THE MITĀKṢARĀ BIRTHRIGHT: A COMPARATIVE STUDY IN THE LIGHT OF ANTICIPATED LEGISLATION IN INDIA

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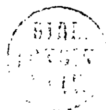

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ABSTRACT OF THE THESIS

Aditya Prasad Mukhopadhyay

The Mitākṣarā Birthright: A Comparative Study in the Light of Anticipated Legislation in India.

This thesis is primarily about the relevancy of the Mitākṣarā birthright, the pivot of the juridical Hindu joint family, in the context of codification of a uniform Civil Code or Code of Family Law in India. It also represents an enquiry into the origination of the concept and a study of it in its historical and comparative perspective. The comparative framework of the thesis shows that a Hindu legal institution, which governs about one-sixth of the human race, may stand comparison with the institutions of any system with which it is likely to be compared. In compliance with the progress of social science, the study of law is heading towards an inter-disciplinary approach, and in the present study attention is also focussed on the operation and veritable social role of the juridical concept of joint family. Contemporary attempts at creating a uniform world law have come into the foreground, prompted basically by socio-economic changes throughout the world. In the context of this global unification movement, the present study indicates that any viable attempt to reform, modernise and unify the personal laws (e.g. Hindu law) in India deserves a comparative awareness of other legal systems of the world, past and present.

Chapter 1 deals, generally, with the justification of a comparative study of Hindu law with other legal systems. The chapter also explains the scope, purpose and methods adopted in the present study.

Chapter 2 deals broadly with the proprietary concepts in Roman family law and examines particularly the hypothesis that the institution of joint family existed in pre-classical Rome.

Chapter 3 deals with the proprietary relationship existing between male ascendants and descendants in ancient Greek, Albanian and South Slavonian laws.

Chapter 4 is a study of the ancient Celtic familial institutions and an exploration of the identical Hindu and Celtic juridical concepts in respect of ownership of property.

Chapter 5 examines the social and juridical relationships in Germanic law, particularly a son's position in the Germanic scheme of inheritance.

Chapter 6 is a comparative appraisal of Babylonian, Assyrian, Elamite and Hittite laws relative to the son's right in family property.

Chapter 7 is an attempt to focus attention on those aspects of Jewish law which clarify the son's position in relation to property in the hands of his father.

Chapter 8 is a discussion of the points of similarity and difference between Sasanian and Hindu familial institutions.

Chapter 9 is an attempt to make a rapid survey of the nature of ownership of family property in Farther India (part of South and South-East Asia) seeking out its origins in the Hindu system.

Chapter 10 deals with the relevant comparable institutions of the Chinese and Japanese systems in the context of our present study.

Chapter 11 discusses the corporate rights in ownership of property in African customary law, in comparison with the Mitākṣarā system.

Chapter 12 is an attempt to explore the origin of the concept of birthright in the pre-dharmaśāstra and dharmaśāstra literature.

Chapter 13 is an examination of the treatment and development of the concept of birthright in early mediaeval Hindu commentatorial literature.

Chapter 14 examines the juridical attitude of the late mediaeval commentators and also of the 17th century logicians towards Vijñāneśvara's theory of birthright.

Chapter 15 is a critical assessment of the concept of co-ownership between father and son in Vivādārṇava-setu (The Code of Gentoo Laws) and Vivāda-bhaṅgārṇava (Colebrooke's Digest).

Chapter 16 is an exploration of the meaning of co-ownership of father and son in the vyavasthā (opinions of court paṇḍits) literature. In this respect, the Chapter also includes the juridical vyavasthā works.

Chapter 17 deals with the extent of a father's power of disposition of family property. Four main areas are discussed: right of preemption, testamentary power, alienation of self-acquired immovables and right of merger or blending.

Chapter 18 examines the rights of different kinds of sons relating to the concept of birthright. The rights of two types of son, namely, those of the illegitimate son (including śūdra's dāsīputra) and the adopted son, are discussed in detail.

Chapter 19 deals with the extent of birthright in Anglo-Hindu law in different types of property, namely, joint family property, self-acquired property and property inherited from the maternal grandfather.

Chapter 20 deals with birthright and a son's right to demand partition of family property under various circumstances.

Chapter 21 examines the relevancy of birthright in the light of contemporary socio-economic developments. Although statistical material regarding the number of joint and nuclear families to be found in different regions in India has been quoted, the significance of this must not be overstressed; such figures were intended to act as indicators and not as absolute guides. The Chapter highlights the anomalies and uncertainties arising out of the relevant provisions of the Hindu Succession Act, 1956. Also discussed are the advantages and disadvantages of the joint family system, and the findings indicate that the sociological joint family will not necessarily wither away with the abolition of the juridical joint family. It is pointed out that the shifting of values within the familial organisation depends on multiple factors, viz., changes in social philosophy; profound transformation in the economic status of the family through statutory enactments, e.g. land reform, revenue laws, etc.; modern scientific and medical developments which make birth control and family planning possible; and growing claims of the State on the family, without, of course, assuming any visible or substantial responsibility towards the family.

Chapter 22 deals with the peculiarities and gradual disintegration of the Malabar joint family. The Chapter also discusses the Kerala Joint Hindu Family System (Abolition) Act, 1975, Act 30 of 1976.

Chapter 23: The last Chapter reminds us of and attempts to answer the problem posed at the beginning of the Thesis. The Chapter concludes that the Mitākṣarā birthright should be abolished by Parliament and in that respect, and by way of recommendation, sets out a proposed bill. Lastly, the Chapter goes into the crux of the problem by pointing out the typical orthodox arguments of the religious groups against reform of personal laws, and emphasises the need for a rational and humane attitude towards reform of family laws for a modern nation committed to secularism and modernity.

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Last, but not least, I must thank the members of my family who were always patient and did not mind too much having a studying, rather than earning member.

ABBREVIATIONS

AASOR	Annual of the American Schools of Oriental Research
A & N	Assam and Nagaland
ABAJ	American Bar Association Journal
ABORI	Annals of the Bhandarkar Oriental Research Institute (Poona)
AC	Appeal Cases
Adyar Lib. Bull.	Adyar Library Bulletin
Ai.A. or Ai.Ar.	Aitareya-āraṇyaka
Ai.Br.	Aitareya-brāhmaṇa
AIR	All India Reporter (Nagpur)
AL	Driver and Miles, Assyrian Laws
ALI	Ancient Laws of Ireland
ALIW	Ancient Laws and Institutes of Wales
All.	Allahabad
All. E.R.	All England Reports
Am. An. or Am. Anthropologist	American Anthropologist
Am.J. Arch.	American Journal of Archaeology
Am.J. of Comp.L.	American Journal of Comparative Law
An. W.R.	Andhra Weekly Reporter
AOR	Annals of Oriental Research (Madras)
A.P.	Andhra Pradesh

Āpastamba	Āpastamba-dharma-sūtra
Arkansas L.R.	Arkansas Law Review
A.R.P. Diary	The Diary of Ananda Rangam Pillai
Arthaś	Arthaśāstra
Ā.Ś.Su.	Āpastamba Śrautra Sūtra
Ass.	Assam
AV	Atharva-veda
BASOR	Bulletin of the American Schools of Oriental Research
BHCR	Bombay High Court Reports
B.K.	Baba Kama
BL	Babylonian Laws
BLJ	Benares Law Journal
BLIJ	Burma Law Institute Journal
BSOAS	Bulletin of the School of Oriental and African Studies (London)
Babyl.	Babylonian
Bau.dh.sū.	Baudhāyana-dharma-sūtra
Beng.L.R. or BLR	Bengal Law Reports
Bhāruci	Derrett, ed., tr., Bhāruci's Manu-śāstra-vivaraṇa
Bibl. Ind.	Bibliotheca Indica Series
Bom.	Bombay
Bom.L.R.	Bombay Law Reporter
Bṛ.	Bṛhaspati-smṛti

Br.su.	Brahma sūtra
Bṛ.U.	Bṛhadāraṇyaka-upaniṣad
CH	Code of Hammurabi
CLI	R. Lingat, tr. Derrett, Classical Law of India
C.Q.	Classical Quarterly
C.W.N.	Calcutta Weekly Notes
Cal.	Calcutta
Calif. L. Rev.	California Law Review
Camb. L.J.	Cambridge Law Journal
Chā.u.	Chāndogya Upaniṣad
Col.L. Rev.	Columbia Law Review
Critique	Derrett, A Critique of Modern Hindu Law.
DJL	Derrett, Dharmaśāstra and Juridical Literature
D.K.S. or Dā.Ka.Saṁ.	Dāyakarma-saṁgraha
D.T.	Dāyatatta
DVS	S. Jha, Dharmaśāstrīya Vyavasthā Saṁgraha
Dā.bhā.	Dāyabhāga
Da.mī.	Dattaka-mīmāṃsā
Deut.	Deuteronomy
Dh.K.	L.S. Joshi's Dharmakośa, Vyavahāra-kāṇḍa (3 vols. continuous pagination)

EHI	H.S. Maine, Lectures on the Early History of Institutions
EHJFI	G.D. Sontheimer, Evolution of Hindu Joint Family as an Institution
ELC	H.S. Maine, Dissertations on Early Law and Custom
En.So.Sc.	Encyclopaedia of Social Sciences
Eng.Rep.	English Reports
E.C. or Ep. Carn.	Epigraphia Carnatica
Er.	Erubin
Ex.	Exodus
F.B.	Full Bench
FEQ	Far Eastern Quarterly
GPHJ	P.N. Sen, General Principles of Hindu Jurisprudence
Garuḍa Pu.	Garuḍa Purāṇa
Gautama	Gautama-dharma-sūtra
Gen.	Genesis
Go.Br.	Gopatha-brāhmaṇa
HAMA	Hindu Adoptions and Maintenance Act
Harv.L.Rev.	Harvard Law Review
HD	P.V. Kāṇe, History of Dharmaśāstra
HISRL	Jolowicz, Historical Introduction to the Study of Roman Law

HLS	G. Jhā, Hindu Law in its Sources
HMA	Hindu Marriage Act
H.P.	Himachal Pradesh
HSA	Hindu Succession Act
I.A.	Law Reports, Indian Appeals Series.
IAQR	Imperial and Asiatic Quarterly Review
I.C.	Indian Cases
ICLQ	International and Comparative Law Quarterly
IDOS	Indian Decisions Old Series
Ill.L. Rev.	Illinois Law Review
ILS	Derrett, ed., Introduction to Legal Systems
IMHL	Derrett, Introduction to Modern Hindu Law
I.O.L.	India Office Library
J. or Jnl.	Journal Section
J & K	Jammu and Kashmir
JAL	Journal of African Law
JANES	Journal of the Ancient Near Eastern Society
JAOS	Journal of the American Oriental Society
JAS	Journal of Asian Studies
JBRS	Journal of the Burma Research Society
JCS	Journal of Cuneiform Studies

JESHO	Journal of the Economic and Social History of the Orient
JIH	Journal of Indian History
JILI	Journal of the Indian Law Institute
JIS	Journal of Indo-European Studies
JKRCOI	Journal of the K.R. Cama Oriental Institute
JNES	Journal of Near Eastern Studies
JRAI	Journal of the Royal Anthropological Institute
JRAS	Journal of the Royal Asiatic Society
JSS	Journal of the Siam Society or Journal of Semetic Studies
Jai.Br.	Jaiminiya-brāhmaṇa
Jer.	Jeremiah
KLT	Kerala Law Times
Kāty.	Kātyāyana
Kau.Up. or K.U.	Kauṣitaki Upaniṣad
Ker.	Kerala
Knt.	Karnatak
Kṛtyakal	Lakṣmīdhara's Kṛtyakalpataru
Kūrma. Pu.	Kūrma Purāṇa
L.Q. Rev.	Law Quarterly Review
L.U.	London University
Lev.	Leviticus
Luck.	Lucknow

M.Bh.	Mahābhārata
MHCR	Madras High Court Reports
MIA	Moore's Indian Appeals
MLJ	Madras Law Journal
MNT	Mahānirvāṇa-tantra
M.P.	Madana-pārijāta or Madhya Pradesh
MRI or MRIHL	K.L. Sarkar, Mīmāṃsā Rules of Interpretation as Applied to Hindu Law
M.R.P.	Madana-ratna-pradīpa
Mad.	Madras
Manu	Manu-smṛti
Mark. Pu.	Mārkaṇḍeya Purāṇa
Medh.	Medhātithi
Mich. L.Rev.	Michigan Law Review
Mitā.	Mitākṣarā
Mys.	Mysore
Mys. L.J.	Mysore Law Journal
NOC	Notes of Cases
n.s.	New Series
N.W.P.	North Western Provinces
Nag.	Nagpur
Nag. L.R.	Nagpur Law Reports
Nārada	Nārada-smṛti
Nu.	Numbers

O.H.	Our Heritage (Calcutta)
OHJ	P. Vinogradoff, Outlines of Historical Jurisprudence
OL	Orientalistische Literaturzeitung
Or.	Orissa or Orientalia
PC	Privy Council
PCR	Privy Council Reports
PLD	All Pakistan Legal Decisions
P.M.	Parāśara-mādhavīya
P.R.	Punjab Record
Pañ. Br.	Pañcaviṃśa-brāhmaṇa
Para or Pr.	Paragraph
Pat.	Patna
Prov.	Proverbs
Pu.	Purāṇa
Punj.	Punjab
qu.	quoted
Rabels Z	Rabels Zeitschrift, formerly Zeitschrift für ausländisches und Internationles Privatrecht
RAL	Rubin and Cotran, ed., Readings in African Law
R.K.	Rādhākrishnan, Sarvapalli

RLSI	Derrett, Religion, Law and the State in India
R.T.	Rājataraṅgiṇī
R.V.	Ṛg-veda
Śat.Br.	Śatapatha-brāhmaṇa
Sāṅ.Br.	Sāṅkhāyana-brāhmaṇa
SBE	Sacred Books of the East (Oxford)
SC	Supreme Court or Smṛti-candrikā
SCC	Supreme Court Cases
SCJ	Supreme Court Journal
SCR	Supreme Court Reports
SCWR	Supreme Court Weekly Reporter
SDA	Sadr Diwani Adalat (available in original edition or the Indian Decisions (O.S.) Select Reports reprint)
Sel.Rep.	Select Reports
Smṛti ch.	Smṛti-candrikā
Spec. Legg.	Philo's De Specialibus Legibus
Suth. W.R.	Sutherland's Weekly Reporter
S.V.	Sarasvatī-vilāsa
Sva.ra.	Svatva-rahasyam
Sva.vi.	Svatva-vicāra
Tai.Ā.	Taittirīya-āraṇyaka
Tai.Br.	Taittirīya-brāhmaṇa

Tai.Saṃ.	Taittirīya-saṃhitā
TASJ	Transactions of the Asiatic Society of Japan
T.C.	Travancore-Cochin
TLL	Tagore Law Lectures
Tit.	Title
Tr.	Translated by
Trav. L.R.	Travancore Law Reports
UCR	University of Ceylon Review
UNESCO	United Nations Educational, Scientific and Cultural Organisation
US	United States Supreme Court Reports
U. of Ch.L.Rev.	University of Chicago Law Review
U. of Penn.L.Rev.	University of Pennsylvania Law Review
v.	Verse
Var.	Variant reading
Vasiṣṭha	Vasiṣṭha-dharma-sūtra
V.bhaṅg.	Vivādabhaṅgārṇava
Vi.Ca.	Vivāda-candra
Vi.Ci.	Vivāda-cintāmaṇi
VIJ	Viśveśvarānand Indological Journal

Vijñ.	Vijñāneśvara
Vi.Mi. or V.M.	Vīramitrodaya
Vi.Ra . or V.R.	Vivāda-ratnākara
V.Setu	Vivādārṇava-setu
Viṣṇu	Viṣṇu-dharma-sūtra
Viṣṇu Pu.	Viṣṇu Purāṇa
Vy.	Vyavahāra
Vy.Chi.	Vyavahāra-cintamaṇi
Vy.Ma.	Vyavahāra-mayūkha
Vy.Ni.	Varadarāja's Vyavahāra-nirṇaya
W.R. see Suth. W.R.	
Wis. L. Rev.	Wisconsin Law Review
Yājñ.	Yājñavalkya
Z.A.	Zend Avesta
ZDMG	Zeitschrift der deutschen morgenländischen Ges ellschaft
ZVR or Z.f.vergl. Rechtsw.	Zeitschrift für vergleichende Rechtswissenschaft

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CHAPTER 1

THE HISTORICAL AND COMPARATIVE BACKGROUND

I. Introduction

The march of mankind through stages of civilization(s) coincides (not necessarily in terms of evolution) with modes of legal thinking, and even the behavioural pattern of primitive man, in a sense, bears the ascription of a juridical norm.[1] The history of the early dwellers on this earth and, more so, their legal history, is partly 'hidden in an unrecorded past'[2], and that is why to unravel the

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1. P. Radin, The World of Primitive Man, (New York, 1953), 223. Jerome Hall illustrates that all societies are legal organisations - ubi societas, ubi ius; on the other hand, legal norms are of primary significance in social action, J. Hall, Comparative Law and Social Theory, (Louisiana State University Press, 1963), 112, 117. E.A. Hoebel, The Law of Primitive Man, (Cambridge, Mass., 1967), 5. 'Law is an index of civilization which reflects the underlying value concepts inherent within that civilization', S.M. Paul, Studies in the Book of the Covenant in the Light of Cuneiform and Biblical Law, (Leiden, 1970), introd., 1. Stanley Diamond, 'The Rule of Law Versus the Order of Custom', in D. Black and M. Mileski, ed., The Social Organization of Law, (New York/London, 1973), 318-341 at 323. '... law is directly linked to the analysis of the social situation to which the law applies, ...', D.N. Schiff, 'Socio-Legal Theory: Social Structure and Law', Modern Law Review, 39 (1976) 3: 287-310 at 287.

2. A.S. Diamond, Primitive Law, Past and Present, (London, 1971), introd., 3. Also E.S. Hartland, Primitive Law, (London, 1924), introd. 3.

legal pattern of primitive society non-legal sciences such as ethnography, [1] philology and anthropology [2] are complimentary.[3] Indeed, in this respect, non-legal [4] works provide information which is invaluable for the jurist [5] studying the interaction between 'quid facti' and 'quid juris'.[6] This generalisation is basically

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1. One of the most important writings in this field is by P. Koschaker, 'Die Eheformen bei den Indogermanen', lecture delivered in the section: Ethnologie juridique, II International Congress for Comparative Law, The Hague, 1937. Koschaker's theory is summarised by J. Renger, 'Who are All These People?', Orientalia, 42 (1973), 259-273 at 260-1. Equally illuminating are the works of Mazzarella. On his theory, see Derrett, 'Juridical Ethnology: The Life and Work of Giuseppe Mazzarella (1868 - 1958), ZVR 71 (1970), 1-44 at 14-28, especially at 23-4. On the method of studying jural ethnography, see P. Bohannan, 'The Differing Realms of the Law', in L. Nader, ed., The Ethnography of Law, American Anthropologist, 67 (1965) 6, pt.2: 33-42 at 41-2; also 'Ethnography and Comparison in Legal Anthropology', in L. Nader, ed., Law in Culture and Society, (Chicago, 1969), 401-418. Also J. Kurczewski, 'The Ethnographic Approach', in A. Podgorecki, ed., Law and Society, (London/Boston, 1974), 66-82 at 66. On jurist's function and importance in interdisciplinary study, see Derrett, 'Luiz da Cunha Gonçalves (1875 - 1956): Jurist, Comparative Lawyer and Orientalist', ZVR 74 (1974), 137-162 at 139. For an interesting work in context of Hindu law, see S. Singh, Evolution of the Smrti Law: A Study in the Factors Leading to the Origin and Development of Ancient Indian Legal Ideas, Bhāratīya Vidyā Prakāśana, Varanasi, 1972), 125-196 et seq.

2. For a summary of the anthropological contribution to law, see L. Nader, 'The Anthropological Study of Law', American Anthropologist, 67 (1965) 6, pt.2: 3-32.

3. J. Renger, 'Who are All These People?', Orientalia, 42 (1973), 259-273 at 260-1. E. Cotran and N.N. Rubin, ed., Readings in African Law, (London, 1970), introd. xvii.

4. Hermann Kantorowicz points out that there are many subjects including some of a non-legal nature which employ a concept of law, H. Kantorowicz, The Definition of Law, (Cambridge University Press, 1958), 29.

5. A.N. Allott, 'The Methods of Legal Research into Customary Law', Journal of African Administration, 5 (1953) 4: 172-77 at 172.

6. G. Gurvitch, Sociology of Law, (London, 1947, rpt. 1974), Preface, x.

true of juridical research into the norms and customs [1] of any preliterate people, and the case of the Hindus,[2] a branch of the proto-Indo-Europeans,[3] is no exception.

II. Hindus and the Indo-Europeans

There is now 'fairly general agreement' [4] that the Āryan peoples had

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1. Bohannan explains that 'norm is a rule, more or less overt', which expresses "ought" aspects of relationships between human beings. Custom is a body of such norms - including regular deviations and compromises with norms - that is actually followed in practice much of the time', P. Bohannan, 'The Differing Realms of Law', in D. Black and M. Mileski, ed., The Social Organization of Law, op. cit., 306-317 at 308. Seagle, of course, does not consider custom and law as 'interchangeable phenomena'. He says, 'If custom is in the truest sense of the terms of spontaneous and automatic, law is the product of organized force. Reciprocity is in force in civilized communities, too, but at least nobody confuses social with formal legal relationships', W. Seagle, The History of Law, (New York, 1946), 35. Seagle is supported by S. Diamond, 'The Rule of Law Versus the Order of Custom', in D. Black and M. Mileski, ed., ibid., 318-341 at 321-2.

2. On the role of custom in Hindu law, see Derrett, Religion, Law and the State in India, (London, 1968), ch.6.

3. infra, 5-7.

4. J.G. Macqueen, The Hittites and Their Contemporaries in Asia Minor (London, 1975), 25. Earlier pointed out by W.K. Sullivan, Introduction to Eugene O'Curry's On the Manners and Customs of the Ancient Irish, 3 vols. (London, 1873), I, iv-v. M. Dillon, 'Celt and Hindu', Vishveshvaranand Indological Journal, 1 (1963) 2: 203-223 at 222.

a common root and common abode.[1] Here linguistic evidences come to our aid,

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1. Scholars differ on the location of the original home (die indogermanische Urheimat) of the Aryans. Bāl Gangādhar Tilak tried to establish that 'the oldest home of the Aryan people was somewhere in regions round about the North Pole', The Arctic Home in the Vedas: Being also a Key to the Interpretation of many Vedic Texts and Legends, (Poona, 1956), 18, also 384. Some of the scholars opine that central Asia was the original abode of the Indo-Europeans. A.B. Keith preferred this view, see 'The Early History of the Indo-Iranians', in Commemorative Essays to R.G. Bhandarkar, (B.O.R.I., Poona, 1971), 81-92 at 91. T. Burrow supports the view that South Russia was the original home of the Indo-Europeans, The Sanskrit Language, New and Revised, ed , (London, 1973) 1, II. Vinogradoff doubted the Central Asian hypothesis and held the view that the Aryans first inhabited Northern Europe, particularly the shores of the Baltic, Outlines of Historical Jurisprudence, (O.U.P., London, 1920), I, 216. P. Giles refutes Vinogradoff's supposition in E.J. Rapson, ed., Cambridge History of India, (Cambridge, 1922), I, 68-69. For an admirable exposition of all the views, see V.G. Childe, The Aryans: A Study of Indo-European Origins, (London, 1926), ch.V-VII, et. seq. Also H. Bruce Hannah, 'Aryan Origins', in Sir Asutosh Memorial Volume, (Patna, 1926-28), I, 104-119. Keith pointed out that without archaeological evidence, the common abode hypothesis based on linguistic evidence, 'pure and simple' was open to gravest doubt. He examined the available linguistic and archaeological evidences but could not come to a definite conclusion in localising the Indo-Europeans, A.B. Keith, 'The Home of the Indo-Europeans', in J.D.C. Parvy, ed., Oriental Studies in Honour of Cursetji Erachji Parvy, (London, 1933), 189-199 at 189, 191, 194-6, 199. The importance of archaeological evidence was also emphasised by Professor Kellogg, see Proceedings of the Middle West Branch of the American Oriental Society, Urbana, Illinois, 1928, JAOS 48 (1928), 358. D.S. Triveda pointed out the fallibility of phonetic laws but took the opportunity of claiming that the Aryans were first born on the bank of river Devika near Multan, 'The Original Home of the Aryans', ABORI 20 (1938) 1: 49-68 at 52,68. Gangānātha Jhā accepted the weakness of linguistic evidences. He also doubted the theory that the Aryans came to India from outside, but he invited further research on the problem. B.K. Ghosh, of course, did not give any weight to Jhā's suggestion of Indian origin of the Aryans, 'The Aryan Problem', in R.C. Majumdar, ed., The Bhāratīya Itihāsa Samiti's History and Culture of the Indian People, Vol.I, The Vedic Age, (London, 1951), 201-217. P. Bosch-Gimpera opines that the embryo of the Indo-Europeans lies in Mesolithic Europe but found that archaeological evidence was against the European theory of the Indo-European homeland, see review of Bosch-Gimpera's Les Indo-Européens, problèms archaéologiques, (Paris, 1961), M. Gimbutas, 'The Indo-Europeans: Archaeological Problems', American Anthropologist, 65 (1963), 815-836 at 815, 833. For recent doubts by jurists on the linguistic basis of the Indo-European concept, see, J.A. Crook, 'Patria Potestas', Classical Quarterly, 17 (1967): 113-122 at 115. Also D. Daube, Studies in Biblical Law, (Cambridge University Press, 1947, rpt., 1969), 201. Gimbutas consistently claims that Kurgan culture of the Eurasian steppe was the basis of Indo-European culture. M. Gimbutas,

Cont'd. on next page:

and, in this respect Adolf Kaegi states:

> To comparative philology we owe the indisputable proof of the fact that the ancestors of Indians and Iranians and Greeks, of Slavs and Lithuanians and Germans, of Italians and Celts, in far distant ages spoke one language, and as a single people held dwelling-places in common, wherever that home may have been situated; and further, that for a considerable period after their separation from their brothers living further to the west, the Indians and Iranians lived together, and distinguished themselves from other tribes by the common name of Aryan. After their separation from the Iranians,[1]

Note 1; - p.4 - continued:

'Proto-Indo-European Culture: The Kurgan Culture During the Fifth, Fourth and Third Millenia B.C.', in G. Cardona, H.M. Hoenigswald, and A. Senn, ed., Indo-European and Indo-Europeans, (Philadelphia, 1970), 155-197 at 190; also her 'The Beginning of the Bronze Age in Europe and the Indo-Europeans: 3500-2500 B.C.', Journal of Indo-European Studies, 1 (1973), 163-214. But Goodenough doubts the Kurgan theory of Gimbutas. He opines that archaeological evidence is entirely compatible with linguistic evidence in pointing to the North European plain as the most probable home of the Proto-Into-Europeans, W.H. Goodenough, 'The Evolution of Pastoralism and Indo-European Origins', in G. Cardona, ibid., 253-265, at 257, 262. In effect, Gimbutas is supported by P. Friedrich, 'Proto-Indo-European Kinship', Ethnology, 5 (1966) 1: 1-36 at 2-3. Also P. Harbison, 'The Coming of the Indo-Europeans to Ireland: An Archaeological Viewpoint', JIS 3 (1975) 2: 101-119 at 101. The controversy on the fons et origo of the Indo-Europeans has also been opened by P.L.Bhargava, 'The Original Home of the Aryans and Indo-Iranian Migrations', ABORI, 48-9 (1968), Golden Jubilee Volume, 219-226. Some scholars doubt the hypothesis 'that, along with related languages the Indo-Europeans had a common origin ...', see Rosane Rocher, 'Review of Cardona, Hoenigswald and Senn', JAOS 93 (1973), 615-617 at 616. But the hypotheses of an original homeland and original Indo-European speech community are too well accepted to be overlooked, see T.Burrow, 'The Early Aryans', in A.L. Basham, ed., ACultural History of India, Oxford, (1975), 20-29 at 22.

1. See F.C. Davar, Iran and Its Culture, (Bombay, 1953), 151, B.K. Ghosh, 'Indo-Iranian Relations', in R.C. Majumdar, ed., The Vedic Age, op.cit., 218-224 at 218.

> the Eastern Aryans, the later Indians, wandered from the west into the land afterwards called India, descending from the heights of Iran, probably over the western passes of the Hindukush.[1]

That the common habitation and migratory course of the Āryans are supported by comparative philology was specifically emphasised by Max Müller in these words:

> The evidence of language is irrefragable, and it is the only evidence worth listening to with regard to ante-historical periods. It would have been next to impossible to discover any traces of relationship between the swarthy natives of India and their conquerors whether Alexander or Clive, but for the testimony borne by language.[2]

Granted that the Romantic period fostered such views, and that language is held in common by the conquered (for example) and their conquerors, the nature and extent of linguistic evidence points unmistakably to migrations and is supported by ethnographic particulars - and archaeological artifacts.

Small wonder that hypotheses of common language and common abode would naturally inspire a legal comparatist to probe into the possibility of an

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1. A. Kaegi, The Rigveda, tr. R. Arrowsmith, (New Delhi, 1972), introd., 11. On the basis of linguistic evidence, Sir William Jones also put forward the same view in 1786 in his famous address to the Asiatic Society of Bengal, see H. Pedersen, Linguistic Science in the Nineteenth Century, tr. J. Spargo, (Bloomington, 1931), 18: R.C. Majumdar, ed., The Vedic Age, loc. cit., 201; also E.J. Rapson, ed., The Cambridge History of India, op.cit., 65.

2. F. Max Müller, The Vedas, (Delhi, 1961), 1. Also R. von Ihering, Vorgeschichte der Indo-Europäer, tr. A. Drucker, sub. tit. The Evolution of the Aryans, (London, 1897), xi. On philological evidences, also see P. Vinogradoff, Outline of the History of Jurisprudence, op.cit., I, 215-231.

unilinear development of legal institutions among the Indo-Europeans.[1] However, to quite a number of Romanists the adjective 'Indo-European' applied to law is highly objectionable.[2] Indeed, considering the 'challenge' and 'response',[3] to each civilization, 'law and institutions cannot be affiliated to a common ancestor with anything like the same certainty as languages[4] ....', nevertheless, despite these limitations, Leopold Wenger opines:[5]

> Certain principles of law can be claimed as a common Indo-Germanic inheritance, which all or some Aryan daughter-peoples have retained from a common past in the course of their separate historical development as nations.[6]

III. Hindu Law: case for comparison

It is indeed correct to say that 'no one now seriously believes that there is a pattern of human social development through which every society must

1. The study was initiated by Sir Henry Maine. On limitations of such studies, see G. Gurvitch, Sociology of Law, (London, 1974), 79-80.

2. D.A. Binchy, 'Celtic Suretyship, A Fossilized Indo-European Institution', in G. Cardona, H.M. Hoenigswald, and A. Senn, ed., Indo-European and Indo-Europeans, Papers presented at the Third Indo-European Conference at the University of Pennsylvania, 1966, (Philadelphia, 1970), 355-367 at 355.

3. A.J. Toynbee, Change and Habit, (London, 1966), 7, 151.

4. D.A. Binchy, loc.cit., 355.

5. 'Gewisse Rechtssätze lassen sich als indogermanisches gemeinsames Erbgut ansprechen, das alle oder einige arische Tochtervölker aus einer gemeinsamen Vorzeit in inhre nationale geschichtliche Sonderentwicklung mitgebracht haben', L. Wenger, Die Quellen des römischen Rechts, (Wien, 1953), 11.

6. Translated for me by Derrett.

pass.'[1] We cannot expect that the Hindus who came to India 'via Azerbaijan and Western Persia'[2] would retain and show exactly identical patterns of legal development with their European counterparts,[3] but this possible diversity of social development does not invalidate the case for comparison of Hindu law with other systems; on the contrary, 'the real Hindu law (let the courts do what they liked with such fragments as they toyed with) deserved comparison with the Roman and the Greek ...'[4]

A Younger student of comparative ancient law has very recently committed himself to the thesis that family law in the ancient Mediterranean and Middle East has common, identifiable, recognisable and predictable features which, at a glance, distinguish the Greco-Roman cultural world at its widest (it bordered on Russia and Iran) from African and South-East Asian customs, with their very different ecology and therefore, ethno-characterology.[5]

However, Gutteridge, the doyen of the discipline, seems to have believed that oriental and occidental family laws were barely capable of fruitful

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1. Derrett, Dharmaśāstra and Juridical Literature, (Wiesbaden, 1973), 6. R.H. Lowie, The History of Ethnological Theory, (New York, 1937), 26-29.

2. M. Gimbutas, 'The Indo-Europeans: Archaeological Problems', American Anthropologist, 65 (1963), 815-836 at 816.

3. See the warning of Vinogradoff, infra, 15.

4. Derrett, 'Review of Sternbach: Juridical Studies in Ancient Indian Law, Pt.I', JAOS 87 (1967), 103-4 at 103.

5. Wolfgang Wodke (Akademischer Rat, Marbarg), 'rom "Ungeschriebinen" zum "Geschriebenen" Recht-Ein Beitrag zur rechtsgeschichtlichen Entwichlung', (cyclostyled lecture, Gdansk, June 1976). The reference was supplied to me by Derrett.

comparison. His view was that 'family law is so largely moulded by racial or religious and political considerations that comparison is fraught with difficulty and apt to be inconclusive ...'[1] Although Gutteridge's scepticism was understandable, the horizon of a legal comparatist could not indefinitely be limited by racial, religious or 'political frontiers'.[2]

Since Gutteridge's days, the parameters of legal learning have

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1. H.C. Gutteridge, Comparative Law, An Introduction to the Comparative Method of Legal Study & Research, (Cambridge, 1946), 32. But he did not say it was futile or impossible, ibid., 32. For an answer to Gutteridge one may quote, 'May we not say that one who knows only the laws of his own jurisdiction knows not the law of that jurisdiction', R. Pound, 'What We May Expect from Comparative Law?', ABAJ 22 (1936), 60. Jerome Hall also neutralises Gutteridge's argument, Comparative Law and Social Theory, (Louisiana State University Press, 1963), 95-7.

2. H.E. Yntema, 'Comparative Legal Research', Mich. L.Rev. 54 (1956) 7: 899-928 at 903. To Yntema the study of law is sub specie universitatis, i.e. law is essentially a comparative science, ibid., 924. Zoltan Petri also opines that to perfect one's own system, even countries having ideologically opposing political systems should have comparison of their laws, 'Goals and Methods of Legal Comparison', in The Comparison of Laws, Selected Essays for the 9th International Congress of Comparative Law, (Budapest, 1974), 45-48 at 46, 53. The same view was of Kazantsev, a Russian law teacher, "The Tasks of Scientific Research-work in the Field of Law', Bulletin of the Academy of Sciences U.S.S.R., Section of Economics and Law, 38 (1950), No.1, cited by E.S. Rashba, 'Consecrated Ignorance of Foreign Law', Calif. L.Rev. 39 (1951), 355-368 at 358, n.7.

considerably changed,[1] and even long before Gutteridge, Pierre Lepaulle pointed out that comparative law was 'a necessary step in a highly scientific study of law'.[2] So, whether it is in the East or the West, the legal experience of a nation 'flows across cultural boundaries',[3] and as a concrete example of this we proffer Pound's suggestion regarding the problem of modernising Chinese law. He emphasised that Republican China would have to develop skill in adapting alien institutions and rules to local conditions and prevailing cultural values.[4] In the context of Indian family law, Derrett's exhaustive and 'synoptic'[5] study of the law of succession [6] shows that a comparative approach

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1. O. Kahn-Freund, 'Comparative Law as an Academic Subject', L.Q. Rev. 82 (1966), 40-61 at 59. At Gutteridge's time, the comparative method was on 'trial' and at an 'experimental stage', H.C. Gutteridge, 'The Province of Comparative Law', in P. Sayre, ed., Interpretations of Modern Legal Philosophies, Essays in Honor of Roscoe Pound, (New York, 1947), 303-312 at 310. Writing in 1949, Gutteridge described comparative law as the Cinderella of the legal sciences, Comparative Law, (2nd ed., Cambridge, 1949), 22. L. Neville Brown sums up the present position by saying: 'Today Cinderella's coach has become something of a bandwaggon on which academics and practitioners scramble for seats, so much so that the older passengers may sometimes be surprised at the company in which they travel', 'Comparison, Reform, and the Family', Annuario Di Diritto Comparato E Di, Studi Legislative 43 (1969), 123-140 at 125.

2. P. Lepaulle, 'The Function of Comparative Law with a Critique of Sociological Jurisprudence', Harv.L. Rev. 35 (1922), 838-858 at 855. The history of comparative law goes back to Aristotle's Constitution of Athens, J. Hall, Comparative Law and Social Theory, op.cit., 15.

3. A.T. von Mehren, 'Roscoe Pound and Comparative Law, Am.J.Comp.L. 13 (1964), 507-517 at 511.

4. R. Pound, 'Comparative Law and History as Basis for Chinese Law', Harv.L. Rev. 61 (1948), 749, 750.

5. When a comparative study is directed to more than one law, the method is called 'synoptic' as opposed to 'monographic' which is focussed upon one particular foreign legal system, M. Rheinstein, 'Teaching Comparative Law', U. of Ch.L.Rev. 5 (1938), 616.
6. TLL, 1953, unpublished.

to Hindu law can open a new vista of juristic interpretation, and his study justifies Rabel's general remark that 'the deeper we push the inquiry, the more bridges are revealed, and the more common conceptions and analogous, if not identical, solutions appear'.[1]

Therefore, comparative study is not merely the 'nobile officium'[2] of the academic lawyer; it has practical utility for the practical lawyer as well.[3] Judges such as Holloway of Madras and Sir Ashutosh Mookerjee in Calcutta did not hesitate to consult Roman law whenever it might throw light on a disputed and unclear passage of Indian law.[4] Sir Gooroodas Banerjee, in his cele-

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1. E. Rabel, 'On Institutes for Comparative Law', Col.L.Rev. 47 (1947), 227-37 at 230.

2. O. Kahn-Freund, 'Comparative Law as an Academic Subject', L.Q.Rev. 82 (1966), 40-61 at 44.

3. J.H. Stevenson, 'Comparative and Foreign Law in American Law Schools', Col.L.Rev. 50 (1950), 613-628 at 616. 'A lawyer is to learn more than his own system', R. Pound, 'Introduction', Am.J. of Comp.L. 1 (1952), 1-10 at 1. Also, B. Kozolchyk, 'Trends in Comparative Legal Research: Apropos Dainow's The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions', Am. J.Comp.L. 34 (1976) 1: 100-112 at 111.

4. Derrett, 'Justice, Equity and Good Conscience', B.L.R.J. 64 (1962) 129-152 at 130-1. For an example of Sir Ashutosh Mookerjee's survey of Roman law on the rights of posthumous son, see Kusum Kumari Dasi v. Dasarathi Sinha, (1921) AIR Cal 487. For J. Holloway's utilization of Roman law on problems of Hindu law, see Derrett, 'The Role of Roman Law and Continental Laws in India', Zeitschrift für ausländisches und internationales Privatrecht, 24, Heft 4 (1959), 657-685 at 670-682. For judicial comparison between Roman law and Hindu law, one may cite the celebrated case of Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree (1856) 6 MIA 393 PC; also recently, Jogendra Nath v. I.T. Commr., AIR 1969 SC 1089, 1092; see Derrett, Critique, Appx.II. In the same vein, see an American judge's application of French principles in an American case, see Singer Manufacturing Co. v. June, 163 U.S. 169, 196. On this and for other examples, see J. Wolff, 'The Utility of Foreign Law to the Practicing Lawyer', ABAJ 27 (1941). The substantive comparison in judicial

/Cont'd. on next page:

brated and pioneering work on Marriage and Stridhana,[1] found it quite natural to refer to Roman law by way of illustration and comparison. Reference to Roman law in the development of Hindu law in practice became so widespread[2] that when, in 1906, a Hindu Subordinate Judge (!) used Roman law to solve a point in adoption, Chandravarkar, J., a known partisan of Hindu jurisprudence, was furious with him.[3]

The worldwide proliferation of comparative law teaching,[4] and the comparative experiments for the universal unification of private laws[5] prove

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Note 4 - p.11 - continued:

context could be extended to judicial technique, R. Pound, 'What May We Expect from Comparative Law?', ABAJ 22 (1936), 56-60 at 60. For an earlier opinion on the practical utility of comparative law, see E. Lambert and J.H. Wigmore, 'An International Congress of Comparative Law in 1931', Ill. L.Rev. 24 (1930), 656-65 at 656.

1. Gooroodas Banerjee, The Hindu Law of Marriage and Stridhana, 5th edn., (Calcutta, 1923), 72-73.

2. Ganga v. Lekhraj, (1886) 9 All 253, 298-9. Even at the present time the practice has not died down, see 1977 2 MLJ 286.

3. Kalgavda v. Somappa, (1909), 33 Bom 669.

4. G. Winterton, 'Comparative Law Teaching', Am.J. of Comp.L. 23 (1975), 69-118 at 69. On Indian response in this context, see R. Khan and S. Kumar, ed., An Introduction to the Study of Comparative Law, ILI, New Delhi (Bombay, 1971), Ch.V-VII.

5. For details of such experiments, see A.J. Levi, 'What Are the Initiating Agencies and What is their Mission in Each Unification Movement? (Sect.I. c.3)', in S.Z. Feller, ed. Israeli Reports to the Eighth International Congress of Comparative Law, (Institute for Legislative Research and Comparative Law, Jerusalem, 1970), 54-64. K.H. Nadelmann, 'The Formal Validity of Wills and the Washington Convention 1973 Providing the Form of an International Will', Am.J. of Comp.L. 22 (1974) 365-383; also J.J. Curtis, Jr., 'The Convention on International Wills: A Reply to Kurt Nadelmann', Am.J. of Comp.L. 23 (1975), 119-131. M. Lupoi, 'M.I.D.A.: A Project for Comparative Legal Information Storage and Retrieval', Annuario Di Diritto Comparato E Di, 44 (1970), 38-44.

that there cannot be two opinions [1] on the justification of the comparative study of Hindu family law.[2]

IV. Our Theme: The Mitākṣarā birthright

The central theme of our study is the Mitākṣarā birthright which, according to Vijñāneśvara, conveys the idea that in the property of his father and grandfather, a son becomes owner from his birth [3] (or rather, from his conception).[4] This birthright of a son correlates with his right to demand partition and to impugn or prevent alienation by the father.

Vijñāneśvara wrote his commentary in the 12th century A.D.[5]

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1. On the general importance of comparative study, see J. Mayda, 'The Value of Studying Foreign Law', Wis.L. Rev. (1953), 635-656 at 649-50. R.H. Graveson, 'Philosophy and Function in Comparative Law', I.C.L.Q. 7 (1958), 649-658. M. Rheinstein, 'Comparative Law - Its Functions, Methods and Usages', Arkansas L.R. 22 (1968), 415-425 at 423. R. David and J.E.C. Brierly, Major Legal Systems in the World Today, (London, 1968), 8.

2. However, R. Khan and S. Kumar in their discussion on tentative topics for comparison in Indian laws gave thought to every conceivable subject matter under the sun but, surprisingly, did not find any topic in Hindu law (unless included in the 'common Civil Code'?) as appropriate for comparative study, An Introduction to the Study of Comparative Law, cit. sup., 48-53.

3. Mitā, I.i.27, for a fuller discussion, see infra, 517-518.

4. Smṛticandrikā, 258.

5. Vijñāneśvara's Mitākṣarā is to be dated A.D. 1120-1125, Kāṇe, HD, I, 70. K.V.R. Aiyangar, ed., Lakṣmīdhara, Kṛtyakalpataru, Vyavahāra-kāṇḍa, 397, n., Dāna-kāṇḍa, Introd., 31. Derrett, 'The Relative Antiquity of the Mitākṣarā, and the Dāyabhāga', MLJ 2 (1952), Jrnl., 9-14; 'A New Light on the Mitākṣarā as a Legal Authority', JIH, 30 (1952), 35-55 at 36; Dharmaśāstra and Juridical Literature, in J. Gonda, ed., A History of Indian Literature, IV, (Wiesbaden, 1973), 50, n.322.

Basically, it was a South Indian work by a South Indian jurist. By the 12th century, the Āryan conversion of the Deccan was complete, but considering the solid foundation of the pre-Āryan Dravidian culture in the South, it is highly likely that Dravidian customs would have influenced the juridical concepts in the Mitākṣarā. It is also not unlikely that, in order to sanctify the customs, a shrewd jurist like Vijñāneśvara would interpret them in terms of the śāstra.

To legal comparatists this is the 'social reality of law',[1] but social reality is only one of the aspects of jurisprudence. Hindu law is something more than a social reality. Like the Qur'ān and the Torah, the dharmaśāstras have a divine sanction behind them.[2] Thus 'custom may negate the applicatioon of a given dharmic rule as ius positivum, but it does not alter its moral authority'.[3] But one must not take the whole of Hindu jurisprudence as revelation and warrantably isolated from social action. The Āryans as their pre-migratory stage had their own legal norms, and undoubtedly, these norms influenced their settled lives in the Indian sub-continent. On the other hand, the Āryan values were bound to be tempered by the customs of the people they subjugated, and with whom they intermarried.[4]

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1. J. Hall, Comparative Law and Social Theory, op.cit., 123.

2. Gautama dh. sū,1:vedo'khilo dharmamūlam. Mīmāṃsāsūtra, I.i.2: codanālakṣano'rtho dharmaḥ.

3. B.S. Jackson, 'From Dharma to Law' (a review of R. Lingat's The Classical Law of India, tr. Derrett), Am. J. of Comp.L. 23 (1975), 490-512. Also Derrett, RLSI, ch.3 and 6.

4. On this see, J. Gonda, 'Introduction. Some Critical Remarks Apropos of Substratum Theories', in his Change and Continuity in Indian Religion, (Moulton, London/The Hague/Paris, 1965), 7-37 at 13, but also 25.

Thus, whether the concept of birthright was an Āryan or a Dravidian concept, or an amalgam of the two, (a question posited by the nature of the Mitākṣarā) can only be established if we approach the question in a comparative context.

Here we must heed the warning, as well as the encouraging note, that 'between the Indians, Teutons, Celts, etc., there are differences in climate, geography, mixture of races, conquests and other conditions and, therefore, their development was bound to proceed on divergent lines. We cannot expect identical results, and we must always take into account the special conditions of economic, geographical and political development. The significant fact is that, in spite of profound differences in results, we do observe - especially in family law, and in that of Succession and Real Property - principles and rules that are varieties of the same leading ideas'.[1]

It is worth adding here that the ecology of the Deccan to which Vijñāneśvara belonged can be likened to that of northern India rather than the Tamil country or South-East Asia. Apart from the rather scanty provision of tanks, irrigation was confined to immediate proximity of the few great rivers. Only one area (the North-West) was rich: most of the area was given over to a hard, unrewarding cultivation in which agricultural labour, and defence against brigands and marauders competed for men's time and energy. Scarcity and petty or more serious warfare dominated the lives of the people for centuries.[2]

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1. P. Vinogradoff, OHJ, I, 228-9.

2. G. Yazdani, The Early History of the Deccan, 2 vols., Part I-XI, (O.U.P., London, 1960), Part IV.

In the South-East of the Deccan there were large settlements of Tamil-speaking peoples of Dravidian race, relatively recent migrants from the plain country below the Deccan. But the principal peoples for whom Vijñāneśvara wrote were Kannaḍa, Telegu and Marathi speaking peoples in that order of importance.

V. Method and Scope of our study

Although in legal research 'the quest will be ever new and the perils ever-changing',[1] the success of any study depends on following the right method; the application of a particular method depends[2] on the purpose; and the purpose, in turn, relates partly to the further aim and partly to the nature of the subject matter to be compared.

At this point we may, perhaps, recall that we have already defined our subject matter; and our purpose is a 'scientific recoupement'[3] of the Mitākṣarā birthright. Thus, our central overriding purpose vindicates the

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1. F. Pollock, 'The History of Comparative Jurisprudence', in his Essays in the Law, (London, 1922), 29.

2. H.C. Gutteridge, Comparative Law, op.cit., 5.

3. Recoupement is the method of verifying a hypothesis by successive observations of the same phenomenon from different angles, P. Lepaulle, 'The Function of Comparative Law with a Critique of Sociological Jurisprudence', Harv.L. Rev. 35 (1922), 838-858 at 842, n.17, 853. For elaboration, see H.E. Yntema, 'Roman Law as the Basis of Comparative Law', in Law: A Century of Progress 1835 - 1935, Contributions in Celebration of the 100th Anniversary of the Founding of the School of Law of the New York University, (New York, 1937), 3 vols., II, 346-403 at 361-2.

'synoptic' [1] and 'analytical' [2] method which, to be precise, brings our study into the category of Wigmore's 'comparative nomogenetics',[3] as well as to Gutteridge's 'applied' [4] comparison.[5]

However, we should point out that a study of such a range and design

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1. On synoptic method, see supra, 10, n. 5.

2. On analytical method, see R. Pound, U. of Penn .L.Rev. 100 (1951), 1-19 at 1.

3. Wigmore devised Greek terms and distinguished between 'Comparative Nomogenetics', i.e. the study of the development of the systems of law; 'Comparative Nomoscopy', i.e. the description of other systems of law; and 'Comparative Nomothetics', i.e. the assessments of the relative merits of the rules under comparison, J.H. Wigmore, 'A New Way of Teaching Comparative Law', Journal of the Society of Public Teachers of Law, (1926), 6. However, Wigmore's classification was not adopted by comparatists, W.J. Wagner, 'Research in Comparative Law: Some Theoretical Considerations', in R.A. Newman, ed., Essays in Jurisprudence in Honor of Roscoe Pound, (New York, 1962), 511-534 at 533.

4. By 'Applied Comparative Law', as opposed to 'Descriptive Comparative Law', Gutteridge means the use of the comparative method with a definite aim in view where the investigator probes deeper into the rules and examines their operation in the context of the social environment in which the legal system operates, H.C. Gutteridge, Comparative Law, op.cit., 7 and passim; also, 'The Province of Comparative Law', in P. Sayre, ed., Interpretations of Modern Legal Philosophies: Essays in Honor of Roscoe Pound, (New York, 1947), 303-312 at 307-9.

5. For a discussion on different methods of comparative research, see H.C. Gutteridge, 'The Province of Comparative Law', in P. Sayre, ed., Interpretations of Modern Legal Philosophies: Essays in Honor of Roscoe Pound, (New York, 1947), 303-312 at 305-10. J. Hall, 'Methods of Sociological Research in Comparative Law', in Legal Thought in the United States of America Under Contemporary Pressures, Reports VIII Congress of the International Academy of Comparative Law, ed., J.N. Hazard and W.J. Wagner, (Brussels, 1970), 149-169 at 165-7.

as ours is difficult to confine within the narrow definitions of Gutteridge's 'descriptive' and 'analytical' methods or Wigmore's 'comparative nomogenetics'. Hence, Winterton rightly points out that these functional distinctions are unnecessary, and it is also 'unnecessary to take sides in this terminological war ...'[1]

In a comparative study, dogmatization is perhaps risky and, indeed, at the same time, comparison is a polysemic concept whose diverse cognitive aspects permit its use as a labelling category in manifold ways. Thus, the heuristics of legal research demand selectivity and emphases as required by the purpose and aim of our investigation. In order not to expand beyond all measure and to avoid confusion of issues, we can pursue our enquiry in the following directions:

(i) First, since the Hindus are a branch of the proto-Indo-Europeans,[2] we must enquire whether other Indo-Europeans peoples had a similar or at least, analogous concept in their family law. If the answer is in the affirmative, we may be allowed to conclude that the concept of the Mitākṣarā birthright was an Āryan phenomenon. If, on the other hand, the answer is negative or doubtful, we should look into other cultures for a possible explanation. That means we must examine the juridical norms of preliterate societies other than that of the Āryans, in order to see if this concept is part of the social structure of non-

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1. G. Winterton, 'Comparative Law Teaching', Am.J. of Comp.L. 23 (1975), 69-118 at 71. Wagner also pointed out: 'And it hardly seems that any rigid categories of comparative law are either possible to be established, or that such efforts are needed', W.J. Wagner, 'Research in Comparative Law; Some Theoretical Considerations', in R.A. Newman, ed., Essays in Jurisprudence in Honor of Roscoe Pound, op.cit., 533.

2. Supra, 5-7.

Āryan people, which might lead us to surmise that son's birthright is an autochthonous customary concept of the Deccan.

(ii) The second stage of our enquiry should be devoted to the exploration of the pre-dharmaśāstra and dharmaśāstra literature, which should reveal whether the concept of birthright was ordained by the śāstra.

(iii) Thirdly, the major commentaries and digests should be searched and revalued, which may reveal at what point of time the concept of birthright became prominent in the fabric of Hindu jurisprudence.

(iv) Fourthly, we should survey judicial opinions in Anglo-Hindu law and Modern Hindu law, and should critically examine and evaluate the juridical interpretation of the concept.

(v) Finally, our study also being anticipatory, we should examine the relevance of the Mitākṣarā birthright in the context of social, economic and legislative developments in modern India; and especially, in the context of a Code of Family Law or 'Uniform Civil Code', we should suggest viable and accommodating adaptations and/or transformations of the concept.

CHAPTER 2

ROMAN LAW

1. The Historical Setting

When we turn to the legal system of the Indo-European peoples, we naturally look to the Roman system in view of its jurisprudential development and intellectual legacy.[1] Archaeologists generally agree that the Indo-Europeans settled on hills adjoining the river Tiber in Central Italy during the second millenium B.C., and superimposed themselves on a pre-Indo-European population.[2] Either in the 7th or 6th century B.C. the Tiber region fell under the domination of the Etruscans,[3] a civilised nation of non-Āryan origin. So in the early period, there was an ebb and flow of Āryan and non-Āryan customs in the region around Rome.[4]

We do not know much of the pre-historic Roman legal system and, apart from certain conjectures,[5] for trustworthy basic materials we can only look

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1. H.E. Yntema, 'Roman Law as the Basis of Comparative Law', in Law: A Century of Progress, 1835 - 1935, Contributions in Celebration of the 100th Anniversary of the Founding of the School of Law of New York University, (New York, 1937), 3 vols. II, 346-403 at 346.

2. H.J. Wolff, Roman Law: An Historical Introduction, (University of Oklahoma Press, Norman, 1951), 7. Vinogradoff, OHJ, I, 216.

3. M. Rostovtzeff, Rome, tr. J.D. Duff, (O.U.P., London, 1960, rpt. 1970), 9.

4. This does not conclusively prove that the Roman legal institutions were influenced by the Etruscans, H.F. Jolowicz, Historical Introduction to the Study of Roman Law, (Cambridge, 1952), 112. H.J. Wolff, loc.cit., 49.

5. Derrett, TLL, 1953, 52.

back as far as the Twelve Tables. However, 'while it is true that the enactment of the Twelve Tables marks the concrete existence of Roman law, it is also clear that, since the city reputedly existed from 753 B.C., there must have been law before this legislation'.[1] During the pre-classical epoch Rome was undoubtedly a monarchy, and excepting 'legendary reports of legal legislation, the law of the period was certainly customary'.[2] And for our present purpose, the customary law of this epoch is particularly important, because this was the period most likely to retain some of the customs of the 'mother nation' (proto-Indo-European) which migrated to Rome.[3]

II. Reconstruction of the pre-Classical Roman Familial Institutions

From time to time, scholars have attempted to collect juridical data and reconstruct the legal institutions of this period but, despite the availability of some valuable materials, 'only extremely vague conjectures can be put forward'.[4]

The conjecture that in pre-Classical Roman law a son could possibly have co-ownership in family property with his father, has sprung from both non-

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1. J.A.C. Thomas, 'Roman Law', in Derrett, ed., An Introduction to Legal Systems, (London, 1968), 1-27 at 3.

2. Thomas, ibid., 3. W. Seagle, The History of Law, (New York, 1946), 160.

3. We are told that in the 'mother nation', the development of legal institutions was low, R. von Ihering, Vorgeschichte der Indo-Europaer, tr. A. Drucker, sub. tit. The Evolution of the Aryan, (London, 1897), 25.

4. C.W. Westrup, Introduction to Early Roman Law, Comparative Sociological Studies, The Patriarchal Joint Families, III, Patria Potestas, (Copenhagen/London, 1939), 238.

legal and legal materials, and the hypothesis has been strengthened by evidences which throw light mainly on three institutions, namely (i) evidences of joint family life; [1] (ii) the nature of compulsory heirship (heres necessarius) of children (suus heres) [2] and (iii) the special rules on disinherison of a son by testamentary disposition.[3]

a. Non-legal materials

Among the non-legal materials, Plutarch's [4] Lives of the Greeks and Romans is informative on the existence of joint family among the Romans in Republican times. From Plutarch we get a pen-picture of a joint household consisting of a father and his adult married sons in the Life of Marcus Crassus, which comes very close to its Hindu counterpart. Plutarch records the virtue of joint living:

> Marcus Crassus was the son of a man who had been censor and had enjoyed a triumph; but he was reared in a small house with two brothers. His brothers were married while their parents were still alive, and all shared the same table ... which seems to have been the chief reason why Crassus was temperate and moderate in his manner of life. 5

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1. Maine, Dissertations on Early Law and Custom, (London, 1883), 239.

2. W.W. Buckland, Elementary Principles of Roman Private Law, (Cambridge, 1912), 185. G. Diosdi. Ownership in Ancient and Preclassical Roman Law, (Budapest, 1970). 44. Of course, this is to be understood that, if they were instituted in the will.

