acts bears a rational relationship to the objective sought to be achieved.9

Thus cl.(d) of S.6A of the Karnataka Act and clause (iv) of 29A of the other three Acts should be deleted and the main object of the Acts should be only to remove discrimination inherent in the Mitakshara coparcenary against daughters both married and unmarried.

Another reason for having an all India legislation is that if the Joint Family has properties in two states, one which is governed by the Amending Act and the other not so governed, it may result in two Kartas, one a daughter and the other a son. Difficulties pertaining to territorial application of Amending Act and the Lex Situs principle will also arise. Thus is the need for an all India Act or Uniform Civil Code more immediate.

It is important to notice what the impact of Section 6-A of the Karnataka Act and Section 29-A of the other three Acts would be on Section 23 of the Hindu Seccession Act, 1956. Section 23 of the Hindu Succession Act 1956 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 heir chooses to do so; and secondly it curtails even the right of residence of a daughter by stating that where such female heir is 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 separated from her husband or is a widow."10 Whether these restrictions will be operative in the case of female coparceners will have to be considered and we must focus on the interpretation of the words `Hindu intestate `and' `heirs' exclude coparceners and coparcenary interests from their scope. Section 6 of the Hindu Succession Act retains the rule of devolution of undivided coparcenary interest by survivorship in spite of the significant change introduced in it. Under the Act it should be clarified that female coparcener will have equal rights as males in the matter of asking for partitioning and allotment to them of their share in coparcenary property. Thus Section 23 from the HSA may need to be deleted altogether.

It is noteworthy, that there is hardly a case of a daughter claiming equal rights to property in the parental family, even though her dowry may not be equal to the son's share. This is due mainly to overweighing consideration of modesty and desire for amity and the fear of social disapproval. A study prepared for

the Ministry of Education and Social Welfare on the succession rights of women in Andhra Pradesh, is very revealing in this regard.11 It observed that 38 per cent of women in Godavari and 12 per cent of women in Krishna districts reported considerations of family prestige, 27 percent of the respondents in both the districts reported consideration of getting bad name among relatives and others, for not taking resort to courts of law in getting their due share in property. Cost of litigation, complicated the procedures of law and uneconomic nature of the deal in terms of the cost involved in property are the other reasons stated by the respondents.

In view of the limited assertion of equal rights to property by women, it is necesary to understand that if equality exists only as a phenomenon outside the awareness and approval of the majority of the people, it cannot be realzed by a section of women socialized in tradtions of inequality. Thus there is need to social awareness and to educate people to change their attitude towards the concept of gender equality. The need of the hour is also to focus attention on changing the social attitudes in favour of equality for all by enacting a uniform law. This is what the Law Commission suggests and we have attempted to draft a Bill which is annexed.

Bill No. _____ of 1998

An Act to amend the Hindu Succession Act, 1956.

Whereas the Constitution of India has proclaimed equality before the law as a Fundamental Right;

And Whereas the exclusion of the daughter from participation in coparcenary ownership merely by reason of her sex is contrary thereto;

And Whereas such exclusion of the daughter has also led to the creation of the socially pernicious dowry system with its attendant social evils.

And Whereas this baneful system of dowry has to be eradicated by positive measures which will simultaneously ameliorate the condition of women in the Hindu society;

Be it enacted by Parliament in the fifty-first year of the Republic of India as follows:

Short Title, Extent and Commencement

1.(1) This Act may be called the Hindu Succession (Amendment) Act, 2000.

(2) It extends to the whole of India except Jammu and Kashmir;

(3) It shall be deemed to have come into force on the day of _____, 1998

After Section 6 of the Hindu Succession Act 1956 the following sections shall be inserted by virtue of the Hindu Succession (Amendment) Act, 1998 (..... of 1998).

6A. Notwithstanding anything contained in section 6 of this Act -

Equal rights to daughters in coparcenary property

(i) 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 and have the same rights in the coparcenary property as she would have had if she had been a son, inclusive of the right to claim by survivorship, and shall be subject to the same liabilities and disabilities in respect thereto as the son;

(ii) at a partition in such a joint Hindu Family the coparcenary property shall be so divided as to allot to a daughter the same share as is allotable to a son.