3. J. Muirhead, Historical Introduction to the Private Law of Rome, (Edinburgh, 1886), 46.

4. A.D. 46-120 (?), Everyman's Classical Dictionary, (London, 1965), 413.

5. Life of Marcus Crassus, Plutarch's Lives, tr. B. Perrin, Loeb edn. III, 315. Amherst translates: 'they kept but one table amongst them all', Plutarch's Lives (London, 1700), III, 242. Cp. Aristotle defines primitive family: 'the same institution of common meal', Politics, II.6, The Politics of Aristotle, tr. J.E.C. Welldon, (London, 1901), 56. Cp. Jewish law, Mishnah 'Eruvin VI.7; 72, B. Cohen, Jewish and Roman Law: A Comparative Study, 2 vols.,

/Cont'd. on next page:

In the same vein, Plutarch describes joint living in the house of Aelius:

> For there were sixteen members of the family, all Aelii; and they had a very little house, and one little farm sufficed for all, where they maintained one home together with many wives and children. 1

Again, from Plutarch one can add a record of joint living among Roman brothers. This is revealed in the life of Cato, the younger (c. 95 - 46 B.C.) who maintained a joint household with Caepio, his brother:

> Indeed, when he was twenty years old, without Caepio, he would not take supper, or make a journey, or go out into the forum.[2]

Plutarch indicates that the two brothers were living jointly up to the time of Caepio's death, and Cato gave him an expensive and honourable burial.[3] Plutarch goes on:

Note 5 - p.22 - continued:

(New York, 1966) I, 222-3. Bṛhaspati also explains jointness as: ekapākena vasatām, Bṛ. 25.6; SBE, 33, 370-1; Aiyangar, ed., 26.5, p.196.

1. The Life of Aemilius Paulus, Plutarch's Lives, tr. B. Perrin, Loeb edn., (London, 1918), VI, 367.

2. The Life of Cato, Marcus Portius, Plutarch's Lives, Loeb edn., VIII, 245.

3. ibid., 259.

> Furthermore, when the inheritance fell to him and Caepio's young daughter, nothing that he had expended for the funeral was asked back by him in the distribution of the property.[1]

b. Juridical value of Plutarch's evidences

For our purpose, Plutarch's records do not seem to prove anything except that what he describes as the Republican norm could be the vestiges of a social ethos in an earlier epoch of ancient Rome.

However, we should not lose sight of the point that, even in a joint family, a father's authority could be absolute and patria potestas could be fully operative. On the other hand, as the Hindu Mitākṣarā experience indicates, the institution could be consonant with the existence of common property and joint ownership in the family. If poetic utterance is any evidence of legal norm, then the second possibility is supported by Horace when he contrasts the extravagance of individual wealth in his own time with what he discerns to have been the ancient Roman ideal; 'their private property was small: what was in common that was large'.[2]

Horace's pointer coalesces with the juridical view that the pater familias in pre-classical Roman law was in fact, though not in form, no more

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1. ibid., 259-261. To these could be added the tale 'how Q. Fulvius Flaccus, the censor of 174, removed his own frater germanus et consors from the roll of the senate', J.A. Crook, 'Patria Potestas', Classical Quarterly, 17 (1967) 1: 113-122 at 117. Appous Claudius Pulcher, Claudius' brother was also left by the death of his father in 76 with two brothers and two sisters to look after, Crook, ibid, 117.

2. Privatus illis census erat brevis, commune magnum, Horace, Carm. ii,15, quoted by C. Gore, Property Its Duties and Rights, (New York, 1922), introd., xxiii.

than a manager of the family estate.[1] The family had the right to use but could not alienate the property.[2]

This conjecture, as Westrup warns,[3] should be taken with caution; and great care, therefore, is required in deducing from non-legal passages the existence of a provision in ancient Roman law of which there is seemingly no abundantly conclusive sign in the legal sources.

Recently, John Crook has rejected[4] these 'well attested historical cases'[5] as conclusive evidences of 'survival of a universal institution of remote antiquity',[6] namely the joint family of the Indo-Europeans in pre-classical Rome. On the historical materials of joint living, as referred to above, Crook suggests that in three out of four cases there was an emphasis on poverty and 'there was

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1. C.W. Westrup, Introduction to Early Roman Law, Comparative Sociological Studies, The Patriarchal Joint Family, II, Joint Family and Family Property, (Copenhagen/London, 1934), 27-29. A.S. Diamond, Primitive Law, (London, 1935), 251. Jolowicz, HISRL, 2nd ed., 123. R. Pound, Jurisprudence, (St. Paul, Minn. West Publishing Co., 1959), III, ch.14, 144. In this respect, Paton assumes that 'within the group, save for articles of personal use, there was little need to distinguish between meum and tuum - both persons and chattels were considered as belonging in the group rather than to particular individuals'. G.W. Paton, A Text Book of Jurisprudence, (Oxford, 1951), 422.

2. Noyes says: 'there was little notion of alienation. The idea was of a politico-economic organisation, not of a proprietary fund', C.R. Noyes, The Institution of Property, (New York, 1936), 127-9.

3. Westrup, III, 289.

4. J.A. Crook, "Patria Potestas', Classical Quarterly, 17 (1967) 1: 113-122 at 117-8.

5. ibid., 117.

6. ibid., 118.

just not enough property in the family for the members to risk splitting up until they had acquired more by some means'.[1] In economic terms, Crooks' statement sounds convincing, but when we consider the crux of Crooks' contention that poverty was the reason for joint living, it falls short of social realities.[2]

Poverty might exist, nevertheless some of the families were high in social status. For instance, in the family of Aelii the daughter of Aemilius was married. Aemilius 'had twice been consul and twice had celebrated a triumph',[3] and his daughter 'was not ashamed of her husband's poverty, but admired the virtue that kept him poor'.[4] Crook does not prove by evidence that nucleated family life was the norm among the richer classes. On the contrary, Plutarch shows that Cato and Caepio, who were living jointly, were people of considerable means;[5] a fact which Crook left unexplained. Thus, there is no convincing reason to believe that only the poor resort to joint living; and the Chinese evidences, which Crook freely uses in his article, do not support his contention either.[6] Moreover, the 'haves' are a tiny minority anywhere, as in Rome, and , accepting Crook's argument that the 'have-nots' show a tendency towards joint living in Rome of the relevant period, indeed, it is they, being the majority, and not the 'haves' who set up the general social

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1. ibid., 117.
2. See our discussion in context of Chinese law, infra, 283-285.
3. The Life of Aemilius Paulus, Plutarch's Lives, Loeb edn., VI, 367.
4. ibid., 367.
5. The Life of Cato, Plutarch's Lives, Loeb edn., VIII, 259.
6. See our discussion on Chinese law, infra, 283-285.

norm of the time.[1]

c. Plutarch vis-a-vis the legal sources

When we turn to the legal sources, the reference to joint living of brothers in Plutarch [2] is corroborated by the existence of a consortium of brothers recorded in the Digest.[3] The discovery [4] of the new papyrus fragment of Gaius in 1933 strengthens the argument that it was not uncommon in Rome for brothers to remain in co-ownership of the family property after the death of their father.[5]

The text of Gaius [6] runs as follows:

> But there is another kind of partnership peculiar to Roman citizens. For at one time, when a paterfamilias died, there was between his sui heredes a certain partnership at once of positive and natural law, which was called ercto non cito, meaning undivided ownership: ...[7]

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1. This has been pointed out by David Daube in context of testamentary disposition in Roman law, Roman Law: Linguistic Social and Philosophical Aspects, (Edinburgh University Press, 1969), 72.

2. Plutarch's Lives, Loeb edn., VIII, 245.

3. Digest, 10.2.39.3; 17.2.52.6-8; 26.7.47.6; 27.1.31.4; 29.2.78; 31.89.1.

4. On this, see C.W. Westrup, Family Property and Patria Potestas, (Copenhagen/ London, 1936), 46, n.2.

5. Westrup, ibid., 47.

6. Est autem aliud genus societatis proprium ciuium Romanorum. olim enim, mortuo patre familias, inter suos heredes quaedam erat legitima simul et naturalis societas, quae apellabatur ercto non cito, id est dominio non diuiso. Gai. III. 154a, F. de Zulueta, The Institutes of Gaius,(Oxford, 1946), I, 202.

7. tr. Zulueta, ibid., 203.

The members of an ercto non cite had, as in the Germanic 'joint hands' (Gemeinschaften zur gesammten Hand),[1] no divided independent shares in the consortium as a whole, or in the common rights, though subject to the same right on the part of the others. Gaius says that each member had the power to dispose of the whole property without the consent of others.[2] Thus, it appears to be a partnership of independent equals in its widest sense. But the lack of ius prohibendi to control the act of individual members is the Achilles' heel of the institution and arouses doubts about its existence.[3] Indeed, from a theoretical point of view, the scholars are likely to be baffled[4] by the lack of ius prohibendi, but if we correlate law with life ' the right of alienation was not likely to lead to abuses because the members lived in a community and could easily control each other's acts'.[5] Moreover, alienation was an overt transaction and mancipatio required the participation of eight men so it was impossible to be performed in secrecy.[6]

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1. C.W. Westrup, Family Property and Patria Potestas, op.cit., 45. M. Kaser, Romisches privatrecht, tr. R. Dannenbring, sub. tit., Roman Private Law, (London, 1968), 310. These 'Communities of Common (joint or collective) Hand' were voluntary associations and should be distinguished from larger (sib) family of the Germanic peoples, see S.J. Stoljar, 'Children, Parents and Guardians', International Encyclopedia of Comparative Law,; IV, 7, 20-1.

2. Gai. 154b., Kaser, ibid., 310. H.F. Jolowicz and B. Nicholas, Historical Introduction to the Study of Roman Law, 3rd ed., (Cambridge, 1972), 126. G. Diosdi, Ownership in Ancient and Preclassical Roman Law, op.cit.,45. But in the Germanic Gemeinschaften zur gesammten Hand alienation had to be made by all.

3. J.A. Crook, 'Patria Potestas', op.cit., 116. Also see Diosdi, ibid., 45.

4. Diosdi, ibid., 45.

5. ibid., 45.

6. ibid., 45.

In a strict comparative context, the consortium [1] of brothers does not prove anything in respect of our study of the son's birthright, but in the community of property (quaedam societas) between the sui heredes, which Gaius called ercto non cito, one can see much more than mere partnership of brothers. In this respect, Diosdi observed:

> The ercto non cito was no mere co-ownership but was also a family community. On the death of the father, his sons become sui iuris, and being themselves patresfamilias, they were entitled to deal freely with the property in the same way that their father had been. A co-ownership divided by individual shares is an individualistic and highly developed solution, but at that time it was still unknown. 2

In other words, when seen in the light of a son's ipso jure inheritance, to his father's property, ercto non cito may be considered as a continuation of the same 'family community' which existed between the father and the son before the death of the paterfamilias.[3]

d. Compulsory heirship (heredes necessarii)

The foregoing interpretation of the institution of ercto non cito as a family community leads us to examine the nature of acquisition of inheritance by sui heredes.

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1. Crook thinks that the consortium may be a product of the Servian reform and may not be an ancient institution as claimed by Gaius, J.A. Crook, CQ 17 (1967) 1: 117. But David Daube opined that the antiquity of consortium was undisputed, 'Societas as Consensual Contract', Cambridge Law Journal, 6 (1938) 3: 381-403 at 382.

2. Diosdi, op.cit., 45. At that rate, a tenancy in common would be excluded.

3. Westrup,III , 288.

Gaius says: [1]

> They are called sui heredes because they are household heirs and even in their father's life-time are considered in a manner owners. 2

Paul [3] also states on sui that 'even in the pater's lifetime, they are regarded as owners in some fashion ... and so, on his death, they do not appear to take an inheritance but rather do they acquire free administration of the estate'.[4]

Gaius and Paulus both assert that sui heredes acquire the inheritance ipso jure because they are regarded as 'a kind of owners ' during the lifetime of their father'.[5] It is also asserted that the succession of the sui heredes was not regarded as the 'taking' [6] of an inheritance, because they did not acquire alien property; rather it was that their latent ownership oin the family property became an actual one on the death of their father. [7]

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1. Gai. II. 157: Sed sui quidem heredes ideo appellantur, quia domestici heredes sunt, et uiuo quoque parente quodammodo domini existimantur., F. de Zulueta, The Institutes of Gaius, op.cit., 110.

2. tr. Zulueta, ibid., 111.

3. D.28. 2.11: '... etiam vivo patre quodammodo domini existimantur ... itaque post mortem patris non hereditatem percipere videntur sed magis liberam bonorum administrationem consequuntur', J.A.C. Thomas, The Institutes of Justinian: Text, Translation and Commentary, (Cape Town, 1975), 122.

4. Thomas, ibid., 122.

5. Gai. II. 157. D.28.2.11.

6. Diosdi, op.cit., 44.

7. W. Markby, Elements of Law, (Oxford, 1885), 391. W.W. Buckland , Elementary Principles of the Roman Private Law, (Cambridge, 1912), 185. Jolowicz, HISRL, 3rd ed., 124-5.

It is perhaps not without significance that in developed Roman law, the sui heredes are still termed as necessarii, because unlike other heirs entitled to inherit, i.e. agnatus proximus and gentiles, they acquire the estate (familia) independently of their own volition.[1] In the Institutes of Justinian the incidents of heres necessarii and suus heres are explained thus:[2]

> Heirs are said to be obligatory (necessarii), direct and obligatory (sui et necessarii) or outsiders (extranei). 1. An obligatory heir is a slave who is instituted heir and he is so called because, whether he like it or not, he forthwith becomes free and obliged to be heir on the testator's death. ... 2. Direct and obligatory heirs are e.g. sons, daughters, grandchildren, etc., of either sex by a son who are in the power of the deceased. ... 3. Other persons, who are not subject to the power of the testator, are called outside heirs. 3

Thus, sui heredes could not refuse succession and they did not need to take possession of the estate by any special act,[4] because they were domestici in contrast to extranei. The position of sui heredes in respect of inheritance

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1. sive velint, sive nolint, Gai. II, 157.

2. Inst.II. XIX.1-3. Heredes autem aut necessarii dicuntur aut sui et necessarii aut extranei. 1. Necessarius heres est servus heres institutus: ideo sic appellatur, quia, sive velit sive nolit, omnimodo post mortem testatoris protinus liber et necessarius heres fit. ... 2. Suit autem et necessarii heredes sunt veluti filius, filia, nepos neptisque ex filio et deinceps ceteri liberi, qui modo in potestate morientis fuerint. ... 3. Ceteri, qui testatoris iuri subiecti non sunt, extranei heredes appellantur.

3. tr. J.A.C. Thomas, The Institutes of Justinian, op.cit., 138.

4. aditio and cretio, see Thomas, op.cit., 139.

explains the nature of the son's right in pre-classical Rome. Pound states the situation in concrete expression:

> The word used for inheritance in Roman law, namely, succession, expresses the original idea much better. Originally one did not inherit, he succeeded. He did not acquire the rights in which he already had a share, but which had previously been administered for his benefit. 1

However, it is conceded that in ancient Roman law, a son's co-ownership with his father was only potentially present. It was not unambiguously present as the Mitākṣarā janmasvatva (birthright),[2] and that is why the co-ownership of Roman sons is expressed by Paulus as quasi-ownership (quodamodo dominium). The position of quasi-ownership of sons as opposed to full ownership is also substantiated by the fact that although ancient Roman law envisaged sanction against dissipation of family property by a paterfamilias,[3] there is nothing in the texts which suggests that sui heredes had any control over the management of family property by their father.[4] Nevertheless, the quasi-ownership of a Roman sui heredes and the birthright of his Mitākṣarā counterpart are manifestations of the idea of agnatic group ownership of family property.

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1. R. Pound, Jurisprudence, III, 14, 143-4.

2. Infra, 517-518.

3. Westrup, Family Property and Patria Potestas, op.cit., 69.

4. But the latent ownership of the housesons indirectly curtailed the ownership of the paterfamilias, Westrup, ibid., 72. S.J. Stoljar, 'Children, Parents and Guardians', in M. Rheinstein, ed., Persons and Family, International Encyclopaedia of Comparative Law, IV, 17.

III. Disherision (exheredatio) and will

In continuation of our foregoing discussion, we can say that the only prohibition on a father's action that may be mentioned is the restriction on disherison of sons by the father.

Romans are acclaimed as the inventors [1] of the will, but 'in Rome, as everywhere else, wills developed only gradually and in stages ...' [2] However, despite the development of the will, it was indeed an arduous process in Roman law to evolve a proper instrument to disinherit a son. Before we take up the point of disherison as such, let us take a quick view of the evolution of the will in Roman jurisprudence.

a. Acts of Testament

Originally, as we learn from Gaius, [3] testaments were made in public: (i) testamentum calatis comitiis and (ii) testamentum in procinctu.

(i) testamentum calatis comitiis

The testators came before the comitia, which sat twice a year for the despatch of private business, to declare their testaments.[4] But this type of testament did not imply a freedom of testation; it was open only to childless

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1. Maine, Ancient Law, (London, 1905), 172. Jolowicz, HISRL, 3rd ed., 126-7. The popularity of testamentary disposition in ancient Rome is denied by David Daube, Roman Law, op.cit., 71-2.

2. M. Kaser, tr. Dannenbring, op.cit., 289. Also Thomas, op.cit., 122.

3. Gai. II. 101-104. Inst. Justn. II.X.

4. T.C. Sandars, The Institutes of Justinian, (London, 1956), 164. Nicholas warns us to use Sandars' views with caution because his notes are often out-of-date and unrealiable, B. Nicholas, An Introduction to Roman Law, (Oxford, 1975), 272.

persons, [1] which is very significant. Its purpose was not to replace an intestate heir by a testamentary heir, but rather to create an heir on intestacy by a process in the family law.[2]

(ii) testamentum in procinctu

Members of the armed forces, while setting out to battle, could make a testament.[3] This practice was restricted to the army and did not apply to the general population.

(iii) testamentum per aes et libram

A mancipatory will was of later development. The testator used to sell by mancipatio his whole fortune at a nominal price to a friend (familae emptor) with instructions as to its disposal after his death.[4] Testamentum per aes et libram gradually replaced the earlier forms and became the sole form of testamentary transaction.[5] However, we should not overlook the point that it was a legal dodge [6] to will away one's property by a fictitious sale. A will generally means

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1. Crook, op.cit., 118. Diosdi, op.cit., 48.

2. M. Kaser, op.cit., 290. Jolowicz agrees with Kaser on this point, but he is not sure whether this sort of will was, in effect, an adrogation, Jolowicz, op.cit., 131. Pound suggests that Hindu adoption and Roman testament served the same purpose, Jurisprudence, III, 14, 148-9.

3. Gai. II. 101. Inst. Justn., II. X. Schulz, Classical Roman Law, (Oxford, 1951), 240-1.

4. Jolowicz, op.cit., 127. Kaser, op.cit., 290.

5. Kaser, op.cit., 290.

6. Crook, op.cit., 118. Cp. sale adoption at Nuzi, infra, 191-4 . For comparable devices in Jewish law, infra, 218-9 . Also see the development of testament in Hindu law, infra, 713-43.

an interference with the legal rights of natural heirs. If, in early Roman law, this interference by means of testamentary disposition was freely allowed, there would have been no need of a fictitious sale, inter vivos.

.b. Texts on the concept of 'Will' in the Twelve Tables

There are two texts in the Twelve Tables which are generally believed to contain the substantive authority for testamentary disposition.

1. One of these texts runs like this: [1] 'as a man shall have made legacy concerning money and guardianship of his own, so shall it be law'. [2]

There are varying versions of this text, [3] and David Daube opines that despite this provision, the act of making a will was anything but ordinary. [4] Max Kaser considers the text refers to the mancipatory will [5] which form, he thinks was known [6] during the time of the Twelve Tables. Kaser adds:

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1. uti legassit super pecunia suae rei ius esto, Tab. V.3.

2. Crook, 'Patria Potestas', op.cit., 118. Also, A. Kocourek and J.H. Wigmore, Evolution of Law, (Boston, 1915), I, 466.

3. Jolowicz, HISRL, (Cambridge, 1932), 141, n.4.

4. Roman Law, op.cit., 72.

5. Kaser, op.cit., 290.

6. Doubted by Jolowicz, HISRL, 3rd ed., 127-8; but Kaser is supported by Diosdi, op.cit., 47.

> However, it is likely that this form of will at first, by the side of intestate succession, contained merely particular dispositions (legacies, manumissions) and only gradually came to be extended to form a disposal of the whole property (familia), originally this extension was perhaps made in the case of the absence of sui [1], and later for the express purpose of choosing the ablest among sui as the sole heir and to benefit him with the undivided property.[2]

Diosdi is unhappy [3] about Kaser- confining the purport of the text to a situation where the paterfamilias had no sui. Diosdi remarks that 'it can be seen that the paterfamilias could bestow legacies without any limitation' and 'the clear and unambiguous wording of the statute excludes the possibility of legal limitations',[4] but according to Crook 'the Romans are unlikely to have advanced so far in individualism by that date' [5] and the positive tone of the text on the hypothesis of full free testation in earlier epochs makes it all the more superfluous.[6]

2. The other text [7] which seemingly deals with intestate succession runs as follows: 'if a man dies intestate without having a suus heres,

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1. Pound, Jurisprudence, III, 14, 148.
2. Kaser, op.cit., 290-1.
3. Diosdi, op.cit., 47.
4. ibid., 46-7.
5. Crook, op.cit., 118.
6. ibid., 118.
7. si intestato moritur cui suus heres nec escit, adgnatus proximus familiam habeto, Tab. V.4.

the nearest agnate is to take'.[1]

This text also is capable of several translations with diverse interpretations.[2] On this, Jolowicz remarks:

> at first sight it would seem that the provision of the XII Tables, si intestato ... implies that a man who had sui heredes might nevertheless appoint other heirs ... but it can equally well envisage merely the case of a man who, having no sui heredes, is in a position to make a will and fails to do so. 3

Lévy-Bruhl,[4] following Bonfante, opines that the text si intestato ... means 'if a man dies intestate and therefore no suus becomes his heir' ...' He He holds the view that the text has nothing to do with property or testament. Lévy-Bruhl suggests that testation, not intesacy, was the primitive Roman custom. However, the purpose of such testation was not to devise any property but to choose a heres among the adult sons to be the sacral and gubernatorial head of the joint family.[5] In the sphere of property, there could be no question of testation because property devolved automatically in the joint family,[6] and continued as

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1. Jolowicz, HISRL, 3rd ed., 131. Also, Kocourek and Wigmore, The Evolution of Law, op.cit., I, 466.
2. Jolowicz, ibid., 131. Crook, op.cit., 118.
3. Jolowicz, ibid., 131, n.4.
4. H. Lévy-Bruhl, Nouvelles études sur le trés ancien droit romain, (Paris, 1947), 33ff., cited by Jolowicz, 3rd ed., 131, n.8. Lévy-Bruhl was explained to me by Dr. H. Kanitkar, Department of Anthropology, S.O.A.S.
5. Jolowicz, ibid., 132. Diosdi, op.cit., 47, n.23. Crook, op.cit., 118.
6. Crook, ibid., 116.

before the death of the propositus. Lévy-Bruhl assumes that the text suggests that if no appointment is made for the sacral purpose, even then the son would acquire the property as the nearest agnate.[1]

Both Bonfante[2] and Lévy-Bruhl interpreted this text in the context of the Roman joint family, and thought that the concept of will in Rome was immemorial as an instrument for appointing one of the sui as the head of the family. This view is obviously unacceptable to Crook because he is out to explode the communis opinio that an agnatic Indo-European family lies behind the classical Roman family.[3] Diosdi also joins issue with Lévy-Bruhl[4] on the ground that his assumptions are far-fetched and wander away from the plain meaning of the text. Others thought that the text implied an institution analogous to primogeniture, of which there does not seem to have been any trace in classical Rome.[5] Max Kaser conjectures a situation[6] similar to that envisaged by Lévy-Bruhl. Although 'without more evidence, the riddle must remain unsolved',[7] 'it is, indeed, not inconceivable that testation originated in the desire of the patres to be able to select, among other sui, the one to succeed them in the care of the family sacra'.[8]

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1. Jolowicz, ibid., 132.
2. P. Bonfante, Corso di Diritto Romano, (Milan, 1963), Ch.6; also Scritti Giuridici Varii, 3 vols. (Turin, 1926), I, 115-6. Bonfante's views were explained to me by Derrett.
3. Crook, op.cit., 114, 118.
4. Diosdi, op.cit., 47, n.23.
5. Jolowicz, op.cit., 125.
6. Kaser, op.cit., 291.
7. Jolowicz, op.cit., 132.
8. Thomas, op.cit., 122. The same view of Pound, Jurisprudence, III, 14, 148-9.

c. Disherison of sons

This chequered origin of the concept of will in Rome points out the secured right of natural heirs to inherit, but the unique position of the son is highlighted only when we view the matter in the context of disherison of heirs.

In the Roman law of intestate succession, there was no preference for males over females. Daughters inherited equally with their brothers in the class of sui heredes.[1] But in testate succession, when a father wanted to disinherit a son who was in his power, he had to be disinherited individually and by name (nominatione exheredare).[2] If this procedure was not followed, the entire will was void.[3] Other sui, such as daughters or grandchildren, could be disinherited together without being specifically mentioned.[4] This require-

1. Jolowicz, HISRL, 3rd ed., 125-6.

2. Kaser, op.cit., 300. Thomas, op.cit., 122.

3. Kaser, ibid., 300. This rule was extended to posthumous suus, son or not, Thomas op.cit., 123. The Sabinians held that even if the child en ventre sa mere at the time of the testator's death were subsequently born and died without uttering a cry, the will would still be invalidated, P. Stein, 'The Schools of Jurists in the Early Roman Principate', Cambridge Law Journal, 31 (1972) 1: 8-31 at 24.

4. Kaser, ibid., 300. There were various provisions to protect the natural heirs: (i) lex Furia; (ii) lex Voconia; (iii) lex Falcidia. The first two were ineffectual because the number of legacies a testator could make was not restricted. But by the last one, a testator was restrained from bequeathing more than three-fourths of the inheritance, Gai.II. 227; T.C. Sandars, The Institutes of Justinian, op. cit., introd. liv, 549-50. When children were completely disinherited they had remedies like: (i) querela inofficiosi testamenti or (ii) de inofficiosi testamento, Sandars, ibid., 209-10. W.W. Buckland, Elementary Principles of the Roman Private Law, (Cambridge, 1912), 139. Kaser, op.cit., 299.

ment of express disherison, though it does not directly envisage birthright of Roman sons in the Mitākṣarā sense, yet a fortiori it substantiates the purport of the text of Gaius [1] that even in their father's lifetime suus heres are considered in a manner, owners. Thomas presents the most plausible insight on this point by saying that 'testation inevitably gave a pater, in due course, the power to dispose of his estate as he chose; but the old concept survived to the extent that sui, if not instituted as heirs, must be expressly disinherited'. [2]

IV. Indo-European family and Roman family

a. The general pattern of Indo-European family

The general hypothesis is that among all Indo-European peoples, the fundamental social unit in pre-historic times was the patriarchal joint family. [3] This family pattern was characterised by co-residence of several generations, together exploiting a single homestead. In the gubernatorial sphere, the head of the family is sovereign, but in affairs of property he was not so much the owner as the administrator. At the death of the head, the joint family can continue uninterrupted, but in a partition all the sons have a right to equal shares. Apart from functioning as a social unit, the joint family is an ascribed social grouping underpinned by the cult of the ancestors.

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1. Gai. II. 157; supra,

2. Thomas, op.cit., 122.

3. Maine, Lectures on the Early History of Institutions, (London, 1889), 133. J. Kennedy, 'The Aryan Invasion of Northern India: an Essay in Ethnology and History', JRAS (1919), 5-29; (1920), 31-48 at 47.

b. Contribution of Henry Maine

The most outstanding proponent of this pattern of the Indo-European family was Sir Henry Sumner Maine, who opined that society in general, and Aryan society in particular,[1] originated as patriarchy. He based his theory on his observations of Aryan India and Europe, and concluded that the structure of the Indo-European family was patriarchal.[2]

The nineteenth century was influenced by Darwin's theory of evolution,[3] and social evolution was a major topic of anthropological speculation.

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1. Maine, ibid., 133. C.K. Allen in Maine's Ancient Law, (O.U.P., 1930), introd., xxii. H.H. Meinhard, 'The Patrilineal Principle in Early Teutonic Kinship', in J.H.M. Beattie and R.G. Lienhardt, ed., Studies in Social Anthropology: Essays in Memory of E.E. Evans-Pritchard by his Former Colleagues, (Oxford, 1975), 1-29 at 4.

2. Unquestionably accepted by Vinogradoff, OHJ, I, 224. Also A.B. Keith, 'The Home of the Indo-Europeans', Oriental Studies in Honour of Cursetji Erachji Parvy, (London, 1933), 189-199 at 190. Endorsed by recent scholarship, P. Friedrich, 'Proto-Indo-European Kinship', Ethnology, 5 (1966) 1: 1-36 at 29.

3. C.R. Darwin, On the Origin of Species by Means of Natural Selection, on the Preservation of Favoured Races in Struggle for Life, (London, 1859). For an extensive recent discussion on the development and interrelationships of biological and socio-cultural theories of evolution, see M. Harris, The Rise of Anthropological Theory: A History of Theories of Culture, (New York, 1969), Ch.6 and 7, on Maine 189-92. Darwin's theory of evolution has been challenged by Immanuel Velikovsky, an interesting, though less known, author, in his works, Worlds in Collision, (Victor Gollancz, London, 1950); Earth in Upheaval, (London, 1956); Ages in Chaos, (Sidgwick and Jackson, London, 1953). Velikovsky's thesis runs counter to Darwin's evolutionary theory. He advocates the catastrophic theories which coalesce with the Hindu ideas of sṛṣṭi and pralaya. On Velikovsky, see A. De Grazia, The Velikovsky Affair, (London, 1966). Also, F. Warshofsky, 'When the Sky Rained Fire: The Velikovsky Phenomenon', Reader's Digest, January, (1976), 144-157 at 144, 156.

Maine expressed this evolutionary process [1] in terms of jurisprudence, [2] and came out with his other postulation that individualism is a product of social evolution. He believed that the evolutionary shift in society was from status to contract; which means that in primitive societies an individual's social position was determined almost exclusively by the kinship status into which he was born. Afterwards, as society progressed, a man's relations to others were determined primarily by the restricted voluntary agreement into which he entered.[3]

c. Re-appraisal of Maine's views

Neither the Mainesque hypothesis of patriarchal origin of society nor the Mainian shift [4] from status to contract had universal acceptance. Maine

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1. R. Nisbet, 'Kinship and Political Power in First Century Rome', in D. Black and M. Mileski, ed., The Social Organization of Law, op.cit., 262-277 at 263.

2. L. Nader, 'The Anthropological Study of Law', American Anthropologist, 67 (1965), 6 pt.2: 3-32 at 9. Edwin Patterson opines that Maine derives his theory, 'partly from Hegel and partly from Darwin ...', E.W. Patterson, 'Historical and Evolutionary Theories of Law', in Essays on Jurisprudence from the Columbia Law Review, (Columbia University Press, New York/London, 1963), 281-309 at 290.

3. On Maine's theory, see R. Redfield, 'Maine's Ancient Law in the Light of Primitive Societies', Western Political Quarterly, 3 (1950), 574-589. J.L. Peacock and A. Thomas Kirsch, The Human Direction, (New York, 1970), 41.

4. See E.A. Hoebel, The Law of Primitive Man, (Cambridge, Mass., 1967), 327.

was assailed [1] by Johann J. Bachofen [2] (1815-1887), Lewis Henry Morgan [3] (1818-1881), and John McLennan [4] (1827-1881). Morgan and McLennan shared the view of Bachofen that in the evolution of society 'Matriarchy is followed by patriarchy and preceded by unregulated hetaerism'.[5] That means patriarchy was not the pristine state of society; it was preceded by gynaecocracy, a society ruled by women.

In the same vein, Malinowski also thought that Maine 'was handicapped by his narrow adhesion to the patriarchal scheme' [6] and Sawer found

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1. See G.E. Howard, 'The Patriarchal Theory', in A. Kocourek and J.H.Wigmore, ed., Evolution of Law, (Boston, 1915), II, 196-214 at 204. W.A. Robson, 'Sir Henry Maine To-day', in W.I. Jennings ed., Modern Theories of Law, (London, 1933), 170.

2. J.J. Bachofen, a German-Swiss legal scholar whose lecture series in Stuttgart was published as Das Mutterecht: Eine Untersuchung uber die Gynaikrokratie der alten welt nach iher religiosen und rechtlichen Natur, (Stuttgart, 1861, rpt. Basel, 1897); Mother Right: An Investigation of the Religions and Juridical Character of Matriarchy in the Ancient World.

3. L.H. Morgan, Ancient Society or Researches in the Line of Human Progress from Savagery, through Barbarism and Civilization, (Cambridge, Mass., 1965); Systems of Consanguinity and Affinity of the Human Family, (Columbia, 1871).

4. J.F. McLennan, Primitive Marriage: An Inquiry into the Origin of the Form of Capture in Marriage Ceremonies, (Edinburgh, 1865).

5. Bachofen's 'Introduction' to Mother Right in R. Marx, ed., Mutterrecht und Urreligion, (Stuttgart, 1926), tr. R. Manheim, sub. tit. Myth, Religion and Mother Right, (London, 1967), 69-120 at 93. For summarisation of the views of Morgan and McLennan, see J.L. Peacock and A. Thomas Kirsch, The Human Direction, op.cit., 42. Morgan's scheme that society passed through primitive promiscuity and barbarism was incorporated by Friedrich Engels, The Origins of the Family, Private Property and the State, (Chicago, 1902).

6. B. Malinowski, Crime and Custom in Savage Society, 8th ed., (London, 1966), 3.

that Maine's generalisation on the family structure was weak because he 'relied almost exclusively on early Roman law'.[1] Sawer's criticism seems to be a little unfair because Maine, in fact, examined all the European societies as well as Hindu society in India.[2]

Although Maine 'was a whipping boy of anthropology',[3] the main criticism against him, namely, that he did not have sufficient comparative ethnographic data on non-European societies[4] to postulate a general theory,[5] could also be levelled at the proponents of a matriarchal origin of mankind.[6] Now no one believes that there was one grand universal system by which mankind developed.[7] This is a question on which dogmatisation[8] is perhaps risky and now anthropologists

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1. G. Sawer, Law in Society, (Oxford, 1965), 65-66. Also R. Pound, Interpretations of Legal History, (Cambridge, 1923), 55.

2. J.L. Peacock and A. Thomas Kirsch, Human Direction, op.cit., 41.

3. L. Popisil, Anthropology of Law: A Comparative Theory, (New Haven, 1974), 150. Also L.L. Fuller, Anatomy of the Law, (Pelican, 1971), 72.

4. J. Stone, Law and Social Sciences in the Second Half Century, (University of Minnesota Press, 1966), 4.

5. On defence of Maine's method, see F. Pollock, 'The History of Comparative Jurisprudence', Essays in the Law, (London, 1922), 1-30.

6. See Derrett, 'Succession in Nigeria, the Patchwork of the Present Scene and the Common Problems of the Future', in Derrett, ed., Studies in the Laws of Succession in Nigeria, (London, 1965), 1-32 at 15.

7. Derrett, Dharmaśāstra and Juridical Literature, (Wiesbaden, 1973), 6. P. Bohannan, 'Ethnography and Comparison in Legal Anthropology', in L. Nader, ed., Law in Culture and Society, (Chicago, 1969), 401-418 at 408-9. G. Feaver, From Status to Contract: A Biography of Sir Henry Main, 1822-1888, (London, 1969), 169.

8. Maine was not dogmatic; 'he was ready to accept new evidence, not to distort it', H. Gluckman, Politics, Law and Ritual in Tribal Society, (Oxford, 1965), 8.

are saying that 'the search for an archetypal form from which all subsequent society has sprung is fruitless; we simply have no way of knowing precisely what happened when humanity began'.[1] Even within the well-attested patriarchal family of the Greeks, Willett found in the succession law of Crete, evidence of 'encroachment of males upon the old-established rights of tenure of females',[2] and traces of more ancient matriarchal traditions.[3] But Willett's evidences are not substantiated by other Greek societies, and are, therefore, too doubtful to be regarded as unassailably accurate.[4] However, these could be either remnants of pre-Aryan customs,[5] or due to Babylonian influences to which Crete was exposed.[6]

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1. J.L. Peacock and A. Thomas Kirsch, The Human Direction, op.cit., 43.

2. R.F. Willett's, The Law Code of Gortyn, (Kadmos, Supplement i, 1967), 21. Also Aristocratic Society in Ancient Crete, (London, 1955), 69-100.

3. Willett's, The Law Code of Gortyn, op.cit., 18. Earlier claimed by M. Miller that pre-Homeric Greeks were matrilineal, 'Greek Kinship Terminology', Journal of Hellenic Studies, 73 (1952-53), 46-52 at 50-1. But see P.Friedrich, 'Proto-Indo-European Kinship', Ethnology, 5 (1966), 1: 1-36.

4. D. Schaps, 'Women in Greek Inheritance Law', Classical Quarterly, 25 (1975) 1: 53-7 at 57.

5. T.P. Howe, 'The Primitive Presence in Pre-classical Greece', in S. Diamond, ed., Culture in History, Essays in Honor of Paul Radin, (New York, 1960), 745-759.

6. On contact between Babylon and Greece, see E.A. Speiser, 'Early Law and Civilization', in J.J. Finkelstein and M. Greenberg, ed., Oriental and Biblical Studies: Collected Writings of E.A. Speiser, (Philadelphia, 1967), 534-555. Archaeologically and epigraphically Babilonian activities are attested in Crete, C.H. Gordon, Before the Bible, (London, 1962), 57-8.

Although Maine's utterances on many points are to be taken with caution,[1] from the point of view of family law 'his famous theory that there has been a movement from status to contract is fully borne out by Indian data'.[2]

Maine 'fully concedes that patriarchy is not applicable to all forms of society; all he claims is that it is characteristically Aryan ...'[3], and despite McLennan's[4] attempt to discredit Maine in the context of Hindu law, his view of the patriarchal character of the Āryan family is well established.[5] Under the shadow of formidable opposition, Maine's 'basic insights often survive or revive'[6] ... and through evidence from 'most societies commonly studied by

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1. On the limitations of Maine's hypotheses in the Hindu context, see Derrett, 'Sir Henry Maine and Law in India: 1858-1958', Juridical Review, (1959), pt.1; 40-55.

2. Derrett, ibid., at 53. Gluckman points out the misunderstanding of Maine by anthropologists, M. Gluckman, 'Concepts in the Comparative Study of Tribal Law', in L. Nader, ed., Law in Culture and Society, op.cit., 349-373 at 351. Allott, however, opines that Maine's theory on this point is not fully borne out by African experiences, A.N. Allott, 'African Law', in Derrett, ed., An Introduction to Legal Systems, (London, 1968), 131-156 at 149-50. But see Gluckman's appreciative comments on Maine, The Ideas in Barotse Jurisprudence, (New Haven, 1965), Preface, xvi, and throughout. For support of Maine, also see M.J. Levy, Jr., 'Notes on the Hsu Hypothesis', in F.L.K.Hsu, ed., Kinship and Culture, (University of Chicago Press, 1971), 34.

3. C.K. Allen, in Maine's Ancient Law, (O.U.P., 1930), introd., xxii.

4. D. McLennan, ed., The Patriarchal Theory, Based on the Papers of the Late John Ferguson McLennan, (London, 1885), Ch.VI, 51-70.

5. Derrett, RLSI, 207.

6. J. Stone, Law and Social Sciences in the Second Half Century, op.cit., 4.

anthropologists'[1] he seems to have been rehabilitated.

The basic concept of joint property or family property in archaic societies is interlinked with Maine's generalisation on the progress of human society from status to contract. As a social theory, jurisprudentially it forms the foothold of convergence of multiple rights over family property on the basis of kinship; such as the birthright of sons, rights to inherit, or, in appropriate cases, the right to be maintained. So the status relationship envisages a cellular regime of property in the household.

V. Pre-classical Roman family

a. The Indo-European hypothesis

The suggestion is made that among the Romans, the Germans, the Greeks, and the Hindus, as among other Indo-European peoples, family and ownership have passed from a joint or communal to an individual stage.[2] But recently, Crook has come out with a belligerent thesis that the agnatic joint family may not be the basis of the classical Roman family.[3] This doubt, if substantiated, throws overboard many of the premises on Roman family law which were hitherto accepted by a school of jurists[4] to be axiomatic in the

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1. Klaus-Friedrich Koch, 'Law and Anthropology', in P.B. Hammond, ed., Cultural and Social Anthropology: Introductory Readings in Ethnology, (New York/London, 1975), 240-249 at 241.

2. See Westrup, II, 13.

3. J.A. Crook, 'Patria Potestas', Classical Quarterly, 17 (1967) 1: 113-122 at 114.

4. The point has been explained by D.A. Binchy, 'Celtic Suretyship, A Fossilized Indo-European Institution', in G. Cardona, ed., Indo-European and Indo-Euopeans, op.cit., 355-367 at 355.

light of genetic comparison of legal institutions in other Indo-European societies. Crook's article is an outgrowth of the line of thinking prevalent among a number of Romanists who do not accept that there was such a concept as Indo-European law.[1]

b. Crook's objections

Crook's main objections to the existence of joint family among the pre-classical Romans may be enumerated as follows:

(i) that there are plenty of joint families in wholly non-Āryan communities.

(ii) that striking analogies to early Greek institutions are found in contemporary Near Eastern, wholly non-Āryan communities.

(iii) that one can point to numerous cases of adjacent communities with different family property, and descent patterns, and even to instances of different patterns co-existing within the same community.

(iv) that the idea of an exclusive family pattern may be a chimera, as suggested by the Chinese situation. Families may divide, re-unite and divide again.

(v) that the Indo-European concept is a linguistic one and only with caution could it be transferred to other fields.

(vi) that patria potestas is a power over descendants and never over collaterals. If no one has potestas over brothers, how is it conceivable to have a joint family of brothers?

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1. See Crook, loc.cit., 115-6. The point has been recently pursued by Geoffry MacCormack, 'Hausgemeinschaft and Consortium', ZVR 76 (1977) 1: 1-17.

c. A review of Crook's objections

Let us take up Crook's objections one by one.

(i) No one disputes that there may exist plenty of examples of joint families in other, non-Aryan communities, but their existence by itself does not disprove the existence of an Indo-European type joint family among pre-classical Romans.

(ii) Crook found striking analogies between early Greeks and Near Eastern non-Aryan institutions. One cannot be very sure on the point that the non-Aryans of the Near East remained completely untouched by Aryan values. In fact, the Aryan cultural impact in the ancient Near East is well attested,[1] and there are traces of contact between Greece and semite Babylon.[2] Moreover, one wonders how semblances of Greek institutions in the Near East do affect the existence of the Indo-European joint family in Rome. In addition, it is no less significant that although our study of the Near East does note patriarchal, nuclear, or conjugal households among the non-Aryans, in many fundamental aspects they differ from the accepted norms of the Indo-European

1. N. Na'aman, 'Syria at the Transition from the Old Babylonian Period to the Middle Babylonian Period', Ugarit-Forschungen Internationales Jahrbuch fur die Altertumskunde Syrien-Palestinas, Band 6, (Neukirchener Ver Lag, Germany, 1975), 265-274 at 273-4. On Indo-European influence in the Near and Middle East, also see M. Stone, 'When God was a Woman', condensation of The Paradise Papers, (1976), The Sunday Times Magazine, August 29, (1976), 30-35 at 32.

2. Supra, 46, n. 6.

joint family and it is assumed by scholars that the patriarchy in the Near East was preceded by fratriarchy and matriarchy,[1] which in the case of the Indo-Europeans, has not been convincingly suggested from any quarter.[2]

(iii) Of course, as Crook noticed, there could exist adjacent communities with different family and property regimes, and even different patterns within the same community. The Hindus are a classic example in South Asia, and within the Hindu fold diverse systems of property ownership have existed side by side.[3] Also, in the context of social organisation, the Vedic period envisages joint as well as nuclear households.[4] These variations do not disprove the Indo-European hypothesis in the context of Hindu joint family.

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1. E.A. Speicer, 'The Wife-Sister Motif in the Patriarchal Narratives', in A. Altman, ed., Biblical and Other Studies, (Cambridge, Mass., 1963), 15-28 at 18. A. Skaist, 'The Authority of the Brother at Arrapha and Nuzi', JAOS 89 (1969), 10-17 at 11. P. Koschaker, 'Cuneiform Law', Encyclopaedia of Social Sciences, IX, 216. Also M. Stone, loc. cit., 32.

2. Miller suggested that the pre-Homeric Greeks were matrilineal, 'Greek Kinship Terminology', Journal of Hellenic Studies, 73 (1952-53), 46-52 at 50-1. Miller's contention is refuted by Paul Friedrich, who opines that the Indo-European society was 'typical of the patrilineate in its most highest form', 'Proto-Indo-European Kinship', Ethnology, 5 (1966) 1: 1-36 at 29. H.J. Rose rejects the suggestion that the plebeians in Rome had matrilineal organisation, 'Patricians and Plebeians at Rome', Journal of Roman Studies, 12 (1925), 106-133 at 113. From linguistic evidences, Goody was inclined to suggest that the Indo-Europeans were matrilineal but he concluded: 'I do not seriously suggest that this was the case', J. Goody, 'Indo-European Society', Past and Present, 16 (1959), 88-92 at 91.

3. Kāṇe, HD, III, 557.

4. Sontheimer, EHJFI, 42-43.

(iv) It is true that an exclusive family pattern is not synonymous with any particular culture, but here we are confronted with a primitive situation and since the Roman family pattern would have to be judged in its pre-classical setting, reliance on the evidences of other Indo-European families is less risky than on a comparatively modern study of Chinese families by Olga Lang. [1] In respect of Crook's contention that there is no static and set pattern of family; it is always in a state of flux in the sense that families may divide, reunite and divide again: This cycle of partition and reunion is a well-attested phenomenon in Hindu families, [2] but that does not alter the original Indo-European hypothesis of Hindu familial institutions.

(v) Fifthly, although the Indo-European concept is initially a linguistic one, arousing mistrust on the inferences drawn from it, [3] in many respects the archaeological evidence is entirely compatible with linguistic evidence. [4] There is 'a new sign of the renaissance of Indo-European studies ..." [5] and 'law'

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1. Considering the position of women, it seems that the Chinese social organisation was completely different from that of the Romans. The chia-chang's (paterfamilias) wife in practice shared his power, 'in fact she is often the real head ...' K. Biggerstaff, 'The Peasant Family: The Chinese Large-Family, its Role and Recent Trends', in C.F. Ware, ed., The Cultural Approach to History, (New York, 1940), 109-124.

2. Derrett, IMHL, §§ 557-562. Critique, §§ 190, 199.

3. Rosane Rocher, 'Review of Cardona, Hoenigswald and Senn', JAOS 93 (1973), 615-617 at 616.

4. W.H. Goodenough, 'The Evolution of Pastoralism and Indo-European Origins', in Cardona and others, ed., Indo-European and Indo-Europeans, op.cit., 253-265 at 262.

5. Rocher, loc.cit., 616.

is likely to provide 'precisely solid and relatively unambiguous data that the comparative study of the Indo-European institutions needs at this time'.[1]

(vi) Sixthly, the argument that it is paradoxical that a joint family of brothers can exist without patria potestas over collaterals is not borne out by parallel experiences. The Greeks had no patria potestas in the Roman sense, still they had joint families;[2] the Chinese, on whose evidences Crook relies with much elation, had a less stringent[3] system of potestas (hisao) than the Romans, but had some joint families nevertheless. The Hindus had, and even today, have joint families of collaterals without the institution of patria potestas (or fratria potestas); so to have a joint family patria potestas is not an indispensible component. Again, if patria potestas is the most important factor in the formation and continuation of joint families, Crook should have applied his mind to the possibility of the existence of joint families consisting of a Roman father and his grown-up married sons.

To attack the Indo-European concept has become fashionable, sometimes without having more convincing reasons than its proponents'. In the same vein, Crook poses doubts but cannot proffer any solution. However, quite a few

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1. Rocher, ibid., 617. On comparative linguistic approach to Indo-European legal institutions, see C. Watkins, 'Studies in Indo-European Legal Language, Institutions and Mythology', in Cardona, loc.cit., 321-354. Also D.A. Binchy, 'Celtic Suretyship, a Fossilized, Indo-European Institution', in Cardona, ibid., 355-367.

2. Westrup, II, 8-9. R.F. Willett's, The Law Code of Gortyn, (Berlin, 1967), 12. Also Germanic law, infra, 123-5.

3. K. Biggerstaff, 'The Peasant Family: the Chinese Large-Family, its Role and Recent Trends', in C.F. Ware, ed., The Cultural Approach to History, op.cit., 115.

of the questions raised by him are thought-provoking, even though they do not neutralise many of the positive evidences for the possibility of a pre-classical joint family in Rome.

d. Continuation of Crook's hypothesis

Crook's line of thinking has been pursued further by Geoffry MacCormack, another disintegrator of the Hausgemeinschaft [1] theory. As recently as 1977, MacCormack [2] raised hypotheses using as a basis the doubt that the texts of Gaius [3] do not suggest any ownership of the sui during the lifetime of the paterfamilias; nor do they suggest the existence in archaic Rome of the joint family as a characteristic institution.[4]

MacCormack, however, has rightly understood that, to explore the nature of the institutions of family in pre-classical Rome, law and anthropology should share the field. His technique lay chiefly in comparing the familial institutions in other cultures, especially those pre-literate cultures which present a societal stage such as may be conceived in archaic Rome.

e. MacCormack's observations

MacCormack relied principally upon the following series of arguments:

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1. On this, see supra, 28.
2. G. MacCormack, 'Hausgemeinschaft and Consortium', ZVR 76 1977 1: 1-17.
3. Gaius, 3.154ab.
4. MacCormack, loc.cit., 11.

> i. One may be able to cite examples of joint agnatic families among all the Indo-European peoples ... Nor is the joint agnatic family an institution peculiar to the Indo-Europeans. In one form or another, it is commonly found in Africa. Hence one may say that the joint agnatic family is a widespread phenomena of human life not that it is a specially Indo-European institution. 1
>
> ii. The Roman evidence does not allow one to suppose that either the family or the notion of ownership can helpfully be discussed in terms of an evolution of society from one stage to another. 2

f. Review of the above two arguments

(i) The first argument, namely, that the agnatic joint family is not an institution peculiar to the Indo-Europeans, in fact, places undue reliance upon Crook's argument [3] which we have already neutralised. [4]

(ii) Although no one now seriously believes that there is a pattern of human social development through which every society must pass, [5] 'it can be proved in the case of many societies that family groupings undergo a certain pattern of development, [6] and it would be natural to expect Roman law to conform

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1. ibid., 2.

2. MacCormack, op.cit., 3.

3. Crook, 'Patria Potestas', CQ 17 (1967), 115.

4. Supra, 50-54.

5. Derrett, Dharmaśāstra and Juridical Literature, (Wiesbaden, 1973), 6.

6. MacCormack, op.cit., 3.

to developments seen in śāstric and Jewish law.[1]

g. MacCormack's study of Indo-European families

In a comparative context, MacCormack studied three Indo -European legal systems and observed the following proprietary relationship in the family:

(i) Among the South Slavs 'All members of the joint family might be said to possess rights in the property ...'[2]

(ii) In Albanian customary law 'the male members of the family have joint rights in the property which are realised on partition or separation'.[3]

(iii) In the Hindu system, 'it seems that the Aryan patrilineal families originally were not joint since the sons upon marriage generally left home'.[4]

h. Review of MacCormack's study of Indo-European families

About (i) and (ii) above we have nothing more to say. But MacCormack's remark on the Hindu system deserves our attention.

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1. Derrett, loc.cit., 6.

2. MacCormack, loc.cit., 5.

3. ibid., 5.

4. ibid., 5. Relied on Derrett,' The History of the Juridical Frameworth of the Joint Hindu Family', in Contributions to Indian Sociology No.6 (1962), 17-47. The same theme is presented in a revised form, RLSI, Ch.12, 'The more than imaginary expectations of sons' in the Aryan texts contained the gems of birth-right in the mediaeval sense, RLSI, 414-5.

Although the enormous 'house community' of the zadruga type has not been the norm, the sacred literature shows evidence that joint family life was not merely 'an ideal but a real expectation' [1] in the Hindu tradition. There is no conclusive evidence in the śāstra that all sons after marriage used to set up separate households. [2] A marriage hymn in the Ṛg-veda may be interpreted as indicating joint family living. [3] Moreover, śruti texts may be interpreted as meaning that co-ownership of dāya existed between father and son. [4]

i. A general review of MacCormack's study

It is a weakness in the study of MacCormack that he examined only three Indo-European systems. He did not take any notice of Celtic, Germanic or Greek law which could have thrown light on pre-classical Roman law and, instead, he relied greatly on familial institutions in African society. His analysis of African law is not exhaustive, but he did not fail to notice that the general characteristic of the property arrangements in African extended or joint families is the multiplicity [5] of rights over the same property.

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1. H. Orenstein and Michael Micklin, 'The Hindu Joint Family: the Norms and the Numbers', Pacific Affairs, 39 (1966-67), 314-325 at 315.

2. Orenstein and Micklin, op.cit., 317. Sontheimer, EHJFI, 42-43.

3. R.V.10.85.46.
samrājñī śvaśure bhava samrājñī śvaśrām bhava /
nanadarī samrājñī bhava samrājñī adhidevṛṣu //
'Over thy husband's father and thy husband's mother bear full sway. . Over the sister of thy lord, over his brothers rule supreme', tr. R.T.H. Griffith, The Hymns of the Rigveda, (Benares, 1897), II, 506.

4. Tai. Saṃ. III.1.9.4.

5. MacCormack, op.cit., 7.

He also observes that junior members in African society have not only the right to inherit; in many societies, they also have an expectancy amounting to a right that property will be made available to them in their father's lifetime. However, MacCormack adds:

> When one speaks of a 'right' in this context one does not mean a right in the Hohfeldian sense. It would be misleading to think of the father as under a duty to allocate land which might be enforced by the son. Rather it is a question of behaviour which the father is normally expected by the society to show. [1]

To MacCormack, a father's behaviour may not sound like a "right" for the sons in the Hohfeldian sense, but in a pre-literate society an accepted customary norm has a similar effect to a 'right' in modern jurisprudence.

Against this ethno-juridical background, MacCormack examines the texts of Gaius and concludes that 'It is a mistake to conceive the power of the paterfamilias as merely a power to direct or control the family affairs'. [2] We have already refuted this sort of observation on the text of Gaius, [3] and it is unnecessary to repeat ourselves. Since MacCormack used anthropology as a jurist's aid, let us see what the anthropologists have got to say on the role of the paterfamilias in Rome which has been conveniently overlooked by MacCormack.

Radcliffe-Brown [4] opines:

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1. Ibid.

2. MacCormack, op.cit., 10-11.

3. Supra, 27-32.

4. A.R. Radcliffe-Brown, 'Patrilineal and Matrilineal Succession', in his Structure and Function in Primitive Society, (London, 1952, rpt. 1971), 32-48 at 45.

> The rights of a Roman father over his children were nearly exclusive but even these, at certain period of history certainly, were subject to the rights, exercised jointly, of the _gens_ or of the state; even the _potestas_ of a _pater familias_ was not absolute.

He adds:

> ... the decay of the _gens_ in Rome still, left the patriarchal family as a corporation (as Maine long ago has pointed out) the basis of which, however, was not merely the exercise of rights _in rem_ by the _pater familias_ over his children but also the exercise of joint rights over property and the maintenance of a religious cult of ancestor-worship. 1

Zimmerman and Unnithan explain this point further and says:

> Much of the patriarchal idea prevalent in the Western world arose from a misinterpretation of _patria potestas_, which is a term in Roman law used to designate the power of the head of the household. The confusion of this word with "patriarch" and private control of family funds was then quite general in Western writings about the early times. But certainly the Greek family which was related, if not a precedent, to the Roman family was of the "trustee" type ... 2

and

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1. ibid., 47.

2. Carle C. Zimmerman and T.K.N. Unnithan, _Family and Civilization in the East and the West_, (Bombay, 1975), 73. The trustee family is so named because the elders of the families are considered 'trustee' of the property, titles and honours of the family groups, ibid., 165. This 'trustee family' of Zimmerman is synonymous with Frederic Le Play's 'patriarchal family', ibid., 166. Le Play also suggested that the traditional European family system had all the characteristics which are claimed as uniquely Indian, ibid., 3. On Le Play, see M.Z. Brooke, _Le Play, Engineer and Social Scientist_, (London, 1970).

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> ... the Greek family ... furnished the pattern
> of the Roman family ... 1

From the above observations, it is needless to dwell upon the arguments of MacCormack further, but it may be said that his predominant scepticism prevented him from delving into learned works of anthropologists which were not infected with all the faults he had found in the Hausgemeinschaft theory.

j. Gens

At this point, the mention of an ancient Roman institution called gens[2] would not be superfluous. Gens was supposed to be a group of several agnatic families[3] which had the same name and looked back to their descent

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Note 2 - p.59 - continued:

In Hindu context, Derrett says: 'The head was trustee, in a non-technical sense, for a host of dependants of various qualities', RLSI, 409.

1. Zimmerman, and Unnithan, ibid., 73.

2. A.S. Diamond opines that gens were real entities at Rome until the middle of of the 3rd century B.C., Primitive Law, (London, 1935), 251. E. Poste holds the view that 'no definite historical record exists' of the institution, Institute of Roman Law by Gaius, (Oxford, 1904), introd., xii. But S.J. Stoljar opines that the development of political power of the state caused the deterioration of the gens, 'Children, Parents and Guardians', International Encyclopaedia of Comparative Law, IV, 17.

3. Agnatic families in Rome are well attested in Rome: 'familium dicimus omnium agnatorium', Ulpiun, quoted by H.H. Meinhard, 'The Patrilineal Principle in Early Teutonic Kinship', in J.H.M. Beattie and R.G. Lienhardt, ed., Studies in Social Anthropology, op.cit., 5.

from an eponymous ancestor.[1] Perhaps in ancient Rome, the *gens* represented the original owner of the land,[2] and the property of the *gens* was succeeded by family property.[3] It was laid down in the Twelve Tables that in default of nearest agnates, the inheritance would pass to the members of the *gens*.[4]

The idea of common descent from an ancestor is linked with the practice of ancestor-worship, and is a key to the law of inheritance in many primitive societies.[5] In Rome, the sacrifice to the dead in the form of *sacra*

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1. Maine, *Dissertations on Early Law and Custom*, (London, 1883), 238-9. A. Watson, *Roman Private Law Around 200 B.C.*, (Edinburgh, 1971), 28-9.

2. Jolowicz, 123. Diosdi, *Ownership in Ancient and Preclassical Roman Law*, (Budapest, 1970), 46.

3. Diosdi, ibid., 46. K.S. Karlston, *Law and Structure of Social Action*, (London, 1956), 39-40.

4. G.W. Paton, *A Text Book of Jurisprudence*, 4th ed., (Oxford, 1972), 548.

5. See our discussion at infra, 267, 303-4.

fell on the heir as a burden on the inheritance.[1] Thus, all the natural heirs of every generation had a supersensorial link through the inheritance of family property. This continuum of family sacra endows a supragenerational and metaphysical entity on property and provides a background to the compulsory heirship of children. To a modern mind this may sound incongruous, but in a classical setting the concept that the purpose of property is to perform sacrifice is as real and appealing as its physical enjoyment.[2]

VI. Patria potestas

a. Nature of the Institution

In Roman law, the virtually unrestricted power (patria potestas) of the paterfamilias over his children and remoter descendants is well known.[3] The

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1. nulla hereditas sine sacris was a well-known maxim in the jus pontificium, R.V. Ihering, Vorgeschichte der Indo-Europaer, tr. A. Drucker, sub. tit. The Evolution of the Aryan, (London, 1897), 42-3. Cicero, De Legibus, II, 19, 20: 'Religion prescribes that property and the worship of a family shall be inseparable, and that the care of the sacrifices shall always devolve upon one who receives the inheritance'. Cp. in the śāstra the inheritance of the son becomes dependent on his offering piṇḍa to the ancestor, Manu, IX. 136: ... dadyāt piṇḍam hared dhanam / Yājñ. II.132: piṇḍado 'ṃśaharaś caiṣām .../ Viṣṇu, XV.40: yaś cārthaharaḥ sa piṇḍadāyī /

2. Cp. Derrett, RLSI, Ch.5.

3. Tab.4. Sandars, The Institutes of Justinian, op.cit., introd., xv, p.29. Gai.I. 55. A. Watson, Roman Private Law Around 200 B.C., op.cit., 28. The peculiarity of the institution in Rome is restated in the Institutes of Justinian, I.IX.2: Ius autem potestatis, quod in liberos habemus propium est civium Romanorum: nulli enim alii sunt homines qui talem in liberos habeant potestatem qualem nos habemus; 'The power that we have in respect of our children is particular to Roman citizens: for there are no other men who have such power over their issue as we do', tr. Thomas, op.cit., 26. Gaius mentions that the Galatians had a similar institution, Sandars, ibid., 30. Patria potestas in the Roman sense was absent in Athens and Egypt, Harrison, infra, 76. Also R. Taubenschlag, The Law of Greco-Roman Egypt in the Light of the Papyri, 2nd ed., (Warsaw, 1955), 130-1. The idea of patria potestas could be found in Vasiṣṭha, XV.2; SBE, 14,75.

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adopted children and wife in manu were also under this power. Patria potestas lasted the entire lifetime of the paterfamilias unless he released the child by a special legal act [1] (emancipatio).

A father could sell [2] into slavery (ius vendendi), expose [3] or put to death his children [4] (ius vitae necisque). The power also included

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Footnote 3 - p.62 - continued:

Also literally in Manu, VIII.416; but see, infra,427-33.Cp. the puissance paternelle (puissance came from the Roman potestas) of the French Civil Code, 1896, gave a father unchecked authority over a child's person and property for the first 21 years of his life. To a certain extent, father's dominance in France is retained even under the new law of 4th June, 1970, M.A. Glendon, 'Power and Authority in the Family: New Legal Patterns as Reflections of Changing Ideologies', Am. J. Comp.L. 23 (1975) 1: 1-33 at 14-6. Also Cp. Germanic mundium, infra,124-6.

1. F. Schulz, Classical Roman Law, (Oxford, 1951, rpt. 1969), 150.

2. Cp. the story of Śunaḥśepa. King Hariścandra proposed to sacrifice his son Rohita to the god Varuṇa, but as Rohita did not submit,a brahmin named Ajigarta was persuaded to sell his son Śunaḥśepa to be sacrificed in place of Rohita, Ai. Br. VII. 13-18, Keith, HOS, 25, 301-2. Implicitly referred to in R.V.I. 24. Also The Rāmāyaṇa, I.62.3. On this legend, see A.P. Karmakar,'Human Sacrifice in Proto-India', ABORI 25 (1944), 109-115 at 115. K.M. Kapadia, Hindu Kinship, (Bombay, 1947), 83. Parallel tales are found in ancient Ireland of god Dian Cecht and also of 'Conn of the Hundred Battles', M. Dillon, 'Celt and Hindu', VIJ 1 (1963) 2: 203-223 at 212.

3. According to Manu, it was a crime to cast off one's son, Manu, VIII. 389. Also Yājñ. II.237.

4. This was absent in the law of Athens, see infra,78. In Rome, however, a father could use this power arbitrarily. He had to put his case before a consilium, Jolowicz, HISRL, 3rd ed., 119. Cp. Jewish law, infra,203 . In Vedic India, similar power of a father was not altogether unknown. We learn from the Ṛgveda that Ṛjrāśva was robbed of his eyesight by his father, R.V. I. 116. 16, alsoR.V.I. 100.17. However, his eyesight was ultimately restored by the Aśvins, Wilson, tr. Ṛgveda, (London, 1850), I, 311, n.c. Macdonell and Keith consider it to be 'a legend of quite obscure meaning', Vedic Index of Names and Subjects, (London, 1912), I, 108-9. Nacíketas was offered by his father to death (mṛtyaye), Tai. Br.III. 11 .8; Katha.Upa.1.1. The historical reality of Naciketas is extremely doubtful. The philosophical significance of the story is pointed out by

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chastisement,[1] noxal surrender[2] (ius noxae dandi) and the right to force married children to divorce.[3]

Maine chose to regard patria potestas as a power much like soveriegnty of a state - abstract, impersonal and remote.[4] Maine's analogy between sovereignty and patria potestas emphasises the power aspect of the institution, considering family an imperium in imperio,[5] a community within a commonwealth. Of Roman patria potestas, Roscoe Pound says that it is legally quite one-sided. The paterfamilias has rights, but whatever duties he may owe are owed without the household, not within.[6] The Institution of patria potestas, as understood by Kagan,[7] stems from the idea of dominium on the principle that everyone who was under the power of the paterfamilias was considered as property.

Note 4 - p.63 - continued:

S. Radhakrishnan, The Principal Upanisads, (London, 1953), 596.

1. Manu ordains that a father could beat his son with a rope or split bamboo 'but on the back part of the body (only)', Manu, VIII. 299-300.
2. Jolowicz, loc.cit., 119.
3. Maine, Ancient Law, New ed., 153.
4. R. Nisbet, 'Kinship and Political Power in First Century Rome', in D. Black and M. Mileski, ed., The Social Organization of Law, op.cit., 262-277 at 263.
5. Maine, Ancient Law, (London, 1885), 150.
6. R. Pound, The Spirit of the Common Law (Boston, 1921), 27.
7. K.K. Kagan, Three Great Systems of Jurisprudence, (London, 1955), 61.

We are bound to be misled if we try to understand the legal majesty of the patria potestas isolated from its historical and sociological perspective. Stoljar points out: 'To begin with, nothing in our anthropological experience suggests that the Roman patria potestas simply reflected an earlier or continuing order of an absolute parental tyranny'.[1]

Although the patria potestas connotes unrestricted power of the pater-familias, and thereby upholds him as an independent individual, in essence, it is a negation of individualism;[2] and in this respect, quite in tune with the mores of archaic societies. The significance of patria potestas does not lie in its being exclusively a power – it rather springs from its function as an essential cohesive element in a household. Indeed, it stood for the unity of the family, its continuity in time, and as the irreducable atom of society as a whole.[3] But, at the same time, it should be borne in mind that the word pater did not originally refer to the biological father or genitor;[4] it did not connote generation, but authority, responsibility and protection.[5] Thus, this abstract and impersonal element of family continuity, like the concrete element of family property, was not attached to any particular individual as such, but served as a weapon in the hands of the head of a family to hold together the individual members through generations in

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1. S.J. Stoljar, International Encyclopaedia of Comparative Law, IV, 16.

2. P. Stein and J. Shand, Legal Values in Western Society, (Edinburgh University Press, 1974), 116.

3. R. Nisbet, 'Kinship and Political Power in First Century Rome', in D. Black and M. Mileski, ed., The Social Organization of Law, op.cit., 262-277.

4. S.J. Stoljar, Intl.En.Comp.L., IV, 17.

5. Nisbet, loc.cit.

in the fabric of a 'community within a commonwealth'.

In most ancient societies in their grand designs of familial institutions, the potestas element was present in different forms and different degrees [1] - defining the status aspect of the individual within the group. Maybe in Roman society, the manifestation of this power was rigorous but in essence, it had no conflict with the values of archaic kinship-based groups in general, and in that sense with those of the Indo-European joint families in particular.

The Roman family constituted, in a leading aspect, a sort of private religious society devoted to the worship of ancestors. The paterfamilias was in charge of the sacra privata.[2] Ancestor-worship entails the necessity of offspring to perpetuate the family. A society, thus geared to preservation of family, cannot have been insensitive to the maltreatment of its children. That is why, any act of cruelty towards children done by the father without discernible justification exposed him as a sacer - virtually an outlaw.[3] Also, to a certain extent, a father was liable to public scrutiny of the ius sacrum for his domestic actions.[4] This shows that 'the total picture, then, we have been presenting, emphasises the limitations rather than the formal scope of the father's rights. In this light, it is simply not true, though this is what is commonly asserted, that a father could freely or quite arbitrarily kill, maim, abandon or expel a child',[5] once he has accepted the child into the family.

1. Maine, Ancient Law, (London, 1930), 151.

2. S.J. Stoljar, Intl.En.Comp.L., IV, 17.

3. Stoljar, ibid., 17.

4. ibid., 17.

5. ibid., 17.

b. Patria potestas and family property

In the sphere of property ownership, the institution of patria potestas entails that no one under potestas could own property.[1] A son under power, however important he might be in military and public affairs,[2] could not legally own property. Any acquisition made by the filius familias was an acquisition for the pater.[3]

We are informed that 'at the basis of the patria potestas was its economic solidarity, the corporate possession of property by the family alone, not its individual members'.[4] Therefore, although a son in potestate was not allowed to own property, the character of the property in the hands of the paterfamilias was virtually corporate; and it was for the continuation and sustenance of the family. This is implied from the fact that in the Republic, property could not easily be alienated from the agnatic family.[5]

We also know from Gaius[6] and Paulus[7] that a suus was a sort of

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1. Jolowicz, HISRL, 3rd ed., 119. D. Daube, Roman Law, op.cit., 75.

2. Thomas, op.cit., 28.

3. Gai.II.86. Just. Inst. II.IX. See G.W. Keeton, The Elementary Principles of Jurisprudence, (London, 1949), 353. Cp. Manu, VIII, 416; but see the comment of Bharucī, Derrett, Bharucī's Commentary on the Manusmṛtī, (Wiesbaden, 1975), II, 209-10. The exegetical, interpretation also neutralises the literal purport of the text. A.S. Nataraja Ayyar, Mīmāṃsā Jurisprudence, (Allahabad, 1952), 36-8. For the text, see infra, 427, n.2.

4. R. Nisbet, op.cit., 272. Also J. Declareuil, Rome the Law Giver, (London, 1927), 156ff.

5. Nisbet, ibid., 267.

6. Gai. II. 157.

7. D.28.2.11.

However, the most plausable explanation could be this, that, as commerce flourished, the shift from an agricultural to a commercial economy demanded exclusive ownership of the <u>paterfamilias</u> to facilitate transaction of property in a predominantly commercial community.

owner of the family property during the lifetime of the *pater*.

Now, it remains inexplicable how if in a preceding epoch, a father was nothing more than an administrator [1] of family property, in later periods, a father in the household concentrates so much power in his hands, '... beholden to no one for his actions and performances'.[2]

We are not certain when 'the original vague administrative supremacy of the head of the family ... crystallised into ownership of property as it had crystallised into *potestas*, *manus* and *mancipium* over persons'.[3] The answer to this query perhaps may be supplied by the study of the historical forces behind the growth of Roman legal institutions, rather than by concentrating on a particular epoch.

In the Byzantine era, a trend is noticeable toward the assimilation of *patria potestas* with the institution of guardianship and toward its termination when majority is reached. This profound change in substance was not abrupt; the process of transformation began from the Republican era.[4] Similarly, it would be fallacious to assume that the nature of the institution during its preclassical stage was the same as is presented in the Republican era.[5] The historical and economic reasonings behind the concentration of ownership in the hands of the *pater* is

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1. G.W. Paton, *A Text Book of Jurisprudence*, 4th ed., (Oxford, 1972), 519.
2. J.L. Strachan-Davidson, *Problems of the Roman Criminal Law*, (London/New York, 1926), 28-9.
3. Jolowicz, HISRL, op.cit., 123.
4. Thomas, op.cit., 27.
5. Thomas, op.cit., 27.

explained by Gyorgy Diosdi thus:

> The peculiarity of the Roman development consists in the fact that, unlike other people, the development did not veer towards the economic independence of the members of the family, on the contrary, it tended towards a concentration of the family property, which meant the exclusive ownership of the paterfamilias. ... What can account for the fact that the exclusive ownership of the paterfamilias succeeded family property so early? I think that the decisive ground for it was the peasant character of the ancient Roman society. A developed commodity turnover, and a lively commerce require the economic independence of individual, while the basically archaic peasant economy necessitates on the contrary the concentration of property. So the paterfamilias had to become very soon the sole owner of the family property. [1]

We must remind ourselves that Diosdi's attempted explanation is based mainly on supposition and should not be allowed to grow into a juridical conviction.

Another contradiction in the position of the son in Roman law baffles the jurists. The economic dependence of a son under potestas conflicts with his military and constitutional independence. In the language of Maine:

> In every relation of life in which the collective community might have occasion to avail itself of his wisdom and strength, for all purpose of counsel or of war, the Filius Familias, the Son under Power, was as free as his father. It was a maximum of Roman jurisprudence that the Patria Potestas did not extend to the Jus Publicum. Father and son voted together in the city, and fought side by side in the field;

1. Diosdi, op.cit., 49.

> indeed, the son, as general, might happen to command the father, or, as magistrate, decide on his contracts and punish his delinquencies.[1]

The exalted position of the son in civic and military life makes his life under potestas[2] unbelievable, nevertheless it is not impossible. As a parallel, a Hindu son belonging to the Dāyabhāga[3] school is in a position no different from his Roman counterpart. Civic independence from and proprietary dependence on the father may sound paradoxical but traditional family law is not always logic ; it is also experience.

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1. Maine, Ancient Law, (London, 1905, 121.

2. A.A. Schiller informs us that during the classical period, 'The Roman pater familias, socially and often legally prevented from engaging in commercial enterprises, placed his sons in control of trading companies ...' , 'The Business Relations of Patron and Freedman in Classical Roman Law', in M. Radin and A.M. Kidd, ed., Legal Essays in Tribute to Orrin Kip McMurray, (University of California Press, Berkeley, 1935), 623-639. The position of these sons may be explained in terms of Hindu law. Although at Mitāksarā law a son has birthright (janmasvatva) and he is entitled to partition of the joint family property, he has no independence (svātantrya) in respect of the management of the family and the disposition of certain acquisitions of the father. Svātantrya is acquired by relatively few. Svātantrya comes with age, seniority, and the death of ancestors. A son is an example of pāratantrya (dependence) and he is not svātantra (independent) while his father is alive. To create full ownership in the western sense svatva and svātantrya must be combined, but in the Mitāksarā sense, property is by no means dependent upon independence. A Roman son also was paratantra but achieved a limited svātantrya due to the social or legal incapacity of his father. However, unlike the Hindus, the Romans were not smart enough to distinguish svatva from svātantrya. For a discussion on these concepts, see Derrett, 'The Development of the Concept of Property in India', ZVR 64 (1962), 15-130 at 96-101.

3. Infra, 532.

c. Peculium

We have already pointed out that only persons sui iuris could own property and whatever the son in potestas acquired was acquired for the father.

However, usually a father used to allow a son to administer a fund called the peculium.[1] Technically, a father remained the owner of the peculium but the son could manage it as if it was his own. It should be borne in mind that the paterfamilias could reduce the peculium or completely recall it at any moment.[2] It is also worth noting that 'the filiusfamilias was not normally entitled to use it for any liberality.[3] ... Even with respect to the peculium ... he lacked true independence'.[4]

Considering the general rule that a son under potestas could own no property, the semblance of independence implied in the institution of peculium aroused juristic speculations. David Daube satisfied himself by stating that peculium as a custom was manifestly confined to the 'haves'.[5] John Crook, on the other hand, did not hedge behind a Marxist interpretation; he temporarily

1. F. Schulz, Classical Roman Law, op.cit., 154. The term peculium is derived from pecus = cattle, as in early times property primarily consisted of livestock. Cp. 'fee' in English feudal law: old High German fehu, signifying property in the shape of animals: modern German Vieh. Corresponding term in Jewish law is segullah. B. Cohen, Jewish and Roman Law ..., op.cit., I, 181. Cp. the Hindu expression godhanam.

2. A.J. Crook, Law and Life of Rome, (London, 1967), 110. Daube, Roman Law, op.cit., 83.

3. Liberality is liber, which is the test of power over property. Cp. Aristotle, Rhetoric, I.5.7. See J.W. Jones, The Law and Legal Theory of the Greeks, (Oxford), 1956, 197.

4. Daube, Roman Law, op.cit., 83.

5. D. Daube, Roman Law, op.cit., 83.

paused to doubt the very existence of the institution.[1] However, despite the lack of information on its actual administration, later legislation on its modification corroborates its existence.

In the reign of Augustus, peculium castrense was developed. It permitted the sons under power to retain all booty, income and property they had acquired during military service.[2] A filius familias could freely dispose of such property without his father's approval, although the peculium still remained technically his father's property and should he die intestate, the peculium went to his pater, iure peculii.[3] In the later Empire, an analogous institution, the peculium quasi-castrense was developed for sons in the civil service.[4]

However, the reason for this limited recognition of property rights of sons in two particular careers was more military and administrative than any general recognition of the legal equality of ascendants and descendants.[5] Although Robert Nisbet finds in the decree of peculium castrense 'the beginnings of economic individualism',[6] Marcia Colish remarks on its contemporary rationale that

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1. Crook, op.cit., 119-120.

2. Cp. śaurya-dhana as impartible in the śāstra.

3. Thomas, op.cit., 28.

4. ibid., 28.

5. M.L. Colish, 'The Roman Law of Persons and Roman History: A Case for an Interdisciplinary Approach', American Journal of Jurisprudence, 19 (1974), 112-127 at 123.

6. R. Nisbet, op.cit., 272.

> rather than being a recognition of the full personhood of sons under patria potestas, the institution of the peculium castrense and quasi-castrense was a perfectly transparent effort on the part of the emperors to encourage members of the propertied classes to enter and to remain in the service of the state as military and civil officials. 1

Such recognition re-emphasised the vitality of potestas.

VII. Conclusion

Lastly, the two points which bring the position of the Roman son closer to his Mitākṣarā counterpart deserve a restatement.

The restriction on disherison of a son in Roman law is not an absolute restriction. All a testator needs is to be careful to exheredate the son in due form. Nevertheless, it signifies that a son is the most formidable of the natural heirs and disherison was an act which interfered with his prospective rights to the family property acquired at his birth.

Again, according to the Mitākṣarā, only sons are co-heirs with their father , and they inherit excluding all other relatives; but in Roman law, granted that they are quodammodo domini,[2] sui heredes include daughters and they inherit with their brothers.[3] So, even if the texts[4] of Gaius and Paulus imply a co-ownership of ascendants and descendants, it is not exclusively restricted to the son.

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1. M.L. Colish, loc.cit., 124.
2. Gai.II. 157.
3. Jolowicz, HISRL, 3rd ed., 125-6.
4. Gai.II. 157. D.28.2.11.

Nonetheless, even though this last argument may diminish the possibility of son's birthright in the _Mitākṣarā_ sense, we can say that the various points brought together in this discussion, even though the text of Gaius is salvaged from scraps of papyrus material, will add up to something more than a mere mirage of the son's co-ownership with the father in pre-classical Rome.

CHAPTER 3

GREEK, ALBANIAN AND SOUTH SLAVONIAN LAW

(1) Greek Law

1. Introductory Remark

The majority of scholars agree that the Indo-European arrived in Greece c. 1900 B.C.[1] Insofar as it is a branch of the Indo-European legal system, ancient Greek family law stands theoretically, as Greece does geographically, in a curiously midway position between Roman and Hindu jurisprudence.[2] Although there wae variations among the laws of more than a hundred cities, 'the similarity of Doric and Ionian institutions allows us to speak of "Greek law" as a unity.'[3]

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1. R.A. Crossland, 'Indo-European Origins: The Linguistic Evidence', Past and Present, 12 (1957), 16-46 at 38. Wyatt did not find any evidence of Indo-European speech in Greece prior to c. 1600 B.C., W.F. Wyatt, Jr., 'The Indo-Europeanization of Greece', in G. Cardona and others, ed., Indo-European and Indo-Europeans, op.cit., 89-111 at 107. The following articles in Acta of the 2nd International Colloquium on Aegean Prehistory, (Athens, 1972) throw light on this controversy: W.F. Wyatt, Jr., 'Greek Dialectology and Greek Prehistory', 18-22 at 18; R.A. Crossland, 'Recent Re-Appraisal of Evidence for the Chronology of the Differentiation of Indo-European', 46-55; J.G. Macqueen, 'The First Arrival of Indo-European Elements in Greece. Some Observation from Anatolia', 142-5.

2. Derrett, TLL, 1953, 54.

3. F. Pringsheim, The Greek Law of Sale, (Weimar, 1950), 5.

II. The Law of Athens

a. Father and son relationship

The Greek world in general shows that the relationship of a father to his household differed from that which we find in developed Roman Law. [1] Gaius [2] had very much in mind the law of Athens when he said that in no other system did a father have so much power over his children as the Romans. [3]

In this respect, Aristotle points out that a Greek father was not an autocrat at his house, rather the father and son relationship was full of filial love:

> A husband and father rules over his wife and children, both free, but the rule differs, the rule over his children being a royal, over his wife a constitutional rule. ... The rule of a father over his children is royal, for he receives both love and the respect due to age, exercising a kind of royal power. ... For a king is the natural superior of his subjects, but he should be of the same kin or kind with them, and such is the relation of elder and younger, of father and son. [4]

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1. Vinogradoff, OHJ, I. Ch.V. R. Taubenschlag, The Law of Greco-Roman Egypt in the Light of the Papyri, 332 B.C. - 640 A.D., op.cit., 130.

2. Gai. I.55.

3. A.R.W. Harrison, The Law of Athens, I, The Family and Property, (Oxford, 1968), 70, n.3.

4. The Politics of Aristotle, I.12, tr. B. Jowett, (Oxford, 1885), I, 22-3. On relationship between parents and children, also see D.A. Rees, ed., Aristotle The Nichomachean Ethics, (Oxford, 1951), 251-2.

The Greek attitude to sonship is permeated by their attitude to the institution of family. 'Every Greek family', as Lacey puts it,

> looked backwards and forwards all the time. It looked backwards to its supposed first founder, and shared a religious worship with others with a similar belief; it also looked forward to its own continuance, and to the preservation for as many future generations as possible of the cult of the family which the living members practised in the interest of the dead. [1]

The Hellenic genos corresponds closely to the Hindu joint family, [2] and the son of the house (oikos), in order to continue the family both in its sacerdotal and secular aspects, was under a strong obligation to marry and procreate a son. [3]

However, the crucial moment in a child's juridical life in Athenian law was its admission into the family by the father. A child had no right ipso jure on birth to be nurtured by its father. [4] One might argue that unlike his

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1. W.K. Lacey, The Family in Classical Greece, (London, 1968), 15. On ancestor worship in Greece, see E.R. Leach, Rethinking Anthropology, (London, Athlone, 1961), 127.

2. Maine, Dissertations on Early Law and Custom, (London, 1883), 239.

3. Lacey, op.cit., 16. Homer speaks of the 'incomplete household' of Protesilaus who died without a son, Iliad, II, 701. Cp. Vedic hankering after son, R.V. VII.4.7-8, Kaṇe, HD, III, 656-7. Also Cp. Hindu idea that man is born with four debts: to the gods, to the ṛṣis, to the fathers, to the human beings; ṛṇaṃ ha vai jāyate yo'sti, sa jāyamāna eva devebhyaḥ ṛṣibhyaḥ pitṛbhyo manuṣyebhyaḥ ... , Śat. Br. 1.7.2.1. The obligation to the parents is discharged through procreation of progeny, Śat. Br. 1.7.2.4. On this, see H. Chatterjee, The Law of Debt in Ancient India, (Calcutta, 1971), 84. Also other texts, infra, 410-19.

4. In Sparta also, the elders of the tribes examined every newborn infant and if they found it to be well-built and sturdy, they ordered the father to rear it, D. Asheri, 'The Laws of Inheritance, Distribution of Land and Political Institutions in Ancient Greece', Historia. Zeit. für alte Geschichte, 12 (1963), 1-21 at 5.

Mitākṣarā counterpart, a son in Athenian law had no right from his birth. Nevertheless, it is a valid argument, though subject to the factor of admission, that it is birth which was the determining factor in establishing the relationship between father and son. Once the child is admitted to the family, it acquires its rights.[1]

In Athens, as in Rome, a father could expose[2] a child, but the act of exposure was legally negative in character and the legal tie between the father and the exposed child could be revived if the child later reappeared.

Up to the time of Solon, an Athenian father also enjoyed the right to sell his children, and perhaps also to pledge them against a debt.[3] But we should not suppose that in historical times an Athenian father ever enjoyed the Roman father's right to put his son to death (ius vitae ac necis). A son in Roman law, unless emancipated by his father, had to remain under potestas as long as the latter lived. There is no trace of anything comparable in the laws of Athens. A male child in Athens seems to have been almost wholly free from paternal power as soon as he reached the end of his seventeenth (conceivably eighteenth) year.[4]

III. Ownership of family property

In the embryonic epoch of Greek legal history corporate ownership

1. Harrison, op.cit., 78.

2. Lacey, op.cit., 164-5. Aristotle was in favour of legislation to prevent exposure of children: E. Baker, The Politics of Aristotle, (Oxford, 1946), XVI. 15, p.327.

3. Harrison, op.cit., 73.

4. Harrison, op.cit., 74.

of family land and chattels must have been the rule,[1] and 'even in the fourth century it was common enough for sons to remain joint owners of the family property on their father's death ...'[2] The discourses of Dio Chrysostom[3] reveal that in ancient Greece joint family estate was the general norm of ownership. In a series of speeches, Chrysostom tried to arouse the national feelings of the Greeks by reminding them of their glorious past.[4] Once he dealt with the affairs of his native Bithynia. He spoke against envy and rivalry and praised co-operation and jointness in these words:

> Or, since we admire those brothers who share completely a common estate and have not because of stinginess divided their patrimony, whose wealth moreover, is even more admired since it is greater for the very reason that it has not been divided and half of everything made the property of each, but instead the whole is thought to belong to the both ...[5]

1. Harrison, ibid., 239. J.W. Jones, The Law and Legal Theory of the Greeks, (Oxford, 1956), 200. D. Asheri, 'Laws of Inheritance, Distribution of Land and Political Constitutions in Ancient Greece', Historia, 12 (1963), 1-21 at 7.

2. Harrison, ibid., 239. R.F. Willetts, The Law Code of Gortyn, (Berlin, 1967), 12.

3. A.D. 40-120.

4. Dio Chrysostom, (London/New York, 1932), I, introd., ix.

5. Dio Chrysostom, 38.45, tr. H.L. Crosby, (London/Cambridge, Mass., 1946), IV, 89. Other examples of joint living: Euthymachos' two sons Meidylides and Archiades remained joint after the death of their father, Dem. Leoch. 10, 18, cited by Harrison, op.cit., 239. Apollodoros was living joint with his minor brother, Pasikles, Harrison, ibid., 240. Menecles and his brother were in joint ownership of land, Isaeus, II, 28, cited by Lacey, The Family in Classical Greece, op.cit., 126, n.9 at 292. For other instances, see Lacey, ibid., 126-7. The joint living is also indirectly proved by the detailed rules of partition (diairesis) of joint property, see R. Taubenschlag, 'Survey of Papyri Published 1939-45', The Excavations at Dura Europos, Journal of Juristic Papyrology, 1 (1946) 1: 98-118 at 117.

The corporate family ownership of property is also substantiated from the fact that land, at least theoretically, [1] was inaliendble in ancient Greek law.[2] Even when it became legal to dispose of ancestral land, it was deemed disgraceful to do so.[3]

Commenting on the general inalienability of land in ancient Greece, Lacey says:

> It is also a reminder that modern notions of ownership may be misleading, and suggests that we should not look on the kyrios of an oikos as an individual owner, but as the present custodian of what belongs to his family, past, present and, if he is successful in procreating a son, future. 4

In this sense, the succession of sons on the death of their father was in principle, not succession at all, but simply the continuation of joint ownership, [5] a son thus stepping into the shoes of his father to play the same role in respect of the oikos.[6]

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1. Lacey, ibid., 23.

2. N.DFustel de Coulanges, The Origin of Property in Land, tr., M. Ashley, (London, 1927), 90. D. Asheri, 'Laws of Inheritance, Distribution of Land and Political Constitutions in Ancient Greece', Historia, 12 (1963) 1-21 at 1-3. Cp. the śāstric text: sthāvare vikrayo nāsti ..., Dh.K.1589b, infra,

3. Plato, Laws, 923A. Also, Lacey,loc.cit., 23.

4. Lacey, op.cit., 23. Cp. the position of the manager of joint Hindu families, Derrett, IMHL,§§426, 427.

5. For survival of this custom in modern Greece, see E. Friedl, 'Dowry and Inheritance in Modern Greece', in J.M. Potter, M.N. Diaz and G.M. Foster , ed., Peasant Society(Boston, 1967), 57-62 at 57.

6. D. Asheri, op.cit., 7.

IV. Testamentary power of the father

In pre-classical Greece, testate succession was unknown.[1] In Homeric society we do not come across the concept of will.[2] Plato also disapproved of testamentary disposition.[3] The general rule was that a man could not dispose of his property by will if he had legitimate sons.[4] Plutarch speaks of Solon that :

> before his time, no will could be made, but the entire estate of the deceased must remain in his family. Whereas he, by permitting a man who had no children to give his property to whom he wished, ranked friendship above kinship, and favour above necessity, and make a man's possession his own. 5

Although Plutarch's record gives the impression that the reform of Solon granted general power[6] of making a will, in fact it only introduced a a testamentary adoption.[7] The law granted the power of making a will only in the case of fa ilure of natural heirs. David Asheri opines that a

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1. Asheri, ibid., 6.
2. Lacey, op.cit., 131.
3. Law, 922A.
4. Lacey, op.cit., 131, n.35 at 294. Asheri, op.cit., 6.
5. Plutarch's Lives, Life of Solon, tr. B. Perrin, (London, 1914), I, 461–463.
6. Asheri thinks that Plutarch's report was inaccurate and erroneous, D. Asheri, op.cit., 7, 12.
7. Asheri, ibid., 8.

> Solonian testament was identical with the institution of an heir by means of adoption by a childless head of household. The adopted son, at the death of the testator, was introduced into his adoptive father's household to inherit and perpetuate it and to keep its *sacra* alive.[1]

However, the passage from Plutarch undoubtedly suggests that prior to the legislation of Solon, property belonged to the family and a father did not have the power to deprive the natural heirs by testamentary disposition.

It is interesting to note that in Sparta, a father could not dispose of family property with the object of depriving his son either *inter vivos* or by a will. Plutarch informs us that the Spartan families who were instituted by Lycurgus retained their old system in the Lacedaemonian state until it was changed by Epitadeus, who had a quarrel with his son. As a result of this personal aggrandisement he 'introduced a law permitting a man during his lifetime to give his estate and allotment to any one he wished, or in his will and testament so to leave it'.[2] Thus, Plutarch comments, 'the most excellent of institutions'[3] was destroyed.

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1. Asheri, ibid, 8.

2. *Plutarch's Lives*, *Life of Agis*, V, 2, tr. B. Perrin, (London, 1921), X, 13-15. Also see *the Life of Lycurgus*, VIII, 3. Asheri tells us that unlike the Solonian testamentary *adoption*, the *rhetra* of Epitadeus was a proper testamentary instrument: 'Land became absolute private property and its owner was now free to dispose of his substance without limitations ...', D. Asheri, *Historia*, 12 (1963) 13. Alluded to by Aristotle, *Pol*. 1270 A21.

3. *Plutarch*, *Ag*., ibid., X, 13.

V. Son's position among the natural heirs

In Athenian law, the most important of the heirs of the de cuius are his legitimate sons.[1] It is perhaps not insignificant to note in a context comparable with Hindu law that throughout Greece[2] (excepting a variation in Gortyn)[3] sons exclude all other heirs in respect of inheritance.

However, even during his lifetime, a father could distribute the family property among his sons.[4] Like a Hindu vānaprastha,[5] in ancient Greece

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1. Adopted sons also are equally important, Harrison, op.cit., 130. Also see, D. Schaps, 'Women in Greek Inheritance Law', Classical Quarterly, 25 (1975) 1: 53-7 at 54. Illegitimate children were excluded from inheritance of their father's estate. D.M. Macdowell, 'Bastards as Athenian Citizens', Classical Quarterly, 26 (1976), 1: 88;91 at 88. Cp. Hindu Law, infra, 761-4.

2. Asheri, loc.cit., 20. Inscriptional materials also supports this contention. An inscription of Naupactus prescribes the order of succession: (a) sons, (b) daughters, (c) brothers; and explicitly excludes the daughters in presence of sons. The order of succession in an inscription from Thermus in Aetolia, around c. 223 B.C. (a) sons, (b) daughters, (c) brothers or sisters, (d) at least any other category. The same order in an inscription from Tegea, on these, see D. Schaps, loc.cit., 55-57. The same preference for sons in Plato, Laws, XI, 924. In Attic law, in order of preference of heirs, the anchisteis were the first; then the sungeneis. The anchisteis were members of the anchisteia. In its concrete sense anchisteia means those who stand very near to the deceased; in its abstract sense it means proximity, which is exactly synonymous with the Sanskrit word, pratyāsatti, Derrett, TLL, 1953, 57, n.15. With the Greek rules, cp. Manu, IX, 185.

3. infra, 88-90.

4. Bouselus had five sons; 'their father divided their property for them'. They got married and set up five oikoi, Lacey, op.cit., 127, n.13 at 292. Euctemon, during his lifetime, settled property to his son Philoctemon. In a proprietary sense this property belonged to Philoctemon since he bequeathed it to one of his sister's two sons during the lifetime of Euctemon, Lacey, ibid., 127. Cp. Tai. Saṃ. III. 1.9.4; II.5.2.7; also Mitā on Yājñ. II. 114, Kāṇe, HD, III, 565-569. Also see, infra, 370-85.

5. On vānaprastha, see infra, 385-402.

'fathers of adult sons often handed over the management of their oikos to their sons, and virtually stepped down from the management of the house,[1] ...' To safeguard the interest of the aged, Athenian law provided that a father, in common with other ascendants both male and female, had a right in his old age to be maintained by his son;[2] to which Solon added a proviso that a father who failed to educate his son in a trade could not claim maintenance from him in old age.[3]

It is worth discussing the fact that a son of any age could be removed from the house by his father, and possibly this was a means to exclude a son from his share in the inheritance, an exclusion which the father could not bring about by testamentary disposition. Actual instances of casting out sons were extremely rare,[4] and possibly, like formal disherison, were contra bonos mores.[5]

Apart from discountenancing disherison, Athenian law took care to protect the interest of children and remoter heirs in family property against dissipation by the father due to his idleness or mental incapacity.[6] These safeguards indicate that the latent right of the heirs in the family property which was in the

1. Lacey, op.cit., 117. Also G.S. Kirk, 'Old Age and Maturity in Ancient Greece', in A. Portmann and R. Ritsema, ed., The Stages of Life in Creative Process, (Leiden, 1973), Eranos, 40 (1971), 123-158 at 131.

2. Harrison, op.cit., 77. Cp. Śat. br.

3. Harrison, ibid, 78.

4. Harrison, ibid., 75-6. Cp. Manu, VIII. 389. Yājñ. II. 237.

5. Plato, Laws, 928, D-E. Lacey, op.cit., 126, n.7 at 292.

6. Harrison, op.cit., 79.

hands of the father was not a myth but a juridical reality.

VI. Conclusion

Thus, the preferential position of a son as first among the heirs, the checks and balances in the power of the father to deal with family property, and the absence of the power of testamentary disposition, indirectly imply a quasi-ownership of the son in the family property along with his father. It may not be as concrete as the Mitākṣarā birthright, nevertheless, it makes meaningful the assertion of Plato that 'neither your own persons nor the estate are your own; both belong to your whole line, past and future ...' [1]

VII. The Gortyn Code

The Greeks were not confined to the mainland of Greece. Commerce and conquest carried the Greek civilization quite far afield, and in some of the Greek colonies valuable traces of the Greek legal system have been found.

One of the outstanding discoveries in the field of Greek legal history is the finding of the Great Code of Gortyn.[2] Scholars agree that the Code is not older than c. 450 B.C.,[3] and it is generally accepted that the Code contains many

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1. The Laws of Plato, X. 924, tr. A.E. Taylor, (London, 1934), 316. Cp. Vyāsa's text: ye jātā ye'pyajātāś ca ..., Dh.K. 1587.

2. On the importance and nature of the Code, see R.F. Willetts, Ancient Crete: A Social History, (London, 1965), 82-4.

3. A.C. Merriam, Law Code of Gortyna in Krete, (Baltimore, 1886), 6. R.F. Willetts, The Law Code of Gortyn, (Berlin, 1967), 8.

traces of older usages than its actual date of formulation.[1]

a. Family organisation

The Code gives the impression that, so far as the Dorian[2] citizens were concerned, the social system was essentially patriarchal.[3] The family was centred within the wider circle of the clan[4] and the household (oikos) was closely related to the tenure of the kleros, i.e. the ancestral estate consisting of the land and the attached peasants.[5]

b. Proprietary relationship between father and son

The Gortyn system reveals that a father's power was not as absolute as in developed Roman law. The sons could deal with their self-acquisitions in any way they liked. The passage which deals with the respective proprietary

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1. Willetts, ibid., 8. Also Vinogradoff, OHJ, II, The Jurisprudence of the Greek City, (London, 1922), 207. Cp. the remark of Benveniste, 'Il n'y a pas imprudence à supposer dès maintenant que les Aryens doivent autant à la culture de l'Indus que les Hellènes au monde créto-mycénien', E. Benveniste, Vṛtra et Vṛagna, Étude de mythologie indo-iranienne, E. Benveniste and L. Renou, (Paris, 1934), 199; 'It is not rash to suppose from now on that the Aryans owe as much to the Indus culture as did the Hellenes to the Creto-Mycenaean world', tr. H. Kanitkar, Department of Anthropology, S.O.A.S.

2. On the origin of the Dorians, see W. Ridgeway, 'Who Were the Dorians?', Anthropological Essays, Edward Burnett Taylor Felicitation Volume, (Oxford, 1907), 295-308 at 308. Also, Willetts, Ancient Crete, loc.cit., Ch.II.

3. Willetts, The Law Code of Gortyn, loc.cit., 10-17.

4. Cp. gens among the Romans, supra, 60-62.

5. Willetts, loc.cit., 11-12.

rights of father and son in family property unambiguously upholds a son's independence and ownership of his self-acquisitions:

> As long as a father lives, no one shall purchase any of his property from a son, or take it on mortgage; but, whatever the son himself may have acquired or obtained by inheritance, [1] he may sell if he will: nor shall the father sell or promise the property of his children whatever they have themselves acquired or succeeded to ... [2]

An ingenious variety of checks existed to prevent possible infringement of these rules, and the Code laid down a fine in relevant cases. The intention of imposing these penalties was 'to try to limit the extent of encroachment upon collective rights, particularly by limiting the powers of individual action by the males'.[3]

Although the father was given control of the children and division of property, he had no power of testamentary disposition.[4] We have just seen that a father had no right over the self-acquired property of his sons and this shows that a father had effective control only over his own self-acquisitions and the ancestral property in his hands. However, it is indeed worth noting that even in respect of these properties, a father could not interfere with the normal course

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1. When the wife died leaving children, her property passed to the children and not to her husband. The father had the right to administer such property, but, unless the children consented, he could not sell or mortgage such property, Willetts, The Law Code of Gortyn, op.cit., 20, n.38, n.35; 44, Cols. VI, 31-46.

2. Willetts, ibid., 20.

3. Willetts, ibid., 21.

4. Willetts, ibid., 12, 20.

of inheritance by testamentary means.[1]

The Gortyn Code gives the impression that so long as the parents were alive, the property remained joint and there seems to be no general right of the sons to demand a share of the family property during the lifetime of the father.[2] But there is a curious provision in the Code which implies son's ownership even during the lifetime of the father. The provision was that if a son was condemned to pay a fine, his due portion of the family property had to be given to him.[3] This entitlement to his share of the family property in his father's lifetime denotes a birthright of the son which, although it may not be exactly like the Mitākṣarā birthright in connotation, nevertheless, is the manifestation of a right which a Dorian son acquired from his birth.[4] The only limitation was that it was conditional on committing an offence, resulting in the necessity of paying a fine by the son.

c. Position of the daughter

From the Indo-European point of view where agnatic succession is the

1. Willetts, The Law Code of Gortyn, op.cit., 20. O.K. McMurray, 'Liberty of Testation and Some Modern Limitations Thereon', in Celebration Legal Essays to mark the twenty-fifth year of service of John H. Wigmore as Professor of Law in Northwestern University, (Chicago, 1919), 536-563 at 539.

2. Cp. the Mitākṣarā position, Kāṇe, HD, III, 564-570. Also infra, 518-9.

3. It was a portion, not a payment like the paterfamilias paying for the delict of filiasfamilias in Roman Law, Willetts, loc.cit., 64, cols. 23-31.

4. In a personal discussion, Willetts agreed on this point with the present writer.

norm, the Gortyn Code has a discordant provision which, in respect of certain movable property, [1] provides that half a son's portion goes to the daughter. [2] Thetext on this rule runs as follows:

> But, if a (father) die, the houses in the city and whatever there is in the houses in which a serf residing in the country does not live, and the sheep and larger animals which do not belong to the serf , shall belong to the sons, but all the rest of the property shall be divided fairly, and the sons, how many soever there be, shall receive two parts each, and the daughters, how many soever there be, one part each daughter. 3

A father could make a gift of property to his daughter on her marriage, but this should not exceed the daughter's entitlement of inheritance at his death. The texts run as follows:

> If the father while alive, wished to make a gift to his daughter on her marriage, he could do so, but only within the prescribed limits, that is to say, the prescribed limit of her share of the inheritance, which was half as much as the sons. 4
>
> Any (daughter) to whom he gave or pledged before shall have these things, but shall obtain nothing besides from the paternal property. 5

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1. D. Asheri, 'Laws of Inheritance, Distribution of Land and Political Constitutions in Ancient Greece', Historia, 12 (1963), 1-21 at 17.

2. D. Schaps, 'Women in Greek Inheritance Law', Classical Quarterly, 25 (1975) 1: 53-57 at 55.

3. A.C. Merriam, Law Code ofGortyna in Krete, op.cit., 15.

4. Willetts, The Law Code of Gortyn, op.cit., 20.

5. Willetts, ibid., 42, col.iv.

In fact, it is an advancement, and the rule restricts a father's power of gift to his daughters in order to protect the rights of the sons.[1]

VIII. Conclusion

The foregoing discussion shows that among the Dorian Greeks, a father is dominant in the gubernatorial sphere but in the sphere of property, he appears to be no more than an administrator of the common goods. And, indeed, in this respect, like the Athenian system, the Dorian stands half-way between the absolute paternal ownership characteristic of developed Roman law and the corporate property regime of the *Mitākṣarā*.

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1. Daughter as co-heir with her brother is mentioned in the Hindu texts. Yājñavalkya ordained her a share with her brother which was to be one-fourth of what she would have got had she been born as a son. Yājñ. II. 124. Mitā on Yājñ. II. 124: anena duhitaro'pi pitur ūrdhvaṃ aṃśa bhāginya iti gamyate ... tasmāt pitur ūrdhvaṃ kanyāpi aṃśa bhāginī / Balaṃbhaṭṭa is more emphatic and says that a sister is entitled to a share as of right of the paternal property: vibhāge satyasati ca duhitā taccaturthāṃśa bhāginī tad anantaram iti siddham / ata evaika putrasthalepy ūpapādanaṃ kṛtam iti bodhyam / Balaṃbhaṭṭī, on Yājñ. II. 124, Ghārpure, ed. 159; also, putrīs-vatve (putritve) tu svajātinibandhanādaṁśac caturthāṃśa bhāgitvam vaksyamā-nam bodhyam / Balambhattī, on Mitā, Yājn. II. 124; Gharpure, ed., 154-5. Cp. Manu, IX. 185. The Nagpur High Court (defunct in 1956) held that unmarried daughters may, if they choose, demand each a quarter of any brother's share according to the text of the *Mitākṣarā*, *Mt. Lochan* v. *Babai* (1909) 5 Nag. L.R. 161, 170-1 = 4 I.C. 786 (referred to in *Shamrao* v. *Munnabai* (1945) 1948 Nag. 678, 687. The Nagpur decision was ignored by the Supreme Court in *Guramma* v. *Mallappa*, AIR, 1964 SC 510; and in the light of the S.C. decision, a daughter's right to a share in presence of son should be considered as obsolete. For a juridical discussion on this point, see Derrett, *Critique*, 91, n.7.

(2) The Customary Law of the Albanian Highlands

I. Background

The Albanian highlands, i.e. the country lying to the north of the river Shukumbin, stretches from the Adriatic sea on the west to the Yugoslav frontier in the east. The inhabitants of this region are the direct descendants of the Illyrians, [1] and 'until recent decades, this tribal region probably represented the most ancient social system still extant in Europe'.[2] Thus, the Albanian customs are of special significance in the study of the ancient family law in a comparative context among the Indo-Europeans.

II. Sociometric and proprietary relationship

Albanian society was patrilineal [3] and property rights were vested in the men.[4] Joint families of four or five generations, numbering twenty

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1. En. Br. (1970) I, 507. The Illyrians were an Indo-European people who settled in the western half of the Balkan peninsula at about c. 1000 B.C., ibid., 1101. Also, see N.G.L. Hammond, 'The Coming of the Indo-Europeans to the southwestern Balkans', in Acta of the 2nd International Colloquium on Aegean Prehistory, (Athens, 1972), 104-112.

2. P.E. Mosely, 'The Distribution of the Zadruga within Southeastern Europe', in The Joshua Starr Memorial Volume, (New York, 1953), 219-230 at 221. Mosely opines that Albania also passed through the familial institution of *zadruga*. Eventually the *zadrugas* declined but the Indo-European tribal social organisation remained, ibid., 223.

3. M. Hasluck, The Unwritten Law in Albania, ed., J.H. Hutton, (Cambridge, 1954), 25.

4. Hasluck, ibid., 25.

members or more, used to live under one roof.[1] These families were governed according to the patriarchal system[2] under the absolute management of a head who used to be elected from among the male members. Normally, the dying father's mantle used to fall on the son and even a younger brother, having better administrative qualities than his elders, could become the manager of a household.[3]

However, it is assumed that the head of the family was supreme in the administrative sphere. In the affairs of property, he was no more than a manager of the common goods. Like the Mitākṣarā coparcenary, the family farm was jointly owned by all the men 'and the master did not own a blade of grass more than the others did'.[4] The earnings of any member of the family had to be handed over to the house master who would save or spend them for the benefit of the family.[5] The Albanian custom has a saying that 'the earnings of a son are shared by his father and brothers'.[6] The customary law did not give any scope to the master of the household to act as an autocrat.

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1. Ibid., 25.
2. Ibid., 34.
3. M. Hasluck, The Unwritten Law in Albania, op.cit., 35.
4. Ibid., 36.
5. Ibid., 36.
6. Ibid., 36. In this connection, the words such as 'father', 'son', and 'brothers' apart from their literal and narrow connotations should be taken in the wider Albanian sense of relatives in the older and younger generations, ibid., 30, 36.

It was his duty to consult other male members whenever he had to buy or sell any family possessions.[1] He had to give everybody the impression that the family property belonged to all the members, and the welfare of each member concerned the whole family.

Although the overall power to direct the lives and work of all members remained in the hands of the master of the joint family, an adult married member of the joint household was supreme over his own conjugal unit.

III. Relationship of father and son

In a household comprising a father and his sons, naturally the father was the master of the house. A son and his conjugal family had the right to be maintained by the joint family, even though the son was a wastrel and did not earn anything to contribute to the family. The customary law disapproved of expulsion[2] of such a son by the father; 'it was the offender's "birthright" to remain in the house, to eat at the common table,[3] and to have his wife and children maintained out of the family purse'.[4] Only for gross misdemeanour, like murder, could a father expel a son from the house.[5]

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1. Ibid., 40.

2. Cp. Manu, VIII. 389; Yājn. II. 237.

3. Cp. Br. 25.6. SBE, 33, 370-1; Aiyangar, ed., 26.5, p.196; ekapākena vasatam. Aristotle, Politics, II.6. Plutarch's Lives, Life of Marcus Crassus, Loeb ed., III, 315.

4. M. Hasluck, The Unwritten Law in Albania, op.cit., 39. As an illustration, see the case of Pal, the eldest son of Mirash Nue in Shalë, ibid., 39.

5. Hasluck was present when a father expelled one of his sons for killing the other in Krujë, ibid., 38.

Although a son's joint living with his father was socially praised [1] and economically favoured, occasionally sons used to separate while their father was still alive. But, it is indeed, significant in a comparative context with classical Hindu law that the sons who took the initiative in a separation were publicly mocked as 'low class fellows'. [2] This social disapproval, as in <u>śāstric</u> law, [3] only proves that the legal right of a son to demand partition of family property against the will of his father was well known in the customary law of Albania. However, as is found in Greek [4] and Hindu [5] law, there were occasions when the father might partition the family property amongst his sons. [6]

In Albanian customary law, property was not distinctly labelled as movables and immovables. Property was categorised as 'food' or 'other than food', and the latter category included both movables and immovables. In a division during the lifetime of the father, one-eighth of the land and a room were set aside for the father and the rest of the family property used to be distributed among the sons. However, the father would retain all the title-deeds of land which would pass to the sons after his death. Property in the Albanian

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1. Ibid., 51.
2. Ibid., 52. Cp. Gautama states that the <u>brāhmaṇas</u> who had separated from their father against the latter's will, were not fit to be invited for dinner at a <u>śrāddha</u> feast, Gautama, 15. 15 and 19, Kāṇe, HD, III, 566-7.
3. Kāṇe, HD, III, 567.
4. Supra, 83.
5. Kāṇe, HD, III, 568.
6. Hasluck, loc. cit., 63-4.

mountains was categorised into ancestral and self-acquired, and this categorisation had importance regarding the rules of partition. The customary law provided that lands inherited and bought by the father had to be divided amongst the brothers *per stirpes*, and a predeceased son's son would represent his father.[1] But any land bought after the death of the father had to be divided *per capita*, i.e. according to the number of adult men .[2]

We have mentioned earlier that, according to Albanian custom, for extreme misdemeanour a father could banish a son from his house, and while partitioning the property among his sons, he was not obliged to give any portion to the banished son. Despite this power, the banishment and the consequent exclusion from the partition by the father did not entail disherison, and could not affect the inherent right of the son in the property of his father. It seems that a son's right in the family property was latent from his birth because, even though an expelled son could be excluded from his share in a partition by his father, he could take his share back proportionately from his brothers after the decease of their father.[3]

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1. Hasluck, op.cit., 61. About a house there were different rules. If the house was inherited or built by the father, it would go to the youngest son. If it was built after the father's death, the eldest used to retain it but he had to pay to the other brothers their proportionate shares of assessed value, ibid., 61.

2. Ibid., 61.

3. Hasluck, op.cit., 65.

IV. Conclusion

In many of the provisions discussed above, Albanian customary law presents a clarifying insight into the proprietary relationship between father and sons and, in a comparative context, illuminates our study of the *Mitākṣarā* birth-right. Although the head of a family among the Albanians might buy and sell property without obtaining the approval of other members, in practice he was not likely to undertake important transactions without consultations with the male members. Thus, Margaret Hasluck states that in Albanian customary law, the male members of the family have joint rights in the property which are realised on partition or separation.[1] It needs no elaboration that similar rights of the male members in Hindu joint family are quite well-known.

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1. Hasluck, op.cit., Ch.IV-VI.

(3) The Zadruga (communal joint family) of the South Slavs

I. Introductory Remarks

The opinion that 'South Russia', more than any other region, can claim to be regarded as the cradle-land of the Aryans (= Indo-Europeans)'[1], must draw our attention to the ancient familial institutions around the region.

II. Zadruga: Definition and structure

Until recently,[2] the zadruga or communal joint family, was

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1. B.K. Ghosh, 'The Aryan Problem', in R.C. Majumdar, ed., The Bhāratīya Itihāsa Samiti's History and Culture of the Indian People, I, The Vedic Age, (London, 1951), 212. Also supra, 4, n.1.

2. As recently as 1936, Philip Mosely made case-studies of the zadruga in some forty-five localities within Yugoslavia, Albania and Bulgaria, P.E. Mosely, 'The Peasant Family: the zadruga or Communal Joint-Family in the Balkans, and its Recent Evolution', in C.F. Ware, ed., The Cultural Approach to History, (New York, 1940), 95-108; also 'The Distribution of the Zadruga within Southeastern Europe', in The Joshua Starr Memorial Volume, (New York, 1953), 219-230. The zadrugas could be found in Montenegro, Northern and Central Albania, Bosnia, Herzegovina, Western Croatia, Northern, Central and Southern Macedonia and Dalmatia, ibid., 221-2. Vinogradoff, OHJ, I, 268, Slavonic Encyclopaedia, (New York, 1969), IV, 1393-4. The Southern Slavs were not the only people of eastern Europe with a joint family life. Both in the Northern forests and in the Southern Steppes, the Russians had a similar kind of family structure and property ownership among kinsmen, Vinogradoff, OHJ, I, 271. These Russian joint families were called derevnia, and usually extended to second cousin and sometimes to their children. The power of the father was stronger among the Russians than among the South Slavs. Among the native tribes, belonging to the different ethnic groups: Turki, Mongol, Tungus and Urgo-Finish, of Western and Eastern Siberia, the power of the lord of the household is very great. The family relations are built on patriarchal basis and among some tribes, there are marked weakening of parental authority in respect of grown-up children. V.A. Riasanovsky, Customary Law of the Nomadic Tribes of Siberia, (Indiana University, Bloomington, 1965), 29, 33, 59. Cp. the dvor in pre-revolutionary Russia which was part and parcel of the 19th century Great Russian mir system. The peasant dvor was actually a farming unit. A family

/Continued on next page:

characteristic of the Southern Slavs. No single definition embraces all varieties of zadruga,[1] but it can best be defined as an extended family association of 50 to 80 members related patrilineally by blood to one another up to second and third degree. They live in the same farm for several generations without dividing the property or the household.[2] Very much like a Mitākṣarā coparcener, each male member of a zadruga 'possesses a recognised, if latent, right to a share of the communal property and is free, if he chooses, to leave the zadruga to take his share of its property, as defined by customary or written law ...'[3] However, besides the common property (skupcina), an individual could also own separate property (osebunjak).[4]

Note 2 - p. 97 - continued:

could be a dvor unit, but it is more a tenure than a kinship-based complex. The corporate personality of the dvor has been left intact in modern collective farms (kolkhoz), S. Osofsky, 'The Legal Status of the Russian Collective Farm Household', Am. J. Comp.L., 22 (1974), 541-562.

1. P.E. Mosely, 'Adaptation for Survival: the Varzic Zadruga', Slavonic and East European Review, 31, pt.1 (American Series, vol.II), March, (1943), 147-173 at 147. On varieties of zadruga, see Mosely, 'The Peasant Family; the zadruga, or Communal Joint-Family in the Balkans', in C.F. Ware, ed., The Cultural Approach to History, op.cit., 95-108 at 97. Outside Croatia, the zadruga is more commonly referred to as 'a large house' or 'a large household', 'a lot of people', sometimes as 'an undivided house'. In Serbia, to live in zadruga means 'to live in concord' or 'in harmony', ibid., 99.

2. K.P. Chattopadhyaya, 'Ancient Indian Culture: Contacts and Migrants', Our Heritage, 8 (1960) 1: 1-36; 2: 37-73 at 5, quoting O. Schrader, Real-lexicon der Indogermanischen Altertumskunde (Strassburg, 1901).

3. Mosely, 'The Distribution of the Zadruga within Southeastern Europe', op.cit., 220.

4. Slavonic Encyclopaedia, IV, 1393.

III. Head of the family community

At the head of the zadruga household is the house manager. Beyond his own share, he does not own anything of the family property; he administers it on behalf of its members.[1] Zadrugal custom rests on the equality of its male members and, therefore, the house manager makes the basic decisions jointly with other members. The administrator is almost always the father of the family and usually, he is succeeded by his son or brother. Election to headship, although rare, is not unknown.

IV. Narrower family units (inokostina)

We have stated earlier that an individual member had the right to demand a partition of the zadruga property and he could set up his own conjugal family; but each small family, because of the uniformity of social configuration in the area was, potentially, a zadruga.[2] Thus, in many cases, zadrugas were larger groups which grew out of the narrower conjugal units (inokostina).[3] However, it will be wrong to assume that these two institutions are separate. They may differ in size, but the same customs apply to both in respect of ownership, inheritance and dowry.[4]

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1. Vinogradoff, OHJ, I, 269. Cp. the position of the manager of a joint Hindu family, Derrett, IMHL, 259 ff.