Provided that the share which a pre-deceased son or a pre-deceased daughter would have got at the partition if he or she had been alive at the time of the partition shall be allotted to the surviving child of such predeceased son or of such pre-deceased daughter;

Provided further that the share allotable to the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, if such child had 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 of the pre-deceased daughter as the case may be;

(iii) any property to which a female Hindu becomes entitled by virtue of the provisions of clause (i) shall be held by her with the incidents of coparcenary ownership and shall be regarded notwithstanding anything contained in this Bill or anyother law for the time being in force, as property capable of being disposed of by her by will or other testamentary disposition;

6B. Interest to devolve by survivorship on death

When a female Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2000 having at the time of her death an interest in a Mitakshara coparcenary property, her interest in the property shall devolve by survivorship as in the case of males

upon the surviving members of the coparcenary and not in accordance this Act.

Provided that if the deceased had left any child or child of a pre-deceased child 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-1.- For the purposes of this section, the interest of a female Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to her if a partition of the property had taken place immediately before her death irrespective of whether she was entitled to claim partition or not.

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

6C. Preferential right to acquire property in certain cases

(1) Where, after the commencement of the Hindu Succession (Amendment) Act, 2000 an interest in any immovable property of an intestate or in any business carried on by him or her, whether solely or in conjunction with others devolves under section 6A or section 6B upon two or more heirs and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have preferential right to acquire the interest proposed to be transferred.

(2) The consideration for which any interest in the property of the deceased may be transferred under this section shall in the absence of any agreement between the parties, be determined by the court, on application being made to it in this behalf, 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 of or incidential to the application.

(3) If there are two or more heirs, proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred.

Explanation:- In this section `court' means the court within the limits of whose jurisdiction the immovable

property is situate or the business is carried on, and includes any other court which the State Government may, by notification in the official Gazette specify in this behalf.

FOOT NOTE

1. M. Indira Devi, "Woman's Assertion of Legal Rights to Ownership of Property" p.168 in Women AND Few, Contemporary Problems, (1994) edt by L. Sarkar & B. Sivaramayya/

2 Mayne, Treaties on Hindu Law & Usage, 14th Edition ed. by Alladi Kuppuswami, (1996)

3. AIR 1978 SC 1239

4. AIR 1985 SC 716

5. Ibid.

6. Ratna Kapur and Brenda Cossman, Feminist Engagements with Law in India (1996)

7. B. Sivaramayya, "Coparcenary Rights to Daughters Constitutional and interpretational issues" (1997) 3 SCC(J), page 25.

8. (1996) 2 SCC 380

9. Ibid

10. Proviso to section 23 of HSA.

11. Department of Cooperation & Applied Economics, Andhra University, Agricultural Growth Rural Development and Poverty selected writings of G. Parthasarthy 497 (1998 as noted in Supra, n 1.

ANNEXURE - IV

The Kerala Joint Hindu Family System (Abolition) Act, 1975*

(Act 30 of 1976 amended by Act 15 of 1978)

An Act to abolish the joint family system among Hindus in the state of Kerala.

Preamble:- Whereas it is expedient to abolish the joint family system among Hindus in the state of Kerala

Be it enacted in the Twenty-Sixth Year of the Republic of India as follows:-

1. Short title, extent and commencement - (1) The Act may be called the Kerala

Joint Hindu Family System (Abolition) Act, 1975.

(2) It extends to the whole State of Kerala.

** (3) It shall come into force on such date as the Government may, by notification the Gazette, appoint.

2. Definition - In this Act, "joint Hindu family" means any Hindu family with community of property and includes-

*The above Act received the assent of the President on the 10th day of August, Kerala Gazette, Extraordinary No.484, dated 17.8.1976.

**The Act came into force on 1-12-1976 as per notification No. 17469/Leg (A)2/69 Law, dated 18.11.76 S.R.O. 1185/76. K.G.No. 46, dated 23.11.1976.

(1) a tarward or tavazhi governed by the Madras Marumakkattayam Act, 1932, the Travancore Nayar Act, II of 1100, the Travancore Ezhava Act III of 1100, the Nanjinad Vellala Act of 1101, the Travancore kshatriya Act of 1108, the Travancore krishnavaka Marumakkattayam Act, VII of 1115, the Cochin Nayar Act XXXIX of 1113, or the Cochin Marumakkattayam Act, XXXIII of 1113;

(2) a kutumba or kavaru governed by Madras Aliyasantana Act, 1949;

(3) an illom governed by the Kerala Nambudiri Act, 1958; and

(4) an undivided Hindu family governed by the Mitakshara law.

3. Birth in family not to give rise to right in property -

On and after the commencement of this Act no right to claim any interest in any property of an ancestor during his or her lifetime which is founded on the mere fact that the claimant was born in the family of the ancestor shall be recognized in any court.

(4) Joint tenancy to be replaced by tenancy in common --

(1) All members of an undivided Hindu

family governed by the Mitakshara law holding any coparcenary property on the day this Act comes into force shall with effect from that day, be deemed to hold it as tenants-in-common as if a partition had taken place among all the members of that undivided Hindu family as respects such property and as if each one of them is holding his or her share separately as full owner thereof;

Provided that nothing in this sub-section shall affect the right to maintenance or the right to marriage or funeral expenses out of the coparcenary property or the right to residence, if any, if the members of an undivided Hindu family, other than persons who have become entitled to hold their shares separately, & any such right can be enforced if this Act had not been passed.

(2) All members of a joint Hindu family, other than an undivided Hindu family referred to in sub-section (1), holding any joint family property on the day of this Act comes into force, shall, with effect from that day be deemed to hold it as tenants-in-common, as if a partition of such property per capita had taken place among all the members of the family living on the day aforesaid, whether such members were entitled to claim such partition or not under the law applicable to them, and as i.e. each one of the members is holding his or her share separately as full owner thereof.

NOTES

By virtue of this Act the joint family system of the Marumakkattayam Tarwad stood abolished by the operation of law and the properties of the joint family are held thereafter by the members of the joiint family as tenants-in-common as if there was a partition.1

If under the custom, a female is entitled to ask for partition or is granted a share in the property in lieu of her right to maintenance, or marriage expenses, then only she is entitled to a share in the property.2 Where there was a partition in a joint family consisting of the asessee, his wife and son prior to the coming into force of this Act, it was held that the property held by the assessee was his individual property and the wife is not entitled to any

share in it. Therefore, the entire income from the property in the hands of the assessee is to be assessed in his hand as an individual.3

After passing of Joint Family Abolition Act, 1975, section 17 of the Hindu Succession Act does not become inoperative in respect of persons living on 18.6.1956 (Date of coming into force of Hindu Succession Act) and who died after the passing of Joint Family Abolition Act on 1.12.1976. It also does not become inoperative in respect of persons who were born on or after 18.6.1956 but before 1.12.1976 and who died on or after that date.

5. Rule of pious obligations of Hindu son abrogated.-

(1) After the commencement of this Act, no court shall, save as provided in sub-sections (2) 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 or any alienation of property in respect of or in satisfaction of any such debt on the ground of the pious obligation under the Hindu law, the son, grandson or great grandson to discharge any such debt.

(2) In the case of any debt contracted before the commencement of this Act, nothing contained in sub-section(1) 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 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 if this Act had not been passed.

Explanation- For the purposes of sub-section (2), the expression "son", "grandson" or "great 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 this Act.

The expression "Hindu Law" in this section has to be understood in a broad sense as including Marumakkattayam Law which is also part of Hindu Law.4

6. Liability of members of joint Hindu family for debts contracted before Act not affected -

Where a debt binding on a joint Hindu family has been contracted before the commencement of this Act by Karnavan, Yejman, Manager or Karta, as the case may be, of the family, nothing herein contained shall affect the liability of any member of the family to discharge any such debt and any such liability may be enforced against all or any of the members liable, therefore, in the same manner and to the same extent as it would have been enforceable if this Act had not been passed.