2. Mosely, 'The Distribution of the Zadruga within Southeastern Europe, op.cit., 220.

3. Maine, Dissertations on Early Law and Custom, (London, 1883), 241-2.

4. Mosely, loc.cit., 226.

V. Respective proprietary rights of ascendants and descendants

In the context of our present study, it is significant that 'one of the customary rules on which the zadrugal way of life rests is that, as long as there are male heirs to carry on the communal family, women inherit no share in the zadrugal land'.[1] Thus, basically, like the *Mitākṣarā* coparcenary, zadrugal ownership also implies a male property complex. The striking resemblance between the two institutions is further revealed by the co-ownership of ascendants and descendants in zadrugal property. The customs of family ownership have been presented by Professor Bogišić as follows:

> 1. The father, while living in the same household as his grown-up sons, has not the right to dispose of the family property.
>
> 2. He has not the right to dispose of it *mortis causa* without the consent of his sons.
>
> 3. The father is the head of the administration, but on important occasions he acts in concert with his sons. If, for any reason, he is not equal to the task of administering the affairs of the community, one of his sons may be put in his place.
>
> 4. Sons who are of full age, especially if they are married, may demand partition during the life of their father. 2

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1. Mosely, 'The Peasant Family: the *zadruga*, or Communal Joint-Family in the Balkans', op.cit., 100.

2. tr. Vinogradoff, OHJ, I, 271 from an article by Valtazar Bogišic in the *Russian Journal of the Ministry of Public Administration*, Vinogradoff, ibid., 270, n.1. On this topic, the other important works of Bogišic are: *Pravni običaja u slovena; privatno pravo*, (Zagreb, 1867); *Zbornik sadašnjih pravnih običaja u južnih slovena; gragja u odgovorima iz različnih krajeva slovenskoga juga*, see Mosely, loc.cit., 96, n.1. It is regretted that the original sources could not be consulted. On the life and works of Bogisic, see Maine, *Early Law and Custom*, 241-2; 244, n.2. Also *Slavonic Encyclopaedia*, I, 10.4.

VI. Conclusion

Considering the above rules, it is needless to say that nothing could more proximate [1] the concept of the *Mitākṣarā* co-ownership of father and son, and one can hardly be satisfied with any suggestion that the two proprietary systems represent mere agro-economic coincidence without any ethnological significance.

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1. Derrett, TLL, 1953, 56.

CHAPTER 4

CELTIC LAW

1. Introductory Remarks

In addition to linguistic and mythological affinities,[1] the social organisation and familial institutions of the Vedic Indians and the Celts[2] show striking resemblances in their juridical context.[3]

The continental Celts of Gaul were conquered by the Romans and, excepting some insights into their general social organisation, very little is known of their family law.[4] For a study of Celtic law, one has to depend mainly on the ancient laws of Ireland and Wales.[5]

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1. A. Macbain, Celtic Mythology and Religion, (Stirling, 1917), 44. On linguistic affinity, see P. Rolland, 'A Few Vedico-Celtic Concordances', Vishveshvaranand Indological Journal, 12 (1974) 1 and 2: 311-318.

2. On the Celts, see J. Cameron, Celtic Law, (London/Edinburgh, 1937) 3-4.

3. M. Dillon, 'Celt and Hindu', VIJ, 1 (1963) 2: 203-223 at 220-3. Also, D.A. Binchy, 'Preface', to R. Thurneysen, Studies in Early Irish Law, (Royal Irish Academy, Dublin/London, 1936), vi.

4. E. MacNeill, 'Celtic', sub. 'Law', En.So.Sc., IX, 246.

5. MacNeill, ibid., 246,

II. The ancient laws of Ireland

The 'Beaker invasion' of the later third millennium B.C. in Ireland marks the major Indo-European infiltration,[1] and the formation of a juridical tradition in Ireland has been a process of development from its Indo-European origin. The Irish law tracts[2] go back in written form to the seventh century,[3] but the oldest writings on Irish law point clearly to an older oral tradition which, perhaps, remained undisturbed by the subsequent invasion of Christianity. Thus, these laws are mostly pure Celtic tradition,[4] and thereby , are an 'authentic monument of a very ancient group of Aryan institutions ...'[5], though the

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1. P. Harbison, 'The Coming of the Indo-Europeans to Ireland: an Archaeological Viewpoint', Journal of Indo-European Studies, 3 (1975), 2: 101-119.

2. The two largest of these tracts are: (i) Senchus Mor or Great Book of the Ancient Law; (ii) Book of Aicill. Senchus Mor is one of the oldest portions of the Ancient Laws of Ireland, W.K. Sullivan, Introduction to E.O'Curry's Lectures on the Manners and Customs of the Ancient Irish, (London, 1873), I, xiii, xv.

3. Even in A.D. 1509 these laws were in force in the County of Clare, Sullivan, ibid., xiii-xv.

4. E. MacNeill, 'Celtic', sub. 'Law', En.So.Sc. IX, 246-7.

5. Maine, Lectures on the Early History of Institutions, (London, 1897), 11. Maine's supposition that the Irish law tracts were a kind of phonographic record of primitive customary law is not shared by MacNeill. He points out that Irish law came forth not from the customs of the countryside but from a school of law and from a long tradition of teaching under a class of men who claimed to be, and recognised to be authentic expositors of all high knowledge, Early Irish Laws and Institutions, (Dublin, 1935), 83.

original texts need to be distinguished from a subsequent gloss.[1]

a. The Social Organisation

The structural institutions of ancient Irish society were closely linked with their rural setting and the whole community was dependant on the use and cultivation of land.[2] Within a limited zone of kinship, the whole society was divided into tribes and sub-tribes [3] named after an eponymous ancestor. The smaller unit of these two groupings, the Sept, shows the characteristics of the joint family of the Hindus.

b. Ownership of family property

In the context of ownership, the sons, grandsons and great-grandsons of a male ancestor, like the Hindu coparcenary, constitute the derbfine or the true family.[4] The juridical and comparative significance of the institution

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1. D.A. Binchy, 'The Linguistic and Historical Value of the Irish Law Tracts', in Proceedings of the British Academy, 29 (1943), 195-227. The juristic value of the 1852 edition of the Ancient Laws of Ireland has been doubted by scholars for faulty rendering, E. MacNeill, ibid., 88-9. 'The law still has to be deduced from elliptical, incomplete and often corrupt texts, which appear to be copies of copies of archaic manuscripts ...', Gavan Duffy P. in Foyle and Bann Fisheries Ltd. v. Attorney-General, (1949), 83 ILTR 29, 41. But Binchy opines that the 'sacred' texts were preserved with touching fidelity by 16th century scribes, D.A. Binchy, 'Ancient Irish Law', Irish Jurist (n.s.) 1 (1966), 84-92 at 90.

2. E. MacNeill, Early Irish Laws and Institutions, op.cit., 42.

3. T.D. Sullivan's ballad: 'Chiefs and clans in all directions,
   With their far and near connections.'
   quoted by MacNeill, ibid., 5.

4. MacNeill, 'Celtic', sub. 'Law', En.So.Sc., IX, 248. Myles Dillon, Celts and Aryans: Survivals of Indo-European Speech and Society, (Indian Institute of Advanced Study, Simla, 1975), 95.

is brought out by Myles Dillon in these words:

> The important unit in Ireland was the family of four generations, descendants of a common great-grandfather, and known as the *derbfine* ("true kindred"). This was the normal property-owning unit - land belonged to the *derbfine* - and it was also the unit for the purpose of dynastic succession. ... In Hindu society we find the same family group, there called the *sapinda*; but it is found elsewhere in ancient legal systems, so that no importance attaches to it, beyond the common survival, east and west, of old IE tradition. 2

All recognised members of a *fine*, in the sense of a particular family, constituted the *fine duthaig* or hereditary family, embracing all within the degrees of consanguinity entitled to inherit property; and in the order of degree, the sons (*cindfine* = children) had the foreright.[3] The *fine duthaig*, like the joint

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1. The word *fine* or *finead* literally means family or house, W.K. Sullivan, Introd. to *O'Curry's Lectures on the Manners and Customs of the Ancient Irish*, op.cit., I, clxii-clxiii. *fine* was a miniature clan and it was considerably more comprehensive than the word family. Each clan was composed of a number of *fines*, see L. Ginnell, *The Brehon Laws: A Legal Handbook*, (London, 1894), 100-111. Also J. Cameron, *Celtic Law*, op.cit., 101-20.

2. M. Dillon, 'Celt and Hindu', VIJ, 1 (1963) 2: 203-223 at 220-1. Also Dillon, *Celts and Aryans*, loc.cit., 95. MacNeill, *Celtic Ireland*, (Dublin, 1921), 118; *Early Irish Laws and Institutions*, op.cit., 16-17. J. Cameron, *Celtic Law*, op.cit., 112. Maine, EHI, 89.

3. 'If there is a male heir, a daughter receives nothing of her father's inheritance of movables or immovables, save *lanna*, *ranna* and *bregdha*', H.3.18. 221a 3 (C.395) quoted by M. Dillon, 'The Relationship of Mother and Son, of Father and Daughter, and the Law of Inheritance with Regard to Women', in D.A. Binchy, ed. *Studies in Early Irish Law*, (Royal Irish Academy, Dublin/London, 1936), 129-179 at 133. It is clear from the texts that a daughter never inherited ancestral land in presence of sons, ibid., 133. Dillon also informs us that juridically, 'A son was closely bound to his father', ibid., 129. Cp. Manu, IX, 185. According to text (AL iv.240) 'a father must answer for the liabilities of his son if the latter has no assets, ...' and a son was bound to support his aged parents, ibid., 129-30.

Hindu family, was a corporate, organic and self-sufficient social unit and its continuation depended both in its origin from a common ancestor, and on the land it continued to occupy.[1]

Since the ownership of family land belonged to the group (fine duthaig), the right to alienate such land was denied to the individual.[2] In this respect, the text of Senchus Mor is unambiguous: 'every tribesman is able to keep his tribe-land: he is not to sell it or alienate or conceal it, or give it to pay for crimes or contracts'.[3] The archaic law conceals the prohibition against alienation under the guise of the individual's duty to the tribe: 'The property duties of one towards the tribe are that when he has not bought he should not sell ...'[4]

These rules show that the rights of an individual member of the fine were limited to cultivation and, in case of family necessity, to raise a loan on a very limited scale. An individual member could alienate if, and only if, he could get the consent[5] of all the members of the property complex, or if

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1. Maine, ELC, 107. Laurence Ginnell explains this point by saying that 'The fine or sept occupied the position of principal and cestui que trust, The Brehon Laws, op.cit., 114.

2. Ginnell, ibid., 114-5.

3. W.N. Hancock and T.O'Mahoney, ed., Ancient Laws of Ireland, II, Senchus Mor, (Dublin/London, 1869), 283. Maine, The Early History of Institutions, (London, 1897), 108.

4. T. O'Mahoney and A.G. Richey, ed., Ancient Laws of Ireland, (Dublin/London, 1873), III, 55. Ginnell, loc.cit., 115.

5. Cp. Hindu law, Derrett, IMHL, §461.

he was under pressure of strong necessity:[1] 'No person should grant land except such as he has purchased himself, unless by the common consent of the tribe, and that he leaves his share of the land to revert to the common possession of the tribe after him'.[2] And, 'he who neither sells nor purchases may give as far as the third of tribe share, in case of little necessity, and the one-half in case of great necessity'.[3]

c. Self-acquired property

As in the smṛtis, the concept of self-acquired property is well attested in the Brehon tracts and the instances of self-acquisitions differ from those of the common property of the 'tribe'.[4] A tribesman had more power over and independence regarding property acquired by his own industry, unaided by the nucleus of property of the tribe, than over acquisitions made through profits arising from the cultivation of tribal land.[5] The crisis of defining self-acquired property and its overlapping with joint family property are burning problems of Hindu law.[6] Considering the antiquity of Brehon laws, the ancient Irish system deserves commendation in its practical and well-defined approach to this sensitive topic which

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1. Cp. āpatkāle kuṭumbārthe ..., Bṛ., cited Mitā, I.i. 28; Dh.K. 1588b.
2. Ginnell, op.cit., 115. ALI, III, 53.
3. Ancient Laws of Ireland, III, 47.
4. Ginnell, loc.cit., 115.
5. ALI, III, 53.
6. Derrett, Critique, 61 ff.

puzzles the judiciary even today.[1]

In respect of self-acquired land, the power of bequest by the acquirer has been detailed in the following rules: 'If it be land that acquires it, it is one-half, if it be land that grows it; if it be not he that acquires it, it is one-third; if it be a professional man, it is two-thirds of his contracts'.[2] Then the law makes a distinction, and quite equitably, between the power of a professional man who acquires his skill by the aid of tribal property and such a man who acquires his skill without such aid:

> If he be a professional man, i.e. if it be land that he has obtained for (by the exercise of) his profession, i.e. if it be property acquired by judicature or poetry, or for any other profession whatsoever, he is capable of giving two-thirds of it to the Church ... (but) if it was the lawful profession of the tribe, he shall not give of it (the emolument of that profession) but just as he would give of the lawful land of the tribe. 3

It seems that in the case of acquisition through the 'lawful profession of the tribe' the presumption was that the individual was acquiring for the group; the earning being the result of a skill which he was likely to learn simply by being born in that tribe; and thereby, the law restricted the individual's right to make a gift of his earnings as strictly as it did tribal land. On the other hand, if the individual was engaged in a profession which was not pursued by his tribe, his

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1. Ibid.

2. ALI, III, 49.

3. Comment on the text cited at III, 49, n.2 above. ALI, III, 51. Also Maine, EHI, 111.

skill was presumed to be his personal attainment and he could give away up to two-thirds of his earnings.[1] However, the general presumption of the corporate character of property is still emphasised by the remaining one-third. The experiences of Irish and Hindu societies conform to the norm that in archaic societies, the claim of the group prevailed over the claim of the individual. Thus, in terms of Hindu law it could be said that the interaction between the claim of the group and claim of the individual over self-acquisition is determined by how far the birthright of other members of the group could be extended to the individual's acquisition. Thus, in both the Hindu and Irish systems, acquisition by any member was prima facie acquisition for the family (fine), and to negate the corporate image of property it had to be established that the earning of the individual concerned was unaided by the common property of the group.

d. Conclusion

In the context of our present study, part of the Irish system of land tenure is significant. Before the establishment of Common law, all landed property in Ireland came under either the descent system of Tanistry or that of Gavelkind. Tanistry was an estate of impartible character, attached to the Signory or Chieftaincy, and used to pass to the Tanist by election or by force of arms.[2]

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1. Cp. The Hindu Gains of Learning Act (1930). Derrett, IMHL, 625-6: Critique, 60.

2. Abolished in the Case of Tanistry (K.B. 1607) Dav. Rep. 28, 80 Eng. Rep. 516, cited by A.G. Donaldson, Some Comparative Aspects of Irish Law, (Durham/London, 1957), 230. On the characteristics and antiquity of the institution, see G. Mac Niocaill, 'The 'Heir Designate' in Early Medieval Ireland', Irish Jurist, (n.s.) 3 (1968), 326-335 at 326, 329.

But the majority, that is, all inferior tenancies, were divisible among the males of the Sept (clan) in Gavelkind.[1] Sir John Davis observed: that: '... after partition made, if any one of the Sept had died, his portion was not divided among his sonnes, but the Chief of the Sept made a new partition of all the lands belonging to that Sept, and gave everyone his part according to his antiquity'.[2] Cameron explains that in connection with the 'derbfine', it was only on the death of any one of the adult male members the property was divided among the remaining members of the 'derbfine'.[3] We have already noticed[4] that according to Irish custom, property descended at first only to the male heirs,[5] each son receiving an equal share. It was also not uncommon for the brothers to remain joint after the death of their father as comorbs[6] or co-heirs. The custom of re-distribution of a deceased member's property among the surviving males comes very near to the institution of survivorship in the Mitākṣarā system. Maine observed that survivorship in a Hindu joint family and the kind of survivorship

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1. The term used in Irish for this kind of succession was Gabal cined which originally meant the liabilities and rights of the whole fine, Sullivan, TrIntrod. to O'Curry's Lectures on the Manners and Customs of the Ancient Irish, op.cit., clxix.

2. The Case of Gavelkind, (K.B. 1605) Dav. Rep. 49, 80. Eng. Rep. 535; quoted by Maine, EHI, 186. Maine thought that by 'according to antiquity', Sir Davis meant that the distribution of the effects were made not per capita but per stirpes, EHI, 188.

3. J. Cameron, Celtic Law, op.cit., 114.

4. Supra, 105.

5. Ginnell, The Brehon Laws, op.cit., 130-1.

6. Sullivan, loc.cit., clxxxii. orba = property; com-orb = co-heir. Identical is German Erbe = heir, Sullivan, ibid., clxxxii, n.332.

we have just discussed in a Sept were identical. He remarks: 'All the property being held in common, and all earnings being brought into the 'common chest or purse', the lapse of any one life would have the effect, potentially if not actually, of distributing the dead man's share among all the kindred united in the family group'.[1] Thus, the Irish Gavelkind with its institution of survivorship presupposes a birthright of sons in the family property at the hands of their father.[2]

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1. Maine, EHI, 187. Cp. Katama Natchiar v. Rajah of Shivagunga, (1863) 9 MIA 539, 543, 611. Also Appovier v. Rama Subba, (1886) 11 MIA 75, 89-90.

2. From the contents of 1911 census schedules, David Symes informs us that in the electoral divisions of Dunurlin and Marhin in the parish of Ballyferriter, married sons assumed de facto authority and responsibility concerning the family farm during the lifetime of their parents. Although it is thought that marriage and inheritance are synchronous events in some parts of Ireland, Symes found that even the unmarried sons had a 'subordinate economic status' during the lifetime of their father, D.G. Symes, 'Farm Household and Farm Performance: A Study of Twentieth Century Changes in Ballyferriter, Southwest Ireland', Ethnology, 11(1972), 25-38 at 30. Normally, after the marriage of their son, the aged parents relinquish the farm and 'enter the age grade of the dying', C.M. Arensberg and S.T. Kimball, Family and Community in Ireland, (Cambridge, Mass., 1968), 118. But in some cases, a son's marriage and inheritance were delayed until after the death of his parents, K.H. Connell, 'Peasant Marriage in Ireland: Its Structure and Development Since the Famine', Economic History Review, ser.2, 14 (1961-62), 502-523 at 510; also P. McNabb, 'Demography' (Pt.3); 'Social Structure' (Pt.4), in J. Newman, ed., The Limerick Survey, 1958-64, (Tipperary, 1964), 158-247 at 226.

III. The Law of Wales

a. The background

Although the Welsh Code was drawn up in the tenth century under Howel the Good, [1] the rules existed as custom before that period.[2] However, we should not miss the point that owing to subsequent additions, in their existing form the Laws of Howel the Good exhibit influences of feudalism as established in parts of Wales by the Norman invasion.[3]

b. The family organisation and ownership

Like other Indo-European peoples, the family group of the Cymric tribal society was essentially a patriarchal unit.[4] Both the Denbigh Extent and the Welsh Extent point to the fact that the family unit (gwely or wele) [5] was limited to the fourth degree of descent.[6] The wele occupied the homesteads with land around them in quasi-ownership in severalty. The eldest male member, along with his descendants, held in common the family share in tribal

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1. Howel the Good died in c. 948 A.D.

2. A. Owen, Ancient Laws and Institutes of Wales, (1841), I, Preface, vii.

3. E. MacNeill, 'Celtic', sub. 'Law', En.So.Sc., IX, 246.

4. F. Seebobm, The Tribal System in Wales, (London, 1904), 99.

5. The clans were divided into groups of cousins (gwelys or wele = beds), Vinogradoff, OHJ, I, 278. The families of a group either shared common dwellings or lived closely together in little hamlets, The Cambridge Economic History of Europe, (Cambridge, 1966), I, 53.

6. F. Seebohm, loc.cit., introd., vii, also p.73.

rights and occupation in land.[1] Sometimes, even after the death of the great-grandfather, the surviving members used to manage the property under his name. This system of corporate ownership of family property is very close to the Mitākṣarā coparcenary. Initially, after the death of the head of the household, property used to be divided among the male members per capita,[2] but gradually representation by male heirs crept in and by the time of Howel the Good, it was well-established.[3]

c. Proprietary relation of father and son

Co-ownership of father and son in family property is implied in the Venedotian Code:

> The father is not to deteriorate nor dispose of the rights of his son for land and soil, except during his own life; neither is the son to deprive his father, during his life, of land and soil; in like manner, the father is not to deprive the son of land; and though he may deprive him, it will be recoverable, except in one case: where there shall be an agreement between father, brothers, cousins, second cousins and the lord, to yield the land as bloodland; and that the son cannot recover; for peace was bought to the son by that as well as to the father: for those persons are the grades, without whose consent land cannot be assigned. 4

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1. Seebohm, ibid., introd., vii.
2. F. Seebohm, The Tribal System in Wales, op.cit., introd., viii.
3. Seebohm, ibid., xvi.
4. The Venedotian Code, II. XIV.3; A. Owen, Ancient Laws and Institutes of Wales, op.cit., I, 177.

As in most mediaeval literature, the language of the passage leaves scope for ambiguity, but one thing is clear from the rule, namely, that the father was not the absolute master of the family land. Even though the father could dispose of the land, normally, a son's right of preemption is confirmed by the rule.[1]

The Dimetian Code implies that the sons share the patrimony after the death of their father but the Code, in certain specific properties, implies a combination of ultimogeniture and birthright of the youngest son:[2]

> When brothers share their patrimony between them, the youngest son is to have the principal tyddyn, and all the buildings of his father, and eight erws of land, his boiler, his fuel hatchet, and his coulter; because a father cannot give those three to any one but to the youngest son; and though they should be pledged, they never become forfeited. Then let every brother take a homestead with eight erws of land and the youngest son is to share; and they are to choose in succession, from the eldest to the youngest.[3]

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1. Cp. that an heir even in the ninth descent could redeem at a valuation by jury any portion of an estate with which his forefathers had been compelled to part, Richard of Cirencester, Bk.I, Ch.III, cited by I.H. Elder, Celt, Druid and Culdee, (London, 1962), 45, n.13 at 50. Cp. Yājñ. II. 119.

2. Ginnell is inclined to believe that in early Irish law the youngest son was in a similar favoured position, The Brehon Laws, op.cit., 132. Cp. the additional share of the youngest son in Gautama, xxviii, 7, SBE, 2, 300.

3. The Dimetian Code, II. XXIII.1; ALIW, I, 543, 545. A slight variation in the Venedotian Code, II, XII.3, ALIW, 81 (Institute of Historical Research Library, Volume, BWW3, 3940.

The youngest son's innate right to certain properties seems to be equitable because the youngest is generally the weakest, and thus, the law simply takes care to protect him. It is not a denial of the rights of the other sons.[1]

The Gwentian Code also reveals that joint ownership of land was the norm among brothers and cousins:

> Every joint land is to be maintained with oath 2 and with goods; and he who does not maintain it, let him lose his share, after the sharing shall have taken place, however, no one is to pay for the land of another; each, however, is to maintain it one for another, upon his oath, of the brothers, the cousins, and the second cousins ... 3

The above passage implies a joint management of common landed property in a joint family up to the second cousins.

d. Concluding comment

Although the original Celtic customs underwent later redaction, it is, indeed, least to be expected that familial customs in a settled agrarian society would suffer drastic transformation. Therefore, the rules of the Welsh Codes discussed above may not be the customs of the pristine state of Celtic

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1. We should note that a text allows daughters half the share of a brother: 'A daughter is to have, of her father's property, only half the share a brother shall have ...', The Venedotian Code, Laws of Howel Dha, rpt. from ALIW, in A. Kocourek and J.H. Wigmore, ed., Evolution of Law, (Boston, 1915), I, 524.

2. Oath means goods and with strength, ALIW, I, 761, n.a.

3. The Gwentian Code, II. XXI.2; ALIW, I, 761.

society; nevertheless, in their general purport, they point to the corporate, patriarchal household of other Indo-European peoples.

IV. Celts of Scotland

a. General features

The heterogeneous [1] origin of the population of Scotland does not connote any uniformity of custom, but the Highlands of Scotland where Celtic custom is best able to holds its own is probably discernible as an area full of a mixture of Cymric and Gaelic elements.

Clanship in the Highlands is well known. The chief of the clan is representative of the common ancestor of the whole clan. Unlike Ireland, there is no early Code of Gaelic law in Scotland,[2] but 'the system in Ireland, Scotland and Wales was practically identical'.[3]

In Scotland, like Wales and Ireland, the land was divided among clans and Septs, each under the strict patriarchal rule of its chieftain. The land of each clan is, in principle, the common property of its members.[4] By the law of the Gavel the property of the clan was divided in certain proportions

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1. J. Cameron, Celtic Law, op.cit., 165-66. A. Robertson, A Course of Lecture on the Government, Constitution and the Laws of Scotland, from the Earliest to the Present Time, (London, 1878), 3.

2. Cameron, ibid., 141.

3. Cameron, ibid., 178.

4. M.M. Postan, ed., The Cambridge Economic History of Europe, (Cambridge, 1966), I, 53.

among the whole of the male branches of the family.[1] Females could not succeed. The Highlanders adhered strictly to succession in the male line,[2] and there are evidences that early Scottish society, like the Welsh and Irish, recognised kindred up to the fourth degree.[3] This shows that the Celts had a distinct law of succession, common for the most part of Ireland, Scotland and Wales.[4]

b. Conclusion

One must not seek in the Celtic legal systems a purely primitive customary law,[5] but the social system reflected in them in general 'are likely to have their roots in a prehistoric order common to the ancestral Indo-European stock before the era of its expansion ... had begun'.[6]

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1. W.F. Skene, The Highlanders of Scotland, (Stirling, 1902), 106.

2. Skene, ibid., 106. We should note that the Picts had a matrilineal system, J. Cameron, Celtic Law, 179. On the controversey over the origin of the Picts, see Cameron, ibid., 180-186.

3. Kindred up to 4th degree is referred to in Quonian attachiamentia, I, 365, clause De brevi de nativis, cited by F. Seebohm, Tribal Custom in Anglo-Saxon Law, (London, 1902), 319-20. Sometimes kindred is referred to up to 9th degree: St. Margaret seems to renounce her kindred up to 9th degree by these words: 'al my kun I forsake to the ninthe kune', Seebohm, ibid., 318-9.

4. J. Cameron, Celtic Law, op.cit., 120.

5. As claimed by Maine, Early History of Institutions, (London, 1897), 11. Denied by MacNeill, En.So.Sc., IX, 247.

6. MacNeill, ibid., 247.

CHAPTER 5

GERMANIC LAW

1. Introductory remarks

Germanic law is the law of the Germanic peoples, that is, the law of the tribes called Germans or Teutons.[1] The Saxons, Danes and Normans, who came to Britain, were but extensions of the same Germanic warp and woof that was shaping the law in France, Germany, Saandinavia, Netherlands, Austria, Switzerland, Northern Italy and Spain.[2]

The Romans spread over the whole land-mass of South-Western Europe and the Roman Empire extended its frontier to Britain, the Rhine and the Danube. But during the last centuries of the Western Empire, powerful groups of Germans mingled with the Romans, and this was followed by a conquering movement, (Völkerwanderung), in consequence of which, German settlement spread into the Alpine lands and Gaul (France).[3] The Germans came into contact with Roman jurisprudence and the decisive fact in Germanic legal history was this 'Reception'

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1. Principal Germanic tribes were the North Germans or Scandinavians (Norwegians, Swedes and Danes); the East Germans (Goths and Burgandians) and the West Germans (Germans, Frisians, Lombards, Angles and Saxons), E. von Künssberg, 'Germanic', sub. 'Law', En.So. Sc., IX, 235.

2. Comment of the Editorial Committee, in R. Huebner, Grundzüge des deutschen Privatrechts, tr. F.S. Philbrick, sub.tit., A History of Germanic Private Law, (London, 1918), ix. Also, F. Pollock and F.W. Maitland, The History of English Law, 2nded., (Cambridge, 1911), I, introd., xxx-xxxi.

3. M.M. Postan, ed., The Cambridge Economic History of Europe, 2nd ed., (Cambridge, 1966), I, 1-2.

of the Roman law.

But in their general effect, the German customs 'were to survive the later Reception of Roman law, something perhaps less difficult to explain when one remembers that indigenous custom, peculiarly custom relating to family status, is vigorously resistant to external change ...'[1] Also, Huebner opines that if we look at German private law before the Reception, a whole sequence of social characteristics can be pointed out which essentially distinguish it in form and content from its later appearance.[2] In the same vein, Ernest Young observes that 'the old German law of the household is not merely interesting and important as showing the modern laws and customs: it is even more important, for the student of comparative history, as furnishing a type - perhaps the most archaic type of which we have any knowledge - of a primitive Aryan Institution'.[3] Thus, in jurisprudential context 'the law of the Germanic peoples is as fundamental to comparative law as is Sanskrit to comparative philology'.[4]

It is indeed difficult, if not impossible, to reconstruct the primal Āryan[5] legal institutions among the early G ermans from medieval law Codes; and the difficulty, in this respect, is also enhanced because of the lack of unity

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1. Stoljar, International Encyclopaedia of Comparative Law, IV, 7, 20.

2. Huebner, op.cit., 1-2.

3. E. Young, 'The Anglo-Saxon Family Law', in Essays in Anglo-Saxon Law, (Boston, 1905, rpt., Southnackensack, New Jersey, 1972), 121-182 at 148.

4. Könssberg, op.cit., 235. Also see Pollock and Maitland, op.cit., I, introd., xxix.

5. Könssberg, op.cit., 235.

among Germanic laws from the very beginning.[1] However, it is not our purpose to reconstruct the family organisation of the primitive Germans. Geoffrey MacCormack scorns such attempts at reconstruction and observes:

> The reconstruction of society which is offered appears either to be based upon arbitrary and improvable assumptions or to involve an illicit argument. Where the available evidence is some centuries later, one may find an argument which suggests that certain items of the evidence (for example, such institutions as appear to be common to a number of tribes or peoples) may be taken as a survival from a more distant age. Such arguments are illicit. It does not follow that, because tribe A, B, C have X institution in common (even if this could be shown), the tribes at an earlier age formed one people whose dominant institution was X. 2

Despite the force in his argument, MacCormack does not tell us as to why the common dominant institution is always, or overwhelmingly, X; and not in some cases Y, or, indeed, Z. He suggests: 'what it is possible to do is to examine the law Codes of the separate Germanic peoples in order to extract information on a particular topic'.[3] And that is our primary intention - a comparative appraisal of the Mitākṣarā birthright in the context of early Germanic law. In our enquiry the Germanic Codes will be our primary guidance, but at the same time, we cannot altogether ignore the learned juridical opinions on earlier epochs

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1. Huebner, op.cit., 2.

2. G. MacCormack, 'Inheritance and Wergild in Early Germanic Law - I', Irish Jurist, (n.s.) 8 (1973), 143-163; II, 9 (1974) 1; 166-183 at 143. Echoes Pollock and Maitland, op.cit., I, introd., xxxi.

3. MacCormack, ibid., 144.

of Germanic legal history.

II. Social Organisation

a. Sippe (sib).

Rubrics of family law are interrelated with the type and structure of the family in a social organisation. Therefore, a brief over-view of the familial organisation of the Germanic peoples must claim our attention and in this respect, we come to know from juridical literature that 'the oldest type of association, existing already in the primitive Germanic period, is the union of the blood-group ("Geschlechtsverband"), the sib'.[1] Most of the Germanists seem to assume that the term Sippe was originally applied to an agnatic descent group descended from a common male ancestor.[2] In historical times, it changed its meaning to imply an impermanent cognatic body of kinsfolk, the type of grouping which is usually styled 'kindred'.[3] It was also an agrarian union of equal adult

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1. Huebner, op.cit., 114.

2. Vinogradoff, OHJ, I, 303. Huebner, ibid., 114. H.H. Meinhard, 'The Patrilineal Principle in Early Teutonic Kinship', in J.H.M. Beattie and R.G. Lienhardt, ed., Studies in Social Anthropology: Essays in Memory of E.E. Evans-Pritchard by his former Oxford Colleagues, (Oxford, 1975), 1-29 at 7, 10. This blood-group among the Anglo-Saxons was called as the maegth or maegburh, E. Young, op.cit., 123.

3. Meinhard, ibid., 7. Tacitus noticed among the Germans a larger group than the family. In Germania, Ch.7, he mentions that German tribal army is composed of 'familiae et propinquitates'; and at Ch.21, speaking of compensation for homicide he says: 'recipit satisfactionem universa domus' , cited by Meinhard ibid., 5. The 'propinquus', was probably larger than the immediate family and Germanists identify 'universa domus' as Sippe. Meinhard points out that in the light of the authentic old sources, the word Sippe does not unambiguously and exclusively apply to an 'agnatic descent group', ibid., 6. A.R. Radcliffe-Brown explains a man's sib : 'This included all his relatives through his father

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male members and, like land, even movables seem to have been the object of collective ownership in the sib.[1]

a. Household

The sib as an associational group gradually disintegrated and was replaced by the house community, the institution which is particularly important in studying the family law of the early Germanic peoples. On the structure of familial organisation among the primitive Germans, Huebner remarks:

> In view of the present result of historical research it may be asserted with good reason that the primitive Indo-Germanic folk already lived under patriarchal conditions; and at any rate, as regards the general Germanic and German family law, there can scarcely remain any doubt that their historical point of departure was the patriarchal family organization. It prevailed among the primitive Germans ("Germanen") in a pure and absolute form, so far as their conditions can be traced in the obscure origins of history.[2]

Note 3 - p.121 - continued:

and through his mother, counting either through males or through females, within a certain range', 'Patrilineal and Matrilineal Succession', in his Structure and Function in Primitive Society, (London, 1952, rpt., 1971), 32-48 at 39. Meinhard has presented the conflicting views on the connotation of the term but the controversy still remains unabated, ibid., 10.

1. Huebner, op.cit., 115. But the case is not so in respect of maegth in English law, Pollock and Maitland, II, 251.

2. Huebner, op.cit., 584-585. Huebner's view represents the opinions of a considerable number of nineteenth and early twentieth century scholars. For the views supporting the priority of mother right in Teutonic prehistory, see Meinhard, op.cit., 14. Young opines: 'There is quite as much evidence in early Germanic law to support the theory that the primitive German kinship was limited to those descended from a common ancestor through females as that it was a system of agnation', Young, op.cit., 150-1. Strict Adherence, either to the patriarchal or matriarchal life of the early Germans, has been disapproved by MacCormack, op.cit., 143, but, as he concedes, much of the

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In Germany, the original family consisted of the 'greater family' presided over by a truncal father (Stammvater) uniting all male descendants and their wives.[1] This greater family developed into a looser form of the sib.[2] These families remained conscious of their origin through common descent, but were independent in their own sphere. When the son got married he ordinarily lit his own hearth fire and set up his own household.[3] Thus, in these cases, with the departure of the son with his immediate family, a narrower separate (Sonder) or 'lesser' family came into being.

Among the primitive and later Germans, we find a preponderance of this 'lesser' family but, even during the Middle Ages, in some localities reminiscences of the original greater family were preserved.[4] From the law of Ostergötland and also with reference to some Danish laws, Bergman concludes

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Note 2 - p. 122 - continued:

literature from the late nineteenth century was unavailable to him, ibid., 143, n.1. Juridically, the patriarchal character of Germanic family seems to be well-established, Stoljar, Int. En. Comp.L., IV, 20.

1. Stoljar, ibid., IV, 20.

2. These two distinct groups, namely maegth (Sippe) and the household were juridically distinct among the Anglo-Saxons, Young, op.cit., 125.

3. Huebner, 587. Cp. the same custom among the Vedic Indians.

4. Huebner, op.cit., 588. These early Germanic families had a close resemblance to the early Russian great family communes, J. Blum, Lord and Peasant in Russia, (Princeton, 1961), 25. Bede described this Germanic familial institution as 'Terra unius familiae' - 'a patriarchal institution of several generations and several collateral households living around a common hearth'. Bede translated the English word hide as 'Terra unius familiae', M. Bloch, in M.M.Postan, ed., The Cambridge Economic History of Europe, op.cit., I, 279-80.

that the joint family in Sweden was comparatively small in size and embraced only four generations.[1] He noticed another, older, type of joint family in the laws of Götland (South Sweden) which was characterised on the one hand by submission of the sons to their father and, on the other, allowed a certain amount of equality of ownership to the son.[2] The learned professor informs us that submission of a son to his father co-existed in certain cases with his equality of ownership with the latter.

c. Mundium

Families were under the headship of the house-father and the members were under his mundium.[3] The original character of the institution of mundium was preserved in its purest form in the relation of a father to his children. Although Huebner points out that 'its original character was that of an unlimited authority of the mundium-holder ("Muntherr") over the persons subjected to his power',[4] there is no convincing reason to believe that Germanic mundium in its

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1. Gleaning of C.G. Bergman's 'The Joint Family in Ancient Swedish Law', in Essays of the IVth International Congress of Historical Studies, (London, 1914, rpt., Nendeln/Liechtenstein, 1972), 245.

2. Bergman, ibid., 245.

3. mundium is the Latinised version of mund (North Germanic and Old Norse), derived from Old High German munt, meaning hand, the symbol of power. Munt corresponds etymologically and in meaning to the manus of Roman family law, Huebner, op.cit., 585-6. Mund is close enough to be interchangeable with Anglo-Saxon, 'borg', meaning 'surety', see Stoljar, op.cit., 20.

4. Huebner, op.cit., 586.

juridical form exactly coalesced with the absolute regime of the patria potestas.[1]

Like the Roman patria potestas, Germanic mundium was not 'one-sided';[2] it recognized a duty, in addition to the rights of the master. Mundium as an institution implies a relationship of protection and subjection, duties as well as rights. A father has rights but, at the same time, he has specific duties, and the children may have legal rights too.[3] Moreover, the wider family or the kindred had a significant role in the protection of the child. Thus, the mund of the father was not absolute, it was subject to the intervention of the kindred.[4]

This limitation on the father's power becomes apparent when we analyse the specific powers of the father. For example, the power to chastise the children is a natural power, inherent in all parental authority;[5] but in early Germanic law, a father was not even supposed to perform any severe chastisement[6] without the co-operation of the family or the sib.[7] Nevertheless,

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1. Stoljar, op.cit., 20. Huebner points out that upon the original concept of almost unlimited authority, moral and, then, legal restrictions were grafted, op.cit., 586. Maine also considered mundium as 'relics of a decayed Patria Potestas', Ancient Law, (London, 1905), 127. Young disagrees with Maine, Young, op.cit., 150-1.

2. R. Pound, The Spirit of the Common Law, (Boston, 1921), 27.

3. Stoljar, op.cit., 20.

4. Young, op.cit., 153.

5. Among the Anglo-Saxons, it was specifically ascribed to the father, Young, op.cit., 153, n.5.

6. Cp. Manu, VIII, 299-300.

7. Huebner, op.cit., 657-8; Stoljar, op.cit., IV, 21.

sometimes a father could unilaterally enforce very harsh rights.[1]

Theoretically, it appears that a father could kill, abandon or sell a child for a price. But all these rights were qualified when put into practice.[2] It is true that a father could reject a child at birth,[3] if he had reason to doubt his paternity. A father also could abandon crippled or deformed children but these exceptional cases do not prove his general power of exposing or killing[4] children at his will.[5] Again, once the father had accepted the child, his right to kill was completely gone.[6]

Selling of children was also not an unlimited right. It existed mainly to allow the parents to deal with situations of extreme necessity.[7] We should not lose sight of the fact that the mundium was a sort of general guideline, embedded in custom; but, to a great extent, its administration remained a matter for the kindred.

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1. Stoljar, op.cit., 21.
2. Young, op.cit., 153.
3. Cp. Greek law, supra, 77.
4. Stoljar, op.cit., 21.
5. Young informs us that a father had a general right of killing children 'who had not tasted food', op.cit., 153, n.2. In the oldest of the Norse laws, we find that in case of extreme necessity, a father could kill his children. Gulathingslog, c. 63 provides that if parents come to extreme want, they are graftgangsmenn. They would dig a grave and leave all the children to die there. The father shall take out the one who lives the longest, and feed him thereafter, F. Seebohm, Tribal Custom in Anglo-Saxon Law, (London, 1902), 265.
6. Stoljar, op.cit., 21.
7. Stoljar, op.cit., 22. Edictum Pistense of the Emperor Charles II of A.D. 864 provided that a father might sell his children into slavery in case of his own actual necessity. A similar rule was adopted in the Schwabenspiegel but it is doubted by Huebner, op.cit., 658, and also by Stoljar, op.cit., IV, 7, 22.

III. Father's power in the context of ownership of property by children

Unlike developed Roman law, children in Germanic law were always regarded as capable of holding property.[1] Theoretically, as the child came under the father's mundium, so did his property; but 'the power of the father was not of the nature of property, but of guardianship; it was not gewere, but mund'.[2] A child could acquire separate property by inheritance or by gift.[3] The father, however, by virtue of his mundium obtained a 'seisin in mundium'[4] which did not give him ownership but only a right to enjoy it and its profits or income. In other words, 'the father had the gewere, the legal possession, of his son's property and, as a consequence of this, the usufruct'.[5] It remained throughout the property of the son and, at the close of parental authority, the father was bound to deliver the property of the child with indemnity for any diminution of value resulting from excessive damage or waste.

Germans, like the Hindus, have treated movables differently from immovables.[6] A father could deal independently with the child's movables;

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1. Huebner, op.cit., 665. Stoljar, op.cit., 23.
2. Young, op.cit., 153.
3. Huebner, op.cit., 665. Stoljar, op.cit., 23.
4. Huebner, op.cit., 666.
5. Young, op.cit., 154. It resolves an apparent contradiction in father's gwere.
6. Huebner, op.cit., 694-98. On the Hindu law texts, see infra, 339-46. Gluckman points out that in all tribal societies, the movables and immovables acquire different symbolic values in the law and ritual, M. Gluckman, The Ideas in Barotse Jurisprudence, (New Haven, 1965), 116 -7.

but in respect of immovables, the latter's consent was necessary for similar juristic acts. If, during the child's minority, a father disposed of immovable property, the former could revoke the agreement within a year of attaining majority.[1] Generally, even after the son's attainment of majority, the father continued to administer the son's separate property; but, according to Westgothic law, the father was bound to restore a portion of such property to the son when he came of age; and this did not depend on whether he was married or not.[2]

IV. Son's interest in family property

Apart from having separate property, in Germanic law, a son had an interest in family property co-ordinate with that of the father. Huebner states:

> The house-lord and the heirs united within his household and under his household authority - that is, his sons, - constituted as respects the household estate a property community, in which the father as the representative of this community was indeed accorded a primary right, above all the usufruct of the household property, but the sons were also recognized as co-holders of rights with him, and were conceded an irrevocable right of succession.[3]

1. Huebner, op.cit., 666. Stoljar, op.cit., 24.

2. Young, op.cit., 159, n.2.

3. Huebner, op.cit., 695. Also Maine, 'The ancient German law, like the Hindu jurisprudence, makes the male children co-proprietors with their father, and the endowment of the family cannot be parted with except by consent of all its members', Ancient Law, (London, 1905), 176.

Although a father had a right to the usufruct of the entire household property, the idea of considering his sons as 'co-holders' of rights with him is a convincing parallel in a Germanic setting to the Mitākṣarā birthright.[1] The closeness between the two systems becomes clear when we add the subsequent statement of Huebner:

> Within the family, therefore, there were in fact, originally involved no rights of inheritance whatever but merely a "community succession" in the collective property; or as the case might be, if one of the sons died during the lifetime of the father or after his death but during a continued community, a question of benefit of survivorship (Anwachsung).[2]

V. Alienation

The restriction on alienation by the unilateral act of the head of the family connotes multiple ownership over the same property.[3] Like the Mitākṣarā system, the early Germanic law also manifests this lack of power of the father (househead) to dispose of the family property at his own will. Rights of other members, especially of the (adult) son, prevented him from making an alienation of family property inter vivos. Ernest Young informs us:

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1. See Pollock and Maitland, II, op.cit., 248.

2. Huebner, op.cit., 695. Pollock and Maitland, The History of English Law, 2nd ed., II, 248. Cp. the incidents of coparcenary property in Hindu law, Katama Natchiar v. Rajah of Shivaganga, (1863) 9 MIA 539 at 611. Also Raghavachariar, Hindu Law, 4th ed., 243.

3. The 'true notion' of Hindu law is laid down in Appovier v. Rama Subba Aiyan, (1866) 11 MIA 75, 89.

> that even, as regards the father's property, the attainment of majority had an important effect is admitted by Stobbe. Before majority, the son had no right of veto in alienations by the father; after majority, he acquired this right. In some laws also the son, after majority, had the right to demand a division of property. [1]

A father, however, could dispose of his own 'free portion' (Freiteil; Freiteilsrechte) [2] but before doing so he had to partition the property amongst his sons. In order to avoid confusion over the extent of this 'free portion' some of the laws fixed it by 'head-rights', according to the number of heirs entitled to rights in expectancy; for example, 'the father who had only one son could dispose of one-half. If he had two sons of one-third, and if nine sons of one-tenth, of his property'.[3] This 'per capita' system (Kopfteilsrechte) regarding alienation does imply a definite right in expectancy (Wartrecht) of the son and, since he can prevent his father from alienating his expected portion he undoubtedly acquires this right from his adulthood which, in effect, may be said to stem from his birth, as will become clear later.[4]

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1. Young, op.cit., 159. Young is referring to Stobbe's Beiträge zur Geschichte des deutschen Rechts, .21, 11. This was peculiar to the South German (Alaman and Bavarian) nations. Pollock and Maitland, The History of English Law, 2nd ed., (Cambridge, 1923), II, 248, n.2.

2. Huebner, op.cit., 305. It was abolished by a Capitulary of Louis the Pious for all folk-laws of the Frankish Empire, ibid., 304, n.2.

3. Huebner, op.cit., 305, n.3., quoting Brunner, 'Beiträge zur Geschichte des germanischen Wartrechts' in Berliner Festgabe für Durnburg, (1900), 5. Huebner points out that this was also the rule in Lombard, Bavarian, Alamnic, Turingian and in many Swedish and Danish systems, ibid., 305-6. The Salic Franks, Frisians, the West Gauls and the Burgundians, irrespective of the number of sons, made the free portion a fixed portion, like a half, a third, a fifth or a tenth, ibid., 306; this could be a secondary development.

4. Infra, 132.

The modern tendency is to liberate the individual from the fetters of group ownership of property. In this respect, when substantive law was in favour of the group, various procedural and fictional devices were adopted to promote the tendency toward individualism. In Germanic law, one such device is the so-called 'Rights of Co-alienation' (Beispruchsrechte).[1] In dispositive acts, it was a formal right of co-operation. It is significant that this right existed only in favour of the next heir, and the next heir to the father was almost always the son. The next heir enjoyed this right whether or not he suffered any loss by the disposition in question, It applied only to alienation inter vivos and the validity of a conveyance was dependent upon the consent of the next heir.[2] Unless this consent was obtained, an alienation was not treated as unimpeachable.[3] When an alienation was made without the consent of the next heir, he could, within a year and a day, sue to set aside the alienation as 'void'.[4] The rule was so strict, and the right of the next heir so inviolable, that on the instant of an invalid alienation, the land became his property. The law viewed the situation as if the alienor had died and, therefore, the next heir could demand redelivery of the property from the third parties.[5]

In describing the nature of this right of the next heir, Huebner comments

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1. Huebner, op.cit., 306. It was particularly developed in Saxon Law; Lex Saxonum, cc 62-64, Huebner, ibid., 306, n.2.

2. Huebner, op.cit., 306.

3. ibid., 306.

4. ibid., 306-7. Cp. the Hindu law position, Derrett, IMHL, §§ 465, 476; Critique, § 129.

5. ibid., 307.

that 'he possessed a real right in expectancy ("dingliches Anwartschaftsrecht") which was transformed by the unlawful alienation into ownership ...'[1] But in terms of the Mitākṣarā, this 'real right', since it is effective during the life-time of the father, is a form of birthright which merely manifests itself as soon as the father alienates the family property without the consent of his son (the next heir).

VI. Entailed estates

With the growth of the rising commercial value of land, restrictions on free alienation were gradually eroded; but in the systems of 'town law', they still persisted in the case of ancestral lands (Erbgut).[2] From A.D. 1200 onward, the nobility maintained their family lands in the form of entailed estates (Stammguter) which were inherited from ancient times.[3] The entailed estates were inalienable and were inherited agnatically. Although in the matter of inheritance, the entailed estates devolved in accordance with the system of primogeniture, the majority of the Germanists opine that all the agnates as members of the Körperschaft had 'real rights in expectancy'.[4]

The lower nobility was unable to secure for itself the power of private enactment which enabled the higher aristocracy to preserve agnatic family owner-

1. Ibid., 307.

2. Huebner, op.cit., 308-9.

3. Ibid., 309.

4. Ibid., 309-10.

ship in the form of entailed estates. The lower nobility, however, chose to accomplish the same ends by means of consensual agreements and entails (Stammgutsstiftungen).[1] Such entails come to our notice sporadically from A.D. 1000 onwards and became very popular in the sixteenth century. The purpose of this institution was to keep lands inalienable and heritable in the male line of the first acquirer, and it became the most effective means of guarding the 'splendor familiae' against the individualistic principles of the Roman law of inheritance.[2]

In English legal history also, we find that the rights of the heir combined with the tendency to keep the property within the family assert themselves through the system of feudal tenures. In Norman England 'lands acquired by inheritance as family domain were considered more or less like entailed property, that is, property in which the "heir" had a legal interest in the lifetime of the tenant, so that the heir's consent was necessary to any transfer even inter vivos'.[3]

The Glanvill exegesis seems to suggest that at that time the fee,[4]

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1. Ibid., 311. Stiftungen of this type are well-known in Switzerland to this day.

2. Ibid., 311.

3. M.M. Bigelow, 'The Rise of the English Will', in E. Freund, W.E. Mikell and J.H. Wigmore, ed., Select Essays in Anglo-American Legal History, 3 vols., (Boston, 1909), III, 770-781 at 778.

4. Fee had grown into heritable estate from a succession of life estates granted by the lord and his heir to the vassal and his successors. Enfeoffment in fee took the form of a grant 'to A and his heirs', (et suis haeredibus); first brought into England in late eleventh century or twelfth century, Bigelow, ibid., 778. On this, also see, C.H.S. Fifoot, English Law and its Background, (London, 1932), 46.

at least in theory, had grown into an hereditary estate.[1] Within certain limits a fee was subject to alienation barring the succession of the heirs. But the rules governing succession and determining the scope of alienability were still unsettled. The traditional tendency to keep the family property intact and to pass it through a particular line of descent, conflicted with the forces in favour of free alienability. Stefan Riesenfeld observes: 'The land hunger of the church likewise worked toward alienability, and last, not least, the acceptance of a moral duty to provide for a daughter or sister on the occasion of her marriage added to the existing forces'.[2]

It appears from Glanvill that he supported the inalienability of inherited lands,[3] but he also wrote that a man could convey a reasonable part of purchased property without consent of his bodily heirs: 'If he has only acquired land, and wishes to give part of this land, then he can do so; but he cannot give all his acquired land, because he must not disinherit his son'.[4]

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1. S.A. Riesenfeld, 'Individual and Family Rights in Land During the Formative Period of the Common Law', in A. Newman, ed., Essays in Jurisprudence in Honor of Roscoe Pound, (New York, 1962), 439-462 at 454-5. For an assertion to the contrary, see S.E. Thorne, 'English Feudalism and Estates in Land', Camb. L.J., (1959), 193-209.

2. Riesenfeld, ibid., 455. Cp. the Hindu law position in Guramma v. Mallappa, AIR 1964 S.C. 510. Derrett, Critique, § 124.

3. W.S. Holdsworth, A History of English Law, 7 vols., (3rd ed., London, 1923), III, 74.

4. Glanvill, VII, 1: Si uero questum tantum habuerit is qui partem terre sue donare uoluerit, tunc quidem hoc ei licet; sed non totum questum, quia non potest filium suum exheredare, Tractatus De Legibus Et Consuetudinibus Regni Anglie Qui Glanvilla Vocatur, ed. tr. G.D.C. Hall, sub.tit. The Treatise on the Laws and Customs of the Realm of England Commonly called Glanvill, (Nelson, London/Edinburgh, 1965), 71a; tr. ibid., 71b.

However, the author of the Glanvill [1] was conscious that he was writing in an age of transition and conflict between corporate family ownership and the emerging notion of unbridled alienability. That is why he devoted some space to this, as yet unsettled, problem. Until the end of the twelfth century, the effects of heritability on the power of alienation remained in a fluid state, though one might say that the controversy mostly remained a matter of doctrinal neatness.

The lingering doubts on the point were judicially settled in 1225 in respect of the position of a tenant in fee held in knight service. According to the facts of this case,[2] S, the son of F, the alienor, bought a suit against one AS, the son of A, the alienee, in order to recover certain lands. The defendant pleaded that F had conveyed the lands to A by 'quit-claiming the same for himself and his heirs to A, and his heirs in perpetuity' [3] in a settlement concluded in the Royal Court. S, the plaintiff, admitted the authenticity of this transaction but asked for judgment 'si pater suus potuit dare totam terram quam tenuit per servitium militare nullo retento servicio sibi vel heredibus suis'.[4]

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1. On Glanvill, see Pollock and Maitland, The History of English Law, op.cit., I, 162 ff.

2. 12 Curia Regis Rolls, 47 (Hil. Term, 9 Henry III), cited in F.W. Maitland, ed., Bracton's Note Book: A Collection of Cases Decided in the King's Courts During the Reign of Henry the Third, (London, 1887), III, case 1054 at 84.

3. See Riesenfeld, op.cit., 460.

4. Bracton's Note Book, III, op.cit., 84.

The court held that such alienation without reservation of any service was binding on the heir and decided against the plaintiff.[1] Bracton noted[2] the case and, on the historic family restraints on free alienability, juridically gave the coup de grace by saying: 'If the ancestor disposed of the entire inheritance without retaining anything in demesne or seignory for the benefit of the (potential) heir, the latter ceased to be such'.[3]

But the victory of free alienation was short-lived and, significantly, the traditional attachment of the family to its property re-emerged almost instantly in another form. A grantor who wished to deviate from the rules governing succession and alienation started to modify the magic words 'et heredibus suis' by adding restrictions and conditions, and the most common restriction was a grant to A 'et heredibus suis quos habuerit de corpore suo'.[4] These words were con-

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1. We notice that in the reign of Henry I (1100-1135) 'a son confirms or rather makes anew, a gift of land by his father to the church, which had been adjudged good against the son', Placita Anglo-Normanica, 128-9, cited by Bigelow, op.cit., 779, n.1.

2. Bracton's Note Book, III, case 1054 at 84.

3. Eodem modo desinere possit, (poterit) esse filius & heres, ut si pater & mater, vel eorum alter totam dederint hereditatem, nihil relinquentes heredi nec in dominio nec in servitio, cum id quasi (quare) sine causa heres dicebatur cum iam non subsistat, De Legibus et Consuetudinibus Regni Angliae, (London, 1649), 265a, b. Summary of the text in English, Riesenfeld, op.cit., 460.

4. Riesenfeld, op.cit., 462.

strued as limiting the succession to lineal descendants of the grantee, leaving a right of reversion to the grantor and his heirs in cases where a direct line of descent from the grantee was lacking or became extinct. Thus, a new form of family ownership gradually emerged, known as the feodum arctatum or fee tail.[1]

VII. Testamentary power of the father

The absence of testamentary disposition in early Germanic law is another proof that the right enjoyed by natural heirs was irrevocable.[2] This is contained in the proverb: 'he who would die well and blessed should leave his property to the legal heir'.[3] Society disapproved any arbitrary interference by man with the law of succession: 'Whatever the dying man lets fall must fall into the hand of the heir appointed by nature'.[4] And in this respect, 'the strict

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1. ibid., 462. The Statute De Donis, the first chapter of the Statute of Westminster II (1285) sanctioned and strengthened the new institution. On its further implications and developments, see F.T. Plucknett, A Concise History of Common Law, 5th ed., (London, 1956), 546-557. Also C.H.S. Fifoot, English Law and its Background, op.cit., 46-47.

2. M.M. Bigelow, op.cit., 776. Huebner, op.cit., 740.

3. 'wer will wohl und seelig sterben, der lasse sein Gut den rechten Erben', Huebner, op.cit., 697.

4. 'solus deus heredem facere potest, non homo', Huebner, op.cit., 696. Cp. Glanvill, Lib. VII.c.1: 'quia solus Deus heredem facere potest, non homo'; 'for only God, not man, can make an heir', tr. G.D.G. Hall, op.cit., 71b; qualified by Pollock and Maitland, The History of English Law, 2nd ed., II, 254.

Germanic order of succession was in entire agreement with the general conditions and views of a primitive and unindividualistic society. Moreover, it was identical with the original institutions of other Indo-Germanic races'.[1]

This points to the fact that the son who was first in order of priority among the natural heirs had an unassailable right of expectancy in family property at the hands of his father. The appearance of wills in the Germanic codes (Leges Barbarorum) of a later time was due to the influence of Roman jurisprudence.[2]

In conformity with the law of their Germanic ancestors, the early settlers in England, who later became the English, had no testaments in their laws of succession.[3]

Glanvill says that a man may make a will in his last sickness: 'However, a gift of this kind made to another in a last will can hold good if made and confirmed with the heir's consent'.[4] Glanvill adds that a man cannot disinherit

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1. Huebner, op.cit., 697. Maine, Ancient Law, (London, 1905), 174.

2. Maine, Ancient Law, (London, 1905), 174. Bigelow, loc.cit., 777. But Huebner opines that Germanic law itself, in time, came to recognise a voluntary testamentary order of succession, op.cit., 697. To this should be added the influence of the church. The priest before granting absolution used to persuade the dying man to make a will by which he would bestow a part of his movables on the church and the poor for the repose of his soul, C. Gross, 'The Mediaeval Law of Intestacy', in E. Freund and others ed., Select Essays in Anglo-American Legal History, (Boston, 1909), III, 723-736 at 723.