7. Repeal.-

(1) Save as otherwise expressly provided in this Act, any text, rule or interpretation of Hindu law or any custom or usage part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act.

(2) The Acts mentioned in the schedule, in so far as they apply to the whole or any part of the State of Kerala, are hereby repealed.

8. Proclamation IX of 1124 and Act XVI 1961 to continue in force5

Notwithstanding any thing contained in this Act or in any other law for the time being in force, Proclamation (IX of 1124) dated 29th June, 1949, promulgated by the Maharaja of Cochin, as amended by the Valiamma Thampuran Kovilakam Estate and the Palace Fund (Partition) and Act, the Kerala Joint Hindu Family system (Abolition)Amendment Act 1978 and the valiamma Thampuron Kovilakam Estate and Palace Fund(Partition)5 1961 (16 of 1961), as amended by the said Act, shall continue to be in force and shall apply to the Valiamma Thampuran Kovilakam Estate & the Palace Fund administered by the

Board of Trustees appointed under section 3 of the said proclamation.

The Schedule
[See section 7(2)
Acts repealed

(1) The Madras Marumakkathayam Act, 1932 (XXII of 1933);
(2) The Madras Aliyasantana Act, 1949(IX of 1949);
(3) The Travancore Nayar Act, II of 1100;
(4) The Travancore Ezhava Act, III of 1100;
(5) The Nanjinad Vallala Act of 1101 (VI of 1101);
(6) The Travancore Kshatriya Act of 1108, (VII of 1108);
(7) The Travancore Krishnavaka Marumakkathayee Act, (VII of 1115);
(8) The Cochin Thiyya Act, VII of 1107;
(9) The Cochin Makkathayam Thiyya Act, XVII of 1115;
(10) The Cochin Nayar Act, XXIX of 1113;
(11) The Cochin Marumakkathayam Act, XXXIII of 1113;
(12) The Kerala Nambudiri Act, 1958 (27 of 1958)

FOOT NOTES

1. WTO v Madhavan Nambiar(K)(1988) 169 ITR 810; CWT v Padmanabhan (PM) (1989) 179 ITR 243.

2. CWT v Padmanabhan (PM)(1989)179 ITR 243;

3. Deputy CAgIT v Chidambaram (RS)(1994) 209 ITR 531(Ker) distinguishing Surjit Lal Chhabda v CIT (1975) 101 ITR 776 (SC): 1976(2) SCR 164; Krishna Prasad (C) v CIT (1974) 97 ITR 493(C); Narendranath (NV) v CWT (1969) 74 ITR 190 (SC): 1970 SC 14: Gowli Bhddanna v CIT (1966) 60 ITR 293 (SC).

4. Chellamma v Narayana 1993 Ker 146 (FB).

5. By section 8 of Valiamma Thampuram Kovilakam Estate and the Palace Fund (Partition) and the Kerala Joint Hindu Family System (Abolition) Amendment Act, 1978 (Act 15 of 1978) after section 7 of the Kerala Joint Hindu Family System (Abolition) Act, 1975 (Act 30 of 1976) section 8 was inserted and shall be deemed always to have been inserted.

AND REGULATIONS, ETC.

The following Act of Andhra Pradesh Legislative Assembly which was reserved by the Governor on the 10th October, 1985 for the consideration and assent of the President received the assent of the President on the 16th May, 1986 and the said assent is hereby first published on the 22nd May, 1986 in the Andhra Pradesh Gazette for general information.

ACT NO. 13 OF 1986

An Act to amend the Hindu Succession Act, 1956 in its application to the State of Andhra Pradesh.

Whereas the Constitution of India has proclaimed equality before the law as a Fundamental Right;

And Whereas the exclusion of the daughter from participation in coparcenary ownership merely by reason of her sex is contrary thereto;

And Whereas such exclusion of the daughter has led to the creation of the socially pernicious dowry system with its attendant social ills.