3. Bigelow, op.cit., 777. On the various stages of English will, see Pollock and Maitland, History of the English Law, 2nd ed., (Cambridge, 1923), II, 314-356. Alsto T.F.T. Plucknett, A Concise History of Common Law, 5th ed., (London, 1956), 732-746.

4. Glanvill, Lib.VII. c.1; Hall, op.cit., 70.

'his son and heir' even as to land which the father has bought himself. However, if he has no heir of his body, he may do as he will with such land. Also, he could convey a reasonable part of his self-acquired property without consent of his natural heir.[1] We may say that the right of making a testament in England arose from the power to will away chattels[2] and self-acquired land.

VIII. Debts of the father

The primary rights of the natural heirs in family property are also reflected in the attitude toward the debts and obligations of the propositus. In Germanic law, it was unknown that the legal personality of the deceased was continued in the heir.[3] Despite this rule, the heir was liable to some extent

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1. Glanvill, Lib. VII. c.1; Hall, ibid., 71.

2. Glanvill says that chattels of a deceased should be divided into three portions: one-third went to the legacies of the deceased or, if he had none, were devoted to his executor in pios usus; one-third went to the wife; and the rest was distributed among the children, Lib. VII. c.5. This independence over the third to dispose of by legacy might have developed from the 'dead man's portion', the part of the movable estate laid with the dead man in his grave or burned with him; this sometimes included the widow as well, Huebner, op.cit., 611, 742. The practice was noted by Herodotus (V, 5), among the Thracians of the Danube, and was also prevalent among Slavonic tribes, Vinogradoff, OHJ, I, 236, n.1, 2. 'It was a widespread custom', says Huebner, 'to set apart a third of the movable estate as the death-portion, from the part belonging to the heirs', loc.cit., 743.

3. Huebner, op.cit., 705. Cp. Roman law: Hereditas est successio in universum jus quod defunctus habuit: an inheritance is a succession to the entire legal position of a deceased man, see Maine, Ancient Law, (London, 1905), 161.

for the obligations of the deceased. Nevertheless, this does not mean that the heir was bound to honour every conceivable obligation; even a mediaeval work like the Sachsenpiegel [1] provides that certain obligations did not belong to the heritage, and they were presumed, therefore, to lapse on the death of the propositus.[2] The crucial test was whether a particular obligation 'enabled the deceased to leave the heritage and the heirs to receive it in its existing form'.[3] Thus, the father was restrained from entering into obligations which might jeopardise the interest of the heir. That is why the Sachsespiegel provided that among the contractual obligations of the propositus, the heirs were obliged to honour those which had left in the heritage a 'wederstadinge',[4] that is, a value in exchange. This value in exchange need not be an actual or demonstrable increase of the inheritance, but it should help to bring the heritage to the heirs in its undiminished form.[5] Following this principle, promises of gifts, promises of alienations and also gaming debts [6] were non-heritable, but debts due for loans

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1. Written by the East-Saxon knight, Eike von Repgow, about A.D. 1225, Meinhard, op.cit., 2.

2. Huebner, op.cit., 706.

3. Ibid., 706.

4. Ibid., 706.

5. Ibid., 706.

6. Huebner, op.cit., 706. Cp. in Hindu law father's debts tainted by illegality as wagering contracts are avyāvahārika, that is, 'unenforceable by process'. Derrett, IMHL, § 509.

were.[1] This is a sequel to the rule that the father did not have the unilateral right to alienate the property *inter vivos;* and particularly, it emphasises that the father did not have the right to bind the heirs with a promise of alienation, far less to squander away the property by entering into wagering contracts. Moreover, under the older law any obligation of the deceased could be enforced only against the chattels which the heirs inherited.[2] That lands should rest free from liability for debts in the herital system was a rubric of old Germanic law. Thus, the law gave some freedom to the father only in dealing with chattels within the indestructible herital rights (*Erbgut*)[3] of the son; and, had the father been allowed to contract debts without restriction, his sons could have been forced to make them good out of the estate and, as a result, ownership in 'collective hand'[4] by father and sons would be meaningless.[5] In other words, the co-ordinate right of the son with the father in family property stood in the way of a father's contracting debts and entering into obligations at his own volition; and the attitude taken by Germanic law might form a key, in the

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1. Huebner, op.cit., 706. Magdeburg town-law; the *Schwabenspiegel;* and the town-laws of South Germany did not follow the requisites of *wederstandinge.* They treated all contractual obligations of the father as heritable, but debts violating the prohibition of usury by containing a promise of interest and obligations of suretyship were non-heritable. Huebner, ibid., 706. In Hindu law, debts for being surety for the appearance or for the honesty of another are *avyāvahārika* (unenforceable) debts, Mulla, *Principles of Hindu Law,* 13th ed., § 298. For a fuller discussion on avyāvahārika, see Derrett, *Critique,* §§ 134-139.

2. Huebner, op.cit., 706-7.

3. Ibid., 707.

4. On this, see infra, 142-4.

5. Ibid., 707.

proprietary sense, to the so-called pious obligation [1] of a Hindu son, and also to his exemption from honouring illegal and immoral debts (avyāvahārika).

IX. Ownership in Collective Hand (Eigentum zu gesamter Hand)

Another feature of the Germanic concept of ownership is manifested in the institution of 'Collective Hand'. The members of this joint community were co-owners of property, but no individual member had the dispositive power unilaterally. Unlike the Roman ercto non cito,[2] all the co-owners, acting together 'as with one Hand' (mit gesamter Hand), could dispose of either a part or the whole of the property.[3] The shares of individual members remained in an ideal sense and undifferentiated,[4] until the dissolution of the community by partition.

The communities of collective Hand had their origin in the Indo-Germanic institution of the household community.[5] Among the primitive Germans, it was common practice that the sons, after the death of their father, used to live jointly holding the estate in collective hand. It is well-

1. For its origins, see Kāṇe, HD, III, 442 ff. Derrett, 'Indica Pietas: a Current Rule Derived from Remote Antiquity', Zeitschrift der Savigny-Stiftung fuer Rechtsgeschichte, Rom. Abt., vol.86 (1969), 37-66.

2. Supra,27-9.

3. Huebner, op.cit., 235.

4. ibid., 142.

5. ibid., 140.

attested from the folk-laws of the Lombards, Alamanians, Bavarians and Franks [1] that these 'house associations' (Hausgenossenschaften) or 'associations of commoners' (Gemeinderschaften) [2] among peasants included grandchildren or even remoter descendants.[3] These communities of collective hands survived down to the end of the Middle Ages [4] and continued, sporadically, even to the present time.[5]

These communities were mostly consortiums of brothers and sisters and their descendants.[6] Exceptionally, and significantly in some cases, there existed a community of collective hand among parents and children; but the legal

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1. Ibid., 141. Huebner points out that joint living of brothers was also known among the Saxons, Frisians, Anglo-Saxons, East Germans (Burgundians) and Scandinavians, ibid., 141. Among the Lombards, we notice that acquisition by individual brother was considered as acquisition for the common pool. The Edict of Rothar, c.167; Title De fratres qui in casam communem remanserunt, allowed a brother in the service of the king or judge to keep his acquisitions for himself, Seebbhm, op.cit., 293. Joint pool or Communis Substantia is also well-attested from the Lex Scania Antiqua, (A.D. 1206-1215) among the Danes, Seebohm, ibid., 282. Capitula Generalia of A.D. 825 shows that Frankish brothers were living jointly, Seebohm, ibid., 183.

2. Huebner, ibid., 141.

3. Ibid., 141.

4. Throughout the Middle Ages, they were widely noticed in South and West Germany, Huebner, ibid., 141.

5. Ibid., 141. These communities played a great role in the A.D. 1500s and 1600s in Switzerland. In the Zurich Code of 1853-55, they were capitally regulated, ibid., 141. In the 1500s and 1600s the communities existed in the Burgundian and Alamanian districts as well, ibid., 141.

6. The eldest brother acted as the manager and representative of the community, Huebner, ibid., 142.

systems of many regions excluded these explicitly because of their inconsistency with parental powers,[1] a fact which does not disprove the possibility of holding property by father and son as co-owners. It should be mentioned that, although these communities might come into existence as a result of contract among members, they were marked throughout by the old characteristics of familial institutions, and thereby, fell within the family law.

X. Preemption (Näherrechte)

Corporate rights in family property, as opposed to exclusive individual ownership, are also noticed in early Germanic law from the next heir's right of preemption (Näherrechte).[2] The next heir's right of retractive purchase (Zugrecht) is 'one of the restrictions upon ownership based upon a one-time existence of collective family property'.[3] The right of preemption is of later growth than the right of co-alienation,[4] which itself stemmed from the co-ordinate right (of expectancy) of the heir. As we have noticed earlier,[5] by refusing consent, the heir could prevent any gift (Vergabung), even though gratuitous, as well as any sale of land, outside the family.[6] Also, through his formal right

1. Ibid., 141.
2. Huebner, ibid., 395.
3. Ibid., 395.
4. Supra, 131
5. Supra, 131.
6. Huebner, op.cit., 395.

of co-alienation, he could bring a real action and rescind a sale already made without his consent. The rigour of these rules against the landowner paved the way for a less restrictive institution in the form of a mere prior or preferential (Näher)[1] right of the heir to purchase the property. For some time the right of co-alienation and the right of preemption existed side by side. Although it may appear that the introduction of the right of preemption and the abolition of the right of co-alienation gave reasonable freedom to the father in dealing with family property, 'the interest of the heirs in the preservation of the family estate was also completely protected '[2] by the former right. It became well-accepted practice in Germanic law that whoever wished to sell his land must offer it first to his heirs.[3]

In old Norse law, we notice that the vendor intending to sell land, first of all had to offer it publicly to his odal-[4] fellows who had the first option to buy.[5] If the vendor sold the land 'unoffered' the odal men could redeem

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1. Ibid., 396.

2. Huebner, op.cit., 396.

3. The other preemptors were: part-owners (Geleilen); fellow-occupants of an estate (Hofgenossen); the members of the commune, etc., Huebner, ibid., 396. Cp. Hindu law, infra, 711-2.

4. odal is terra hereditaria; genuine odal is the odal inherited from lineal ancestors, not from collaterals, A. Taranger, 'The Meaning of the Words, Odal and Skeyting in the Old Laws of Norway', in Essays of the IVth International Congress of Historical Studies, op.cit., 159-173 at 167. The word odal generally signifies family ownership but there are opinions that the original meaning of the word was simple ownership, see Taranger, ibid., 160, 168.

5. Vinogradoff, OHJ, I, 277-8.

it within twelve months.[1]

In this respect, which is important for our purpose, Taranger puts forward the controversy as to whether in Norse law a son had any right of redemption in the case of sale of odal property by his father. He says: 'None of the seller's offspring had any right of redeeming sold odal-land, if it had been lawfully "offered". On the contrary, he had to "offer" it even to his own son'.[2] This shows that although there could be doubts about a son's right of redemption after a sale has been made properly following the rules of preemption, the son's position as a preemptor and, indeed, the first among the preemptors, in a sale by his father, is unquestionable.

If we look at old Norse law from another angle, it strengthens the son's position as a possible primary preemptor. The Guthalingslaw provides that when land falls to a woman, the men of the kindred have a right to redeem it from the kinswoman at one-fifth less than its value. The preference for male kindred is further emphasised by the rule that even if odal has passed 'three times under the spindle',[3] it comes bagk at least to the male kinsmen.[4] So

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1. Gulathingslaw, s.278; F. Seebohm, Tribal Custom in Anglo-Saxon Law, op.cit., 273. Also Taranger, loc.cit., 168.

2. Taranger, ibid., 169.

3. The spindle represents the female kind. Spindelmagen include all female kin, as well as male kin connected with by a female link. As a contrast the sword is the symbol of the male sex. German Schwertmagen is defined as male kin connected exclusively through the male link. They are not only agnati but agnati masculi as opposed to Spindelmagen or nonagnates, Meinhard, op.cit., 16. The juridical significance of these two are pointed out by Vinogradoff: 'In the case of the Teutons the sword side has a natural and marked precedence over the spindle side in all matters concerning defence and ownership of land', OHJ, 302, 286 ff.

4. Guthalingslaw, s.275, cited by Seebohm, op.cit., 275.

a son, being the nearest of the male kindred of his father, and also being the first to inherit the patrimony, would naturally have the right to preempt family land if sold by his father.

The right of preemption does imply an original situation in which the ownership of property was corporate as opposed to individualistic, though it does not directly prove any exact synonymity with the Mitākṣarā birthright of a son.

XI. A son's position in the Germanic scheme of inheritance

Strictly speaking, the study of the Mitākṣarā birthright should be confined to the analysis of a son's rights during the lifetime of his father. Nevertheless, the concept has direct bearings on the heritable position of a son in respect of the paternal estate after the death of his father. That is why, before we come to a final conclusion in the comparative context, a short survey of the son's position in early Germanic systems of inheritance seems to be relevant to our purpose.

a. Germania of Tacitus

The earliest record regarding rules of inheritance among the Germans is by Tacitus. He states: [1] 'The son is always heir to his father. Last wills and testaments are not in use. In case of failure of issue, the brothers of the

1. Tac. Ger. 20: heredes tamen successoresque sui cuique liberi, et nullum testamentum. si liberi non sunt, proximus gradus in possessione, fratres, patrui, avunculi, quoted by Pollock and Maitland, The History of English Law, 2nd ed., (Cambridge, 1923), II, 250, n.2.

deceased are next in succession, or else the paternal or maternal uncles'.[1] We have no way of knowing from Tacitus which particular Germanic tribe, or how many of them, followed this rule and therefore, 'the evidence of Tacitus

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1. tr. A. Murphy, Tacitus' Germania: A Treatise on the Situation, Manners, and People of Germany, in A. Kocourek and J.H. Wigmore, ed., Evolution of Law, I, Sources of Ancient and Primitive Law, (Boston, 1915), 106. We note that the maternal uncle (avunculi) is one of the heirs in order of succession and the text is preceded by a general statement concerning the 'honor' accorded to a sister's son by his mother's brother: Sororum filiis idem apud avunculum qui apud patrem honor, Pollock and Maitland, II, ibid., 241, n.1. 'The uncle by the mother's side regards his nephews with an affection nothing inferior to that of their father', tr. Murphy, ibid., 105-6. The German legal historians often interpret the text as the oldest literary record of an agnatic society gradually admitting the principle of cognation, Huebner, op.cit., 590. Lowie disagrees with this interpretation and adds: '... matronymy is perfectly consistent with the assignment of definite functions to the father's group and patronymy is equally consistent with the avunculate', University of California Publications in American Archaeology and Ethnology, 16 (1919), 42. Also, R.H. Lowie, Social Organization, (London, 1950), 76. Primitive Society, (London, 1929), 78, 181. The champions of 'mother right' opine that at a remote epoch the Teutonic peoples passed the matriarchal stage, Meinhard, op.cit., 14. In the African context, see the same view of H.A. Junod, The Life of a South African Tribe, 2 vols. (New York, 1966), I, 234. Junod's orthodox view is contested by A.R. Radcliffe-Brown, 'The Mother's Brother in South Africa', in his Structure and Function in Primitive Society, (London, 1971), 15-31. He says: 'Even in the most strongly patriarchal society some social importance is attached to kinship through the mother ...', ibid., 23. Elsewhere Radcliffe-Brown does not attach any legal significance to the Tacitean passage, in A.R. Radcliffe-Brown and D. Forde, ed., African Systems of Kinship and Marriage, (London, 1950), introd., 18. Cp. the marumakkattayis in the Malabar Joint Family customs. Among the Nayars of South India, the descent is matrilineal and the son belongs to the family of his mother. 'When his father dies, he does not wear mourning nor take part in the funeral, but if his mother or the brother of his mother dies, he is bound to wear the deepest mourning and to sit in ashes for weeks', Vinogradoff, OHJ, I, 191. A man's attachment to his sister's children more than his own is also found among the matrilineal Khasis, Vinogradoff, ibid., 192-3. The same custom is also found among some of the North Indian tribes, ibid., 193.

is ... of limited help in the reconstruction of the rules on inheritance ... among the Germanic tribes of the first century A.D.'[1]

b. Lex Salica

Although the different Germanic codes were not contemporaneous with early Germanic society, it is supposed[2] that the ancient Teutonic rules were retained in the Frankish laws (Lex Salica; Lex Ribuaria) and in that of the Thuringians (Lex Angliorum).

The Lex Salica (Title 59; de alodis: Concerning Private Property) speaks of a propositus dying without leaving any sons (filii):[3] 'If a man die and leave no sons, if the father and mother survive, they shall inherit'. Meinhard opines that, since the mother is mentioned, the first paragraph refers only to the inheritance of movable property.[4] Even if we accept MacCormack's rendering of the term filii as 'children' and not as 'sons' the purport of the rules entitles the daughters only to the inheritance of movable property, because the last paragraph lays down: 'But of Salic land no portion of the inheritance shall come to a woman; but the whole inheritance of the land shall come to the male sex'.[5]

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1. MacCormack, op.cit., 147.
2. Meinhard, op.cit., 18.
3. The Lex Salica, 59.1, in Evolution of Law I, op.cit.,
4. Meinhard, op.cit., 18. Pollock and Maitland, op.cit., II, 251.
5. MacCormack, op.cit., 166. Pollock and Maitland, ibid., 251, 261.
   The Lex Salica, 59.6. De terra vero nulla in muliere hereditas non pertinebit, sed ad virilem sexum qui fratres fuerint tota terra perteneat. The text is quoted by Vinogodrafoff, OHJ, I, 302, n.3. Meinhard points out that the passage is not too clear but 'qui fratres fuerint' is probably to be understood as meaning 'of

/Continued on next page:

c. Lex Ribuaria

The exclusion of females from the inheritance of land is also found in the Lex Ribuaria,[1] the law of the Franks of the Middle Rhine. Title 56 of the Lex Ribuaria provides that amongst the heirs first in the order of succession are the children.[2] A proviso at the end of the Title excludes females from the inheritance transmitted from the grandfather, or 'patrimonaial inheritance' (hereditas aviatica).[3] Thus, if there are both sons and daughters among the children of the deceased, the former undoubtedly would inherit the hereditas aviatica.[4]

Note - p.149 - continued:

the male line', op.cit., 18. Note the changes in different recensions of the Lex Salica, see MacCormack, op.cit., 166. In some manuscripts instead of 'de terra' there is 'de terra salica', which could imply as law applicable to the Salian Franks or the adjective salica could be derived from the Frankish word sala, meaning 'house', homestead. Thus terra salica would mean 'the land belonging to the homestead', Meinhard, op.cit., 18.

1. The laws of inheritance in the Lex Ribuaria, ss.32-64, were supposed to be influenced by the Lex Salica. The Lex Ribuaria is thought to be completed in the latter part of the sixth century and to have been revised in the Carolingian period, MacCormack, op.cit., 169, n.41.

2. MacCormack, ibid., 169.

3. sed cum virilis sexus exstiterit, femina in hereditatem aviaticam non succedat, Meinhard, op.cit., 18.

4. Meinhard opines that hereditas aviatica is 'the inheritance transmitted from the grandfather'. He does not make any distinction between movables and land, ibid., 18. MacCormack holds the view that 'this phrase seems to denote the land belonging to the inheritance', op.cit., 169, n.42.

d. Lex Angliorum et Werinorm hoc est Thuringorum

Thuringorum [1] (ss.26-34, de alodibus) states that in the inheritance of a deceased's hereditas (land and movables), sons exclude daughters.[2] When there are no sons of the deceased, the daughters inherit only movables (pecunia et mancipitia); the land goes to the nearest kinsman of the male line.[3] The male line succeeds, to the exclusion of the females, up to the fifth generation and, after the fifth, the daughter may, however, succeed to the whole of the inheritance.[4] When the mother dies, the son, in respect of terra, mancipia and pecunia, excludes the daughter; only the mother's jewellery and clothing go to her.[5]

e. Lex Burgundiorum etc.

In the Lex Burgundiorum also the sons took the inheritance to the exclusion of the daughters.[6] But the significant position of the son among the

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1. As late as the early 9th century, Meinhard, op.cit., 18.

2. Meinhard, ibid., 19. MacCormack, ibid., 179. Vinogradoff, OHJ, I, 302, n.3.

3. s.27: ad proximum paternae generationis consenguineum, quoted by Meinhard, ibid., 19. Also MacCormack, ibid., 179-80.

4. Meinhard, op.cit., 19.

5. MacCormack, op.cit., 180. Cp. strīdhanaṃ among the Hindus, Kāṇe, H.D. III, Ch.30. The provisions on the laws of inheritance followed among the Burgundians are contained in the Lex Gundobada, named after the king Gundobad (A.D. 474-516). The collection is dated to the last quarter of the 5th century A.D., MacCormack, ibid., 171, n.47.

6. MacCormack, ibid., 171. But there was a stipulation that a daughter who entered church was to receive the same share of inheritance as a son, Meinhard, op.cit., 17-18.

Burgundians is this, that the land was normally divided among the sons in the father's lifetime,[1] the latter keeping a portion for himself.

The other Germanic laws[2] also state that the sons exclude daughters in matters of inheritance. The only exception we notice is located among the Frisians. The Lex Frisiorum[3] (s.19.2, de parricidiis), indirectly implies the order of succession as: children, parents, brothers and sisters. MacCormack is inclined to believe that the children, both male and female, used to share; equally. But there is a suggestion in a phrase - vel fratri vel etiam sororis suae,[4] that in the matter of inheritance men might bepreferred to women. The phrase does not isolate the Frisian law from the general mould found in the Germanic pattern of inheritance.

f. Anglo-Saxon law

The Anglo-Saxon laws fall into two groups. First, there are the dooms issued by the earlier Anglo-Saxon kings; and, secondly, there are the late collections of laws from the time of Canute, William and Henry I.

The dooms do not contain any comprehensive account of the law of inheritance, but indirectly they do supply information on the position of sons

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1. The same rule among the Alamanni, Lex Alamannorum, paras. 2, 35; and especially, 91. The code is dated between A.D. 709 and 730.

2. Lex Baiuwariorum, I.1; II.9; XV.9. The law was applicable to the Bavarians and is dated to the middle of the 8th century, MacCormack, ibid., 175. Edictus Longobardorum (Ed. Roth, 167), MacCormack, ibid., 175. Lex Saxonum, cl.41, MacCormack, ibid., 178. Lex Francorum Chamovorum, MacCormack, ibid., 180.

3. A compilation put together from various sources in the time of Charlemagne, MacCormack, ibid., 177, n.61.

4. MacCormack, op.cit., 177.

(children) among the heirs.

The Laws of Aethelberht [1] (ss. 78-81) provide that if a woman who has borne a child chooses to leave her husband, she is entitled to take with her property equivalent in amount to a child's share: (78) 'If she bears a living child, she shall have half the goods left by her husband, if he dies first'. (79) 'If she wishes to depart with her children, she shall have half the goods'.[2] (80) 'If the husband wishes to keep (the children), she shall have a share of the goods equal to a Child's'. (81) 'If she does not bear a child, (her) father's relatives shall have her goods, and the "morning gift"'.[3]

From the above provisions, it is apparent that the birth of a child is significant in the sense that as soon as a child is born the question of a share in the father's property arises.

The Laws of Hlothhere and Edric provide: 'If a man dies leaving a wife and child, it is right, that the child should accompany the mother and one of his father's relatives who is willing to act, shall be given him as his guardian to take care of his property, until he is ten years old'.[4]

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1. King of Kent, A.D. 560-616.

2. 78: Gif hio cwic bearn gybyrep, healfne scaet age, gif ceorl aer swyltep', F.L. Attenborough, The Laws of the Earliest English Kings, (Cambridge, 1922), 14-15.

3. Attenborough, op.cit., 15. 'Morning gift' is the present which the bridegroom gives to the bride on the morning after the marriage 'for granting his desire', Vinogradoff, OHJ, I, 255. Like Germanic law, a similar custom is found in Russian law, ibid., 255.

4. Attenborough, op.cit., 19.

The law of Alfred [1] states that if a nun is abducted, neither she nor any child she may bear would inherit any property. The rule implies that a legitimate child would ordinarily inherit the property of his father.[2]

Canute's doom seems to imply that when a person died intestate, his son had to share the inheritance with other heirs:

> And if anyone departs this life intestate, be it through his neglect, be it through sudden death; then let not the lord draw more from his property than his lawful heriot. And, according to his direction, let the property be distributed very justly to the wife, and children, and relations, to every one according to the degree that belongs to him. 3

The Leis Willhelme, I.34 provides that the sons of an intestate shall divide the inheritance among them equally.[4]

The Leges Henrici Primi contains an elaborate exposition of the rules of inheritance. The general rule is laid down:' While the male line subsists, and the inheritance descends from that side, a woman shall not succeed'.[5]

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1. King of Wessex, A.D. 871-900.

2. Alfred, 8.1-2; Attenborough, op.cit., 68-9.

3. The Laws of King Cnut, 71, B. Thorpe, Ancient Laws and Institutes of England, 2 vols., The Commissioners of the Public Records of the Kingdom, (1840), I, 413, 415.

4. Young, op.cit., 133. Also C. Gross, 'The Mediaeval Law of Intestacy', in Select Essays in Anglo-American Legal History, op.cit., III, 727. si quis paterfamilias casu aliquo sine testamento oberit, pueri inter se hereditatem paternam equaliter dividant, the text is quoted by MacCormack, op. cit., 147.

5. 70, 18-23; L.J. Downer, Leges Henrici Primi, (Oxford, 1972), 224-5.

The rule confirms that if a man dies leaving a son and a daughter, the latter is postponed by the former.

Seemingly there appears a discrepancy in the law when we view together the rules in the Canute, Leis Willhelme and the Legis Henrici Primi. The last two, conforming with the Germanic laws, [1] contemplate succession to the father's property, by sons alone and not by all children. Although the laws of Canute imply a claim of the relatives and the wife along with the children, there is juridical suggestion that they have no precise significance in the law of inheritance.[2] There is disagreement among scholars on this point, and MacCormack would have us believe that 'the wife took a share of the inheritance together with the children or other heirs',[3] - a view which runs counter to the observation of Young.[4]

The Lex Ribuaria, 56,4 is supposed to be the source of Leges Henrici Primi, 70, 20b, and Downer opines that the author of the latter departed from its source.[5] However, despite slight deviance from the Lex, the Laws of Henry I keep the preference of the male issues in matters of inheritance.

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1. 70, 20b: Et dum uirilis sexus extiterit et hereditas abinde sit, femina non hereditetur, Downer, ibid., 224; tr. 225.

2. E. Young, op.cit., 133. Young says: 'The allusion here to the partition of the inheritance is only casual, and, ... cannot be accepted literally. A partition by which the near kin shared with wife and children is, for the period of Cnut at least, inconceivable ...', ibid., 133, n.2.

3. MacCormack, op.cit.,

4. See n.2 above.

5. Downer, op.cit., 386.

The earlier dooms use the word 'bearn' when signifying children.[1] According to MacCormack, the word 'bearn' could mean children in general, both sons and daughters. He also emphasises that the same inference could be drawn from the Leis Willhelme.[2] If he is correct, it may be said that the equation of daughter with son is a feature developed from social and religious forces.[3]

Ernest Young informs us that in Germanic law, the widow was never an heir to her husband.[4] Similarly, in a male-biased family law, daughters were postponed by sons in the inheritance of their father's estate. But the church played an egalitarian and humanistic role to mould the law of property. Thus, we find that in the seventh century, a Frankish monk Marculf[5] complains that it is an old but heathenish custom to deny women their share in the inheritance of land.[6] Through the influence of the church, the Lex Burgundiorum also incorporated a rule that daughters who entered the church would receive the same share of inheritance as a son.[7] The stipulation appears to show a trend towards equality

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1. See Aethelberht, 78; Attenborough, op.cit., 14. Hlothhere and Eadric, 6; Attenborough, ibid., 18-19. Alfred, 8.2, ibid., 68-69.

2. MacCormack, op.cit.,

3. See infra, 157.

4. Young, op.cit., 124, n.2.

5. Author of Formulae Marculfi, a compilation of legal decisions, see Meinhard, op.cit., 17.

6. Diuturna sed impia consuetudo tenetur ut de terra paterna sorores portionem non habeant, quoted by Meinhard, op.cit., 17.

7. Meinhard, op.cit., 17-18.

of the sexes in the law of inheritance; but in reality, one cannot fail to note that a daughter entering the church would have no issue and therefore, the share would represent a kind of dowry which would ultimately go to the church. Hence, it is clear that the rule has no contrary bearing on the preferential position of the son.

Although the feudal principle of primogeniture changed the rules of succession held by military tenure, the rules in respect of socage [1] tenure still reflected the ancient Anglo-Saxon custom by which the sons shared the estate equally,[2] excluding the daughters. On socage land, Glanvill says:

> It should, however, be known that if anyone holds free socage land and has several sons who must all be admitted equally to equal shares in the inheritance, then it is beyond question that the father cannot give to any one of them any land, whether inherited or acquired if he has no inherited land, beyond the reasonable share that would fall to him from the paternal inheritance; but the father can in his lifetime give to any one of his sons so much of his inherited land held in free socage as that son would take from the inheritance by way of succession after the death of his father. 3

The survival of the old custom could be witnessed in the Gavelkind lands of Kent. The chief feature of the custom was that on intestacy the land

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1. On socage, see Megarry and Wade, op.cit., 19-22.

2. Young, op.cit., 134. Also T.F.T. Plucknett, Legislation of Edward I: The Ford Lectures Delivered in the University of Oxford in Hilary Term, 1947, (Oxford, 1949), 111.

3. Lib. VII.1; Hall, op.cit., 71b. Also Lib. VII. c.3; Hall, ibid. 75b.

descended [1] to all males of the same degree equally, instead of to the eldest male. The rule is stated as follows in the Statute De Praerogativa Regis, 17 Edw. 2, c.16: 'In Kent, in gavelkind all the heirs male shall divide the inheritance, and women in the same way: but women shall not share with the men'.[2]

XII. Conclusion

The preference for male heirs and the devolution of the estate equally among them may be considered to be remnants of a system in which the male ascendants and descendants had co-eval rights in the family property and especially in lands.[3]

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1. C.I. Elton and H.J.H. Mackay, Robinson on Gavelkind: The Common Law of Kent, or The Customs of Gavelkind, with Additions Relating to Borough-English and Similar Customs, 5th ed., (London, 1897), 89.

2. ibidem omnes heredes masculi participabunt hereditatem eorum, et similiter feminae: sed feminae non participabunt cum masculis, ibid., 89. Plucknett opines that the Gavelkind was the relics of pre-Conquest England, op.cit., 111. The Kentish custom is contained in the maxim: 'father to the bough, son to the plough', Plucknett, ibid., 111; also A Concise History of the Common Law, op.cit., 713. The maxim is explained: '... it was part of the customs of Kent that if a tenant in fee-simple of gavelkind lands committed felony, and suffered judgment of death, he would incur a forfeiture of his goods, but his gavelkind lands would not be forfeited or escheat to the king, or other lord of whom they were held; but the heir, notwithstanding the offence of his ancestor, might enter immediately, and enjoy the land by descent under the same customs and services as those by which they were held before ...', Elton and Mackay, Robinson on Gavelkind, loc.cit., 176.

3. Strongly suggested from the rules regarding socage land, Glanvill, VII.c.1, supra, 157 . Also from Gavelkind, supra, 157 . In context of early English law accepted as well as doubted by Pollock and Maitland, The History of English Law, 2nd ed., II, 248, 255.

> In pre-Norman times land belonged to the family, which still remembered and to a certain extent practised joint family law, and was either split up at once on the death of the owner among his children, or was allowed to remain joint in the hands of the senior members of the family, often called collaterals. 1

The discussion should be allowed to rest here and we may conclude that early Germanic family ownership of property bears a close resemblance to the Hindu co-ownership of father and son. Maybe, through the epochs, and through migration, the idea of a son's co-ordinate rights with his father in the family property passed through different variations and modifications; nevertheless, a German son's right of co-alienation,[2] preemption,[3] and, in relevant cases, his right to demand a partition,[4] as well as the Germanic limitation of a father's power in contracting debts,[5] and their rules of testamentary[6] and intestate[7] succession, are evidences enough to visualise that both the Germanic and the Hindu systems point to a common juridical root in which the rights of a son in his father's property were not a mere right of expectancy but much more

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1. Derrett, TLL, 193, n.10 at 239.
2. Supra, 131.
3. Supra, 144-7.
4. Supra, 130, n.1.
5. Supra, 139-42.
6. Supra, 137-39.
7. Supra, 147 ff.

real right during the survival of the father.[1]

However, when in a comparative context we use the phrase 'birth-right', one fundamental difference between the two systems should not go unmentioned. In the Mitākṣarā system, a son's right is co-ordinate with his birth or, to be precise, with his conception. In the Germanic system, a father's admittance of the son was a vital factor in the emergence of the rights of the latter. Although in Germanic law, a father's action was subject to the scrutiny of the kindred, still a father could kill a disqualified son or repudiate one about whose legitimacy he was not certain. Despite these apparent dissimilarities, in both systems the rights of adult sons in family property vis-à-vis their father meet on a converging plane.

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1. It needs to be mentioned that our concluding observations are mainly based on Huebner's Grundzuge des deutschen Privatrechts, op.cit., and his observations coalesce with those of Maine in Ancient Law, but there is no certain way of knowing how much Huebner was influenced by Maine and his school. We should note the remark of Ficker, 'The suggestion therefore may be admissible that at least in some cases "family ownership', or the semblance of it, may really be, not the origin, but the outcome of intestate succession', Untersuchungen zur Erbenfolge, i, 299, quoted by F. Pollock and F.W. Maitland, The History of English Law, 2nd ed., (Cambridge, 1968), II, 249, n.2. On Ficker's opinion, Huebner shrewdly comments" 'Ficker regards the right in expectancy ("Wartrecht") as having been introduced only later in place of an original freedom in dispositive powers, because it is impossible, in view of the great diversity of its later development, to ascribe to the right in expectancy a common or primitive Germanic character; but this conclusion must be a "petitio principii" for any one who does not accept his highly artificial theory - which is certainly wholly devoid of convincing proof - of the interrelations and derivations of the various Germanic legal systems', Huebner, ibid., 305, n.1.

CHAPTER 6

BABYLONIAN AND ASSYRIAN LAWS

1. Introduction

Being a link between India and Europe, topographically and culturally, the Near and Middle East is one of the most interesting and noteworthy regions on the face of the globe. Hence, the laws of the ancient civiliza - tions which flourished in Anatolia and Mesopotamia deserve a full share of attention,[1] not only because of their antiquity,[2] but also because of their contact with the Indo-Europeans who apparently entered Babylonia and Assyria and established themselves as the ruling class of the Hittite Empire.[3]

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1. Derrett, TLL, 254. Also S.M. Paul, Studies in the Book of the Covenant in the Light of Cuneiform and Biblical Law, (Leiden, 1970), 4.

2. E.A. Speiser points out that Mesopotamia experienced more than two millennia of legal progress before the classical civilization began, 'Early Law and Civilization', 31 Canadian Bar Review (1953), 863-877 at 877.

3. On the Indo-European penetration into Hither Asia, see A.H. Sayce, 'The Early Home of Sanskrit', Modi Memorial Volume, (Bombay, 1930), 68-72 at 72; also 'Indians in Western Asia in the Fifteenth Century B.C.', Oriental Studies in Honour of C.E. Parvey, (London, 1933), 399-402 at 402. E.A. Speiser, 'Ethnic Movements in the Near East in the Second Millennium B.C.', AASOR 13 (1931-32), 13-54 at 51-2. M. Gimbutas, 'The Indo-Europeans: Archaeological Problems', Am. Anthropologist 65 (1963), 815-836 at 816. N. Na'aman, 'Syria at the Transition from the Old Babylonian Period to the Middle Babylonian Period', Ugarit-Forschungen, Internationales Jahrbuch für die Altertumskunde Syrien-Pälestinas, Band 6, (Neukirchener Ver Lag, Germany, 1975), 265-274, 273-4. T. Burrow, 'The Early Aryans', in A.L. Basham, ed., A Cultural History of India, (Oxford, 1975), 20-29 at 23-4.

The resurrection of Sumerian, Babylonian, Assyrian and Hittite civilizations is a magnificent achievement of nineteenth and twentieth century archaeological scholarship. Like much other human knowledge, many aspects of ancient laws were hidden under these ruins. Therefore, it is not an exaggeration to say that 'the cradle of law is today no longer sought in Rome but rather in Mesopotamia'.[1]

It deserves to be emphasised at the outset that the family organization of the leading people of the Near East was patriarchal,[2] and the final jural authority over members of the family was vested only in the father. But 'it differed from the Roman patria potestas in that it did not necessarily last throughout his life; nor did it exclude the personal property of the members

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1. S.M. Paul, Studies in the Book of the Covenant ..., loc.cit., 3. Also, Pollock and Maitland, The History of English Law, 2nd ed., I, 1.

2. A. Skaist, 'The authority of the Brother at Arrapha and Nuzi', JAOS 89 (1969), 10-17 at 11. But note the existence of fratria potestas at Nuzi, Skaist, ibid., 11. On this trace of Nuzian fratriarchy, E.A. Speiser says that the encroachment of patriarchy managed to restrict the underlying fratriarchal system 'but could not entirely obliterate it', 'The Wife-Sister Motif in the Patriarchal Narratives', in A. Altmann, ed., Biblical and Other Studies, (Cambridge, Mass., 1963), 15-28 at 18. For a criticism of Speiser's drawing of parallel between Nuzi evidences and the betrothal of Rebecca in Genesis, 24, see D. Freedman, 'A New Approach to the Nuzi Sistership Contract', JANES 2 (1970) 2: 77-85. It is worth mentioning that the filial relationship between father and son was important and popular throughout the Near East, for a study in a different context, see F. Charles Fensham, 'Father and Son as Terminology for Treaty and Covenant', Near Eastern Studies in Honour of William Foxwell Albright, (Baltimore/London, 1971), 121-135.

of the family, especially of the wife'.[1]

II. Babylonian Law

Knowledge of Babylonian laws [2] is derived from the so-called 'law codes' [3] of lower Mesopotamia and also from various tablets unearthed from the

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1. P. Koschaker, 'Cuneiform Law', Encyclopaedia of the Social Sciences, (New York, 1949), IX, 215.

2. The lower part of classical Mesopotamia was known as Babylonia. Babylonia was again divided into Accad, the north and Sumer, the south, see Driver and Miles, The Babylonian Laws, (Oxford, 1952, rpt. 1968), I, 1. Babylonia is roughly identical with modern Iraq, see S.N. Kramer, The Sumerians: Their History, Culture and Character, (Chicago, 1964), 83. The laws of this region are generally designated as Babylonian laws, see Driver and Miles, BL, (1952) I, 54. Also S. Greengus, 'The Old Babylonian Marriage Contract', JAOS 89 (1969), 505-532 at 505. The common bond of these laws is the cuneiform script and some jurists in a wider context like to call these as 'Cuneiform Law', see E.A. Speiser, 'Cuneiform Law and the History of Civilization', Proceedings of the American Philosophical Society, Vol.107 (1963) 6: 536-541 at 536.

3. On the typology and genre of these Codes, see Derrett, TLL, 255-6. J.J. Finkelstein, 'Ammisaduqa's Edict and the Babylonian Law Codes', Journal of Cuneiform Studies, 15 (1961), 91-104 at 103-4. Also Driver and Miles, BL, I, 8-9. The actual and substantive application of the provisions of the Codes has recently been doubted, see B.S. Jackson, 'From Dharma to Law', 23 Am.J.Comp.L. (1975), 490-511 at 493. D.J. Wiseman in effect has given much weight to these doubts but until further research, he prefers to keep the question open. 'The Laws of Hammurabi Again', JSS 7 (1962), 161-172. But Rivkah Harris in the context of the right of inheritance of the nadītu daughters in the Code of Hammurabi opines that the rules were actually applied in practice, 'The nadītu Laws of the Code of Hammurapi in Praxis', Orientalia, 30 (1961), 163-9 at 168.

private archieves of that region.[1] The most famous, although not the oldest,[2] of these Codes is the Code of Hammurabi,[3] to which we shall turn in due course. The earliest collection of laws so far discovered is the Code of Eshnunna,[4] bearing the name of King Bilalama (c. 2268-2259 B.C.);[5] this is at least two

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1. On these private documents, see Driver and Miles, BL, I, 24. Also, R. Harris, Ancient Sippar: A Demographic Study of an Old Babylonian City (1894-1595 B.C.), (Nederlands Historisch-Archaeologisch Instituut Te Istanbul, 1975), Preface, xi-xii.

2. Before sufficient archaeological discoveries, the Code of Hammurabi used to be considered by some scholars as the oldest body of law in the world, see E. Lansing, The Sumerians, (London, 1974), 115.

3. The highest chronology of Hammurabi's reign is of Fotheringham and Langdon, c. 2067-2025 B.C., see Driver and Miles, BL, I, xxiv. But Smith's chronology of c. 1792-1750 is now generally accepted, see M.B. Rowton, 'The Date of Hammurabi', JNES 17 (1958), 97-111 at 111; also A. Leo Oppenheim, Ancient Mesopotamia, (London/Toronto, 1964), 154; L.L. Orlin, Assyrian Colonies in Cappadocia, (The Hague/Paris, 1970), 222; R. Harris, Ancient Sippar, loc.cit., 1. For other lower chronologies, see Driver and Miles, BL, I, xxvii. The King's 40th year of reign is supposed to be the period of promulgation of the Code, see Driver and Miles, BL, I, 36.

4. This is a collection of Old-Accadian Laws. The clay tablets containing the laws were found in a place called Tar Harmall, a small mound on the southern outskirts of Baghdad. Eshnunna was the capital city of the district between Accad and Elam, see A. Goetze, The Laws of Eshnunna, AASOR 31 for 1951-52 (New Haven, 1956), 16. E.A. Speiser, 'Cuneiform Law and the History of Civilization', vol.107, Proceedings of the American Philosophical Society, (1963) 6: 536-541 at 538, n.8. Also Driver and Miles, BL, I, 6. Archaeological evidence shows that the Accadian city of Eshnunna was in communication with the Indus Valley just before the middle of the third millenium B.C., P.J. Chinmulgund and V.V. Mirashi, ed., M.M. Chitraoshastri Felicitation Volume: Review of Indological Research in Last 75 Years, (Poona, 1967), 297.

5. Driver and Miles, BL, I, 6.

centuries older [1] than the Code of Hammurabi and most likely a source of inspiration for the latter, into which much of it might have been incorporated.[2]

a. The Code of Eshnunna

The Code of Eshnunna deals with sixty subjects which do not contain anything about inheritance or respective proprietary rights of father and son. However, there is one text which is seemingly suggestive of the existence of joint ownership of property amongst brothers. The text comes under the topic of 'Special Rules Limiting Sales and Purchases' and runs as follows: 'If one of (several) partners wishes to sell his share (in property owned by them jointly) and his associate wants to buy it, he shall (also) pay the price for the half of the other, i.e. the (third) associate'.[3]

Two interpretations of the text are possible: Either it deals with the dissolution of a company (partnership) or it is laying down rules for alienation of a share of joint property. Regarding these two suppositions, although, considering the antiquity of the Code, the latter is more probable than the former,

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1. Driver and Miles, BL, I, 6. But R. Yaron points out that ancient Babylonian chronology is not yet agreed upon by Scholars. He, however, agrees that the Code of Eshnunna is older than the Code of Hammurabi, but the actual dates are in dispute, 'The Goring Ox in Near Eastern Laws', in H.H. Cohn, ed., Jewish Law in Ancient and Modern Israel, (Ktav Publishing House, New York, 1971), 50-60 at 51.

2. On specific borrowing, see Jørgen Laessøe, 'On the Fragments of the Hammurabi Code', JCS 4 (1950), 173-187 at 187. Also, see Driver and Miles, BL, I, 9.

3. A. Goetze, The Laws of Eshnunna, AASOR 31 (1951-2), 105; Text, 38. A iii, 23-5; B iii, 7-9.

we have in fact, evidences of the existence of partnership in Babylonian law.[1] Goetze informs us[2] that the expression 'qablīt šanīm mullūm' lit. 'to fill (i.e. pay in full for) the middle (part) of the other one'[3] creates difficulty in eliciting its technical legal meaning. The three persons who could be seemingly involved in such a transaction are called athū. The noun athu literally means 'persons who are mutual brothers',[4] which could be a clue to the interpretation of the text. In fact, Yaron opines that the text stands for a rule denoting the right of preemption of the brother.[5] He renders the text as follows: 'If one of the brothers will sell his share, and his brother wants to buy, he shall pay in full the average (price) of another'.[6]

However, even if it is accepted that there was in Eshnunna, an institution like the consortium[7] of Roman brothers, that could have no direct

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1. Note the difference between Babylonian partnership, (societas unius rei) and partnership in English Law, Driver and Miles, BL, I, 187. In Assyrian documents, there are mentions of sellers in the plural. This common ownership of property may be held to fall under partnership, see C.H.W. Johns, Assyrian Deeds and Documents, (Cambridge, 1901), III, 318. Joint ownership or partnership was also found at Sippar, see R. Harris, Ancient Sippar, op.cit., 364.

2. Goetze, loc.cit., 107.

3. Goetze, ibid., 107.

4. Goetze, ibid., 107, n.1.

5. R. Yaron, The Laws of Eshnunna, (Jerusalem, 1969), 152.

6. R. Yaron, ibid., 41. For a discussion of the text, see ibid., 149-152.

7. Gai.iii. 154a. On this see, G. Diosdi, Ownership in Ancient and Pre-classical Roman Law, (Budapest, 1970), 44.

bearing on our present study except by proving that multiple ownership of property was not unknown to the area for which the law was applicable.

b. The Sumerian Codes

The excavations in the sands of Sumer have unearthed Codes far older than the Code of Hammurabi, [1] and there are opinions [2] that promulgation of laws by Sumerian kings became a common phenomenon by c.2400 B.C. and, probably, even considerably earlier.[3]

The first Sumerian legal compilation worth mentioning is that of Ur-Nammu whose reign began about c. 2050 B.C.[4] The fragments of the Laws of Ur-Nammu,[5] as available to us, keep us in the dark regarding the respective rights of father and son in the Sumerian family. But two hundred years later, another king of Isin, Lipit-Ishtar (c. 2217-2207 B.C.), [6]

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1. E. Lansing, The Sumerians, (London, 1974), 115. Driver and Miles, BL, I, 12. On possible contact between the Sumerians and the Indus Valley civilization, see P.J. Chinmulgund and V.V. Mirashi, ed., M.M. Chitraoshastri Felicitation Volume, op.cit., 298,

2. See S.N. Kramer, The Sumerians: Their History, Culture and Character, (Chicago, 1964), 83.

3. Kramer, ibid., 83. Driver and Miles, BL, I, 5.

4. The third dynasty of Ur reigned between c. 2465 - 2347. C. Edwards, The Hammurabi Code and the Sinaitic Legislation, (London, 1921), 129. The lower chronology is c. 2408-2301 or c. 2298-2180 B.C. Driver and Miles, BL, I, 12.

5. For text, translation and comments, see S.N. Kramer, 'Ur-Nammu Law Code', Orientalia, 23 (1954) 40-48. J.J. Finkelstein, 'The Laws of Ur-Nammu', JCS 22 (1968-9), 68-82.

6. Driver and Miles, BL, I, 12.

promulgated a more formal Code [1] which contained some provisions apparently important to our purpose.

The king claims in the prologue:

> I, Lipit-Ishtar ...procured ... the freedom of the sons and daughters of Nippur, the sons and daughters of Ur, the sons and daughters of Isin, the sons and daughters of Sumer and Akkad upon whom ... slave-ship ... had been imposed. Verily, in accordance with ..., I made the father support his children, (and) I made the children support the father ... [2]

The prologue implies (notwithstanding the hyperbole of freeing from slavery) that the pre-Code state of Sumerian society was remarkable for its lack of recognised filial duties, since the father was not obliged to maintain his children nor the children their aged parents.[3] In such a system, the search for the existence of a son's innate right in the property of the father is futile.

However, the Code indicates that, unless not intended by the father,

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1. The Laws of Lipit Ishtar are set out in translation by Kramer, The Sumerians, loc.cit., Appx.8, pp.336-340. Also succinctly by Driver and Miles, BL, II, 306-7. Also see F.R. Steele, 'The Lipit-Ishtar Law Code', Am.J.Arch. 51 (1947) 158-164.

2. Kramer, ibid., 336-7. Although considerable part of the prologue in Lipit-Ishtar's Code is identical with the prologue in the Code of Hammurabi, this part of Lipit-Ishtar's prologue is not seen in the latter, see Driver and Miles, BL, II, 7-13.

3. Cp. Hindu view, Śat. Br.12.2.3.4; Dh.K.1163a: tasmāt pūrva vayase ... infra, 401, n.1. In Athens before a son acquired the right to be maintained, he had to be admitted to the family by his father. The acceptance of the child to the family depended on the absolute discretion of the father, A.R.W. Harrison, The Law of Athens, op.cit., 70-1.

the legitimate sons were the primary heirs of their father's property.[1] A son procreated through a slave girl could also claim a share in the estate if his putative father took the slave as a titular wife while his wife was dying.[2] But ownership of property in Sumerian law was not confined only to males; the law also allowed women to own property. In this respect, a partial translation of a Sumerian ditilla[3] as presented by Elizabeth Lancing runs like this:

> Innashagga, wife of Dudu ... bought a ... house ... with her own money. As long as Dudu lived, Ur-Eninnu, the son of Dudu, had possession of his house. Since Innashagga had bought the house, he (Ur-Eninnu) had the tablet recording the purchase of the house, made over to him by Innashagga. Innashagga took the oath that she bought the house with her own money and not with (that) of Dudu ... Therefore ... the house (was) confirmed as belonging to Innashagga, the wife of Dudu ... The heirs swore by the name of their king that they would not change their mother's word.[4]

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1. Laws of Lipit-Ishtar, No.31, Kramer, The Sumerians, op.cit., 339. This was the general purport of Sumerian laws, see S. Langdon, 'The Sumerian Law Code compared with the Code of Hammurabi', JRAS (1920) 489-515 at 504-6. Also C. Edwards, The Hammurabi Code ..., (London, 1921), 129-132.

2. F.R. Steele, 'The Lipit-Ishtar Law Code', Am.J. Arch. 51 (1947) 158-164.

3. Over three hundred court records and court notarizations of agreements or contracts have been excavated, mostly at Lagash (now called Telloh). The general term for these court records as designated by ancient scribes is ditilla (completed judgement), see Kramer, ibid., 85. Driver and Miles, BL, I, 23. This could be regarded as the beginning of the history of law reporting.

4. E. Lancing, The Sumerians, op.cit., 125. The document was signed by the mashkim (a kind of court clerk or bailiff) and three judges, ibid., 124-5.

This shows that the Sumerian system allowed property ownership to both male and female; and, indeed, there is no reason for us to expect a legal norm identical to that of the Romans, Greeks, Celts or Hindus from people who were speakers of an agglutinative language unrelated to the inflected Indo-European tongue.[1]

c. The Code of Hammurabi

There were no natural boundaries between Accad and Sumer, and the Sumerians at the zenith of their power seem to have overrun the greater part of Accad, and many Sumerians must have settled in Accad, just as many Semites from the earliest times were settled in Sumer.[2] Thus, the two races came into close contact and each was bound to leave its mark on the culture and legal system of the other.[3] Politically, towards the end of the third millennium B.C. the centre of importance continually shifted from one to another city state in the region; but all, whether Sumerian or Semite, ultimately accepted the supremacy of Babylon when the First Dynasty (c. 2169-1870 B.C.)[4] of Babylon was established.

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1. In this respect, the Sumerian language differed from the Semitic family of languages as well, see Kramer, the Sumerians, op.cit., 298. For a recent study on this question, see Istvan Fodor, 'Are the Sumerians and the Hungarians or the Uralic Peoples Related?', Current Anthropology, 17 (1976) 1: 115-118.

2. See G. Roux, 'Ancient Iraq', in T. Jones, ed., The Sumerian Problem, (London, 1969), 135.

3. Driver and Miles, BL, I, 2.

4. Driver and Miles, BL, I, 3.

Hammurabī, one of the seven kings of this dynasty, who brought the whole of Babylonia under his rule in the thirty-first year of his reign, promulgated his famous Code most probably in his 40th regnal year, as we have stated earlier.[1]

Since its discovery the Code has engaged the minds of scholars, who have studied it from different angles and have found parallels, real or simulated, between most of the ancient Codes and that of Hammurabī. Such parallels between Manu and Hammurabī have been noted by Saletore,[2] and Motwanī[3] has enthusiastically put forward the suggestion that Hammurabī drew upon the dharmaśāstra in preparing his Code.[4]

Whatever might be the claims of these scholars there is no ground to suppose that in Babylonian law a son had a birthright, as the term is used in the Mitākṣarā sense, in the property of his father; and, in the course of their survey of co-ownership of father and son in the Hindu (Mitākṣarā) system, Driver

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1. Supra, 164, n.3.

2. B.A. Saletore, Ancient Indian Political Thoughts and Institutions (London, 1963), 151-175. Excepting a passing reference of domestic relations at 161 the work has no relevance to our present purpose. An earlier unsatisfactory attempt, R.S. Vaidyanatha Ayyar, Manu's Land and Trade Laws (Their Sumerian Origin and Evolution up to the Beginning of the Christian Era), (Madras, 1927), 34-46.

3. K. Motwanī, Manu Dharma Sastra, (Madras, 1958), 283.

4. The views of Saletore and Motwanī have recently been evaluated and by examining the theory of kingship in the two Codes, the claims of both have been eroded by E. Burke Inlow, 'Manu and Hammurabī - A Study in Legal Theory', Journal of Indian History, Golden Jubilee Volume, (University of Kerala, Trivandrum, 1973), 97-107.

and Miles correctly say that 'little, however, is known of Babylonian law on this subject'.[1] Nevertheless, they put forward the view that 'probably the sons succeeded originally by survivorship as being co-owners with the head of the family but, when individual ownership became the rule and the head of the family had acquired some of the rights of an owner, they succeeded as his heirs'.[2] If this were not based on supposition, it would have been a happy parallel with the Mitākṣarā system; but no document discovered so far directly supports its substance.

In the earlier epoch in Babylonia sons, unless formally disinherited, succeeded to their father's property and a predeceased son's male issue represented their father and shared the property per stirpes with their surviving uncles.[3] It was a peculiarity of Southern Babylonia that the eldest son was entitled to an additional share[4] but the Code of Hammurabi does not have any such provision.

We notice in the Code of Hammurabi,[5] that daughters who were

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1. Driver and Miles, BL, I,328.

2. Driver and Miles, BL, I, 331.

3. Driver and Miles, BL, I, 331.

4. This was also the rule in Middle Assyrian and Subarean law, P. Koschaker, 'Cuneiform Law', En.Soc.Sc., IX, 216. There are references in the smṛtis to this effect, Gautama, 28, 6, 9; but it was not approved by the śāstra, Āpastamba, 2, 14, 10-11, Dh.K. 1166a; for a fuller discussion, see infra, 380-5.Cp. Jewish Law, Deut. 21: 15-17.

5. CH, §180, §181, Driver and Miles, BL, II, 73.

priestesses [1] received a full share or in some cases, a third share of the paternal estate which reverted to their brothers on their death. Certain documents from the first dynasty of Babylon allow daughters in general to share in the inheritance with sons,[2] but Driver and Miles think that such daughters (neither married nor priestesses) probably used to get only a life interest.[3] So the general rule was that daughters inherited in default of sons;[4] but again, a son was easily available by means of slave wives or by adoption.[5]

According to the Laws of Hammurabi, a widow also got a share in the inheritance if her husband did not make her a settlement,[6] but at her death or remarriage, the property reverted to her sons.

So the general impression of the Code is this, that although the widow or daughters, in certain circumstances, could have a share of the inheritance with life interest in it, the estate was actually vested [7] in the sons. With this formidable position of the son in respect of his father's property, we can link the

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1. Rivkah Harris disapproves the use of the term 'priestess' in this context. She thinks the term 'priestess' is a fallacious description of the nadītu, 'The nadītu laws of the Code of Hammurabi in praxis', Or. 30 (1961) 163, n.3. On these 'women of religion', see Driver and Miles, BL, I, 358-383; R. Harris, Ancient Sippar, op.cit., 302-332. Cp. devadāsīs in South India, Derrett, IMHL, §§ 163, 200. Also vestal virgins in Rome; on vestal virgins, see W.R. Halliday, Lectures on the History of Roman Religion: from Numa to Augustus, (Liverpool/ London, 1922), 54.

2. Driver and Miles, BL, I, 337.

3. Driver and Miles, ibid., 338.

4. Driver and Miles, ibid., 341.

5. Driver and Miles, ibid., 341.

6. CH, § 172; Driver and Miles, BL, I, 334; BL, II, 67.

7. Driver and Miles, BL, II, 334.

rules as to the disherison of a son by his father.[1] The Code implies that disherison of a son was a matter not exclusively dependent on the will of the father. To disinherit his son, a father had to go before a court and announce his intention and if the judges found that the son had not committed an offence entailing disherison, the father could not disinherit him.[2] Indeed, it seems that the law discountenanced disherison, a fact which was established from the provision[3] that even though a son deserved the heavy penalty of disherison, for a first offence, the judges 'shall pardon him'.[4]

However, if the committing of a second offence is established, only then could the son be disinherited. The foregoing provisions only imply that in Babylonia sons had a definite contingent right in the property of their father, though not necessarily co-ordinate with birth, and probably this provision, above all, indirectly led Driver and Miles to put forward the suggestion that in Babylonia originally sons succeeded by survivorship as being co-owners with their father.[5]

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1. CH § 168, BL, II, 65; BL, I, 348.

2. CH § 168. In Athens a father could expel a son from the house and this possibly meant a disherison of the son, A.R.W. Harrison, The Law of Athens, (Oxford, 1968), 74. But Plato required the charge to be brought before a family council, Laws, XI, 929b. In Roman law, a testator was obliged to disinherit each heir (suus heres) by name, see T.C. Sandars, The Institutes of Justinian, (London, 1956), introd., liv; for a discussion, see supra, 39-40. Cp. Hindu law, Jagannātha's view on Gautama, Mitā, I, 1, 23. Jagannātha states that if a father intends to exclude a son from his share on the ground of filial love or animosity, a father's decision is not final unless he proves the grounds for such exclusion in the presence of the king or a public assembly, H.T. Colebrooke, A Digest of Hindu Law, (London, 1801), III, 2.

3. CH §169, Driver and Miles, BL, II, 65; BL, I, 348.

4. CH § 169, Driver and Miles, BL, II, 65.

5. Driver and Miles, BL, I, 331.

d. Tablets from Sippar

The laws of the First Dynasty of Babylon and particularly, the Code of Hammurabi, could be taken as an integrated and unified legal system operating throughout the territories under the sway of the kings of Babylon. But amidst this apparent unity, recently deciphered texts, to which Driver and Miles have referred in passing,[1] are bringing to light diversities which are in no way less important than the Code of Hammurabi in understanding the ancient Babylonian legal system.

One such important study, of ancient Sippar, is by Rivkah Harris, in which she delineates the legal system of Sippar[2] for three hundred years (c.1894-1595 B.C.), which coincide with the reign of the First Dynasty of Babylon.[3]

Although a short-lived and ephemeral control over Sippar can be traaed back to the reign of Sammuabum (c. 1894 - 1881 B.C.), the first ruler of the First Dynasty of Babylon,[4] effective Babylonian domination over the city

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1. See Driver and Miles, BL, I, 359.

2. R. Harris, Ancient Sippar: A Demographic Study of an Old Babylonian City (1894 - 1595 B.C.), (Nederlands Historisch-Archaeologisch Instituut Te Istanbul, 1975). The study is based on the tablets found in the ruins of an institution called the walled 'Close', connected with the famous 'White Temple' of the city god, Samas. The daughters of wealthy families and even the daughters of the kings of Babylon passed their lives inside the 'Close'. Because of their wealth and business investment, they had considerable influence over the economy of Babylon. The women were called nadītum Accadian = 'one who is left fallow', Harris, ibid., Preface, XII; 302-332. Also Driver and Miles, BL, I, 358-383.

3. See the chronology of Smith, Driver and Miles, BL, I, xxiv-v.

4. Harris, ibid., 1.

started only in c. 1838 B.C., and reached its highest point under Hammurabi, the 'organizer of Sippar'.[1]

In line with the Code of Hammurabi, the family in Old Babylonian Sippar was a nucleated unit consisting of husband, wife and their children.[2] The kinship terms used in Sippar tablets imply that in certain cases brothers used to live jointly, but there is no evidence of joint living beyond two generations. It is significant to note that only on rare occasions [3] is the name of the grandfather included in legal texts.[4]

Some texts reveal that children were to revere their parents and normally a man's primary heirs were his sons.[5] Before dividing the patrimony, the heirs were obliged to pay their father's debt,[6] and they were also responsible for performing the feudal duties (watch and corvee) attached to the paternal estate.[7] So it was a universal succession [8] to all the assets and liabilities

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1. Harris, ibid., 7.

2. Harris, ibid., 352.

3. So far there is trace of only one family of three generations in Sippar, see the genealogy of the family of Aksāja, R. Harris, 'Notes on the Babylonian Cloister and Hearth', Or. 38 (1969) 133-145 at 138.

4. Harris, Ancient Sippar, op.cit., 351.

5. Ibid., 361. See another text to this effect, R. Harris, 'Biographical Notes on the Nadītu Women of Sippar', 16 JCS (1962), 1-12 at 2.

6. Harris, Ancient Sippar, op.cit., 361.

7. Harris, ibid., 361.

8. Cp. Roman Law, Haereditas est successio in universum jus quod defunctus habuit, Maine, Ancient Law, (1930), 203.

of the deceased.

The law probably did not need any conceptualisation of property as between movable and immovable,[1] but the inheritance used to be divided 'from chaff to gold',[2] or from the least to the most valuable.

Unlike the practice in South Mesopotamia, as in Nippur and Ur where the eldest son was entitled to a preferential share,[3] the Sippar texts indicate and support the implication of the Code of Hammurabi, that the estate is shared equally by the brothers.

In this connection, it is indeed worth mentioning that nadītu daughters used to receive a share along with their brothers,[4] which coincides with the provisions in Hammurabi's Code.[5] On the entitlement to a share by daughters

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1. This contradicts the universal legal distinction of property made by Gluckman. He states that 'both developed and under-developed legal systems distinguish sharply between immovable and movable property', M. Gluckman, The Ideas in Barotse Jurisprudence, (New Haven/London, 1965), 113. Gluckman's categorisation is also weakened by Kapauku Papuan laws where a deceased person's property is itemised rather than strictly categorised into two broad types, see L. Pospisil, 'A Formal Analysis of Substantive Law: Kapauku Papuan Laws of Inheritance', Am.An., Vol.67, No.6 (1965), Pt.2, 166-185 at 169-73. In Hindu law the distinction between movable and immovable was important, see Mitā, I.1.27 but sometimes slaves were as important as immovables, (which they worked), Vyāsa, Dh.K.1587, infra, 340, n.3. In Roman law, res mancipi included oxen, horses, and slaves, besides land. These overlappings were, however, noticed by Gluckman, ibid., 113.

2. This description is used in a division of estate of a kulmašītum, a well-known type of priestess, between her brothers, see A. Goetze, 'Old Babylonian Documents from Sippar in the Collection of the Catholic University of America', JCS 11 (1957) 15-40, contract No.1:5 at 15.

3. See supra, 172.

4. Harris, ibid., 368.

5. CH §§180-2.

who are not *nadītus*, the texts are not unanimous, but these leave the general impression that daughters who did not belong to a special class, apparently inherited only a small portion of the estate.[1]

However, there is no reason to believe that ownership of property in Sippar was restricted only to males. Besides the *nadītus*, women could possess extensive property rights and a married woman might own property to which her husband had no claim, and which she could dispose of at her will. It was not even uncommon for husband or wife to buy or sell, make or receive, a gift of property from each other.[2]

Parallel to individual ownership, property was not infrequently owned jointly by any combination of members of the family, as exemplified in the contracts of sale where a specific property could be jointly sold by brother, sisters; sisters (usually *nadītus*) and brothers; mothers, sons and daughters; *nadītus* and their fathers; and, significantly, father and sons.[3]

The Sippar tablets also reveal that a paternal estate (*bīt abīm*) could be redeemed by a member of the family at a later date.[4]

In the light of the Code of Hammurabi, Driver and Miles opine that

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1. Harris, ibid., 369.

2. R. Harris, *Ancient Sippar,* op.cit., 367, 369.

3. Harris, ibid., 364. For property sold jointly by father and son, see Cuneiform texts from Babylonian tablets in the British Museum, 8 31c cited by Harris, ibid., 364, n.94.

4. Harris, ibid., 366. Also cp. the discussion on preemption, infra, 689–713.

'the Babylonians did not recognize the "dead hand" of a testator ...',[1] but the Sippar tablets qualify the general purport of this statement. It is indeed correct to say that the Babylonians manipulated the institution of adoption for a variety of purposes, and particularly, as a means of testamentary disposition, but the purport of the Sippar tablets indicates that a bequest, although rare, was not altogether unknown. There is evidence that a wife was allowed to bequeath three slaves which she received as a gift from her husband.[2] Also, from an extant law suit, it is apparent that a brother and two sisters of a propositus unsuccessfully claimed the property which s he had bequeathed (ezēbu) to his wife.[3]

e. Conclusion

The above discussion shows that the property régime in Babylonia was not based exclusively on a collective family entity, nor was it purely individualistic either; rather it was a conglomeration of the two, possibly reflecting a transitional stage from the former to the latter.

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1. Driver and Miles, BL, I, 270.

2. Harris, Ancient Sippar, op.cit., 370. This could be an analogous instrument as in the Code of Hammurabi, § 150. But in the CH there is a restriction on the power of the wife that she should leave the property to one of her favourite children. This is seemingly the underlying purport of the Sippar tablet, but it is not expressly stated, see Harris, ibid., 370. However, there was a tablet in Sippar identical with CH § 150. Harris, ibid., 370. Similar instruments were also found in Elam, infra,184.

3. Harris, ibid., 370.

III. Laws of the Amorites of Old Babylonian Mari

The legal system of the Amorites [1] of Old Babylonian Mari deserves a quick glance. Mari was one of the principal centres of Mesopotamia during the third and the early second millenium B.C. [2]

The Mari archives reflect the customs and institutions of a 'dimorphic society',[3] based on the nomadic and sedentary social morphemes of the West Semitic tribes, and help in our understanding of the gradual process of Israelite settlement in Canaan.[4]

The social system of the West Semitics at Mari was patriarchal and the family was the basic unit of tribal organisation. The head of the family was called 'the father of the household' (abu bitim).[5] Individual ownership

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1. The Amorites (West Semitic) belonged to the same stock as the Hebrews, see A. Malamat, 'Mari', Encyclopaedia Judaica, 1971, Vol.11, Col.972-989; rpt. in A. Malamat ed., Mari and the Bible, (Jerusalem, 1973), 1-11 at 4.

2. The archaeological evidences show that Mari was founded at the end of the fourth millennium B.C. It was situated at Tell Hariri at present some 1.5 miles (2.5 km.) west of the Euphrates near Abu Kemal, around 15 miles (25 km.) north of the modern Syrian-Iraqi border, A. Malamat, ibid., 1. For more information on this see, I.J. Gelb, 'The Early History of the West Semitic Peoples', JCS 15 (1961), 27-47.

3. M. Rowton, 'The Physical Environment and the Problem of the Nomads', XVe Recontre Assyriologique Internationale, Liege, 1966, La Civilisation de Mari, ed., J.R. Kupper, (Paris, 1967), 109-121 at 114; also Rowton, 'Autonomy and Nomadism in Western Asia', Orientalia 42 (1973), 247-258 at 254-5 .

4. A. Malamat, loc.cit., 5-6.

5. A. Malamat, ibid., 6. Cp. Bible, 'By their families by their father's houses', Nu.1.2. Babyl. Talmud, Bava Batra, 109b, cited by Horowitz, The Spirit of Jewish Law, (New York, 1953), 260.

of land was unknown. Land was always considered as 'patrimony' (nihlatum at Mari = Hebrew nahala)[1] which was theoretically inalienable and could pass only by inheritance, thus implying[2] secured and transmissible rights of the heirs over it. However, like the Hurrians of Nuzi,[3] the West Semitics of Mari invented a fiction for circumventing the rule against alienation of land. The legal documents from Mari show that instead of using the term sale, the Amorites of Mari used the term nahālum = 'to inherit or apportion' to effect transfer of land within the framework of quasi-familial inheritance.[4]

Thus, the inalienability of land (patrimony), although seemingly theoretical at Mari, was indeed a socially viable rubric denoting definite expectancy of a son in the property of his male ancestors.

IV. Elam

a. Historical background

At the beginning of History, Sumer was dominated by the Elamites[5] and Sumerians, but eventually the Elamites were driven out of Sumer and they

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1. A. Malamat, ibid., 7.

2. Cp. similar suggestions of inalienability of land, Nu.36.7; Lev.25.13, 25.28. Hindu, sthāvare vikrayo nāsti ..., Dh.K. 1589b; infra, 345, n.3.

3. See the device of 'sale adoption at Nuzi.

4. A. Malamat, loc.cit., 7.

5. The Elamites were a non-Semitic people who used to speak an agglutimative tongue having no known ancient relative and assuredly no modern descendants, En. Br. (1970), VIII, 107.

ceased to play any part in the Babylonian civilization.[1] The eventual grandeur of Babylon completely overshadowed the Elamites who carried on living on the eastern flank of the Mesopotamian plain,[2] but they maintained an outstanding culture and history spanning two thousand years.[3] Despite its propinquity to Babylonia and its 'Mesopotamization',[4] Elam can claim some independent contribution in the field of ancient legal systems of the Middle East.[5]

b. The Elamite law of succession

In Elamite law, inheritance was not agnatic. Sons had no special preference over daughters; rather, the latter were in a better position than the sons. Hinz suggests [6] that during the third and fourth millennia, brothers were preferred at the expense of their sisters, but gradually this gave way to confine

1. Driver and Miles, BL, I, 1.

2. Elam corresponds to modern Iranian province of Khuzistan in South-western Persia. The capital of Elam was Susa. Biblical references of Elam could be found in Gen.10: 21-2; 14:1; Daniel, 8:2; Acts of the Apostles, 2:9.

3. During 21st century B.C. Ur controlled much of Elam, but Elam became independent in c. 2030 B.C. Ashurbanipal invaded Elam and sacked Susa in c. 640 B.C. From the rise of the Persian Empire in c. 550 B.C., Elam was merely a satrappy, En. Br. (1970) VIII, 106-7.

4. A. Leo Oppenheim, Ancient Mesopotamia, (Chicago/London, 1964), 69.

5. On the archaeological expeditions to Susa, see Walther Hinz, The Lost World of Elam: Recreation of a Vanished Civilization, (Verlag W. Kohlhammer GmbH, West Germany, 1964), tr. Jennifer Barnes, (London, 1972), introd., 14-5.

6. Hinz, The Lost World of Elam, op.cit., 108.

rights of inheritance within the immediate family of the propositus and, from then on, sons and daughters had equal rights of inheritance.[1] But even this rule could be varied by the owner by a deed of apportionment or a will.

A father's power to distribute the inheritance according to his will was well-accepted. One of the contract tablets records a dying father's apportionment of property to his son and daughter in equal shares, and it is significant to note that he names his daughter before his son,[2] (perhaps that was the point of such testament-contracts). Another tablet reveals that an Elamite left all his property to a wife with a life interest, with the stipulation that on her death 'only those sons may inherit who have treated their mother with love and consideration'.[3]

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1. Hinz., ibid., 108.

2. Hinz, ibid., 109.

3. Hinz, ibid., 109. The purport of another instrument from the time of the Grand Regent Atta-Merra-halki (c. 1580-1570 B.C.) was also the same, Hinz, ibid., 110. The instruments are identical with CH 150. Similar documents were found in Egypt (c. 1800 B.C.), see J.J. Rabinowitz, Jewish Law: Its Influence on the Development of Legal Institutions, (New York, 1956), 18. The common factor in all these documents is that the wife is to have a life estate in the property together with a limited power of appointment of the remainder after her death to the one of her sons whom she loves best. This restrictive clause of giving the property only to a son is called as the asar taramu clause. The clause originally used to be inserted only in a gift of property by husband to wife. ramu = 'to love', but in course of time, ramu acquired the meaning 'to desire' and the clause came to be used generally in deeds of conveyance of property, and to mean an unlimited power to dispose of the property. In a Susa document, the donee is given the general power to dispose of, see Rabinowitz, ibid., 19, n.5. Another document to the same effect is found in the Aramaic papyri, Rabinowitz, ibid., 19, n.6. Also see a Sippar document to this effect, supra, 179 . This shows a gradual development towards individual's independence in dealing with property. Cp. Aristotelian definition of ownership: 'To have ownership of a thing is to be able to alienate it or not; by alienation I mean gift or sale', Rhet.1.5.7. Rabinowitz claims that Aristotle's definition was anticipated by the scribes of

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A tablet shows that in a will, a testator left his property to his daughter although he had two wives and several sons.[1] The text of the will reads as follows: 'As long as I am still alive, she (the daughter) will care for me, and, when I die, she shall bring sacrifices for the dead'.[2] The will is signed in the presence of sixteen witnesses and the punishment to befall, for those relatives who might dare to defy the provisions of the instrument, is both human and divine. The testament shows that ancestral worship was practised in Elam but, as is evident, the son had no preferential position, as among the Greeks, Romans and Hindus, to offer sacral rites to the ancestors. The evidence of ownership of property by women and their independence in dealing with property are also vindicated by a tablet which records a father's gift of a field to his daughter. Subsequently, the daughter made a bequest of the field to her daughter, and she to hers, who then sold it.[3]

Note 3 - p.183 - continued:

Yeb; a deed of conveyance, c.402 B.C. corresponds to the Aristotelian definition of ownership, Brooklyn 12, E.G. Kraeling, The Brooklyn Museum Aramaic Papyri, (Yale University Press, 1953), cited by Rabinowitz, ibid., 21. Cp. Daniel, 4.14; 'and giveth it to whomsoever he will'. Rabinowitz tries to establish the peregrination of a legal formula 'from the Susa documents, through the Aramaic papyri, to Aristotle and the Book of Daniel', ibid., 23. In the light of the Aristotelian definition of ownership, Cp. a Hindu father's ownership and power of alienation, Mitā, 1.1.21; 1.1.27 and 1.5.10, see infra, 517-29. Also cp. Yatheṣṭa-viniyogārhatva lakṣaṇasya svatvasya, Dā.bhā, 2.27. For a discussion, infra, 548.

1. Hinz, ibid., 110.

2. Hinz, ibid., 110.

3. ibid., 109.

Elamite history was unique in the area in the sense that matriarchal succession was the rule for the throne. A new ruler was always 'son of a sister',[1] which means that the ruling house of Elam propagated itself through the distaff side.[2] This royal practice might have been a contributory influence to the Elamite law of succession, which obviously betrays a female bias showing a contrast to the devolution of property under the Mitākṣarā system.

V. The Hittite Law

In 1902, the Norwegian scholar, J.A. Knudtzon's claim to the discovery of a new Indo-European language in Central Anatolia aroused nothing but initial scepticism among scholars,[3] but the subsequent discoveries confirmed his findings,[4] and it became generally accepted that the Hittites were a separate Indo-European group;[5] thereby, their family law is bound to be of interest to our present study.

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1. En. Br. (1970), VIII, 106.

2. Hinz, ibid., 109.

3. J.G. Macqueen, The Hittites and Their Contemporaries in Asia Minor, (London, 1975), 22.

4. Macqueen, ibid., 23.

5. A.H. Sayce, 'The Hittite Language of Boghaz Keui', JRAS (1920) 49-83; 'The Early Home of Sanskrit', Modi Memorial Volume, (Bombay, 1930), 68-72 at 72; also for the existence of close relationship between the Hittite Empire and the proto-Indian people, see 'Indians in West Asia in the Fifteenth Century B.C.', Oriental Studies in Honour of C.E. Parvey, (London, 1933), 399-402 at 402. M. Gimbutas, 'The Indo-Europeans: Archaeological Problems', Am.An.65 (1963), 815-836 at 816. On Hittite relation with the West, see E.A. Speiser, 'Cuneiform Law and the History of Civilization',

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The old Hittite kingdom was founded in c. 1750 B.C., [1] but the Code [2] belongs to the period before the great conquests (the battle of Kades c. 1290 B.C.) when the kingdom was confined to Asia Minor.[3] It is worth mentioning here that there were some non-Indo-European elements in the Hittite language, and it is possible that the Hittites formed an ethnic stratum superimposed on a Hurrian [4] substratum.[5] The strong Hurrian influence marked in the historical texts from the royal archives at Huttusha betrays a Hurro-

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Note 5 - p.185 - continued:

Proceedings of the American Philosophical Society, Vol.107, No.6 (1963), 536-541 at 541, n.21.

1. L.L. Orlin, Assyrian Colonies in Cappadocia, (The Hague/Paris, 1970), 233.

2. The Code was found in the excavation at Boghazköy in Central Anatolia, ninety miles east of Ankara in 1906 and 1907, J.M. Powis Smith, The Origin and History of Hebrew Law, (Chicago, 1960), 246-7. For details of Bogh-zköy excavations, see L.L. Orlin, Assyrian Colonies in Cappadocia, op. cit., 217-220; also U.B. Alkim, Anatolia, I, tr. J. Hogarth, (Geneva/Paris/Munich, 1968), 182-184.

3. K. Fabricius, 'Landed Property of the Hittites in the 2nd Millenary B.C. (Šahhan and Iuzzi)', in Résumés Des Communications présentées all congrès VIe Internationale des sciences Historiques (Oslo, 1928), 78-80 at 78. The Code is supposed to belong to the 14th century B.C., Smith, loc.cit., 246-7.

4. Hurrians were a non-Semitic race occupying in the 2nd millennium B .C. a considerable portion of the Near East. E.A. Speiser, 'Ethnic Movements in the Near East', AASOR 13 (1931-32), 13-54 at 45.

5. I.J. Gelb, Hurrians and Subarians, (Chicago/London, 1973), 4.

Hittite symbiosis in Anatolia.[1] In consequence, we cannot expect purely Indo-European characteristics in the Hittite Code.[2]

The Code seems to portray two periods of juridical epochs, distinguished by the words 'formerly' and 'now', which suggests that the purpose of the Code was to organise and revise the old customary law by statutory means.[3]

The Hittite households were patently patriarchal[4] and the normal marriage arrangement was that a man 'took' a wife and 'made a house and children'.[5] The phraseology implies that nuclear rather than extended families were recognised as primary social units among the Hittites.[6]

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1. W.W. Hallo and W.K. Simpson, The Ancient Near East: A History, (New York, 1971), 110. A language called ḫattili in the Hittite texts was spoken by the population of the northern part of central Anatolia before the Indo-Europeans conquered the country. This language is still poorly understood, S.R. Bin-Nun, 'The Anatolian Background of the Tawananna's position in the Hittite Kingdom', Revue Hittite Et Asianique 30 (1972) (Paris, 1973), 54-80 at 56.

2. Traces of pre-Indo-European matriarchy may be seen in the provisions of the Code dealing with a mother's right to disown her son, 'The Hittites', sub. 'Law', En. Br. (1967) 11, 556.

3. H.G. Guterbock, 'Authority and Law in the Hittite Kingdom', JAOS 17 Suppl. (1954), 16-24 at 21.

4. Macqueen, The Hittites and Their Contemporaries in Asia Minor, op.cit., 113. O.R. Gurney, The Hittites, (London, 1975), 99.

5. Macqueen, ibid., 113.

6. Macqueen, ibid., 113. Cp. suggestion of nuclear family in Taittirīya Saṃhitā, II. 5.2.7., Kāṇe, HD, III, 565-6. G.D. Sontheimer, EHJFI, 41. For a fuller discussion, Derrett, RLSI, 408-9.

The Code in its present form, hardly throws any light on the relationship and respective rights of father and son, but it is indirectly suggested that the father exercised a great deal of authority in the family.[1] He could 'give' a son to another household whose son he had killed.[2] It also appears from the law applicable to a captive that a free citizen had the power to sell his son.[3] The provision on the captive runs as follows: '... with the captive nobody dare do business; nobody dare buy his son, his field, his vineyards. He who does business with the captive shall forego the business; (var. adds, but) the captive shall take back what he has disposed of'.[4]

The Code as it stands, in its present form, deals mainly with land tenure, and from such meagre materials we should not draw any definite conclusion except for noting the existence of the patriarchal power of the father in a patrilineal family. Despite the paucity of legal materials, it must be taken into account that 'the Hittites carried their composite culture (partly through their conquests that extended in every direction) from the Aegean to Babylon, from the Black Sea to Canaan'.[5]

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1. A father might sell his children and kill an adulterous wife, En.Br. (1967) 11, 556.

2. Macqueen, The Hittites and Their Contemporaries in Asia Minor, op.cit., 113. O.R. Gurney, The Hittites, op.cit., 99.

3. Macqueen, ibid., 113.

4. The Hittite Code, s.48, tr. A. Walther, in J.M. Powis Smith, The Origin and History of Hebrew Law, (Chicago, 1931, rpt. 1960), 256.

5. C.H. Gordon, Before the Bible: The Common Background of Greek and Hebrew Civilization, (London, 1962), 93.

VI. Assyrian Law

(1) The Old Assyrian Documents from Nuzi: the historical setting

a. The historical setting

We have already pointed out [1] that during the middle of the second millennium B.C. the Hurrians could be found in the area extending from the mountains of Northern Iran across upper Mesopotamia and Armenia into Syria, and up to the Mediterranean sea.[2] During the 17th or 16th century B.C., a branch of the Indo-Aryan people penetrated into Hither Asia and dominated the local Hurrians. A group then settled in parts of present-day Iraq and Syria and founded the kingdom of Mitanni in Northern Mesopotamia.[3] They ultimately extended their overlordship even to remote territories like Nuzi.

Although scholars have suggested that the Indo-Europeans formed 'a thin layer of ruling aristocracy' [4] at Mitanni, it cannot be denied that they

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1. Supra, 186, n. 4.

2. A. Skaist, 'The Authority of the Brother at Arrapha and Nuzi', JAOS 89 (1969), 10-17 at 10-11, n.1.

3. G. Herm, The Phoenicians: The Purple Empire of the Ancient World, tr. C. Hillier, (Dusseldorf, 1973; London, 1975), 41.

4. E.A. Speiser, 'Ethnic Movements in the Near East in the Sdcond Millennium B.C.', AASOR 13 (1931-32), 13-54 at 52. G.W. Brown, 'The Possibility of a Connection Between Mitanni and the Dravidian Languages', JAOS 50 (1930), 273-305 at 274. W.F. Albright, 'Publications Recently Received by the Editor', BASOR 91 (1943), 46.

contributed considerably toward the demographic, political and social changes[1] which came about in the Tigris-Euphrates plain.[2]

The Aryan hegemony over Nuzi was only ephemeral,[3] but it cannot be said that the Nuzians remained completely untouched by the Āryan values. Thus, the antiquity of Hurrian civilization and the Āryan suzerainty over Nuzi contribute to an arousal of our interest in the tablets found in the course of the Nuzi excavations.[4]

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1. G. Herm, The Pheenicians, op.cit., 41.

2. N. Na'aman, 'Syria at the Transition from the Old Babylonian Period to the Middle Babylonian Period', Ugarit Forschungen, Internationales Jahrbuch für die Altertumskunde Syrien-Palestinas, Band 6, (Neukirchener Verlag, Germany, 1975), 265-274 at 265, 272.

3. W.F. Albright, 'Publications Recently Received by the Editor', BASOR 91 (1943), 46.

4. The texts are supposed to belong to the middle of the second millennium B.C., E.A. Speiser, 'A letter of Saushshatar and the date of the Kirkuk tablets', JAOS 49 (1929), 269-275 at 269. The tablets belong to Arrapha and Nuzi. Arrapha is to be found under the modern city of Kirkuk and Nuzi was nearby Yorghan Tepe, A. Skaist, 'The Authority of the Brother at Arrapha and Nuzi', JAOS 89 (1969), 10-11, n.1. On Yorghan Tepe (Nuzi) excavations, also see, L.L. Orlin, Assyrian Colonies in Cappadocia, (The Hague/Paris, 1970), 220-1. The excavations provided about 4,000 Cuneiform tablets. Some of these were Sumerian and the rest were Nuzi (Assyrian), E.R. Lacheman, 'Epigraphic Evidences of the Material Culture of the Nuzians', in R.F.S. Starr, Nuzi I, (Cambridge, Mass., 1939), 528. The language of the texts were Hurrianised Accadian, R.H. Preiffer and E.A. Speiser, 'One Hundred New Selected Nuzi Texts', AASOR 14 (1935-6), introd., 11. Also on these texts, see T.J. Meek, 'Some Gleanings from the Last Excavations at Nuzi', AASOR 13 (1931-2), 1-11; 'The Akkadian and Cappadocian Texts from Nuzi', BASOR 48 (1932), 2-5.

b. A son's position in the system of inheritance

Excepting certain peculiarities,[1] on the whole the evidence for Nuzian society being patriarchal is overwhelming.[2] We can say that Nuzian society was patronymic and that inheritance was patrilineal. Unlike Elam,[3] or, as vaguely implied, Babylon,[4] daughters at Nuzi inherited only in the absence of sons.[5]

c. Sale adoption

A son's definite and, at some stage in the past, possibly innate expectation to inherit the property of his father is indirectly established from a legal dodge called 'sale adoption'.[6] Executed in the name of adoption, it was 'a disguised business transaction'.[7] It is interesting to note that at Nuzi

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1. There are evidences that the Nuzians recognised the existence of an fratria potestas in the family. A. Skaist, 'The Authority of the Brother at Arrapha and Nuzi', JAOS 89 (1969), 10-17 at 11.

2. P. Koschaker, 'Cuneiform', sub. 'Law', Encyclopaedia of Social Sciences, ed., R.A. Seligman, (New York, 1933), IX, 215. A. Skaist suggests that the Hurrian society preserved certain fratriarchal customs when it switched to patriarchal system, JAOS 89 (1969), 13.

3. Supra, 182.

4. Supra, 173.

5. Cp. Manu, IX. 185.

6. The phrase adopted by E. Chiera and E.A. Speiser, 'Selected Kirkuk Documents', JAOS 47 (1927), 36-60 at 36.

7. C.H. Gordon, 'The Status of Women Reflected in the Nuzi Tablets', Zeitschrift fur Assyriologie, 43 (1935), 151.

'real estate' was inalienable,[1] and such property could pass only by inheritance from the owner to his legal heirs.[2] So one of the functions,[3] perhaps the main function, of 'sale adoption' was 'to provide a legally unimpeachable by-path for transferred ownership of property ...'[4]

We have already noticed that, in Nuzi, a father's property used to pass to the sons in preference to other heirs; so the rationale behind the inalienability of real estate was to keep the family lands within the family, passing from generation to generation through the male heirs. This archaic rule of inalienability[5] of land is an economic hindrance; and therefore, to cope with

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1. Cp. The anonymous text in the smṛti, sthāvare vikrayo nāsti kuryād ādhim anujñayā / Dh.K. 1589b; infra, 345, n.3.

2. E.A. Speiser, 'New Kirkuk Documents Relating to Family Laws', AASOR 10 (1928-9), 1-74 at 13.

3. P.M. Purves, 'Commentary on Nuzi Real Property in the Light of the Recent Studies', JNES 4 (1945), 68-86 at 86.

4. E.A. Speiser, loc.cit., 13. Hildegard Lewy thought that land was freely alienable at Nuzi and 'sale adoption' was not an indirect means for alienation of land. To support her argument, she cites a text (N V 552) where B purchases land from S and conveys it to his infant son, I, H. Lewy, 'Review of Cassin's L 'adoption a Nuzi', JAOS 59 (1939), 118-9 at 119. But Purves refutes Lewy's interpretation and says that NV 552 (or JEN 552) was perhaps the oldest text of all the Nuzi tablets. Conveying to the minor was probably a formula to evade the law of inalienability of land before the sale adoption was devised; 'for minors at Nuzi as elsewhere, presumably had certain protection from legal action'. He concludes that there was no outright sale of real estate in Nuzi, P.N. Purves, loc.cit., 83.

5. Archaic society envisages a multiple and multigenerational ownership, and therefore, puts fetters on alienation; for example, see the smṛti texts, infra, 347-64. Modern tendency emphasises on maximum alienability and identification of property with the individual, what the German legalists have called Freies Eigentum or as the Civil Code of the French Third Republic stated: '... le droit de jouir et de disposer des choses de la maniere la plus abolue ...', for a discussion on this see, H.F. Schurmann, 'Traditional Property Concepts in China', Far Eastern Quarterly, 15 (1956), 507-516 at 507-8. Both the German

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economic realities, law needs to be plastic. So an ingenious legal fiction [1] in the form of 'sale adoption' for legalised sales of land was looked for and found within the socially recognised institution of sonship.

Thus, the evasion of the rule of inalienability of land was performed by establishing a relationship of sonship with the buyer through a quasi-adoption. The vendor of a house or land had to adopt the prospective buyer, and thus, the seller became the adoptive parent and the buyer became the adopted son; and the relevant portion became the share (zittu) of the inheritance. To keep the appearance of adoption, the consideration, of course, could not be called purchase price (šīmu); but since the law could not prevent the adopted son from presenting an honorarium [2] to his adoptive father, the stipulated purchase price would enter the record as such a grant (qištu).[3] In a real adoption, an adoptee enters the new family for good;[4] in a sale adoption, however, there need be no subsequent family relationship between the contracting parties.[5]

Note 5 - p.192 - continued:

and the French view were anticipated by Aristotle, Rhet.1.5.7. Cp. Dayabhaga, 2.27; yatheṣṭa-viniyogārhatvalakṣaṇasya svatvasya; on this see, Derrett, 'An Indian Contribution to the Study of Property', BSOAS 18 (1956) 3: 475-497 at 481.

1. Cp. the fiction of the doctrine of relation back in Hindu law of adoption, but note the difference of purpose between the two, Derrett, IMHL, §§187-190.

2. E.A. Speiser, AASOR 10 (1928-9), 14.

3. E. Chiera and E.A. Speiser, 'A New Factor in the History of the Ancient East', AASOR 6 (1924-5), 75-92 at 86.

4. See Hindu law, Derrett, IMHL, §§170, 175.

5. A.P. Morgan, Marriage, Birthright and Adoption in the Patriarchal Narratives in the Light of the Nuzi Documents, M.A. dissertation, University of Wales, 1972, unpublished, 75.

At Nuzi, and also in Hurrian society in general, sonship could legally be determined by adoption (fiat), as much as by birth.[1] At Nuzi an adopted son used to take an equal share[2] with a subsequent natural-born son.[3]

d. Disinherison

However, a Nuzian father could disinherit a son at his will. A disinherited son was withheld from possession of family gods (ilāni)[4] and a father symbolically terminated the relationship with his son by smashing a lump of clay.[5]

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1. E.A. Speiser, 'I Know Not the Day of My Death', in J.J. Finkelstein and M. Greensburg, ed., Oriental and Biblical Studies, (Philadelphia, 1967) 91. For establishment of brothership by adoption, see A.D. Kilmer, 'Symbolic Gestures in Akkadian Contracts from Alalakh and Ugarit', JAOS 94 (1974), 177-183. Adoption of brother was also known at Elam.

2. In the laws of Hammurabi, if a father having subsequently a natural son, wanted to cut off the adopted son, he was obliged to give him of his goods one one-third of the portion of a son, but not of fields, garden or house, CH 191. Cp. Hindu law, Derrett, IMHL, § 186.

3. For a typical adoption tablet, see C.H. Gordon, 'Biblical Customs and the Nuzi Tablets', Biblical Archaeologist, 3 (1940), 5. The adoption document stipulates that if a natural son is born subsequent to the adoption, the natural-born son would take the gods (ilani) of the father and not the adopted son. The right of possession of the gods has been thought as the actual right of inheritance. At Nuzi, sons required new ilani to set up a separate household. Cp. the Āryan custom of setting up house fire while sons set up a separate household, Sontheimer,EHJFI,42. Also compare Rachel's stealing of the gods from her father, Gen. 31.20. S. Smith suggests that the possession of the gods was a symbol of possessing the inheritance. By stealing the gods, Rachel was ensuring that she was not deprived of her right as the presumptive heir, 'What were the Teraphim?' Journal of Theological Studies, 33 (1932), 33-36 at 35. But the ilani clause was absent in many adoption documents from Nuzi, E.A. Speiser, 'New Kirkuk Documents Relating to Family Laws', AASOR 10 (1928-29), 1-73 at 7-8.

4. On ilani, see n.3 above.

5. See A.P. Morgan, Marriage, Birthright and Adoption in the Patriarchal Narratives in the Light of the Nuzi Documents, op.cit., 57, n.8. Like other primitive societies, symbolic acts were part of legal transactions at Nuzi, A.D. Kilmer, 'Symbolic Gestures in Akkadian Contracts from Alalakh to Ugarit', JAOS 94 (1974), 177-183.

e. 'Birthright'

The Nuzi tablets contain two texts on sale of 'birthright' by one brother to another, which is terminologically tempting, and thereby needs an investigation as to whether the concept is in any way substantially akin to the Mitākṣarā birthright. The two texts,[1] tuppi tamgurti and tuppi ahhuti, record two transactions similar to the selling of birthright by Esau to his brother Jacob[2] in the Old Testament. In the Nuzi documents, the sale of part of their birthright took place between adopted sons and natural sons. We may recall that the Mitākṣarā birthright is an innate right of the son where co-ownership of father and son is a reality. In Hebrew law where 'family was based on the principle of patria potestas',[3] birthright in the Mitākṣarā sense was impossible.[4] Esau's birthright denotes nothing but the right of the eldest brother in Jewish law to have an extra share of his father's estate.[5] Similarly, considering a father's undisputed power of disherison, and also his power of indirect alienation through 'sale adoption', the idea of birthright at Nuzi should be interpreted in the light of Jewish law and no affinity with the Mitākṣarā birthright should be attached to

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1. N.204; HSS 5, 99 also N 87. On these texts, see E.A. Speiser, 'New Kirkuk Documents Relating to Family Laws, AASOR 10 (1928-9), 18; 'Ethnic Movements in the Near East in the Second Millennium B.C.', AASOR 13 (1931-32), 44. C.H. Gordon, 'Biblical Customs and Nuzi Tablets, Biblical Archaeologist 3 (1940), 5.

2. Gen. 25.29-34; Esau 'sold his birthright unto Jacob', Gen. 25.29-31.

3. G. Horowitz, The Spirit of Jewish Law, (New York, 1953), 260.

4. See Derrett, Law in the New Testament, (London, 1974), 104; for a fuller discussion, see ibid., 104-111.

5. See our discussion on Jewish law, infra, 213-4.

it. Therefore, any analogous idea of Mitākṣarā birthright was as foreign to the Hebrews as it was to the Hurrians.

(2) The Middle Assyrian Laws

Apart from the Nuzi documents, the Old Assyrian Laws (c.2350 - 2100 B.C.)[1] of an Assyrian trading colony in Asia Minor do not seem to be important for our purpose, but the Middle Assyrian Laws (c. 1133 - 1107 B.C.)[2] of the city of ancient Assur deserve our attention.

a. General feature of family property

In Middle Assyrian Law, as in the śāstric provisions of the Hindus,[3] land was categorised into ancestral and self-acquired.[4] The ancestral land belonged to the family; therefore, a member of the family could acquire his share on partition.[5] A man's own 'purchases' (Ass. šimātu) were considered as his self-acquisitions.[6] When the self-acquired land descended to the owner's sons, it was considered as ancestral in their hands. Although we are not told whether the sons had a right to demand partition for a share in the ancestral

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1. Driver and Miles, The Assyrian Laws, (Oxford, 1935), 1-2.

2. Driver and Miles previously dated these laws between c.1450-1250 B.C., see ibid., 4; but now these are known to have been written down in the reign of Tiglath-pilesar (c. 1133-1107 B.C.), see Driver and Miles, The Babylonian Laws, (Oxford, 1952, rpt. 1968), 4, n.4.

3. pitāmahopātta, Yājñ.II. 121, Dh.K.1175b. Viṣṇu. 17.2, Dh.K.1175a. kramāgate, Bṛ.26.10, Dh.K.1180b. svayam upārjita, Kāty, 839, Dh.K.1173b.

4. Driver and Miles, AL, 293.

5. ibid., 293.

6. ibid., 293.

property during the lifetime of their father, we can generally infer that this right was available only to the brothers who were living jointly after the death of their father.[1]

Male inheritance was the rule in Assyria [2] and, to the exclusion of all other males, sons used to inherit the property of their father.[3]

b. Conclusion

However, despite considerable similarities between the Assyrian and Hindu laws of property, we cannot find any vestige of son's birthright in the Assyrian system.

1. Cp. traces of joint living of brothers among the Romans, Greeks, Hebrews, Deut. 25.6, Hindus.

2. Driver and Miles, Assyrian Laws, op.cit., 295.

3. Driver and Miles, ibid., 1920, 295. Cp. Manu. IX, 185.

CHAPTER 7

JEWISH LAW

1. Introductory Remarks

The origin of Israel stemmed from a group of West Semitic nomads of Mesopotamia. At some point in the Old-Babylonian period, this group migrated from Mesopotamia to Palestine.[1] Israel was subsequently conquered by the Assyrians (c. 721 B.C.) and the Babylonians (c. 586 B.C.). Following the Babylonian exile (c. 586-537 B.C.) up to the destruction of the Second Temple (70 A.D.), the Israelites were ruled by the Persians (c. 538 - 333 B.C.), Greeks (c. 333 - 166 B.C.) and the Romans (c. 37 - 66 A.D.). It is not within our scope to record the whole political history of Israel, nevertheless for an understanding of their legal philosophy, it is worth noting that the Jewish people came into cultural contact with most civilized nations of the ancient world.[2]

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1. J.C.L. Gibson, 'Light from Mari on the Patriarchs', Journal of Semitic Studies, 7 (1962) 1: 44-62 at 62. Gibson finds striking resemblances between the nomads of Mari area and the people of the early books of the Old Testament, ibid., 45. On the Mesopotamian origin of the Hebrew people, also see H. Ringgren, 'Israel's Place Among the Religions of the Ancient Near East', in G.W. Anderson, ed., Studies in the Religion of Ancient Israel, (Leiden, 1972), 1-8 at 7.

2. There are stories that the Jews had commercial contact with the Malabar coast since the time of King Solomon, G. Kushner, Immigrants From India in Israel: Planned Change in an Administered Community, (The University of Arizona Press, Tucson, Arizona, 1973), 12. Inscriptional evidences point to Jewish settlement in India as early as c.139 B.C., A.C. Burnell, 'The Original Settlement Deed of the Jewish Colony at Cochin', The Indian Antiquary, 3 (1874), 333-4. K.N. Daniel, 'The Anchuvannam and the Manigramam of the Kottayam Plates of Tanu travi or the Jews and the Christians of
/Continued on next page:

During the post-exilic period, Israel did not renounce everything that bore the Mesopotamian imprint;[1] rather it drew heavily from the parent; civilization.[2]

So, considering the link with Mesopotamian tradition; the possible

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Note 2 - p.198 - continued:

Malabar', The Indian Antiquary, 53 (1924), 257-61. For a discussion on the early Jewish settlement in Cochin, also see D.G. Mandelbaum, 'Social Stratification Among the Jews of Cochin in India and in Israel, The Jewish Journal of Sociology, 12 (1975) 2: 165-210 at 166-70.

1. On striking parallels between Cuneiform documents from north of Babylonia and the patriarchal narratives, see C.H. Gordon, 'Hebrew Origins in the Light of Recent Discovery', in A. Altman, ed., Biblical and Other Studies, (Cambridge, Mass., 1963), 3-14. Specific parallel to the idea in Gen. 3.19: 'You are earth, and to earth you shall return' is found in the Atra-hasis, the Sumero-Babylonian epic, W.G. Lambert and A.R. Millard, Atra-hasis: The Babylonian Story of the Flood, (Oxford, 1969), introd., 21-2.

2. S.M. Paul, Studies in the Book of the Covenant in the Light of Cuneiform and Biblical Law, (Leiden, 1970), 42. But note the opinion of I. Rappaport who thought that the Book of the Covenant was entirely of Israelite origin, 'The Origins of Hebrew Law', Palestine Exploration Quarterly, 73 (1941), 158-167 at 166. A. Goetze did not find any parallel between the Code of Hammurabi and the Book of the Covenant, but he thought that the latter might have inspiration from Old Babylonian Mari, 'Mesopotamian Laws and the Historian', JAOS 69 (1949), 115-120 at 120. However, parallels have been shown to exist between Biblical and Cuneiform law by S.M. Paul, ibid., 43-98, 105. , The Mesopotamian tradition also ' survived in the Babylonian Talmud', E.A. Speiser, 'Authority and Law in Mesopotamia', JAOS 17, suppl. (1954), 15.

influences of the Persians,[1] Greeks[2] and Romans;[3] and, above all, the survival of the peculiarities of Jewish law through moulding and development[4] for three millennia in the four corners of the world, a study such as ours would indeed be incomplete without a comparison with the Jewish legal system.[5]

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1. The Jews of Babylon came in contact with Sasanians and the rabbis unconsciously included many Iranian words and motifs. The rabbis also betray their direct knowledge of Sasanian rules on taxes and real estate transactions, J. Neusner, 'How much Iranian in Jewish Babylonia?' JAOS 95, (1975), 184-190 at 184, 190.

2. The Talmud in a number of passages (e.g. B.K. 82a) prohibits the teaching of 'Greek wisdom'. But this was not a fact; Maimonides did study Aristotle, see Isaac bar Sheshet's responsum, 'Aristotle or the Talmud', S.B. Freehof, A Treasury of Responsa, (Philadelphia, 1963), 72-7. For an assessment of Hellenic influences, see S. Liberman, 'How much Greek in Palestine?', in A. Altmann, ed., Biblical and Other Studies, (Cambridge, Mass., 1963), 123-141 at 123; also Liebermann, Hellenism in Jewish Palestine, (New York, 1950). On the Greek influences in the writings of Philo Judaeus Alexandrinus, see E.R. Goodenough, The Jurisprudence of the Jewish Courts in Egypt: Legal Administration by the Jews Under the Early Roman Empire as described by Philo Judaeus, (Amsterdam, 1968), 58.

3. Successful comparison between Roman law and Jewish law could be seen in B. Cohen, Jewish and Roman Law, (New York, 1966), 2 vols., et seq.

4. Z.W. Falk, 'Jewish Law', in Derrett, ed., An Introduction to Legal Systems, (London, 1968), 28-53 at 42. Hindu law also was never fixed. It passed through interpretative change and modification, Derrett, 'Sir Henry Maine and Law in India', 61 The Juridical Review, (1959), 40-55 at 46-7; 'Sanskrit Legal Treatises Compiled at the insistance of the British', 63 ZVR (1961), 72-117; 'Illegitimates: a test for modern Hindu Family Law', JAOS 81 (1961), 251-261; 'The History of the Juridical Framework of the Joint Hindu Family', Contributions to Indian Sociology, 6 (1962), 17-47 at 19; RLSI, Ch. 3, 4 and 12. K. Lipstein, 'The Reception of Western Law in India', International Social Science Bulletin, 9 (1957), 85-95 at 87-8. Derrett's view has been weighed and endorsed in context of the effects of law on society by B.S. Cohn, 'Anthropological Notes on Disputes and Law in India', American Anthropologist, Vol.67, No.6, Pt.II, (1965), 82-122 at 114.

5. David Daube emphasises that Jewish law deserves to be compared with any legal system in the world, Studies in Biblical Law, (New York, 1969), 2.

Apart from their metadivine origin [1] and similarities in exegetical and interpretative techniques,[2] both Jewish and Hindu legal systems today stand in a world where maintaining the equilibrium between religious law (Hukim: dharma) and secular law (mishpatim: vyavahāra) is a besetting problem.[3] In this respect, it is indeed interesting to note that, under British rule while the Hindus and the Muslims were allowed to follow their own personal laws, [4] the Jewish population of India was governed by the English law of inheritance.[5] However,'when the Indian Civil Code [6] comes to be drafted, Jewish law will have to be taken into account'.[7]

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1. For a comparative similarity on this point between Hindu law and Jewish law, see H.H. Cohn, 'Secularization of Divine Law', in H.H. Cohn, ed., Jewish Law in Ancient and Modern Israel, (Ktav Publishing House, New York, 1971), 1-49 at 7. For further information on this point in context of Hindu law, see RLSI, Ch.3 and 4.

2. Cp. midoth and midrash in the Jewish system with mīmāṃsā and commentatorial literature in Hindu law.

3. See RLSI, Ch.13. From the point of view of Jewish law, see I. England, 'The Relationship Between Religion and State in Israel', in H.H. Cohn, ed., Jewish Law in Ancient and Modern Israel, loc.cit., 168-189. Also, A. Rubinstein, 'Law and Religion in Israel', in H.H. Cohn, ibid., 190-224. Cp. Roman fas and the jus.

4. RLSI, 289.

5. Derrett, 'Jewish Law in Southern Asia', ICLQ 13 (1964), 288-301.

6. Article 44 of the Constitution of India.

7. Derrett, ICLQ 13 (1964), 288.

II. Social Organisation and a father's power over his children

The social organisation of the ancient Israelites was dominated by the tribal community composed of families and kinship groups.[1] The head of the kinship group held enormous power even to the extent of passing sentence of death. This patriarchal authority exercised by the head of the kin group was reflected in the sphere of family life. The Covenant Code, like the Roman[2] system, decrees death for the son who strikes his parents or reviles them.[3]

Here we should remind ourselves that Hebrew law consists of two layers: one, customary law as depicted in the patriarchal narratives, derived chiefly from the experiences of the nomad people; the other, the codified law of the Pentateuch, which is the product of the later period.[4] In the laws of

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1. A. Gulak, 'Jewish', sub. 'Law', En.So.Sci., IX, 219.

2. A law of Servius Tullius: si parentem puer uerberit ast olle plorassit, puer diuis parentum sacer esto, Festus, ed., Lindsay, quoted by J.C. Stobart, The Grandeur that was Rome, (London, 1971), 23. 'If a boy beats his father and the father complains, let the boy be devoted to the gods of parents, (i.e. slain as a sacrifice)', tr. Stobart, ibid., 23. The authorities are divided on the nationality of Servius Tullius (c. 578 - 534 B.C.). Although there is strong evidence to suggest that he was Latin, according to one tradition he is Etruscan, see En.Br. (1970), XX, 259. In Chinese law, scolding or beating a parent carried the death sentence, T'ung-Tsu Ch'u, Law and Society in Traditional China, (Paris, 1961), 28. For an anecdote to the same effect from South India in c. 1773, see J. Maissin, Recherche de la Verite ..., ed. R.H. Regnier (Paris, 1975), 293.

3. Ex. 21.15 and 17.

4. Gulak, loc.cit., 219.

the Pentateuch, we find that the father's power was comparatively diminished.[1] The Deuteronomic Code does not consider cases like the one we just referred to,[2] but deals only with the stubborn and rebellious son who could not be disciplined even when chastised with the rod.[3] We notice, that unlike the Covenant Code (Ex. 2.15 and 17), in such a case the father could not judge and pass the death sentence on his rebellious son. The parents must take him before the elders and make an affidavit that he is disobedient. Then the citizens of the town would stone him to death.[4] The provision seems to be more a deterrent towards disrespect and disobedience to parents than a rule to be applied frequently in Jewish society.[5]

The power of pledging one's children is evidenced in Judaea [6] and there are also evidences in the legal documents in Aramaic and Neo-Babylonian deeds of loan that the father had the power to pledge his children.[7]

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1. R. de Vaux, Les Institutions de l'Ancien Testament, tr. J. McHugh, sub. tit. Ancient Israel: Its Life and Institution, (London, 1962), 23.

2. Ex. 21. 15 and 17.

3. Cp. Manu, VIII, 299 and 300; on this, see Bharuci, Derrett, ed., II, 180-1.

4. Deut. 21.18-21.

5. J.M. Powis-Smith, The Origin and History of Hebrew Law, (The University of Chicago Press, 1960), 50.

6. Nehemiah, 5.1.ff.

7. R. Yaron, Introduction to the Law of the Aramaic Papyri, (Oxford, 1961), 42. However, the Aramaic Papyri should be treated with reserve as evidence for Jewish law, Yaron, ibid., 115; also, Gifts in Contemplation of Death, (Oxford, 1960), 12.

But we should not form the opinion that there was an absence of filial love in Jewish society. In ancient Israel, to have many children was a coveted honour,[1] and lack of children was sometimes regarded as a 'chastisement of love' as was suffering from leprosy.[2]

III. Family ownership of land

It seems that in the beginning alienation of land was not permissible in Jewish law. Selling of an ancestral estate, like entering upon an improper marriage, was disgraceful and would incur the disapproval of kinsmen.[3] However, as the authority of the tribe and family gradually waned, land became alienable, but the original attachment of the land to the family shows through the rule that the relatives were entitled to repurchase it from the buyer.[4]

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1. R. de Vaux, Ancient Israel, (London, 1962), 41.

2. J. Newman, Halachic Sources, Leiden, 1969), 169-70.

3. Kiddushin, 1.5, cited by R. Yaron, Gifts in Contemplation of Death, op.cit., 33.

4. Jer. 32.8. Ruth, 2.20; 3.12; 4.4. The institution was known as go'el. The word, go'el comes from a root which means 'to buy back or to redeem', but fundamentally its meaning is 'to protect'. If an Israelite had to sell his patrimony, the go'el (redeemer or protector) had priority over all other purchasers. The law is set out in Lev.25.25. On this, see R. de Vaux, loc.cit., 21. Also Maimonides, XII.III.XII.4-5, (New Haven, 1951), 198. Developments are discussed by S.W. Baron, 'The Economic Views of Maimonides', in S.W. Baron, ed., Essays on Maimonides, An Octocentennial Volume, (New York, 1966), 127-264 at 158, 168. Also see our discussion on preemption, infra, 689-713.

IV. Traces of joint family

In early Jewish society, joint living of father and married sons, and especially of brothers,[1] was not uncommon.[2] The Sabbath travel regulations[3]

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1. Maimonides, XII.IV.VIII.7: 'If brothers or other heirs do not divide their inheritance but continue to use it together, they have the status of partners in all respects', The Code of Maimonides, XII, The Book of Acquisition, tr. I. Klein, (New Haven, Yale University Press, 1951), 237. Also Maimonides, XII.III.XII.4: 'If one of the brothers or the joint owners ...', Klein, ibid., 198. Traces of joint living of brothers in testimonies deposited in the rabbinical court of Damascus, Genizah fragments: TS 20.92 and TS 8 J 4, f.13, 1094-1095 A.D.; also a court record, reconstructed from three Genizah fragments: TS NS J 382, TS NS J 338, and TS 12.177, (Tyre, around 1194 A.D.), S.D. Goitein, 'Documents from Damascus and Tyre Concerning Buildings belonging to Jews', Eretz-Israel, E.L. Sukenik Memorial Volume, Jerusalem, Israel Exploration Society, 8 (1967), 288-297 (in Hebrew), summarised in English at 78. The rules on levirate marriage also signifies joint living of brothers: 'If brethren dwell together ...', Deut. 25.5; also see The Book of Women, The Code of Maimonides, Book IV, tr. I. Klein, (New Haven/London, 1972), 265. Levirate marriage is attested among the Indo-Europeans, such as the Hindus, Hittites, Greeks and Romans. C.H. Gordon suggests that the institution might have found its way into the Semitic world through the Indo-European invasions that took place during the second millennium B.C., Before the Bible: The Common Background of Greek and Hebrew Civilizations, (London, 1962), 94-5.

2. Among the Jews in Kerala joint family of father and married son is still the usual social unit, and father as the senior male member is the manager of the family, G. Kushner, Immigrants from India in Israel, (Arizona, 1973), 12, 18.

3. S. Langdon thought that the Pharisic strictures against travelling on Sabbath were post-exilic and originated from Babylonian influences, Babylonian Monologies and Semitic Calendars, (London, 1935), 85. But M.Gruber disagrees with Langdon and opines that weekly Sabbath was Jewish in origin, JANES 1 (1969) 2: 14-20 at 20. For a fuller discussion on the origin and significance of Sabbath, see R. de Vaux, loc.cit., 475-483.

throw light on this joint living of father and son. The regulations stem from a verse in Exodus (16.29): '... let no man go out of his place on the seventh day'. The Torah was interpreted to mean that no one could travel on the Sabbath more than two thousand cubits from his residence.[1] Much rabbinic disagreement sprung from this interpretation,[2] but a fiction was invented to avoid the prohibition: the restriction on walking farther than two thousand cubits on the Sabbath could be overcome through the institution of 'eruv.[3] Thus, the person who wanted to take a longer walk on the Sabbath used to place a bundle or basket of food at the proper distance from his residence or on a jointly-owned spot on Friday. The ritual of depositing the food made the place an extension of the person's domain and, thus, another two thousand cubits Sabbath walk then became possible.[4]

A joint family of father and sons needed to place only a single bundle of food (single 'eruv) on Friday. This is implied by the Mishnah. Mishnah 'Eruvin states that brothers who eat at their father's table but sleep in their own houses must prepare a separate 'eruv'.[5] The Mishnah and the

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1. E.J. Lipman, The Mishnah: Oral Teachings of Judaism, (New York, 1970), 92.

2. See Halachoth Pesukoth, Hilkoth Erubin, discussed by J. Newman, Halachic Sources, (Leiden, 1969), 215-6.

3. 'eruv means 'mixture, combination, fusion', Lipman, loc.cit., 92.

4. Lipman, ibid., 92.

5. Babyl. Talmud, Er 72b., G.G. Porton, 'Hanokh Albeck on the Talmudic Sugya', in J. Neusner, ed., The Formation of the Babylonian Talmud, (Leiden, 1970), 127-133 at 128-9. 'The Gemara anonymously states: Then where one sleeps is decisive. Rav Judah quoted Rav: 'The Mishnah refers to people who receive their food from their father's house, but eat at their own houses ...', Porton, ibid., 129. Cp. Plutarch's mention of

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gemara [1] were cited by Albeck,[2] in order to show that the gemara was in a fluid state during the Amoraic period but, for our purpose, the whole tenor of the Mishnah (at 'Eruvin 72b) with the anonymous sugya [3] establishes that sons could live jointly with their father; but the test of jointness was whether they dined and lived in the same house with him.[4] There are evidences in the procedural law as well that co-heirs used to live jointly. This is apparent from the rule that a managing co-heir could clear himself by oath from any suspicion of mis-management of the joint property.[5]

Note 5 - p.206 - continued:

joint living among the Romans; Marcus Crassus and his brothers shared the same table with their parents, Life of Marcus Crassus, Plutarch's Lives, tr. B. Perrin, (London/New York, 1916), 315.

1. See n.5, p.206.

2. Porton, loc.cit., 129.

3. See supra, 206 n.5.

4. Joint living is also evident from interpreation of the scriptural text: 'A lamb for a household', Pesahim, 89a. Even 'ten families belonging to one father's house' was supposed to sacrifice only one lamb, see the Mekilta on Ex.12.3. J. Newman, Halachic Sources, (Leiden, 1969), 93. The term father's house means family, Numbers, 1.2. Cp. the criteria of jointness in Hindu law: 'Mere cesser of commensality or separation in residence, food and worship do not by themselves constitute severance in status. On the other hand, coparceners who live together may very well be separated and unreunited ...', Derrett, IMHL,§515.

5. Mishnah, Shebu'oth, VII.8, see Z.W. Falk, Introduction to Jewish Law of the Second Commonwealth, (Leiden, 1972), I, 130.

V. Joint property

In Jewish law, the juridic concept of joint property could arise either through persons who would acquire property jointly or through heirs who jointly inherited the deceased's estate.[1] But Jewish law does not seem to know anything of joint ownership with the rule of survivorship (jus accrescendi).[2] In all probability, the Jewish concept of shuttafuth[3] (joint property) stands for a concept analogous to tenancy in common,[4] and it does not convey any idea such as co-ownership of father and son.