And Whereas this baneful system of dowry has to be eradicated by positive measures which will simultaneously ameliorate the condition of women in the Hindu society;

Be it enacted by Legislative Assembly of the State of Andhra Pradesh in the Thirty-Sixth Year of the Republic of India as follows:

Short Title, Extent and Commencement

1.(1) This Act may be called the Hindu Succession (Andhra Pradesh Amendment) Act, 1986

(2) It extends to the whole of the State of Andhra Pradesh.

(3) It shall be deemed to have come into force on the 5th September, 1985.

2 Insertion of a new Chapter II-A in Central Act 30 of 1956

In the Hindu Succession Act, 1956 (hereinafter referred to as this Act) after Chapter -II, the following chapter shall be inserted, namely:-

CHAPTER - II-A.

Succession by survivorship

Equal rights to daughter in coparcenary property

29A.- Notwithstanding anything contained in Section 6 of this Act-

(i) 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 and have the same rights in the coparcenary property as she would have had if she had been a son, inclusive of the right to claim by survivorship, and shall be subject to the same liabilities and disabilities in respect thereto as the son;

(ii) at a partition in such a joint Hindu Family the coparcenary property shall be so divided as to allot to a daughter the same share as is allotable to a son.

Provided that the share which a pre-deceased son or a pre-deceased daughter would have got at the partition if he or she had been alive at the time of the partition shall be allotted to the surviving child of such predeceased son or of such pre-deceased daughter;

Provided further that the share allotable to the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, if such child had 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 of the pre-deceased daughter as the case may be;

(iii) any property to which a female Hindu becomes entitled by virtue of the provisions of clause (i) 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, as property capable of being disposed of by her by will or other testamentary disposition;

(iv) nothing in clause (ii) shall apply to a daughter married prior to or to a partition which had been effected before the commencement of Hindu Succession (Andhra Pradesh Amendment) Act, 1986.

Interest to devolve by survivorship on death

29-B When a female Hindu dies after the commencement of the Hindu Succession (Andhra Pradesh Amendment) Act, 1986 having at the time of her death an interest in a Mitakshara coparcenary property, her interest in the property shall devolve by survivorship upon the

surviving members of the coparcenary and not in accordance this Act.

Provided that if the deceased had left any child or child of a pre-deceased child 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-1.- For the purposes of this section, the interest of a female Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to her if a partition of the property had taken place immediately before her death irrespective of whether she 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, before the death of deceased, had separated himself or herself from the coparcenary or any of his or her heirs to claim on intestacy a share in the interest referred to therein.

29-C Preferential right to acquire property in certain cases

(1) Where, after the commencement of the Hindu Succession (Andhra Pradesh Amendment) Act, 1986 an interest in any immovable property of an intestate or in any business carried on by him or her, whether solely or in conjunction with others devolves, under section 29A or section 29-B upon two or more heirs and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have preferential right to acquire the interest proposed to be transferred.

(2) The consideration for which any interest in the property of the deceased may be transferred under this section shall in the absence of any agreement between the parties, be determined by the court, on application being made to it in this behalf, 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 of or incidential to the application.

(3) If there are two or more heirs, proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred.

Explanation:- In this section `court' means the court within the limits of whose jurisdiction the immovable property is situate or the business is carried on, and includes any other court which the State Government may, by notification in the official Gazette, specify in this behalf.

TAMIL NADU ACTS & ORDINANCES

The following Act of Andhra Pradesh Legislative Assembly received the assent of the President on the 15th January, 1990 and is hereby published for general information.

ACT NO. 1 OF 1990

An Act further to amend the Hindu Succession Act, 1956, in its application to the State of Tamil Nadu.

WHEREAS the Constitution of India has proclaimed equality before the law as a Fundamental Right;

AND WHEREAS the exclusion of the daughter from participation in coparcenary ownership merely by reason of her sex is contrary thereto;

AND WHEREAS such exclusion of the daughter has led to the creation of the socially pernicious dowry system with its attendant social evils.