However, parallels could be drawn between the Biblical passage: 'Abraham gave all that he had unto Isaac'[5] and the sruti text 'Manu divided his dāya among (for) his sons'[6] but the Biblical text 'need not be taken literally as meaning that Abraham actually transferred his property to Isaac'.[7]

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1. Rabbi I. Herzog, The Main Institutions of Jewish Law, (London/New York, 1965), I, 213. G. Horowitz, The Spirit of Jewish Law, (New York, 1953), 322.

2. Herzog, ibid., 213. On jus accrescendi see J. Salmond, Jurisprudence, (London, 1924), 474-5.

3. For a discussion on the concept, see Herzog, loc.cit., 213-223. The term is used for commercial partnership as well, Herzog, ibid., Vol.II, 155-166.

4. Horowitz, loc.cit., 324.

5. Gen. 25.5, also see Gen. 24.36.

6. Tai. Sam. III.1.9.4; Kāne, HD, III, 542.

7. R. Yaron, Gifts in Contemplation of Death, in Jewish and Roman Law, (Oxford, 1960), 6. Also the same purport of Ezek. 46.16-18: '... he shall give his sons inheritance out of his own possession', Yaron, ibid., 6.

The law of the Pentateuch, which was followed by the post-exilic Jewry, does not give any indication of the existence of son's co-ownership during the lifetime of the father. A passage in the Book of Numbers, 27.8-11, fixes the order of succession, and ordains that, if sons exist, no other heirs should inherit.[1] Both in written and unwritten law,[2] sons were the primary heirs of the property and continuers of the ancestral traditions. Thus, Philo writes: 'Children ought to inherit from their parents, besides property, ancestral customs (...) which they were reared in and have lived with even from the cradle, and not despise them because they have been handed down without written record'.[3]

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1. Cp. Manu, IX. 185.

2. The Sadducees rejected the oral law, Babylonian Talmud, Qiddushin, 66a. Josephus put forward this opinion: 'only written laws should be considered as such, whereas those from the ancestral tradition need not be kept', Antiquitates Judaicae, XIII. 1,6, 298, quoted by Z.W. Falk, Introduction to Jewish Law of the Second Commonwealth, (Leiden, 1972), I, 39. However, there are doubts as to whether the views of the Sadduccees were ever put into practice even when they dominated the Sanhedrin, Falk, ibid., 40. On Sanhedrin, see H. Mantel, Studies in the History of the Sanhedrin, (Cambridge, Mass., 1961), introd. xi-xv, also 54; also see S. Zeitlin, Studies in the Early History of Judaism, (New York, 1973), I, 275-315.

3. Philo on Deut. 19.14: 'Thy shalt not remove thy neighbour's landmarks which thy forerunners have set up', The Special Laws, IV, 28, 149-50, tr. F.H. Colson, VIII, 101, quoted by J.M. Baumgarten, 'The Unwritten Law in the Pre-Rabbinic Period', Journal for the Study of Judaism, 1970-72 (Leiden, 1972), 7-29 at 14.

VI. Respective positions of sons and daughters in the heritable system

At this stage of our discussion, one point needs to be clarified, namely the position of daughters as heirs in the presence of sons.

We notice that Job's three daughters received a share of the inheritance along with their seven brothers,[1] which is obviously marked as a digression [2] from the 'statute of judgment' (hukkat mishpat) [3] laid down in Numbers, 27.8-11, under which daughters inherit only in the absence of sons. We also know that Moses at first did not consider the daughters of Zelophehad as heirs to the estate of their father, even though he died without leaving any sons. The five daughters of Zelophehad approached Moses who, after deliberation, established the rule that daughters would inherit only in the absence of sons.[4]

In patrilineal families the objection to inheritance by a daughter springs from the consideration that if she marries and has male issue, her portion of the family property passes to another family.[5] This explains why Moses

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1. Job, 42.13-15.

2. Job's action probably represents an ideal situation rather than an actual case, R. de Vaux, Ancient Israel, op.cit., 54. Also, R. Yaron, Gifts in Contemplation of Death, op.cit., 5.

3. N. Lipschutz, 'Wills in the Civil Law of Israel and in the Jewish Law', in International Lawyers Convention in Israel, 1958, (Jerusalem, 1959), 257-275 at 270.

4. Nu.36.1-13. Also Baba Batra, 8.3, cited by E.J. Lipman, The Mishnah, (New York, 1970), 215-6.

5. Driver and Miles, BL, I, 337. This also explains the existence of the rules of preemption, supra, 204.

instructed the Israelites that a daughter's right of inheritance was conditional on her marrying within her father's tribe.[1] The rule simply highlights the predominant interest of the agnates in family property, and particularly, that of the sons. The Sadducees,[2] however, indirectly upheld the right of a

1. Nu.36.1-9. On this, see H.H. Cohn, 'Secularization of Divine Law', in H.H. Cohn, ed., Jewish Law in Ancient and Modern Israel, (New York, 1971), 1-49 at 18. Notwithstanding the written provision of the Torah, this rule provoked controversies. The scribes and the sages considered it void on the ground that it existed only in the generation of wilderness, Babylonian Talmud, Baba Bathra, 120a. But the author of the Tobias held that the requirement of marrying a member of the father's tribe was still in force and went as far as to say that the transgressor of the rule deserved the death penalty. We are to note that this punishment was not Biblical, see Z.W. Falk, Introduction to Jewish Law of the Second Commonwealth, (Leiden, 1972), I, 6,n.2. Yaron points out that the authority of the Book of Tobit (perhaps, 3rd c. B.C.) as evidence for Old Testament law is doubtful, Gifts in Contemplation of Death, op.cit., 7.. Cp. in Attic law, the compulsory rule for marriage of the daughter with a near agnate when one died living no sons or grandsons, but only a daughter; the daughter became an epikleros. The sons of the union, when they came of age, were the heirs of the property, D. Schaps, 'Women in Greek Inheritance Law', The Classical Quarterly, 25 (1975) 1: 53-57 at 54. Philo resorted to a compromise between the rights of a man's tribe and the claims of his daughters. He suggested that the daughters of Zelophehad did not have the inheritance by right of kinship; they had it as an 'external ornament', Vita Mosis, II, 243, cited by S. Belkin, Philo and the Oral Law: The Philonic Interpretation of Biblical Law in Relation to the Palestinian Halakah, (Cambridge, Mass., 1940), 20, n.31. E.R. Goodenough thinks that Philo's interpretation betrays Greek influence. As we just pointed out, in Athens when a daughter inherited her father's estate, that property did not, like the rest of her possessions, belong to her husband. He had only the use of it until their son became of age. By attaining majority, the daughter's son took the property, E.R. Goodenough, The Jurisprudence of the Jewish Courts in Egypt: Legal Administration by the Jews Under the Early Roman Empire as Described by Philo Judaeus, (Amsterdam, 1968), 58.

2. On Sadducees, see Z.W. Falk, Introduction to Jewish Law of the Second Commonwealth, op.cit., 39-40.

daughter to share the inheritance with sons.[1] According to the Sadducees, the daughter of the propositus takes only half the estate in competition with a son's daughter; but the Pharisees advocated the doctrines of representation, and held that the whole estate should go to the son's daughter.[2]

It appears we can conclude that, in the Biblical text as well as in rabbinical literature, the son is the heir to the estate of his father in preference to all other heirs.[3]

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1. A. Gulak, 'Jewish', sub. 'Law', En.So.Sc. IX, 221. The Sadducees and Pharisees had great differences on this point. To the Pharisees, the equality of rights of daughters with sons was nothing else than 'the robbing of orphans', whereas the Sadducees were no less justified, from their point of view, in describing the disinheritance of daughters in the same language, see L. Ginzberg, An Unknown Jewish Sect (Revised and updated translation of the author's Eine unbekannte jüdische Sekte, (1922), (New York, 1976), 157.

2. Babylonian Talmud, Baba Bathra, 115b; Tosefta Yadayim, II.20; Palestinian Talmud, Baba Bathra, VIII, 1, 16a. The doctrine of representation had no foundation in the Torah, but on a right interpretation of the Pentateuch, the Pharisees could not hold otherwise.

3. Philo allowed unmarried daughters to inherit with their brothers, De Specialibus Legibus, II, 125, cited by E.R. Goodenough, The Jurisprudence of the Jewish Courts in Egypt, (Amsterdam, 1968), 59. But Philo admitted that in a normal sort of inheritance, son is definitely the true heir of his father, Spec. Legg., II, 124, cited by Goodenough, ibid., 56, n.98.

VII. Conclusion

Before we close our discussion on Jewish law, we must clear up one other point in order to avoid possible misunderstanding of our central theme, namely, the concept of the Mitākṣarā birthright. It is true that in Jewish law, like Roman law,[1] a son inherits his father's estate whether he wants it or not,[2] but that by itself is no proof of a son's birthright.

It is well-known that Jewish law does not provide equal shares for all sons; on the contrary, the eldest son gets a double share.[3] The strong preference shown to the first-born seems to have been an old custom in Israel,[4] and the Deuteronomic rule guarantees the double portion of the eldest son against any arbitrary action by the father.[5] The Code makes it an absolute rule that, although the eldest son is born from a wife whom the father might disfavour,

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1. Gai.ii. 156-8; The Institutes of Justinian, II. XIX.2.

2. N. Lipschutz, 'Wills in the Civil Law of Israel and in the Jewish Law', in International Lawyers Convention in Israel, 1958, (Jerusalem, 1959), 257-275 at 271.

3. Deut. 21.15-17. The same provision could be found in the Assyrian laws, at Nuzi and at Mari, E.A. Speiser, 'New Kirkuk Documents Relating to Family Laws' AASOR 10 (1928-9), 1-73 at 7-8. R. de Vaux, Ancient Israel, op.cit., 53.

4. Gen.27; also, 49.3. The point has been discussed by G. von Rad, Das fünfte Buch Mose: Deuteronomium, tr. D. Barton, sub. tit., Deuteronomy: A Commentary, (London, 1974), 138.

5. Rad., ibid., 138.

still such a son is entitled to his double share.[1]

This right of the eldest son to a double portion, a right which a father cannot vary, has been designated as 'birthright', as in the case of Esau's sale of his birthright to his brother.[2]

Again Halhed in the Preface to A Code of Gentoo Laws,[3] tried to interpret the right of the Prodigal son [4] in terms of the Mitākṣarā birthright.

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1. Deut. 21.15-17. G. von Rad, Deuteronomy: A Commentary, (London, 1974), 138. R. Yaron, Gifts in Contemplation of Death, op.cit., 9. R. de Vaux, Ancient Israel, op.cit., 53. The classical Greek law also provided double portion of the inheritance to the eldest son, E.R. Goodenough, The Jurisprudence of the Jewish Courts in Egypt, op.cit., 56-7, n.99. This custom was carried over into Ptolemic Egypt, Goodenough, ibid., 57. Philo justifies the double share of the eldest son on the ground that he it is who first makes the parents to be parents and it is a manifestation of lust on the part of the father who takes a second wife when he already has an heir, Spec. Legg. II, 135-9, Goodenough, ibid., 57. In Hindu law, a good number of texts prescribe unequal partition and some of them ordain two shares for the eldest, Gautama, 28.9-10, SBE, 2,300; Manu, 9.117; Vas. VII.42. But double share to the eldest was not approved by the śāstra, Āpastamba, 2, 14, 10-11, Dh.K. 1166a. For a discussion on this, see Ludo Rocher, 'Hindu Law of Succession: From the Sastras to Modern Law', Revue du sud-est asiatique, 1967/1, 1-47 at 11-12. Also Radhabinod Pal, The History of Primogeniture with Special Reference to India, Ancient and Modern, TLL, 1925, (Calcutta, 1929).

2. Deut.21.17.

3. Halhed, The Code of Gentoo Laws, (London, 1776), Preface, lvi.

4. Luke, 15.11-32.

According to Deuteronomic rule, a father was bound to leave each son his due,[1] but on a close analysis neither the right of the eldest[2] nor the right of the other sons to a share in the inheritance resembles the innate right of a Mitākṣarā son. In Jewish law, like their Mitākṣarā counterparts, none of these sons seems to have the right to demand a share from their father. In this context, one cannot treat the subject better than Derrett, who states: 'Neither at law nor by custom nor according to any sort of reasoning could this son demand anything like a share.'[3] To dissipate any possible misconception, Derrett continues and explains the situation in terms of agro-economics and social morphology:[4] '... the Jews, like every other eastern agricultural society, treated an ancestral farm as virtually common property in daily use. Agriculturists live like co-owners, but when a domestic crisis arises, the specialities of the private law reveal themselves.'[5]

However, to forestall fraternal quarrel, a father could 'set his house

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1. R. Yaron, loc.cit., 10.

2. It is interesting to note that with each of the patriarchs, the first-born was deprived of his rank, Yaron, ibid., 9. Vaux, loc.cit., 53. Cp. Āpastamba, 2, 14, 10-11.

3. Derrett, Law in the New Testament, (London, 1974), 104. The portion which the prodigal son received was probably a case of dismission (Abschichtung). Dismission is an arrangement under which a son receives a portion of the father's property while the father is still alive, and thereby, loses all further claims to the inheritance, Yaron, Gifts in Contemplation of Death, op.cit., 2, 42-5.

4. On social morphology, see D. Black and M. Mileski, The Social Organization of Law, (New York/London, 1973), introd., 8-9.

5. Derrett, loc.cit., 104-5.

in order' by giving verbal instructions about the distribution of his property, although he had to conform to law and custom.[1]

Although religion and law appear to be two different concepts, in Hebrew society religion, law and morals were undifferentiated.[2] This ethico-juridic view has played a decisive role in the formations of the various rules and, consequently, property[3] in Jewish law was subject to moral responsibilities.[4] According to Jewish legal philosophy, a man's property is but a kind of holding from the Lord. Society adopts this religious view that there does not exist any full ownership, and , moreover, rights of property are restrained in favour of persons in need of special care.[5] Therefore, in a society where parents were honoured as God himself,[6] a father would have moral claim,

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1. R. de Vaux, Ancient Israel, op.cit., 53. R. Yaron, loc.cit., 10. This was the beginning of a gift in contemplation of death to a favourite son, Derrett, ibid., 105, n.2.

2. B. Cohen, Law and Tradition in Judaism, (New York, 1969), 185.

3. Law of property merges with ethics: the particular formalities in a contract of sale and purchase involved no ethical considerations, yet the failure to keep one's word in an oral contract was morally condemned, B. Cohen, Law and Tradition in Judaism, (New York, 1969), 195. Cp. the Hindu view of property as kratvartha and puruṣārtha, RLSI, Ch.5.

4. Derrett, Law in the New Testament, op.cit., 111.

5. Z.W. Falk, 'Jewish Law', in Derrett, ed., An Introduction to Legal Systems, (London, 1968), 28-53 at 42.

6. Lev. 19.3, to be read with Deut. 6.13; Ex.20.12; Prov.3.9. For a discussion on this, see The Sifra on Lev. 19.3, J. Newman, Halachic Sources: From the Beginning to the Nineteenth Century, (Leiden, 1969), 99-100. B. Cohen, loc.cit., 185, 222. Derrett, loc.cit., 109-10.

in case of necessity, on the earnings even of his separated sons.[1]

At the same time, it is worthwhile noting that in Jewish law, no one was entitled to disinherit his heirs.[2] But the Pentateuchal law was causing hardship by depriving the daughter of any share in the inheritance, and by preventing the father from making a bequest when he did not want the inheritance to fall to a son whose behaviour was not to his liking.[3] So, lately, by circumventing the law of inheritance, a father may deprive his sons by making a gift of his properties to strangers.[4] The rabbis, however, made no secret of their dislike of this power given to the father of the family.[5] Still, to provide for the need of making testamentary disposition, technically keeping the Pentateuchal law intact, recourse was had to the fiction of gift _inter vivos_.[6]

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1. Derrett, ibid., 111. Note the view of R. Abin who opines: 'A son who seems to live apart during the lifetime of his father, what he acquired he acquired for himself', _Methiboth_, J. Newman, _Halachic Sources_, (Leiden, 1969), 237. Cp. Jesus enjoined, 'parents must be supported from their children's possessions', M. Hengel, _Property and Riches in the Early Church_, (London, 1974), 27.

2. H.H. Cohn, ed., _Jewish Law in Ancient and Modern Israel_, (New York, 1971), introd., xxx.

3. R. Yaron, _Gifts in Contemplation of Death_, op.cit., 33.

4. On this mark the subtle terminological device, '... whoever says, "Let X inherit from me" had said nothing; 'Give my goods to X', his words stand', _Tosephta Baba Bathra_, 7.16, cited by R. Yaron, _Gifts in Contemplation of Death_, op.cit., 39.

5. Yaron, ibid., 39.

6. An example of expediency v. authority; for a discussion on this in context of Hindu law, see RLSI, Ch.5. Cp. judicial evolution of will in Hindu law, infra, 730–43.

By this fictitious device, a man could give his property to another person 'as from today until after death', whereupon the gift would take effect immediately but the donee could claim delivery of the property only upon the donor's death.[1]

The development of testamentary disposition through fictitious devices is another aspect of Jewish law which highlights the nature of a son's right in the property of his father. This 'more or less indefeasible'[2] right of a Jewish son could be mistermed 'birthright' but, as the above discussion shows, it is fundamentally different from the Mitākṣarā birthright which is synonymous with the co-ownership of a son with his father. In this context, a comparison between Hindu law and Jewish law may not be rewarding to those who revel in parallel-hunting, but there is no denying the fact that to a legal comparatist, a contrast also provides a useful sidelight on his central theme.

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1. Baba Bathra, 126a; 136a, cited by H.H. Cohn, Jewish Law in Ancient and Modern Israel, op.cit., introd., xxx. This fiction did not cover gifts in respect of after-acquired property which was dealt with by the fictitious acknowledgement of a debt for which the donee was entitled to satisfy himself from any after-acquired property left by the deceased donor, Baba Bathra, 149a; 157a, cited by Cohn, ibid., xxx.

2. The phrase was used by S.G. Vesey-Fitzgerald in context of mediaeval Roman law, 'Family Property in Beaumanoir: A Study in Comparative Law', 8 Journal of Comparative Legislation and International Law, (1926) 1: 71-80 at 72. It is significant that under Jewish law, no son could sell his prospective inheritance. The rabbis themselves had to grant dispensations in favour of the children of persons on their deathbeds when the children tried to obtain money for funeral expenses on the security of their prospective estates, Maimonides' Mishneh Torah, or Code of Laws, Mekirah 22, 1, 5-6, based upon several rather controversial talmudic passages, cited by S.W. Baron, 'The Economic Views of Maimonides' in S.W. Baron, ed., Essays on Maimonides, op.cit., 155, n.58.

CHAPTER 8

THE SASANIAN LAW

1. Historical Background

Probably during the seventeenth century B.C. [1] a group of Indo-Aryans crossed the Oxus and moved into the Iranian Plateau. They were followed by successive Aryan waves, but up to c. 1200 B.C. their presence remained insignificant. However, before c. 900 B.C. they had crossed the Zagros range and spread to the north and south.[2]

Iran, being the geographical focal point between Asia Minor and India, had contact throughout the ages with the great civilizations of East and West.[3] The Achaemenid Empire (c. 559 - 330 B.C.) in Persia succeeded the last Babylonian Empire and continued until the defeat of Darius III by Alexander. The Seleucid period was followed by Parthian domination until the third century A.D. when the Sasanian Empire was established (c. 224 A.D. - 651).[4]

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1. En.Br. (1970), XVII, 653.

2. D.N. Wilber, Iran Past and Present, (Princeton, 1975), 25.

3. G. Morgenstierne, 'Early Iranic Influence upon Indo-Aryan', Acta Iranica Actes Du Congrès Dhe Shiraz 1971 et Autres Études Rédigées A L'ccasion du 2500e Anniversaire de la Fondation De L'empire Perse, (Teheran/Liege, 1974), I, 271-279 at 279.

4. For a short history of the early dynasties, see D.N. Wilber, loc.cit., 26-36.

During the early Sasanian [1] period, part of Northern and Western India was conquered by the Iranians.[2] Ultimately, the Sasanians came into political contact with the Romans.[3] Thus, the course of history during the Sasanian period implies an awareness on the part of the Iranians of the Babylonian, Hellenic, Indian and Roman legal systems,

Zoroastrianism [4] continued to flourish as the state religion under the Sasanians until the overthrow of the dynasty by the Arabs in 651 A.D. After three centuries, some Zoroastrians who could manage it fled to the Western shores of India. It is now generally accepted that the founders of the Parsi

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1. We should note that Darius the Great (c. 522 - 486 B.C.) also conquered part of the North-West India, see Dastur Dr. F.A. Bode, 'Influence of Ancient Iran on India', Journal of K.R. Cama Oriental Institute, 40 (1960), 120-142 at 129-131. Also G.W. Briggs, 'Brief Outline of the Indo-Iranian Contacts' in J.D.C. Parvey, ed., Oriental Studies in Honour of Cursetji Erachji Parvey, (London, 1933), 50-60 at 50.

2. J. Charpentier, 'The Sasanian Conquest of the Indus Region', S. Krishnaswami, Aiyangar Commemoration Volume, (Madras, 1936), 11-17 at 14, 17. Also J.M. Unvala, 'Political and Cultural Relations between Iran and India', ABORI 28 (1947), 165-189 at 181.

3. En.Br. (1970) XVII, 670.

4. On Zoroastrian faith, see K.F. Geldner, 'Zoroastrian Religion in the Avesta', tr. J.C. Tavadia, JKRCOI 24 (1933), 1-80. J.C. Tavadia, 'The Life of Zarathustra as based on the Avesta', JKRCOI 36 (1943), 47-101. Also more recent, Mary Boyce, 'A History of Zoroastrianism', B. Spuler, ed., Handbuch der Orientalistik, (Leiden, 1975).

colony in Gujarat arrived there in 916 A.D. [1] They were the ancestors of the present Parsee community in India, and when they left their fatherland they, as a community, were following the rules of Sasanian family law.[2]

However, in the laws [3] of the Sasanian period we are not expecting an unbroken thread of legal traits stretching from Babylon to Bombay, [4] nevertheless, the Āryanization [5] of Iran and India, and their mutual experiences through the stages of history justify a juridical study in the comparative context.

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1. S.H. Hodivala, Studies in Parsi History, (Bombay, 1920), 67-91. The impression given by Inostranstev and Irani that the Parsees arrived in India in the 7th century is no longer tenable. On their hypotheses, see K. Inostranstev, tr. L. Bogdanov, 'The Emigration of the Parsis to India and the Musulman World in the Middle of the VII Century', JKRCOI 1 (1922), 33-74. P.K. Irani, 'The Personal Law of the Parsis of India', in J.N.D. Anderson, ed., Family Law in Asia and Africa, (London, 1968), 273-300 at 273.

2. Derrett, TLL, 253.

3. We call the Zoroastrian traditional 'Sasanian' because it survives (insofar as it does) in records of that, the last Zoroastrian imperial epoch. Presumably, it was more or less the same under the Arsacids and Aschaemeneans before them.

4. The Parsi law in India is largely based on Hindu customary law and rules of English law. P.K. Irani, loc.cit., 273, 281. Derrett, RLSI, 40, n.1,7; 48-9. Presumably, before British rule, Parsi law was a mixture of their own traditional law with Hindu customary law. This is the view of Mary Boyce.

5. The word Iran itself has come from Āriya; middle Persian: Ēran. Ēran is from Ēranšahr: 'land of the Āryans', Ēran being an Old genitive plural. Darius I called himself as Āriya, En.Br. (1970), XVII, 653. At one time, the Iranians called themselves as 'Ārian', see D.P. Sanjana's translation of Dr. Geiger's German, 'The Ethnography of the Avesta People' in J.J.Z. Madressa, ed., The Collected Works of the Late Dastur Darab Peshotan Sanjana, (Bombay, 1932), 110. The present Shah has given himself the title of Aryānmihr, meaning 'friend to the Āryans', i.e. to his own subjects; I am grateful to Mary Boyce for this information.

II. Traces of joint family

The Zoroastrian legal treatises [1] were worked out partly before and partly during the Sasanian period. The Sasanian laws show unambiguous traces of joint family life [2] in the Pahlavi treatises. Each joint family lived under the domestic management of the Lord and Lady of the House.[3] If either of them died, the eldest son of the family or his wife, living joint with the family, took his or her place.[4] The Lord of the House was the manager of the joint family property [5] and, besides having their interest in the joint family property, the

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1. The Zoroastrian legal treatises were examined in Palhavi original by Dr. B.J. Daboo. The typescript of Daboos' Ph.D. thesis, University of Bombay, on Sasanian Law was used by Derrett, TLL, 263-4. It is to be noted that information on the legal system during the Achaemenid period is very insignificant and no collection of legal treatises, in fact, has survived, En.Br., (1970), XVII, 660.

2. Derrett, TLL, 263. S.J. Bulsara, The Laws of the Ancient Persians as Found in the 'Mātīkān ē Hazār Dātastān' or 'The Digest of a Thousand Points of Law, (Bombay, 1937), 312, (hereinafter as MHD). This work seems to have been written in, or immediately after the ninth century A.D. The author is Farkhanmard, the son of Vahram and the authorities quoted in the work are all of the Sasanian period, see J.J. Modi's introduction, in E.T.D. Anklesaria, The Social Code of the Parsees in Sasanian Times or The Madigān-i- Hazār Dadistan, (Bombay, 1912), 11.

3. See Bulsara, ibid., introd., 50. Cp. Hindu, śruti text: dharme ca arthe ca kāme ca na aticaritaryā / 'In matters relating to Duty (religious acts) and to property and to pleasure the wife should not be ignored', A.S. Nataraja Ayyan, Mīmāmsā Jurisprudence, (Allahabad, 1952), 37.

4. Bulsara, ibid., introd., 50.

5. MHD, XXII.4; XXVIII.2. Also Bulsara, introd., 51.

individual members could have separate property of their own.[1]

a. Proprietary relationship of father and son

Although Bulsara would like to make us believe that 'a son of the family could demand his lawful share in the family property and establish a separate home of his own', the text [2] on which he relied does not say anything to that effect directly. However, it is certainly correct to say that a son could live separately from the family during the lifetime of the Lord of the House,[3] and it is clear from the texts that in the management of the joint family property, the father-manager had no arbitrary power of disposition. A text in the Mādīgan-ī-Hazār Dādīstān clearly states: "The wife and children cannot be disinherited, and the patrimony legally coming down to one's family cannot be alienated'.[4]

b. Procedural law

But Bulsara's conclusion in the light of his interpretation of the text [5] is buttressed to a certain extent by procedural law dealing with the rights of a minor son. In Bartholomae's 'Notes on Sasanian Law',[6] we come across two

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1. MHD, XLII, 43; XLIII.20; XXIII.X+72.

2. MHD, XXIII.X+72.

3. MHD, XXIII.X+72.

4. MHD, I.20, 6-7, cited by M. Shaki, 'The Sassanian Matrimonial Relations', archiv orientální, 39 (1971), 322-345 at 341.

5. MHD, XXII.X+72. See n.2 above.

6. C. Bartholomae, 'Zum Sasanidischen Recht', tr. L. Bogdanov, 18 JKRCOI (1931) I : 1-67; 21 JKRCOI (1932) I : 1-40; 26 JKRCOI (1934) II : 1-80, 30 JKRCOI (1936) III : 1-103; 41 JKRCOI (1967) IV : 1-93.

cases on the question of burden of proof, which imply the recognition of a son's birthright in joint family property. The cases are presented by way of illustration to determine as to which of the parties in a litigation is to be considered as 'nearer to proving by oath'.[1] As a general rule, the right of taking the oath (var) in a trial belonged to the defendant,[2] but, in special cases, the plaintiff could be considered as offering, through the var, the evidence for a better decision; and the protection of the right of a minor son fell into such a special category. The text to that effect runs as follows:

> When the head of the family and the mistress of the house recognize the obligation of effecting a payment from the family (estate) to a countryman and hand over the money for the payment, and (when) then in the family the son comes of age and contests the liability towards the one who has the money in his possession and intends a lawsuit: then the son has the preference for the decision by the var.[2]

The rule in the other case runs as follows:

> When the chief of the family and the mistress of the house recognize the payment (obligation) towards a (former) master of the house and disburse the money for the payment from the family estate, and (when then) a son in the family comes of age and registers a complaint against the

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1. 26 JKRCOI (1934) II : 1-80 at 30.

2. The case is from MHD. MHD, 14.7-10, 26 JKRCOI (1934) II : 1-80 at 31-2.

> one who has taken the money, the decision lies better with the plaintiff's party. [1]

From the evidential point of view, the two cases are not dissimilar; but, in the context of a son's right in family property, they reflect two different situations. If we set out the cases according to a different schema, the situations may be seen in their proper light: in the first case (MHD, 14.7-10), the situation may be expressed thus: A family consists of F, W and S, the minor. F and W paid a family debt during the minority of S. After attaining majority, S contested the liability and sued C the creditor.

In the second case (MHD, 15.12-14) the facts appear to be as follows. A joint family consists of F, W, S^1, S^1W and S^2, a minor. F and W died, and after their death, S^1 and S^1W became the Lord and Lady of the House, respectively. S^1 and S^1W made a payment to C regarding a debt due from F. S^2, after attaining majority, contested the liability and sued C.[2]

In the former situation, the right of S to contest the liability emanates from his birthright; but, in the latter, as it appears from the text, it stems from his right to have a share in the estate of his deceased father. However, it is not too far-fetched to conclude that the first case, by allowing the son to contest the liability, does uphold the innate right of a son in the joint family property.

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1. MHD, 15.12-14; 26 JKRCOI (1934) II : 1-80 at 33.

2. The expression used in the text is pus ī andar dūtak ('son of the house') who is normally the eldest son of the Father of the House. If that is meant in this text, then we should take S^2 as the son of S^1 and there would be no difference in the implications of the two situations. 26 JKRCOI (1934) II: 1-80 at 34.

The payment made to the creditors in these cases were not made for the benefit of the minor, but for the payment of a family debt. Sasanian law jealously guarded the interest of the minor and, like the śāstric law of the Hindus,[1] was particular that the property of the minors should remain in the custody of the manager (Father of the House).[2]

III. Testamentary disposition

In Sasanian law, a father could make a bequest of his self-acquired property.[3] In this also, a son's position as 'owner' has been significantly highlighted when his taking possession of a legacy is distinguished from that of a stranger. In the 'Remarks' to the two cases just discussed, the commentator states:

> the citizen, when a thing is bestowed on him, (is considered), except when he (expressly) declares: "I do enter in possession of the thing" not as owner of the thing; the son (of the family is considered) as owner of the thing,[4] except when he (expressly) declares: "I do not enter (in possession of the thing)".[5]

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1. Kāṇe, HD, III, 165. Cp. Anglo-Hindu law situation on this, Hunooman-persaud Pandey v. Mt. Babooee Munraj (1856) 6 MIA 393, 423. Also Mita, I,i.27-29. For a criticism and comparative background of the Hunooman-persaud rule, see Derrett, Critique, Appx.II, 425-432.

2. MHD, XV.14.

3. See n.1 below, 228.

4. Emphasis supplied.

5. MHD, 61.9-11. 26 JKRCOI (1934) II: 1-80 at 35.

Although it is accepted that the Sasanians were entitled to make a testamentary disposition of their separate property, they had to provide sufficient for the maintenance of wife and children [1] and to leave with the wife a suitable amount for the marriage of the daughters.[2] Again, if there was an only son, 'the father ought to assign the property to him' [3] and, even though the son was guilty of misbehaviour, the father could not disinherit the son; he was required by law to put the property in trust for the benefit of his son.[4] All through these rules we can clearly discern the cellular modality of the Sasanian family, in which a father's power over family property, whether joint family or separate, is considerably restricted by the rights of other members, and particularly of his epigones.

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1. Derrett, TLL, 263. Cp. svaṃ kuṭumbāvirodhena deyam, Yājñ. II.175: 'Property other than what is required for the maintenance of the family may be given', Golāp Candra Sarkār Śāstrī, Hindu Law, 4th ed., 379. Also Vyāsa, Dh.K. 1587b: vṛtti lopaḥ vigarhitaḥ /

2. The Dādistān-ī-Dīnīk (hereinafter as Dd.), LIV.6 and 7; LIV.10, Pahlavi Texts, Part II, SBE, 18 (Oxford, 1882), 184, 186. The Dādistān-ī-Dīnīk ('Religious Opinions or Decisions') is a collection of answers to 92 questions on religious subjects put to the high priest Manuščihr who lived c. 881 A.D., see SBE, 18, introd., xxii.

3. MHD, XXVIII, 3.

4. MHD, XLII, X+129.

IV. A son's obligation to pay the debts of his father

From Daboo's treatment of the subject, as stated by Derrett,[1] we come to know that in Sasanian law, sons were obliged to pay the untainted[2] debts of their father. But this supposition of a parallel system of 'pious obligation'[3] is not endorsed by the texts of the Mātīkān ī Hazār Dātatītān. A son's personal property could not be seized for payment of his father's debt,[4] but the son might have to surrender his portion of property inherited from his father to meet the paternal debt.[5]

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1. Derrett, TLL, 264-270.
2. On this, see Derrett, Critique, §§128-139.
3. On its origin in Hindu law, see Kāṇe, HD, III, 442 ff. Also Derrett, 'Indica pietas: a current rule derived from remote antiquity', Zeitschrift der Savigny-Stiftung fuer Rechtsgeschichte, Rom.Abt., vol.86 (1969) 37-66; Critique, 93, n.10.
4. MHD, XLII. 8. Also Bulsara, op.cit., 591, n.12.
5. MHD, XLII. 4. We find in a text in the Zend-Avesta that breach of a 'word contract' by a man was considered as a great sin. For this breach, the next-of-kin of the man to the 9th degree (Nabānazadistas) were answerable for three hundred years, Z.A. IV. 11c. 5 and 6 to be read with IV. 11d.11. But the commentators reduced these three hundred years and, curiously enough, prescribed that 'only the son born after the breach is liable for it, when the father dies, the son if righteous, has nothing to fear from it', Zenda-Avesta, Part I, SBE, 4, (Oxford, 1880), 36, n.3.

V. Trust for pious purposes

We shall presently see that even in making a gift or setting up a trust for pious purposes, a father's power in respect of joint family property was considerably restricted.

Like most ancient peoples of the world, the ancient Iranians had a strong sense of existence after death. In the remote past, the ritual after death was the responsibility of the living,[1] but eventually it became incumbent on the individual to make provision for himself for the essential rites to be performed for him after his death. And, for this purpose, the individual dould endow property for the performance of such rites.[2] Quite often the Zoroastrians used to set up a Sacred Fire and put property in trust for the maintenance of that Fire.[3] B ut Sasanian law allowed a father to make a gift of

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1. Cp . Hindu son's obligation to perform the śrāddha ceremonies of his parents, Br. 5.66; Aiyangar, ed., 335; Dh.K.1349a. Atri, Dh.K.1352b, see infra, 414, n.1.

2. M. Boyce, 'The Pious Foundations of the Zoroastrians', BSOAS 31 (1968) 1: 270-289 at 271.

3. Usually the trustees were the children and other members of the family, and as trustees of the endowment they could enjoy part of the income, M. Boyce, 'On the Sacred Fires of the Zotoastrians', BSOAS 31 (1968), 1: 52-68 at 62. For comparable institution in Hindu law, see B.K. Muherjea, The Hindu Law of Religious and Charitable Trust, TLL, 1936, (Calcutta, 1962), 1-46. Also Derrett, RLSI, 482-512. The Indo-Iranian cult of fire evidently goes back to the institution of hearth fire. When a man set up his home he used to light a hearth fire and kept it alight as long as he lived, M. Boyce, (review of K. Schippmann's Die iranischen Feuerheiligtümer), 'On the Zoroastrian Temple Cult of Fire', JAOS 95 (1975) 3: 454-465 at 454-5. On setting up of hearth fire by the Vedic Indians, see G.D. Sontheimer, EHJFI, 42.

property for pious purposes only up to that extent which would not deprive his wife and children of their lawful inheritance.[1] He was allowed, however, to give away 'something of the house'[2] to deserving people. It is, indeed, true that the law discountenanced a father's indiscriminate use of joint family property even for pious purposes; this is evident from a judgment of the episcopal dignitaries. The decision, as translated by Bulsara, goes like this:

> One was the deliberation that was announced that there was a certain Master of Divinity Māh-Atrŏ Frēh-Gōshnasp (who) kept pertually aflame the Holy Fire at Ram-Shahpūhar 3 when it could not (otherwise) be kept aflame continuously, and (at last) he passedaway; (and) when (afterwards) it was not possible to keep that Holy Fire perpetually aflame from his personal assets, (it had been found as) becoming to keep it perpetually aflame from the property belonging to the family of (that) Māh-Atrŏ Frēh-Gōshnasp, according to the Episcopal Dignitaries who had met together and commanded that way. 4

It is not clear how far the decision is judicially imperative;[5] nevertheless, even merely as a <u>responsum prudentium,</u> it does indicate the absence of the right of disposition of joint family property by a father.

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1. MHD, XIII.+25. , This should be taken as valid in respect of joint family property.
2. MHD, XXXVII.22.
3. A city founded by one of the Shahpurs, probably the first, (A.D. 241-272).
4. MHD, XLIV.4, Bulsara, op.cit., 616-8.
5. See Bulsara, op.cit., 618, n.4.

VI. Conclusion

But we should not overstate the innate right of a son in the Sasanian system in the context of a comparison with the Mitākṣarā birthright. Certainly, the family law of the Sasanians does not indicate the existence of an institution like the Roman patria potestas, but, at the same time, it does not exhibit, as does the Mitākṣarā [1] system, the crystallization of the son's right by birth in the whole [2] corpus of property in the hands of the father. In Sasanian law, a father's freedom over separate property was unrestricted but, in the Mitākṣarā system, the acknowledgement of the freedom over separate property was a creation of Anglo-Hindu Law.[3]

However, when we consider the common origin of the Hindus and the Iranians, we need not be surprised by the striking parallels between the Sasanian and Hindu legal systems. The resemblances between the two systems which we have identified are found where they were most to be expected, and the contextual variants which emerge may be taken as being conditioned by the respective cultural and environmental patterns.

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1. Wrongly denied in Rao Balwant Singh v. Rani Kishori (1898) 25 IA 54, for a fuller discussion, see infra, 745-6.

2. See Katama Nachiar v. Srimut Rajah Moottoo (Rajah of Shivaganga) (1863) 9 MIA 539. For a discussion, see Derrett, 'Hindu Law: The Rights of the Separated Son', 19 SCJ (1956), 103-111 at 108.

3. It should be borne in mind that the Mitākṣarā system does not represent a pure Indo-Aryan concept. For a discussion on this, see infra, 488-9.

CHAPTER 9

F ARTHER INDIA

1. The Historical and Juridical Background

In the context of our present study, the Indianized civilizations of Southeast Asia, commonly known as 'Greater India',[1] or 'Farther India',[2] should not suffer an unmerited neglect. 'Farther India' includes the old Hindu kingdoms[3] in the present states of Sri Lanka, Burma, Malaysia, Thailand, Laos, Cambodia, Indonesia, Philippines and Vietnam. Excluding Ceylon, the rest of 'Farther India' mainly comes under the geographical division South-

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1. H.G. Quaritch Wales, The Making of Greater India, (London, 1974), 1.

2. G. Coedès, Histoire ancienne des états hindouisés d'Extreme Orient, tr. S.B. Cowing, sub.tit. The Indianized States of Southeast Asia, (Honolulu, 1968), introd., xv. The phrase was used earlier by H. Clifford, Further India, (London, 1905). Also W.F. Stutterheim, Indian Influences in the Lands of the Pacific, (G. Kolff & Co., Weltevreden), 1-9 at 1,4; SOAS Library: G 940/22299.

3. Prominent among these kingdoms were: Funan and Khmer in present Cambodia; Srivijaya in Southern Sumatra; Sailendra in central Java; Champa on the east coast of the peninsula, between the mountain spur of Hoanh-son and the Mekong delta; Dvaravati in the southern part of the Menam valley; Śrikṣetra in the lower valley of the Irrawaddy; for fuller discussion, see R. Le May, The Culture of South-East Asia: The Heritage of India, (London, 1954), Ch. II-IX. B. Harrison, South-East Asia: A Short History, (London, 1964), 21-49. G. Coedes, Les Peuples De La Peninsule Indochinoise, tr. H.M.Wright, sub.tit., The Making of South East Asia, (London, 1966), 50-117; also his classic work, The Indianized States of Southeast Asia, loc.cit., et seq.

east Asia.[1] The general cultural pattern in the whole area and, especially, the difference in ethnic classification between hill and valley peoples, are 'despair to cultural cartographers'.[2] With our knowledge mainly of conventional societies, a microanalytical study of the varied and complex societal phenomenon of Southeast Asian culture is indeed very difficult, and in this respect, the observation of Lauriston Sharp is worth noting: 'Equipped only with the conventional cookie-cutter concept of culture, we find ourselves in grave analytical difficulties when we turn to Southeast Asia, lying between the great creative but self-producing civilizations of India and China'.[3] Among all the Southeast Asian countries, Vietnam was completely sinicised[4] and, aside from Vietnam, perhaps Thailand had the closest historical ties with China.[5]

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1. Freedman, however, is not in favour of including Vietnam, the seat of the ancient kingdom of Champa, in Southeast Asia. According to him, Vietnam should be grouped with the East Asian countries which comprise the area of Chinese civilization, M. Freedman, 'An Epicycle of Cathay: or, The Southward Expansion of the Sinologists', in R.J. Smith, ed., Social Organizations and the Applications of Anthropology: Essays in Honor of Lauriston Sharp, (Cornell University Press, Ithaca/London, 1974), 302-332 at 302-3.

2. L. Sharp, 'Cultural Continuities and Discontinuities in Southeast Asia', JAS, 22 (1962), 3-11 at 5. Also G. Coedes, The Making of South East Asia, loc.cit., 32.

3. L. Sharp, 'Cultural Continuities and Discontinuities in Southeast Asia', JAS 22 (1962), 3-11 at 5.

4. G. Coedes, The Making of South East Asia, op.cit., 49-50.

5. H.J. Weins, Han Chinese Expansion in South China, (Hamden, The Shoe String Press, 1967), 345.

The Indianization or 'Brahmanization' [1] of 'Farther India' started around the beginning of the Christian era, [2] when the autochthonous societies of the area were still in the midst of late Neolithic civilization. [3] In this respect, 'Indianization must be understood essentially as the expansion of an organized culture that was founded upon the Indian conception of royalty, was characterized by Hinduist or Buddhist cult, the mythology of the Purāṇas, and the observance of Dharmaśāstras, and expressed itself in the Sanskrit language'. [4] However, Indian culture [5] could not engulf the popular indigenous institutions and most historians

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1. G. Coedès, The Indianized States of Southeast Asia, op.cit., 15. In using terms, such as, 'Brahmanization' or 'Hinduization', we must not overlook the fact that Brahminism was replaced by Buddhism in these regions and Buddhist philosophy played an important part in the procéss of Indianization, G.H.E. Hall, A History of South-East Asia, (London, 1968), 12. Also B. Harrison, South-East Asia: A Short History, op.cit., 15-16.

2. L.P. Briggs, 'A Sketch of Cambodian History', FEQ 6 (1947) 4: 345-363 at 346. B. Harrison, South-East Asia, loc.cit., 12. R.C. Majumdar mentions the view that Indian colonization in the Far East could be pushed back to a time prior to the Āryan and Dravidian conquest of India, Hindu Colonies in the Far East (Calcutta, 1973), 7. Coedès also concedes that there was a community of culture between pre-Āryan India and the Far East, The Indianized States of Southeast Asia, op.cit., 8. Also see, A. Lamb, 'Indian influence in Ancient South-east Asia', in A.L. Basham, ed., A Cultural History of India, (Oxford, 1975), 442-452 at 442; also the Appx. to the article by H.H.E. Loofs, 452-454.

3. Coedès, The Indianized States of Southeast Asia, op.cit., 7-8. R.C. Majumdar, Ancient Indian Colonisation in South-East Asia, (Baroda, 1955), 15, L. Sharp, JAS 22 (1962), 3-11 at 7-8.

4. Coedès, ibid., 15-16.

5. We should note that although all the regions of India contributed to this expansion, the greatest part of the contribution was made by the South, H.G. Quaritch Wales, The Making of Greater India, op.cit., 28. On the nature and pace of Hinduization of Southeast Asia, see L.P. Briggs, 'The Hinduized States of Southeast Asia', FEQ 7 (1948), 4: 376-393 at 378-9.

agree [1] that 'under the Indian veneer, most of the population preserved the essentials of their own culture'.[2]

Nevertheless, from the juridical point of view, Hindu expansion in this part of the globe was significant. Along with Hindu culture and commerce, Hindu jurisprudence found its way into this region which is eloquently emphasized by Furnivall in these words:

> ... the emigrants from India, Hindu and Buddhist , who laid the foundation of a new world in the Tropical Far East, took with them their law-book, the Code of Manu. Everywhere throughout the region Manu has left his mark: ibin Burma both among Mon and Burman, in Siam, Cambodia, Java and Bali.[3]

Despite controversies over the extent of the influence of the <u>dharmaśāstras</u> on the legal systems of the Indianized states, it is indeed accepted that the <u>Mānavadharmaśāstra</u> served as a model in form, and to a certain degree in substance, to the legal writers of 'Farther India'. However, it will be unwise to think that the <u>śāstra</u> alone was the source of law in this area; and, especially

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1. On this point, note R.C. Majumdar's Indo-centric view. He disagrees with those who 'exaggerate the local factors and belittle the importanceof Hindu element', <u>Ancient Indian Colonisation in South East Asia,</u> op.cit., 15.

2. Coedès, <u>The Indianized States of Southeast Asia,</u> op.cit., 33. Inscriptions from Java prove that the lower classes of Indonesian society were uneffected by Hindu element, W.F. Stutterheim, <u>Indian Influences in the Lands of the Pacific,</u> op.cit., 5. Also J.M. Van Der Kroef, 'The Hinduization of Indonesia Reconsidered', FEQ 11 (1951), 1: 17-30 at 21.

3. J.S. Furnivall, 'Manu in Burma: Some Burmese Dhammathats', <u>Journal of the Burma Research Society,</u> 30 (1940) 2: 351-370 at 351.

in the sphere of family law, it is rather to be expected that, within the framework of the *śāstra*, the local customs continued to be followed.

Having taken into consideration the existence of local, traditional customs and the introduction of the *śāstra* through 'Brahmanization', the family law of 'Farther India' is important in the sense that it can provide valuable insights from two angles on the *Mitākṣarā* birthright. First, from a study of the *śāstra*-oriented literature of the area, we may have an appraisal of the *śāstric* position from a pseudo-*śāstric* angle and, secondly, from the glimpses of the customary practices of the people, we would supplement our comparative knowledge of the jural behaviour of primitive societies in this part of Asia relative to the proprietary relationship between father and son.

II. Ceylon

Although Sinhalese chronicles record North-Indian colonization in Ceylon from the 6th century B.C.,[1] reliable historical records of contact with India are well-documented from the reign of Devanampiya Tissa (c. 250 - 210) when Buddhism was officially introduced into the island.[2] However,

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1. F.A. Hayley, *The Laws and Customs of the Sinhalese*, (Colombo, 1923), introd., 3. T. Hettiarachchy, *History of Kingship in Ceylon up to the Fourth Century A.D.*, (Colombo, 1972), 1-6. T. Vimalananda, *The British Intrigue in the Kingdom of Ceylon*, (M.D. Gunasena & Co. Ltd., 1973), introd., xlvi. The *Vijaya legend* which records the conquest of Ceylon by an Indian prince, has been doubted by G.C. Mendis, 'The Vijaya Legend', in *Paranavitana G.C. Felicitation Volume*, (Colombo, 1965), 263-279 at 279.

2. T. Hettiarachchy, ibid., 1.

> it is clear that sea traffic emanating from distant parts of India impinged on Ceylon to such an extent that it transformed the culture of that island and brought it within the orbit of Indian civilization. This was but a precursor of the impact of Indian civilization on all of Southeast Asia. [1]

In addition to North Indian voyages, Ceylon's contact with the Tamils of South India can be traced back to the second century B.C., and they undoubtedly started to control effectively the North and East coast of the island from the 13th century A.D.[2] While the Tamil domination was mainly confined to the North, the South, centering the mountainous region of Kandy, became the stronghold of the Sinhalese.

a. The Tesawalamai

The Tamils of the North, commonly known as the Jaffna Tamils,[3] had a system of customary laws of their own.[4] In 1706, the Dutch codified this customary law as Tesawalamai,[5] the 'Code' which 'was taken from the

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1. C. Maloney, 'The Beginnings of Civilization in South India', JAS 29 (1970) 3: 603-616 at 604.

2. K. Indrapala, 'Early Tamil Settlements in Ceylon', Journal of the Ceylon Branch of the Royal Asiatic Society, 13 (1969) 43-63 at 46 and 63.

3. T. Sri Ramanathan, Tesawalami: The Laws & Customs of the Inhabitants of the Province of Jaffna, (Colombo, 4th ed., 1972), 2.

4. M.D. Raghavan, 'The Malabar Inhabitants of Jaffna: A Study in the Sociology of Jaffna Peninsula', in Sir Paul Pieris Felicitation Volume, (Colombo, 1956), 114-131 at 115. H.W. Tambiah, Principles of Ceylon Law, (Colombo, 1972), 199.

5. Hayley, op.cit., introd., 11. H.W. Tambiah, Laws and Customs of the Tamils of Jaffna, (Colombo, 1950), 43f. Derrett, 'Preemption in Tesawalamai: a Problem in Choice of Residual Law', University of Ceylon Review, 19 (1961) 2: 105-16 at 107-8.

mouths of the Mudaliars, but they possessed at that time some traditional sastric material, which would have been consulted if it seemed necessary'.[1]

Although the Tesawalamai contains a provision similar to the Hindu rule of pious obligation [2] of the son to pay the untainted debts of his father,[3] there is nothing in the Code to suggest that a son among the Tamils of Jaffna had any right in his father's property during the latter's lifetime. A rule in the Tesawalamai clearly states:

> So long as the parents live, the son may not claim anything whatsoever; on the contrary, they are bound to bring into the common estate 4 (and there to let it remain) all that they have gained or earned, during the whole time of their bachelorship excepting wrought gold or silver ornaments for their ladies, which have been worn by them and which have been either acquired by themselves or given to them by their parents, and that until the parents die, even if the sons have married and quitted the paternal roof.[5]

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1. Derrett, 'Preemption Among Hindus in Malabar', KLT (1962), 59-65 at 63; also UCR 19 (1961) 2: 105-16 at 107.

2. On the origin of pious obligation, see Kāṇe, HD, III, 442ff. Derrett, 'Indica Pietas: a Current Rule Derived from Remote Antiquity', Zeitschrift der Savigny-Stiftung fuer Rechtsgeschichte. Rom.Abt., vol.86 (1969), 37-66; also Critique, 93.

3. T. Sri Ramanathan, Tesawalamai ..., op.cit., 35-6.

4. On this point, cp. the historical position in Hindu law, Sāyaṇa on Tai. saṃ. 2.6.1.6; Dh.K.1161a. Also Sāyaṇa on Ai.Ār.II.1.8; Dh.K.1163a. For a discussion, see Derrett, ZVR 64 (1962), 15-130 at 99, n.333; 19 (1956) S.C.J., 107. Sāyaṇa's texts are discussed infra, 580-3.

5. Sri Ramanathan, ibid., 4. Ramanathan thinks that this provision was taken from the śāstra. Cp. Manu, IX.104, Dh.K.1149b.

b. Kandyan law

The Sinhalese of the Kandyan districts had their own customs and, so far as family law was concerned, these customs remained untouched by the Portuguese, Dutch and the British.[1] It seems that the Sinhalese were a people of predominantly non-Āryan descent, but their ancestors were part of that amalgam which grew out of the fusion of pre-Āryan with Āryan during the period between c. 1500 and 500 B.C.[2] The amalgram is reflected in the Kandyan system of intestate succession which is neither patrilineal, matrilineal,[3] nor what we might call bilineal.[4] Among the Kandyans adelphic polyandry exists with 'an ambiguous and uncertain type of patriliny'[5] and descent is

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1. Hayley, op.cit., introd., 21-7.

2. Derrett, 'The Origins of the Laws of the Kandyans', UCR 14 (1956) 3 & 4: 105-50 at 148-9.

3. On patrilineal and matrilineal succession, see A.R. RAdcliffe-Brown, Structure and Function in Primitive Society, (London, 1952, rept. 1971),32-48.

4. Bilineal descent is a combination of matrilineal and patrilineal descent. The two modes of affiliation are followed concurrently. For definition and illustration of bilineal system, see G.P. Murdock, 'Double Descent', American Anthropologist, 42 (1940) 4, pt.1: 555-561 at 555, 557, 561. Bilineal descent should not be confused with bilateral descent. The contrast between the two systems has been explained by W. H. Davenport, 'Nonunilinear Descent and Descent Groups', American Anthropologist 61 (1959) 4: 557-572 at 558. Also Murdock, ibid., 555, n.1.

5. E.R. Leach, 'Polyandry, Inheritance and the Definition of Marriage: with Particular Reference to Sinhalese Customary Law', in E.R. Leach, Rethinking Anthropology, London School of Economics Monograph on Social Anthropology, No.22, (University of London, Athlone, 1961), 105-113 at 109. We should note that the 'Sinhalese kinship (nākama) is an undifferentiated category into which kin of all kinds is merged', N. Yalman, 'The Structure of the Sinhalese Kindred: A Re-examination of the Dravidian Terminology', American Anthropologist, 64 (1962), 3, Pt.I: 548-575 at 550.

traced through both sexes.[1] As a corollary to the peculiarity of marriage and descent systems, the family as a unit possesses three categories of property, 'namely, the entailed inheritance of the father, the entailed inheritance of the mother, and the acquired property - that is, the property owned jointly by the parents by virtue of their operations as a business partnership during the period of their marriage. The children of the marriage are heirs to all categories of property, but the categories are not merged.[2]

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1. Bilateral social system is found throughout Southeast Asia; for further study on this, see R. Firth, 'Bilateral Descent Groups: an operational viewpoint', Occasional Paper No.16, Royal Anthropological Institute, (London, 1963), 22-37 at 22. F. Eggan, 'Some Aspects of Bilateral Social Systems in the Northern Philippines', in M.D. Zamora, ed., Studies in Philippine Anthropology, (in Honor of H. Otley Beyer), (Quezon City, Philippines, 1967), 186-201 at 201.

2. E.R. Leach, Rethinking Anthropology, op.cit., 109. Leach claims that similar categories of property are found in South India as well, ibid., 109. In Hindu law 'entailed inheritance of the father' and the 'acquired property' are well attested, and it applies to South India as well. But, apart from the strīdhanam (= 'strīdhan' women's wealth), which generally passes on to the daughters, there seems to be no known category of property to the Hindus as the 'entailed inheritance of the mother'. On strīdhanam, see Gooroodas Banerjee, The Hindu Law of Marriage and Strīdhan, (Calcutta, 1923). Kāne, HD, III, ch.30. P.W. Rege, Ph.D. thesis, (London University, 1960) unpublished. Derrett, Critique, 193-7. The customary sources do not profer anything in support of Leach's claim. The Pramalai Kallar of Madura and Tanjore are patrilineal and heritage is divided between sons, L. Dumont, 'Kinship and Alliance among the Pramalai Kallar', Eastern Anthropologist, 4 (1950) 1: 3-26 at 4-5 . The customary law of the Vellalar Chettiyars shows that excepting 'jewels' women had no property. Men were 'the absolute masters of everything' and 'sons inherit first', L. Rocher, 'Jacob Mossel's Treatise on the Customary Laws of the Vellālar Chettiyars', JAOS 89 (1969) 1: 27-50 at s. Ia, p.33; s.IVa, 35-6; ss.XIVa, XIVe, 46. Among the Udayar caste in Northern Tamil Nadu ' the rule of inheritance of property is patrilineal' and women do not hold title to property by virtue of inheritance', G. Burkhart, 'Inheritance in South India: An "Anomalous" Case', Man in India, 55 (1975) 2: 85-97 at 87. It is also a long-standing custom among the Hindus of Pondichery that inheritance is patrilineal and there is no suggestion of proprietary interest of wife or mother, S. Maharajan, 'Administration of Franco-Indian Laws - Some Glimpses', JILI 15 (1973) 1: 122-137 at 131. Despite these evidences, it is submitted that research on this point is far from complete.

Normally, a man's primary heirs were his sons, although in appropriate cases, daughters, until they were married, had a temporary joint interest in the landed property with their brothers.[1] However,

> in some situations maternal kindred are preferred to paternal kindred: at other stages, again, we find equal division between both sides of the house. Succession to males and succession to females differs, as in Hindu law, and the course of descent depends largely upon the nature of the property, its source and time of acquisition. 2

It is quite obvious that the Kandyan system represents a contrast to the Mitākṣarā system where, until a partition, the corpus of family property is maintained intact in the hands of the managing coparcener.

Apart from this fundamental difference of descent and system of devolution of property between the two systems, one must note that in Kandyan law, as might be expected, there is no indication of son's birthright.[3] A son's right of succession to his father's estate (Piya Urume) would arise only after the death of the father. In this respect, the law is stated thus:

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1. R. Pieris, 'Title to Land in Kandyan Law', in Sir Paul Pieris Felicitation Volume, (Colombo, 1956), 92-113 at 104.

2. Derrett, 'The Origins of the Laws of the Kandyans', UCR 14 (1956) 3 and 4; 105-50 at 126.

3. Hayley, op.cit., 319-20.

> The Piya Urume right becomes of avail to the child subsequent to the father's demise, and not previously, therefore in the father's life-time, the child has no right to lay claim to any portion of the father's estate not to be-queath nor transfer, nor dispose of any por-tion thereof, on the presumption that he or she had a right to anticipate the inheritance.[1]

In Kandyan law, a father had also the right to dispose of his property by gift to whomsoever he pleased.[2] In earlier times, an undutiful or disquali-fied natural heir could be disinherited by the mere will of the father,[3] or through a donation mortis causa,[4] but later it became the rule that to exclude one or more legal heirs, a father had to disinherit them by a regularly executed deed in favour of the chosen heir.[5]

It is significant to note that, in Ceylon, in neither of the two custom-ary systems of family law, had a son any semblance of birthright in the property of his father.