AND WHEREAS this baneful system of dowry has to be eradicated by positive measures which will simultaneously ameliorate the conditions of women in the Hindu society;

Be it enacted by Legislative Assembly of the State of Tamil Nadu in the Fortieth Year of the Republic of India as follows:

Short Title, Extent and Commencement

1.(1) This Act may be called the Hindu Succession (Tamil Nadu Amendment) Act, 1989

(2) It extends to the whole of the State of Tamil Nadu

(3) It shall be deemed to have come into force on the 25th day of March, 1989.

Insertion of new Chapter II-A

2. In the Hindu Succession Act, 1956 (hereinafter referred to as the Principal Act), after Chapter -II, the following chapter shall be inserted, namely:-

CHAPTER - II-A.

Succession by survivorship

Equal rights to daughter in coparcenary property

29A.- Notwithstanding anything contained in Section 6 of this Act.

(i) 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 and have the same rights in the coparcenary property as she would have had if she had been a son, inclusive of the right to claim by survivorship; and shall be subject to the same liabilities and disabilities in respect thereto as the son;

(ii) at a partition in such a joint Hindu Family the coparcenary property shall be so divided as to allot to a daughter the same share as is allotable to a son.

Provided that the share which a pre-deceased son or a pre-deceased daughter would have got at the partition if he or she had been alive at the time of the partition shall be allotted to the surviving child of such predeceased son or of such pre-deceased daughter;

Provided further that the share allotable to the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, if such child had 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 of the pre-deceased daughter as the case may be;

(iii) any property to which a female Hindu becomes entitled by virtue of the provisions of clause (i) 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, as property capable of being disposed of by her by

will or other testamentary disposition;

(iv) nothing in this chapter shall apply to a daughter married before the commencement of Hindu Succession (Tamil Nadu Amendment) Act, 1986.

(v) Nothing in clause (ii) shall supply to a partition which had been effected before the date of commencement of the Hindu Succession(Tamil Nadu Amendment) Act, 1989.

29-B. Interest to devolve by survivorship on death

When a female Hindu dies after the commencement of the Hindu Succession (Tamil Nadu Amendment) Act, 1989 having at the time of her death, an interest in a Mitakshara coparcenary property by virtue of the provisions of Section 29-A, her 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 any child or child of a pre-deceased child, 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 purposes of this section, the interest of a female Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to her if a partition of the property had taken place immediately before her death, irrespective of whether she was entitled to claim partition or not.

Explanation II: Nothing contained in the proviso to this section shall be construed as enabling a person who, before the death of deceased, had separated himself or herself from the coparcenary, or any of his or her heir to claim on intestacy a share in the interest referred to therein.

29-C Preferential right to acquire property in certain cases

(1) Where, after the commencement of the Hindu Succession (Tamil Nadu Amendment) Act, 1989, an interest in any immovable property of an intestate or in any business carried on by him or her, whether solely or in conjunction with

others, devolves under section 29A or section 29B upon two or more heirs and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have preferential right to acquire the interest proposed to be transferred.

(2) The consideration for which any interest in the property of the deceased may be transferred under this section shall, in the absence of any agreement between the parties, be determined by the court on application being made to it in this behalf 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 of or incidential, to the application.

(3) If there are two or more heirs proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred.

Explanation:- In this section `court' means the court within the limits of whose jurisdiction the immovable property is situate or the business is carried on, and includes any other court which the State Government may, by notification in the Tamil Nadu Government Gazette specify in this behalf.

3. Certain Partitions to be null and void

Notwithstanding anything contained in the principal Act or in any other law for the time being in force, where on or after the 25th day of March, 1989 and before the date of publication of the Act to the Tamil Nadu Government Gazette, any partition in respect of coparcenary property of a Joint Hindu Family has been effected and such partition is not in accordance with the provisions of the principal Act, as amended by this Act, such partition shall be deemed, to be, and to have always been,

null and void.