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1. T.B. Dissanayake and A.B. Colin de Soysa, Kandyan Law and Buddhist Ecclesiastical Law, (Colombo, 1963), 140-1.

2. Hayley, op.cit., 290, 319-20. R. Pieris, 'Title to Land in Kandyan Law' in Sir Paul Pieris Felicitation Volume, (Colombo, 1956), 92-113 at 95.

3. T.B. Dissanayake and A.B. Colin de Soysa, loc.cit., 101.

4. Derrett, UCR 14 (1956) 3 & 4; 105-50 at 124-5.

5. R. Pieris, loc.cit., 103.

III. Burma

a. Cultural and juridical contact with India

From the earliest times, Indians and Indian ideas have been able to penetrate into Burma by both land and sea.[1] With Hindu emigration, naturally, Hindu law books found their way into Burma. Although scholars tend to believe that the Code of Narada [2] was brought to Burma from the east coast of India, it is, indeed, the name of Manu [3] which permeates a considerable part of the legal literature of Burma. Some Burmese law books (Dhammathats) [4] and a few legal writers actually bear the name of Manu either alone or as a prefix to their names, [5] but, in this respect, M. Maung opines,[6] perhaps with

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1. Sir C. Eliot, Hinduism and Buddhism: An Historical Sketch, (London, 1921), 50.

2. C. Eliot, ibid., 67.

3. J.S. Furnivall, 'Manu in Burma', Journal of the Burma Research Society, 30 (1940), Pt.2: 351. R. Lingat, 'The Buddhist Manu or the Propagation of Hindu Law in Hinayanist Indochina', ABORI 30 (1949), 284-297 at 284.

4. Dhammathats or Dhammasattham are a corruption from the dharmaśāstra. These are to be distinguished from the Rājasattham literature, the science of kings' art of governing and adjudicating cases. On Rājasattham literature, see R. Lingat, 'Evolution of the Conception of Law in Burma and Siam', Journal of the Siam Society, 38 (1950) 1: 9-31 at 18.

5. Out of 36 Dhammathats, 9 are attached with the name of Manu, see M. Maung, Law and Custom in Burma and the Burmese Family, (The Hague, Nijhoff, 1963), Appx. 1. The name of Manu is also attached to the name of legal writers like Manurāja who summarised the local decisions in the Mahārājadhammathat (c. 1640 A.D.), C. Eliot, Hinduism and Buddhism, loc.cit., 67. Also M.H. Aung, Burmese Law Tales: The Legal Element in Burmese Folk-lore, (London, 1962), introd., 19.

6. M. Maung, ibid., 5.

a certain degree of truth, that probably the prefix was used as an inspiration in cases of works, and as a symbolic acknowledgement of scholarship in cases of writers.

Pioneers of Burmese legal research, like Forchhammer, believed that Burma was indebted to India for her family law and legal science,[1] and that the Dhammathats did not represent Burman customary law;[2] but Forchhammer's over-emphasis on the Indian contribution received only qualified acceptance,; even from the earlier jurists like Fuehrer[3] and Jardine,[4] who observed that the Mānavadharmaśāstra was not the only source of Burmese law. In this respect, Jardine pointed out that the Hindu law of Manu was 'modified by Buddhist feeling and interleaved with local customs'.[5] The legal topics in the earlier Dhammathats, like Dhammavilāsa[6] (c. 1174 A.D.) and Waguru[7] (c. 1280

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1. See Derrett, Review, 'Aung, Maung Htin: Burmese Law Tales: The Legal Element in Burmese Folklore', Orientalistische Literaturzeitung, 58 Jahrgang (1963) 7-8: 391-394 at 393.

2. E. Forchhammer, The Jardine Prize: An Essay on the Sources and Development of Burmese Law from the Era of the First Introduction of the Indian Law to the Time of the British Occupation of Pegu, (Rangoon, 1885), 107.

3. A. Fuehrer, 'Manusāradhammasattham, the only one existing Buddhist Law Book Compared with the Brahminical Mānavadharmasāstram', Journal of the Bombay Branch of the Royal Asiatic Society, 15 (1882), 329-338, 371-382 at 371.

4. Sir J. Jardine, 'Buddhist Law', The Imperial and Asiatic Quarterly Review, 4 (1897), 8: 1-9 at 1 (rpt. S.O.A.S. Pam. Law A. 14651).

5. Jardine, ibid., 1. Also R. Lingat, 'Evolution of the Conception of Law in Burma and Siam', JSS 38 (1950) 1: 9-31 at 14.

6. M.H. Aung, Burmese Law Tales, op.cit., introd., 10-18.

7. Aung, ibid., 18.

A.D.) correspond pretty closely [1] to the Manusmṛti and a considerable number of substantive provisions in the Waguru and in the Manusmṛti are strikingly identical;[2] and such correspondence does not deserve to be considered purely accidental. However, despite these textual similarities, Alan Gledhill, with his juridical and judicial acquaintance with Burmese law, opines that 'the actual content of the law in the Dhammathats owes very little to the Dharmasastras. Substantially the law in the Dhammathats is the customary law of South East Asia'.[3] Gledhill's view is also enthusiastically shared by Burmese scholars like Maung Htin Aung,[4] and Maung Maung.[5] On this point, M. Maung opines

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1. Aung, ibid., 12-3.

2. R. Lingat, 'The Buddhist Manu or the Propagation of Hindu Law in Hinayanist Indochina', ABORI 30 (1949), 284-297 at 289. M.K. Swi, The Judicial System in the Kingdom of Burma, Ph.D., thesis, (University of London, 1965), unpublished, 342. A few relevant examples of textual similarity between Manu and Waguru: Manu, VIII.153: W,3; Manu, IX.105: W,71; Manu, IX.114: W, 72, also Manu, IX.117; Manu , IX.153: W,81. For further parallels, see E. Forchhammer, The Jardine Prize Essay, loc.cit., 57-51. Also D. Richardson, The Dhammathat or the Laws of Menoo, (Rangoon, 1874), 14 Vols., Vol.IV.11, 121. U. Shwe Baw, Origin and Development of Burmese Legal Literature, Ph.D. thesis, (University of London, 1955), 2 vols., unpublished, I, 82.

3. A. Gledhill, 'Burmese Law in the Nineteenth Century with Special Reference to the Position of Women', Journal of World History, 7 (1962), 172-194; part of LLD. thesis (1958), IALS, Pamphlet, typed, GT 19.B 50169f, f.1; also 'The Status of Women in Burmese Law', Recueils de la Société Jean Bodin, Tome 11 (1959), 269-273 at 269. On Gledhill's opinion, see Derrett, OL 58 (1963) 7-8: 393.

4. M. Htin Aung, Burmese Law Tales, op.cit., 13. Htin Aung's method was criticised by M.K. Swi, The Judicial System in the Kingdom of Burma, op. cit., 320, but Swi also concluded that the greater portion of the law in the Dhammathats was the customary law of Burma, ibid., 347.

5. M. Maung, Law and Custom in Burma ..., op.cit., 5-6. This was also the opinion of U. Shwe Baw, Origin and Development of Burmese Legal Literature, op.cit., 574. From inscriptional materials Than Tun also could not find the mention of the dhammasaṭṭha literature earlier than A.D. 1249 and, that also

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that:

> the Hindu Code of Manu was used more as a model for legal treatises than for its contents; ... it was not Hindu law that the wise Manu expounded in the Burmese texts, it was Burmese law and custom, and Manu was the convenient and prestigious mouthpiece. 1

On the disclaimer of Burmese borrowing from Hindu law a long time ago, Jardine pointed out that 'the national vanity of the people keeps these facts in the shade; and they dislike to know or acknowledge the amount they have borrowed from India in law ...'[1 2] However, despite Jardine's pointer to the possible 'national vanity' of the Burmese scholars, the truth of the pro-Burmese view cannot be totally denied. And it is indeed to be accepted that, especially in the area of family law, the patriarchal and patrilineal values of the Aryan family, as propounded in the dharmasāstras neither coalesced[3] with Burmese customs nor could they obliterate the Burmese familial institutions.[4] Ethno-juridical writings strengthen the view that Burmese family

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Note 5 - p.246 - continued:

only once. From this, he concludes that 'there is no truth in the dhammasattha of Burma claiming antiquity', T. Tun, 'The Legal System in Burma A.D. 1000-1300', The Burma Law Institute Journal, 1 (1959) 2: 171-184 at 173.

1. M. Maung, Burmese Customary Law, loc.cit., 5.

2½ J. Jardine, 'Buddhist Law', IAQR 4 (1897) 8: 1-9 at 1.

3. On the structure of Burmese family, see M.K. Swi, The Judicial System in the Kingdom of Burma, op.cit., 346. M. Htin Aung, Burmese Law Tales, op.cit., introd., 5-6.

4. Aung, ibid., 5-6.

accords with the customary law of Southeast Asia.[1] Nevertheless, it should be stressed that the śāstra served as a model in form, and, where compatible with local customs, in substance as well, for Burmese legal writings, and undoubtedly the aura of Manu's name gave a moral validity to the common law of the people.[2]

b. Social organisation and family property

Burmese society was strikingly different from the Āryan society.[3] Although even at the present time, a few 'joint conjugal families'[4] may be found in Burma, Maung emphasises that 'there is no joint family as known to the Hindus ...'[5] In Burma, there was no such institution as ancestor worship, and there was no question of continuing the father's line through a son.[6]

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1. See Alan Gledhill, cited supra, 246, n.3.

2. In this respect, R. Lingat remarks, 'It will ascribe to the prescription of the dhammasattham the same transcending nature as those of the smṛtis though they do not come from the mouth of a divine being ...', ABORI 30 (1949), 284-297 at 296-7.

3. Aung, loc.cit., 5-6, 16.

4. M. Nash, The Golden Road to Modernity: Village Life in Contemporary Burma, (New York, 1965), 44-5, 49. In his study of 94 households, Nash found that 53 were nucleated units, 32 were extended conjugal families, and only 5 were joint conjugal families.

5. M. Maung, Law and Custom in Burma, op.cit., 6-7. Also Chan-Toon, The Principles of Buddhist Law also containing a Translation of Important Portions of the Manu Thara Shwe Myin, (Rangoon, 1903), 104.

6. M.H. Aung, Burmese Law Tales, op.cit., introd., 16.

Than Tun informs us that 'we find records using the word amuv meaning the property either the land or the slave that came down from ancestors'[1] but such property has no special significance as known to the Hindus.[2] The Burmese concept of joint property of spouses conforms to the prevalence of the system in Southeast Asia.[3] The spouses held equal interests in all Lettetpwa[4] property, and a husband cannot alienate joint property, acquired by either of them before or during the marriage, without the consent of the wife.[5]

The rules of intestate succession in Burma were quite different from the Hindu system. Inheritance did not depend on the capacity of the heirs to take part in offerings to the spirit of the deceased.[6] When we come to the theme of son's right in father's property, we find that Burmese law is in contraposition to the Mitākṣarā system, nor does it come anywhere near the Dāyabhāga variation. It is a doctrine of Burmese law that no child at birth acquires any

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1. T. Tun, 'The Legal System in Burma A.D. 1000-1300', BLIJ 1 (1959) 2: 171-184 at 180.

2. M. Maung, Law and Custom in Burma, op.cit., 7. Cp. Yājñ.II.121.

3. To some extent joint property of spouses is found in Malay adat law, E.N. Taylor, 'The Customary Law of Rembau', in M.B. Hooker, ed., Readings in Malay Adat Law, op.cit., 109. Also among the Kalingas, infra, 272. Also Kandyan, supra, 241.

4. Lettetpwa means property which accrues to the family through one or both of the spouses by inheritance, gift or earning, Maung, loc.cit., 90-1.

5. Cp. the concept of a communio bonorum in the text: dampatyor madhyagaṃ dhanaṃ, for a discussion on this text, see Derrett, BSOAS, 18 (1956) 3: 490, n.4.

6. M. Maung, loccit., 6.

interest in the property of his or her parents.[1]

Although testamentary disposition was unknown,[2] the parents had the absolute right to transfer their property inter vivos,[3] and an heir could claim a share only on the death of the person from whom he or she was entitled to inherit.[4] At the death of a parent, sons and daughters both inherit with the spouse relict.[5] Although Buddhist philosophy enjoins equality for all

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1. Dhammavilasa, XIV.3, cited by U. Shwe Bau, Origin and Development of Burmese Legal Literature, op.cit., 385. S. Vesey-Fitzgerald, 'Hindu', sub. 'Law', En.So.Sci., IX, 257-262 at 260. M.T. Gywe, A Treatise on Buddhist Law, (Mandalay, 1910), 65. Chan-Toon, The Principles of Buddhist Law, op.cit., 104. Also Ko-zaung-kyop, or Navadhammasattham, see Forchhammer, Jardine Prize Essay, op.cit., 68. Note the mistake of Gywe when he says that the Mitākṣarā rules were applicable to Bengal, ibid., 65.

2. Chan-Toon, The Principles of Buddhist Law ..., op.cit., 99. O.H.Mootham, Burmese Buddhist Law, (O.U.P., 1939), 69. M. Maung, Law and Custom in Burma ... , op.cit., 103. Gradually, testaments developed in Burma, A. Fuehrer, 'Manusaradhammasattham the only one existing Buddhist Law Book Compared with the Manavadharmasastram', Journal of the Bombay Branch of the Royal Asiatic Society, 15 (1882), 329-338, 371-382 at 372. Than Tun disagrees with the view that wills were unknown in Burma. He says, 'the practice in old Burma, I am afraid, was just the contrary', 'The Legal System in Burma A.D. 1000-1300.', BLIJ 1 (1959) 2: 171-184 at 171.

3. Chan-Toon, ibid., 104.

4. O.H. Mootham, Burmese Buddhist Law, loc.cit., 86.

5. J. Jardine, Notes on Buddhist Law, VI, translation by MOung Theka Phyoo of the Law of Inheritance according to the Mahavicchedani Dhammathat from Burmese manuscript, ed., E. Forchhammer, This Dhammathat was written in c.1832 A.D. by Rajabala Kyawdin - the most recent of the Burmese Dhammathats, (Rangoon, 1883), ss.1-4, 1. Also Manoo Wonnana Dhammathat, tr. S. Minus, J. Jardine, Notes on Buddhist Law, V, s.10. Wagaru Dhammathat, tr., E. Forchhammer, (Rangoon, 1892), s.2, 1.

children in respect of inheritance, irrespective of their age and sex, the eldest child in Burmese law has a special position.[1] The eldest son steps into the position of the father at the latter's death and the eldest daughter into that of her mother, thus becoming, the orasa[2] with a right to a fourth share of the estate.[3]

We cannot say with certitude that the position of the eldest in the Burmese law of intestate succession was a reflection of the *śāstra*, because in Southeast Asia, a similar preference for the eldest is well-known.[4] The position of the wife as a consort in respect of property, and daughter's entitlement to a share in the estate along with the sons, were concepts not totally un-

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1. O.H. Mootham, Burmese Buddhist Law, op.cit., 91.

2. orasa has been borrowed from Sanskrit and is a corruption of aurasa. In Burma, it acquired a special meaning; it came to signify a son who by virtue of his position, would assume to the duties of the father, being vested with a defined right in the paternal estate. In course of time, the position was extended to daughters, Mootham, ibid., 91.

3. We are to note that among the Chin tribes, equal share for all children was the custom, Maung Tet Pyo's Customary Law of the Chin Tribe, (Rangoon, 1884), s.64, 5.

4. See our discussion on Ifugao law, infra,269 . Also Kalingas, infra,272 . The custom was also accommodated in the Hinduized laws of Java, infra,256.

known[1] or outrageous to the śāstra, but never juridically recognized. So, concepts which were not followed in the mainland of India could hardly be imputed as śāstric manifestations in a foreign soil.

People, although ethnographically different, may present isolated parallels in their customs. But, when customary norms are measured in terms of their respective socio-cultural matrices, the general juridical pattern comes to the fore. The Dhammathats like the Manusmṛti, speak of the patriarchal power of the father over his family and children.[2] For instance, a father could sell a child into slavery and could chastise it for correction. This authority may sound familiar to scholars steeped in the dharmaśāstras; but the Āryan concept of patriarchal power[3] does not harmonise with the Burmese social organisation and their rules of intestate succession.

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1. On traces of communio bonorum between spouses among the Hindus, cp. the text: dampatyor madhyagaṃ dhanaṃ, 'wealth is common between spouses', on the antiquity of the text, see Derrett, 'An Indian Contribution to the study of Property', BSOAS 18 (1956) 3: 475-498 at 490, n.4. One school of thought in Hindu legal philosophy advocated that daughters and sons should have equal rights of inheritance, for relevant texts and discussion, see A.S. Altekar, 'The Daughter's Right of Inheritance', in P. Seshadri, ed., Har Bilas Sarda Commemoration Volume, (Ajmer, 1937), 217-223 at 219. However, Altekar's views, in this respect, are to be taken with a grain of salt.

2. M. Maung, Law and Custom in Burma, op.cit., 45. D. Richardson, The Dhammathat or The Laws of Menoo, (Rangoon, 1874), IV, 121. Maung rejects the power of the father over the children and of the husband over his wife by saying that 'this power was more true in theory than in practice', ibid., 45. But a recent study on this point runs counter to the remarks of Maung, G.A. Theodorson, 'Attitudes of Burmese Men and Women to Male Dominance in the Family', JBRS 51 (1968) Pt.1: 17-21 at 17-18.

3. Maung, ibid., 45. Patria potestas was absent in Burma, U. Shwe Baw, Origin and Development of Burmese Legal Literature, op. cit., I, 428.

IV. Indonesia

a. Hinduization

From the beginning of the Christian era, as a consequence of commerce and cultural expansion, the presence of Hinduism was recognised in some of the Indonesian islands,[1] and since then Hindu culture has survived up to the present time in the island of Bali.[2] Apart from the religious and cultural aspects of Hinduism, the Javanese and the Balinese were greatly interested in the juridical aspect of dharma.[3]

The peregrination of the dharmaśāstras is revealed in their written law-codes[4] which contain a 'considerable number of passages borrowed from the famous Mānavadharmaśāstra and other Indian sources ...'[5] However, despite

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1. P.J. Chinmulgund and V.V. Mirashi, ed., M.M. Chitraoshastri Felicitation Volume: Review of Indological Research in Last 75 Years, (Poona, 1967), 323-4. J. Gonda, 'The Presence of Hinduism in Indonesia: Aspects and Problems', India's Contribution to World Thought and Culture: A Vivekenanda Commemoration Volume, (Madras, 1970), 535-554 at 535.

2. J. Gonda, ibid., 549.

3. J. Gonda, ibid., 544. Also R.C. Majumdar, 'Hindu Law in Java and Bali', Krishnaswami Aiyangar Commemoration Volume, (Madras, 1936), 445-61 at 445; Ancient Indian Colonies in the Far East, (Calcutta, 1938), II, Pt.II, 1 and 7.

4. Main Javanese legal works are: Sāra Samucaya; Sāra Jambu; Śivaśāsana; Ādigama; Pūrvādigama; Deva Daṇḍa; Dharma Vicāra; Devagāma or Kṛtopapati; Dharmopapati; Kutāra-mānava-śāstra; Gajaḥ Mada, see R.C. Majumdar, Krishnaswami Aiyangar Felicitation Volume, ibid., 445-6. Also Slametmuljana, The Story of Majapahit, (Singapore University Press, 1976), 104.

5. J. Gonda, loc.cit., 544.

their debt to the *śāstra*, the juridical literature of Java and Bali establishes that the *śāstric* rules were modified [1] to adjust to the social organisation and customs of the local population.

The most famous of the Hinduised law-codes of Java and Bali was the *Kutāra-mānava-śāstra*, [2] and it was regarded as the highest authority in the flourishing period of the Majapahit empire (c.1222 - 1527 A.D.).[3] The *Kutāra-mānava-śāstra* deals with various topics of civil law, such as debt, pledge, property, inheritance, and regulations about women and slaves.

b. The society depicted in the juridical works

The picture of society during the Majapahit time betrays strong borrowings from the Hindu view of life. The Hindu social stratification of four castes (*varṇa*) and division of human life into four stages were well recognised.[4] The family was patriarchal; in the household, the father was head and manager of the joint family property.[5] A father's power of chastising a son as ordained by Manu [6] is restated in the juridical literature of Java.[7] According to the

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1. R.C. Majumdar, loc.cit., 445. J. Gonda, ibid., 544. Slametmuljana, loc.cit., 104.

2. Slametmuljana believes that the *Kutāra-mānava-śāstra* could be the result of a combination of two works, namely *Mānava-śāstra* and *Kutāra-śāstra*, *The Story of Majapahit*, op.cit., 105.

3. R.C. Majumdar, *Krishnaswami Aiyangar Commemoration Volume*, op.cit., 447. Slametmuljana, ibid., 104.

4. Slametmuljana, ibid., 106-7.

5. Slametmuljana, ibid., 114.

6. Manu, VIII, 299-300.

7. R.C. Majumdar, loc.cit., 455.

Kutāra-mānava-śāstra (§78) a father could formally discard a son, and this resulted in disherison.[1]

c. Inheritance and the position of a son

The twelve classes of sons detailed by Manu[2] found acceptance, with insignificant variations, in the Kutāra-mānava-śāstra (§259).[3] The influence of the Hindu caste system is reflected in the laws of inheritance and, in tune with Manu (IX.153), the shares of the children used to vary according to the caste of the mother - 'the higher the caste of the mother, the bigger was the portion inherited by her children'.[4] Up to this point, the Javanese Codes

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1. 'If a child is repudiated, the father and the mother no longer wishing to consider it as their child because it behaves badly, evidence of this must be given to the headman of the village or district; the father shall give the child rice and water for bathing and washing, also tëpung Tawar; there must also be witnesses present so that the repudiation is proved; if this has taken place the child may not take the goods of its parents, but neither may it be called upon to pay their debts'. J.C.G. Jonker, Een Oud-Javaansch Wetboek Vergeleken Met Indische Rechtsbronnen, (Leiden, 1885), §78, 113, tr. from Dutch by Ronald Quick, language teacher, formerly of Holborn College, London.

2. Manu, IX.158-60; for a discussion, see infra, 760-64.

3. R.C. Majumdar, Krishnaswami Aiyangar Commemoration Volume, op.cit., 460.

4. Slametmuljana, The Story of Majapahit, op.cit., 114. Also Majumdar, ibid., 459. 'If a Brahmin has taken four wives, so that his children are of different castes, he must divide his possessions into eleven parts; he may not give an equal part to the child born of a woman of the Brahmin caste as to the children born of a woman of the Kṣatriya, Vaiśya or Śūdra caste; this is law throughout the world', J.C.G. Jonker, Een Oud-Javaansch Wetboek Vergeleken Met Indische Rechtsbronnen, (Leiden, 1885), §258, 157, tr. Ronald Quick.

show a striking similarity to the śāstra; but, in details of intestate succession, we realise that the common law of Southeast Asia asserts itself with vigour.

According to the rules of inheritance in the Javanese law codes, the eldest male child was entitled to an additional share,[1] and in some extreme cases, he inherited four-fifths (catur uddhāra) of the estate.[2] The remaining fifth part would go to his younger siblings.[3] Indeed, some dharmaśāstras mention[4] the preferential share of the eldest, but the lion's share of four-fifths is nowhere ordained for him. In contradistinction with the Code of Manu, according to which daughters do not inherit in the presence of sons,[5] the Java-

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1. Majumdar, ibid., 459.

2. 'If anyone has several children of his marriage to a woman, and then dies the eldest son may take a larger share of each estate in advance, which according to the Āgama is called udahara; the size of this is as follows: if the household effects are many, he may take a large part in advance, if they are few, then only a small part, so that the uddhāra may amount to one, two, three or four tahils according to the goods to be distributed. The greatest quantity which may be taken is defined as follows: the household effects must be divided into five parts; if the father has made ornaments from five tahils of gold of similar shape and similar appearance, the eldest of the brothers may take four parts thereof; whilst the remaining part must be divided equally among the younger brothers; all effects must be dealt with in this way; it is not permitted, however, for him to take pantjoddhāra, i.e. five parts, and the brothers jointly must receive one part; the largest quantity he may receive more than his brothers is four parts, caturuddhāra; if the eldest brother behaves thus he shall gain a long life', Jonker, loc.cit., §197, 143-4, tr. Quick.

3. Kutāra-mānava-śāstra, §197, cited by Majumdar, ibid., 459.

4. Infra, 376, 379-80.

5. Manu, IX.185.

nese law books imply that, after the eldest son has taken his preferential share, the rest of the property used to be divided equally among all the brothers and sisters.[1]

Another peculiarity of the rules of intestate succession in the Javanese law books is 'that the children inherit the property of both the father and the mother, which is different from the Hindu laws'.[2]

Although Majumdar was puzzled by the peculiarities of Javanese law, all the three rules, namely, the privileged position of the eldest son, the entitlement of daughters to share the inheritance with their brothers, and the children inheriting the properties of both the father and the mother - are found almost everywhere in the customary law of Southeast Asia.[3]

d. The adat law of the Indonesians

The conspicuous presence of customary rules in the Hinduized codes of Java turns our interest to the local customary law of the Indonesians. Indeed,

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1. On this point, a recent study on Bali by Hildred Geertz and Clifford Geertz show that when the daughters marry, they lose all claims to inherit from their father, but if they remain unmarried and continue to live in the father's house they receive half as much as brothers of equivalent status. However, daughters, in most cases, irrespective of their marital status, receive from their father a large portion of property as gift, H. Geertz and C. Geertz, Kinship in Bali, (Chicago/London, 1975), 142. For the Hindu law situation on this point, see Derrett, A.I.R. 1965 J., 34; JILI 9 (1967) 4: 559; Critique, §§ 124-6.

2. R.C. Majumdar, Krishnaswami Aiyangar Commemoration Volume, op.cit., 459.

3. The first two are found in the śāstra but never juridically recognised, supra, 251-252, 256, n.4. On the third, see our discussion on Ceylon, supra, 241.

the adat law,[1] or the local legal traditions of the Indonesians, was heterogeneous. From the diverse customs of the people, one can set up some generally valid rules 'but no single rule has the same external form in all law-areas'.[2] B. ter Haar illustrates this point further:

> The rule that at the death of a native possessor, the children take precedence is only half-true in the Batak lands; namely, only with respect to the sons (although in this connection, the property which has been given to the daughters must not be left out of consideration). In Minankabau, it is only half true; namely, only with respect to the mother. Inheritance from the father goes to his sister's children and not to those of his wife. In the Lampongs, it is only half-true, insofar as there only the oldest child inherits, although he has the duty of treating the family of the father as his own family. The rule that after the death of the native possessor the estate remains undivided under certain circumstances brings about a different situation 3 in the Minahasa than among the Minangkabau, and in Bali and Java.[3]

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1. adat (Arabic = custom) includes the oral legal traditions of the tribal people of the mountainous regions of Sumatra, Borneo and Celebes, B. ter Haar, Beginselen en Stelsel van het Adatrecht, (Groningen/Batavia, 1939), tr. E.A. Hoebel and A.A. Schiller, sub.tit. Adat Law in Indonesia, (New York, 1948), 3, 5. Also on adat, see R.J. Wilkinson, 'Malay Law', in M.B. Hooker, ed., Readings in Malay Law, (Singapore, 1970), 1-47 at 14-5.

2. ter Haar, ibid., 195.

3. ter Haar, ibid., 195-6. With this one may add the observation of Van Vollenhoven: 'Adat law can only be understood if one never loses sight of the pronounced communal characteristics of Javanese-Madurese life . ... because all rights are understood and applied in such a way that - unlike Roman law, where the individual element predominates - the interest of the community is centred on the use of which the individual's property is put', C. Van Vollenhoven, Het Adatrecht van Nederlandsch-Indië (Leiden, 1918) (The Adat Law of the Netherlands East Indies), tr. and quoted by H.W.J. Sonius, Introduction to Aspects of Customary Land Law in Africa as Compared with Some Indonesian Aspects, (Leiden, 1963), 28. Diaz also informs us that in central Java, ownership of land rests in the village community as a unit, M.N. Diaz,

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Besides these varieties and divergences, one should note that the extended possessions (harta pusaka) of Minangkabau and the extended family lands (dati) of the Hitu Peninsula of Ambon present a corporate regime. According to the customs of these areas 'every child that is born is a participant in the complex of persons which possesses extended family property ... The death of the individual man or woman leaves the complex undisturbed'.[1] The system exhibits an institution approximately analogous to the Mitākṣarā coparcenary, with the difference that the females[2] are also included in the complex, and partition of the property by the members was never allowed.[3] Undivided property of the extended family was a real means of keeping the extended family relationship intact through successive generations.

The self-acquired property of a person may pass on his death as an undivided unit to his descendants, and during the lifetime of the acquirer they

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Note 3 - p.258 - continued:

'Introduction: Economic Relations in Peasant Society', in J.M. Potter, M.N. Diaz and G.M. Foster, ed., Peasant Society: A Reader, (Boston, 1967), 50-56 at 52. Also E.R. Wolf, 'Closed Corporate Peasant Communities in Mesoamerica and Central Java', in Peasant Society, ibid., 230-46 at 231.

1. B. ter Haar, Adat Law in Indonesia, op.cit., 196.
2. See Critique, §§ 149-53, on the role of females in Hindu joint family property.
3. In Minahasa partition of the complex was allowed provided all members consented, ter Haar, ibid., 198.

stood as 'waris'[1] in relation to the possessions.[2]

The foregoing discussion suggewts that among some Indonesian peoples ascendants and descendants enjoyed co-ordinate rights in the family property; however, considered in a comparative context with the Mitākṣarā birthright, the two systems, though providing conceptual parallels, exhibit substantive realities under differing social systems and kinship[3] organisations, which should not be overlooked.

V. Malaysia

a. Ethno-juridical background

Although geographical and political boundaries separate the Malays from the Indonesians, ethnologically speaking, they are indistinguishable.[4]

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1. The term waris, derived from the Arabic term warith, means simply 'heir; inheritor', R. Firth, 'Relations between Personal Kin (Waris) among Kelantan Malays', in R.J. Smith, ed., Social Organization and the Applications of Anthropology: Essays in Honor of Lauriston Sharp, (Cornell University Press, Ithaca/London, 1974), 23-61 at 33.

2. ter Haar, loc.cit., 197.

3. We are to note that the people of Minangkabau were matriarchal. A. J. Barnouw, 'Cross Currents of Culture in Indonesia', FEQ 5 (1946) 2: 143-151 at 143. Also E.M. Loeb, 'Social Organization and the Long House in Southeast Asia and Micronesia', FEQ 6 (1947) 2: 168-172 at 169.

4. B. ter Haar, Adat Law in Indonesia, op.cit., introd., 1.

It is generally accepted that the Peninsular Malays emigrated from the Menangkabau highlands of Sumatra, though all of them did not travel at the same time nor follow the same route.[1]

Those who came directly to Malaya brought with them the matriarchal adat perpateh pinang sa-batang from Menangkabau, while those who came through Pelembang brought with them the patriarchal, adat tememgong.[2] The ancient Malay kingdom of Pelembang[3] came under the influence of the Hindu civilization of Java. The Hinduized juridical influence of Java replaced the Menangkabau custom of matriarchy with alternative patriarchal norms.[4] Thus, the group of people from the highlands of Sumatra who sojourned in Pelembang brought to Malaya, not their original matriarchal adat, but a Javanese-oriented Āryan conception of patriarchy.

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1. P.E. de Josselin de Yong, Minangkabau and Negri Sembilan: Socio Political Structure in Indonesia, (Leiden, 1951), 9. R.J. Wilkinson, 'Malay Law', in M.B. Hooker, ed., Readings in Malay Adat Laws, (Singapore, 1970), 1-47 at 7.

2. For a discussion on these two types of Adat, see P.E. de Josselin de Jong, ibid., 30-2 and 168-72.

3. The Hindu kingdom of Pelembang or 'Sarbaza' flourished between A.D. 900 and 1375. The kingdom was ultimately destroyed by the Majapahit empire of Java, R.J. Wilkinson, 'Malay Law', loc.cit., 30.

4. R.J. Wilkinson, ibid., 38. On the influence of sāstric law in Malaya, see P.P. Buss-Tjen, 'Malay Law', in R. Khan and S. Kumar, ed., An Introduction to the Study of Comparative Law, ILI, New Delhi, (Bombay, 1971), 125-6.

b. Adat perpateh

In the relevant situations, the two types of adat are found to co-exist in Malaya.[1] Adat perpateh is predominant in the states which constitute the modern Negri Sembilan.[2] The social organisation in this area is matriarchal.[3] In matriarchal communities, descent passes through the female line, so in Negri Sembilan a man remains a member of his mother's tribe until by marriage he is received into the fold of his wife's tribe.

Unlike the patrilineal system, the inferior position of the male under matriarchy is reflected in the rules of adat perpateh concerning property. According to the customs followed in Rembau, a man is excluded from the ownership of land. He may work on the land owned by his mother, sister or his wife but, excepting maintenance out of the proceeds, he has no other right.[4]

However, in Rembau a couple may own joint property acquired by

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1. J.M. Gullick, 'Sungei Ujong', Journal of the Royal Asiatic Society - Malayan Branch, 22 (1949) 2: 1-69 at 18.

2. The name Negri Sembilan traditionally implied a grouping of nine states, but the actual number of the states varied from time to time, M.B. Hooker, Readings in Malay Laws, op.cit., Appx.III. It should not be overlooked that even in the predominantly matrilineal system of Negri Sembilan, there are patrilineal traits, M.B. Hooker, Adat Laws in Modern Malaya; Land Tenure, Traditional Government and Religion, (O.U.P. Kuala Lumpur/London, 1972), 30.

3. R.J. Wilkinson, 'Malay Law', in M.B. Hooker, ed., Readings in Malay Adat Laws, op.cit., 1-47 at 12.

4. R.J. Wilkinson, ibid., 27-8.

their joint effort,[1] a feature not uncommon in other parts of Southeast Asia.[2] A man could own separate property which he acquired before marriage. Such property would devolve on his death to the nearest female descendant.[3]

Under adat perpateh, which is a matrilineal system, there is hardly any scope for the emergence of a proprietary relationship between father and son; More appropriately, it could be compared with the matrilineal system of the Malabar Hindus.[4]

Despite this difference which contrasts with the Mitākṣarā system, the features of ancient law in respect of ownership of ancestral property are present in adat perpateh. Although ancestral property vests in the female members, they actually hold it as trustees for the tribe rather than as owners.[5]

However, for our present purpose, except for noting the peculiarities of adat perpateh in the context of SoutheastAsian primitive law, further ramification on the concept would be extraneous to our theme.

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1. E.N. Taylor, 'The Customary Law of Rembau' in M.B. Hooker, ed., Readings in Malay Adat Law, loc.cit., 109-158 at 109.

2. See supra, 249.

3. P.P. Buss-Tjen, 'Malay Law', in An Introduction to the Study of Comparative Law, op.cit., 124.

4. On Malabar matrilineal families, see Derrett, IMHL, §572; §§576-80. Also infra, 954-58.

5. E.N. Taylor, 'The Customary Law of Rembau', in M.B. Hooker, ed., Readings in Malay Adat Law, op.cit., 109-158 at 126.

c. Adat temenggong

The adat temenggong which betrays Hindu influence could not obliterate the matrilineal customs of the people. However, it penetrated the aristocratic aspects of life. Thus, succession to titles and dignities in Perak follows the male line, while succession to lands and houses is governed by adat perpateh.[1] This co-existence of the matriarchal adat with Hinduized patriarchy is a triumph of the original customs of the simple societies which, in a later period, despite the onslaught of Islam, remained considerably unshaken.[2]

VI. The Philippines

a. Introduction

At an early period, Indian cultural influence spread to the Philippines, though not directly from Indian soil but through Indo-China, and especially

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1. E.N. Taylor, 'Aspects of Customary Inheritance in Negri Sembilan', in M.B. Hooker, ed., Readings in Malay Adat Law, op.cit., 159-249 at 163. P.E. de Josselin de Jong, Minangkabau and Negri Sembilan, op.cit., 168. For further explanations of this point, see M.B. Hooker, Adat Laws in Modern Malaya, op.cit., 28-31.

2. See E.N. Taylor, ibid., 163. J. Minattur, 'The Nature of Malay Customary Law', Malay Law Review, 6 (1964), 327-52. The Malayan Digests show that the laws of marriage and divorce were oriented by Islam but in the matter of inheritance, the Quranic precepts had to compromise with local customs, tr. J. Rigby and ed., R.J. Wilkinson,'The Ninety-nine Laws of Perak', in M.B. Hooker, ed., Readings in Malay Adat Law, loc.cit., 51-82 at 51, and ¶ 33 at 66. In fact, in respect of inheritance, adat perpateh is still surviving in Negri Sembilan, see M.B. Hooker, 'Adat and Islam in Malaya', Malaya Law Review Legal Essays, ed., G.W. Bartholomew, (Singapore, 1975), 164-87 at 181.

through Java.[1] From our study of Hinduized jurisprudence in Burma and Indonesia, we can form a broad idea of the reception of the *śāstra* in the Philippines.

However, it is not so much the course of *śāstric* law in the Philippines that interests us as the norms and customs of the indigenous population. The customary law of the different races of the Philippines,[2] being the behavioural norm of these unsophisticated peoples, is very likely to shed light on the concept of the *Mitākṣarā* birthright, which itself seems to be the result of a symbiosis, mainly of two simple societies namely, the Āryans [3] and the Dravidians.[4]

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1. The Srivijaya empire extended to the Philippines from Sumatra in the 11th century A.D. and two centuries later (c. 1377 A.D.), the Mahapajit empire of Java made its influence felt in Manila and Sulu, M. Trosdal, 'Foreign Influences on Cebuano-Bisaya', in R. Rahmann and G.R. Ang, ed., *Dr. H. Otley Beyer, Dean of Philippine Anthropology: A Commemorative Issue,* (The University of San Carlos, Cebu, Philippines, 1968), 63-70 at 64.

2. On general racial classification of the natives of the Philippines, see H.W. Krieger, 'Races and Peoples in the Philippines', FEQ 6 (1945) 2: 95-101. H.O. Beyer and J. De Veyra, *Philippines Saga,* (Manila, 1947); summarised by J.B. Bailen, 'Studies in Physical Anthropology on the Philippines', in M.D. Zamora, ed., *Studies in Philippine Anthropology,* (In Honor of H. Otley Beyer) (Quezon City, Philippines, 1967), 527-58 at 537-8.

3. According to Marija Gimbutas, the history of the Aryans goes back to 5th millennium B.C., M. Gimbutas, 'Proto-Indo-European Culture: The Kurgan Culture during the Fifth, Fourth and Third Millennia B.C.', in G. Cardona, H. Hoeningswald and A. Senn, ed., *Indo-European and Indo-Europeans,* (Philadelphia, 1970), 155-97; also 'The Beginning of the Bronze Age in Europe and the Indo-Europeans: 3500-2500 B.C.', *Journal of Indo-European Studies,* 1 (1973), 163-214. The view is endorsed by P. Harbison, 'The Coming of the Indo-Europeans to Ireland: an Archaeological Viewpoint', JIS 3 (1975) 2: 101-19.

4. On the antiquity of Dravidian culture, see S. Fuchs, 'The Dravidian Problem', *Journal of the Asiatic Society of Bombay,* 41-2 (1966-67), 153-63 at 161. Also J.R. Marr, 'The Early Dravidians', in A.L. Basham, ed., *A Cultural History of India,* (Oxford, 1975), 30-7 at 33.

b. The Ifugaos of Northern Luzon

Anthropological data are complementary to the study of comparative jurisprudence,[1] and Roy Franklin Barton, an anthropological behaviourist, made a classic contribution in this field by studying the customs of the Ifugaos[2] of the Philippines. The Ifugaos, who practice terraced cultivation of rice[3] as their main livelihood, 'have developed through the ages a most elaborate system of substantive property law and personal law'.[4]

The Ifugao people are divided into a large number of hereditary clans who are believed to be descended from a common ancestral pair[5] and like many

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1. E. Cotran and N.N. Rubin, ed., Readings in African Law, 2 vols., (London, 1970), I, introd., xvii.

2. Of the three great racial stocks native in Southeast Asia, namely the Negrito, Pre-Dravidian or Veddoid and the Malayan or Maritime Mongols, the Ifugao belongs to the Indonesian subrace of the Malayan race, J.J. Roginsky and R.F. Barton, 'Ifugao Somatology', Philippine Journal of Science, 74 (1941), 349-65.

3. E.P. Dozier, The Kalinga of Northern Luzon, Philippines, (New York, 1967), 2. R.M. Lopez, 'The Origin of the Rice Terraces in Luzon and Their Presence in the Island of Cebu, Philippines: A Brief Review of Hypotheses' ined., R. Rahmann and G.R. Ang, Dr. Otley Beyer Commemorative Issue, (The University of San Carlos, 1968), 31-42.

4. E.A. Hoebel, in R.F. Barton, The Kalingas: Their Institutions and Custom Law, (Chicago, 1949, rpt., AMS, New York, 1973), introd., 3.

5. O.H. Beyer and R.F. Barton, 'An Ifugao Burial Ceremony', Philippine Journal of Science, 6 (1911) 5: 227-52 at 228.

people in the world they relate the living to their ancestors.[1] This unbroken chain of relationship between 'the dead, the living and yet unborn'[2] is reflected in the Ifugao attitude toward family property. In this respect, Barton states that:

> the Ifugao attitude is that lands and articles of value that have been handed down from generation to generation cannot be the property of any individual. Present holders possess only a transient and fleeting possession, or better, occupation, insignificant in duration in comparison with decades and perhaps centuries that have usually elapsed since the field or heirloom came into the possession of the family. Their possession is more of the nature of a trust than an absolute ownership - a holding in trust for future generations. 3

Among the Ifugaos, parting with family property was considered a misfortune.[4] However, a field could be sold in order to provide animals to

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1. F. Eggan, 'Some Aspects of Bilateral Social Systems in the Northern Philippines', in M.D. Zamora, ed., Studies in Philippine Anthropology, op.cit., 186-203 at 198.

2. E.A. Hoebel, The Law of Primitive Man, (Cambridge, H.U.P., 1954), 104-5. Cp. Vyāsa, Dh.K. 1587; Jhā , HLS, I, 276: ye jātā ye'pyajātāś ca ye garbhe vyavasthitāḥ / in the Hindu law context, see the text infra, 340, n.3.

3. R.F. Barton, Ifugao Law, (University of California Press, Berkeley/Los Angleses, 1969), 32. Cp. the fiduciary position of a manager of Hindu joint family, Derrett, IMHL, §426. In ancient Roman law, a paterfamilius was considered as a trustee of an inalienable heredium, En.Br., 11th ed., Vol.23, 531.

4. Barton, ibid., 32.

accompany the spirit of a deceased ancestor or in order to provide animals for sacrifices to secure the recovery from serious illness of some member of the family.[1] A family's attachment to ancestral property was greater than that to acquired property,[2] and this is proved by the fact the sale price of ancestral property was considerably higher than that of acquired property even though the intrinsic value of both be the same.[3] Selling of family property, even in cases of family necessity, must be done with the consent of the members of the family.[4]

From the age of ten or twelve, an Ifugao child 'begins to look upon his parents' property as his own, or at least that portion of it that will fall to his share'.[5] Normally, parents hand over their properties to the children

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1. Barton, ibid., 32. Cp. Hindu law, āpatkāle kuṭumbārthe dhamārthe, Bṛ. cited, Mita, I.1.28; Dh.K.1588b.

2. Inśāstric literature, similar importance is attached to ancestral property, Bṛ. 15.6, Dh.K.803b; Bṛ .15.2, Dh.K.802a; Bṛ .15.5, Dh.K.803a; the implication of Bṛ .14.5, Dh.K.803 and Bṛ .26.58-9, Dh.K.1222a is also the same. In South India and Ceylon also 'sale outright of ancestral property is so obnoxious to its owners, however impoverished they may be, that they will go to any lengths to avoid it', Derrett, 'Kutta: A class of Land-Tenures in South India', BSOAS 31 (1958) 1: 61-81 at 66.

3. Barton, ibid., 33.

4. Barton, ibid., 34.

5. R.F. Barton, Ifugao Law, op.cit., 31. Cp. the Mitākṣarā rule where ownership accrues at birth, Mita, I.1.27.

as soon as they are able to marry and care for themselves.[1]

Whether property is passing by assignment or inheritance, children of both sexes are entitled to their parents' property, [2] and the elder children inherit greater portions of the property than the younger ones and the proportional share is determined by the ordinal rank of the children as to their birth.[3]

The entitlement of the female children to succedd and the practice of gradual primogeniture are in contrast with the Mitākṣarā system, but the Ifugao attitude to family property, the children's looking upon their prospective share as their own and the absence of testamentary disposition [4] - are con - cepts not too distant, under a differential social organization, from the rationale

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1. Barton ibid., 31. Cp. the obsolete institution of Vānaprastha among the Hindus, infra, 385-402. Also the Japanese system of inkyo, supra, 304-6. Pre-mortem transmission of property is also known in other societies. Irish farmers pass on the control of the farmstead to their children when they marry, C.M. Arensberg, The Irish Countryman, (New York, 1937), cited by J.Goody, Death, Property and the Ancestors: A Study of the Mortuary Customs of the Lodagga of West Africa, (Stanford, California, 1962), 277-8. In 13th century England often the holder handed the tenement over to his heir, G.C. Homans, English Villagers of the Thirteenth Century, (Cambridge, Mass., 1941), 144. Similar custom prevails among the Mbugwe of Tanganyika, R.F. Gray, 'Positional Succession Among the Wambugwe', Africa, 23 (1953), 233-43 at 234-5. This is also found among the Fulani, Goody, ibid., 278. Goody points out that pre-mortem transfer is also 'intergenerational transmission', ibid., 279. He is apparently not imputing any element of co-ownership in pre-mortem transmission.

2. Barton, ibid., 44.

3. Ibid., 44.

4. Ibid., 47.

behind the concept of the Mitākṣarā birthright of a Hindu son.

c. The Kalingas

Barton's companion study of the Kalingas [1] is also a landmark in the comparative study of family law in India, with particular relevance to a system with a South Indian orientation, such as the Mitākṣarā birthright.

From anthropological studies and somatologic data, we know that the features of the Kalingas resemble Indian features,[2] a conspicuous variation from the other mountainous peoples of Luzon.[3] Among the Kalingas, Barton finds a strong infusion of Indian blood,[4] a revelation which suggests a close link between the ancient inhabitants of the Philippines and the proto-Indians. Thus, in a

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1. R.F. Barton, The Kalingas: Their Institutions and Custom Law (Chicago, 1949, rept. AMS, New York, 1973), The Kalingas have two major divisions, the Northern Kalinga and the Southern Kalinga. Barton's study is confined to the Southern Kalingas, F. Eggan, 'Forward', R.F. Barton, Ifugao Law, op.cit., xv. On the Northern Kalingas, see F. Eggan, 'Cultural Drift and Social Change', Current Anthropology, 4 (1963) 4: 347-55 at 350. Also for a fuller study, E.P. Dozier, The Kalinga of Northern Luzon, Philippines, (New York/London, 1967). The Kalingas are also rice cultivators like the Ifugaos, Dozier, ibid., 2.

2. Some of them are of decided 'Dravidian' type, R.F. Barton, The Kalingas, lop.cit., plate, VIII. Even without these studies, it is perfectly well-known that Kalinga is an Indian name.

3. J.B. Bailen, 'Studies in Physical Anthropology on the Philippines', in M.D. Zamora, ed., Studies in Philippine Anthropology, op.cit., 527-58 at 531. However, inhabitants of Cainta, Rizal are also thought to be of East Indian origin, R. Bean and F. Planta, 'Men of Cainta', Philippine Journal of Science, 6 (1911), 7-14.

4. R.F. Barton, The Kalingas, loc.cit., 13. This is also accepted by L.A. Estel, 'Racial Origin in Northern Indonesia', University of Manila Journal of East Asiatic Studies, 2 (1952), 1-20.

comparative context, and besides the contribution to anthropological understanding, great jurisprudential interest can be found in the folk-life of the Kalingas.

As we have stated earlier,[1] Barton's study was confined to the Southern Kalingas, but 'within the Kalinga community, whether north or south, the elementary family is dominant and makes up the household, sometimes with the addition of one or two parents or other relatives of the couple'.[2]

Kalinga parents have the power to chastise their children,[3] but the principal aims of parents is the welfare of the children and giving them a good start in life. According to customary practices in Kalinga, the parents hand over their entire property to the children and often lead lives of poverty thereafter.[4] In this respect, Barton says:

> It will probably be correct to say, then (1) that the properties of the parents become vested in the children _from their very birth_ [5]

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1. See n.1, p.270.

2. F. Eggan, 'Cultural Drift and Social Change', _Current Anthropology_, 4 (1963) 4: 347-55 at 350. Two or more nuclear families form the extended families of the Kalingas, E.P. Dozier, _The Kalinga of Northern Luzon_, op.cit., 17.

3. R.F. Barton, _The Kalingas_, op.cit., 65.

4. Barton, ibid., 66. This is also implied among the Northern Kalingas, Dozier, loc.cit., 27. Cp. Vānaprastha of the Hindus, infra,

5. Emphasis supplied.

> and (2) that the father, rather than the mother, holds the properties in trust. 1

This does not mean that the mother has necessarily less voice in apportioning property to the children.[2] Her rights are not inferior to those of her husband but 'he is the active member in carrying out the joint decision of the two'.[3]

Unlike the Mitāksarā system where father's property passes on to all the sons in equal shares, the Kalinga system is a peculiar combination of primogeniture and homoparental[4] inheritance. The eldest son inherits the best fields of his father and the eldest daughter, the best fields of the mother.[5] The younger children get the residue of parental property,[6] and their shares

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1. Barton, loc.cit., 114.
2. Barton, ibid., 116.
3. Barton, ibid., 116.
4. In a system of homoparental inheritance, the male children inherit from their father and the female children from their mother. However, among the Kalingas, when the eldest child is a daughter and the mother has considerably less wealth, then the daughter is often given the father's fields. In a reverse situation, the son is given the mother's fields, Barton, ibid., 115. To a certain extent, homoparental inheritance is found in the traditional custom of the Isnegs, living in the mountains of Apayo, a part of the present province of Kalinga-Apayo, H.R. Reynolds and L.K. Keyes, 'The Isneg Family', Part I, in H. Reynolds and F.B. Grant, ed., The Isneg of the Northern Philippines: A Study of Trends of Change and Development, (Anthropology Museum, Silliman University, Dumagaete City, Philippines, 1973), 106-7.
5. R.F. Barton, The Kalingas, op.cit., 115.
6. Barton, ibid., 116.

grow successively smaller after the second child.[1]

Despite many bipolar factors of the Mitākṣarā and the Kalinga systems regarding devolution of property to children, one common factor emerges from both, that is, the concept of innate right of children in the property of their parents.[2] In fact, in the Kalinga system, as in the Mitākṣarā, 'the children know their rights, and the force of custom, public opinion, and the influence of the kinship groups are so strong that even if the parent wanted to deprive the child of his rights, he could not'.[3]

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1. Barton, ibid., 117.

2. This innate right of children is a peculiarity of the Kalingas. The following studies of the customs of different peoples of Philippines establish that generally the children inherit after the death of their parents: M.N. Maceda, The Culture of the Mamanua (Northeast Mindanao): As Compared with that of the Other Negritos of Southeast Asia, (Manila, 1964), 94. F.L. Jocano, Sulod Society: A Study in the Kinship System andSocial Organization of a Mountain People of Central Panay, Monograph Series No.2, Institute of Asian Studies, (Quezon City, University of the Philippines Press, 1968), 237. The same rule among the pre-Spanish Visayans, M.J. Gamboa, An Introduction to Philippine Law, 7th ed., (New York, 1969), 63. On similar Isneg customs, see H. Reynolds, 'Patterns of Status and Role', in H .Reynolds and F.B. Grant, ed., The Isneg of the Northern Philippines, op.cit., 54-78 at 74; also in the same volume, H.R. Reynolds and L.K. Keyes, 'Family Routine and Life Cycle', 79-132 at 106. But see the property law of the Ifugaos who come closer to the Kalingas, supra, 267-69. The Kankanays of Bakun area share a number of traits in material culture, religion and social organization with the Ifugaos. But the children among the Kankanays do not inherit 'until after the death of their parents', M.C. Bello, Kankanay Social Organization and Culture Change, (University of the Philippines, 1972), 35, 80.

3. Barton, loc.cit., 115.

VII. Summing up

It may be recalled that at the beginning of our present discussion,[1] we pointed out that a survey of the reception of śāstric law in 'Farther India' would help us in understanding the historical development of the respective proprietary rights of father and son in the mainland of India. It is significant to note that in the available śāstra-oriented law of Southeast Asia, nowhere do we come across any semblance of a son's birthright in the property of his father.

Although sporadic borrowings from the dharmaśāstras of Yājñavalkya, Bṛhaspati[2] and Nārada[3] are noticeable in the legal literature of 'Farther India', it is indeed the Code of Manu which was the main source of inspiration in this region.

The most faithful adherence to Manu is found in Cambodia, heir to the ancient kingdom of Funan.[4] Robert Lingat points out that 'in Cambodia

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1. Supra, 237.

2. R.C. Majumdar, 'Hindu Law in Java and Bali', Krishnaswami Aiyangar Commemoration Volume, op.cit., 445-61 at 458.

3. R.C. Majumdar, ibid., 458. Also C. Eliot, Hinduism and Buddhism, op.cit., 67.

4. H.R.H. Kantol Norodam, 'Comments on the Law and Practice in Cambodia', in Studies in the Law of the Far East and Southeast Asia, (Washington, 1956), 75-83 at 75-6. Also K.K. Sarkar, Early Indo-Cambodian Contacts (Literary and Linguistic), (Visva-Bharati, Santiniketan, 1968), 4-6.

as in India, Manu was to be the sole legislator'.[1] We should mention that, although Cambodian society is Āryanised patriarchal,[2] the kinship system of ancient Khmer society was bilateral. Significantly, the succession to certain high priestly offices was matrilineal which, according to Kirsch, was more a political strategy than a general norm.[3] But in Cambodia also, as is expected, epigraphic evidences do not point to the existence of corporate ownership of property; an owner could dispose of his land at his pleasure.[4]

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1. R. Lingat, 'Evolution of the Conception of Law in Burma and Siam', Journal of the Siam Society, 38 (1950) 1: 9-31 at 12. In the Cambodian context, same view of A.B. Griswold and P. Na Nagara, 'A Law Promulgated by the King of Ayudhā in 1397 A.D.', Epigraphic and Historical Studies, N.4, JSS 57 (1969) 1: 109-48 at 109; also 'On Kingship and Society at Sukhodaya', in G.W. Skinner and A.T. Kirsch, ed., Change and Persistence in Thai Society: Essays in Honor of Lauriston Sharp, (Cornell University Press, Ithaca /London, 1975), 29-92 at 36, 72. Also S. Sahai, 'Rājyaśāstra in Ancient Cambodia', Vishveshvaranand Indological Journal, 9 (1971) 1: 151-63 at 159.

2. H.R.H. Kantol Norodam, 'Comments on the Law and Practice in Cambodia', in Studies in the Law of the Far East and Southeast Asia, op.cit., 75-83 at 76; but it is less authoritative than the Roman pater familias.

3. A.T. Kirsch, 'Kinship, Genealogical Claims and Societal Integration in Ancient Khmer Society: An Interpretation', in C.D. Cowan and O.W. Wolters, ed., Southeast Asian History and Historiography, (Cornell University Press, Ithaca /London, 1976), 190-202 at 191, 200-1.

4. M.C. Ricklefs, 'Land and the Law in the Epigraphy of Tenth-Century Cambodia', Journal of Asian Studies, 26 (1967) 3: 411-420 at 413-5.

The absence of a son's co-ownership with his father in the Hinduized law of 'Farther India' brings to the fore the particular commentatorial theory [1] that the śāstric literature, especially the Code of Manu, was not the origin of the concept of the Mitākṣarā birthright.

It is accepted that the highest cultural influence on 'Further India' emanated from South India,[2] and juro-politically this was supplemented by the undisputed Chola expansion [3] to the region. Had the concept of a son's birthright remained widely in vogue prior to Vijñāneśvara in South India, it should have left some mark in the legal literature of 'Farther India'. However, we know that Bhāruci [4] and Viśvarūpa [5] from the South, and Medhātithi [6] from the North mentioned the doctrine of a son's co-eval right with his father before Vijñāneśvara; thus, the absence of the concept in the Hinduized jurisprudence of 'Farther India' does not negate its existence as a norm; it lacked only a Vijñāneśvara to popularise and establish it on a solid juridical foundation.

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1. See the view of Jīmūtavāhana, infra, 535-6 . Vijñāneśvara also stressed the point that svatva was laukika. However, he relied on śāstric texts as well, infra, 514, n.3.

2. H.G. Quaritch Wales, The Making of Greater India, op.cit., 28.

3. On Chola expansion in Southeast Asia, see R.C. Majumdar, Hindu Colonies, (Calcutta, 1974), 38-9.

4. Infra, 460, n.1.

5. Infra, 471.

6. Infra, 459.

CHAPTER 10

CHINESE AND THE JAPANESE SYSTEMS

(1) Chinese Law

1. Background

In the north-east quadrant of the Asian landmass, separated by formidable natural barriers from other civilizations, lies China. It is a vast country with over three million square miles of territory.[1] The Chinese civilization is one of the oldest, and it may be claimed that from the Neolithic[2] time onwards land had been cleared for agricultural use[3] in the great alluvial plains of China; but it would be more appropriate to say that it was only from c. 500 B.C. that China started to become the great agricultural country it was to remain until modern times.[4]

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1. A.L. March, The Idea of China: Myth and Theory in Geographic Thought, (London/Vancouver, 1974), 7.

2. The Neolithic period covers from the 4th millennium to the beginning of the 2nd millennium B.C.; the Bronze age covers from the 18th to the 6th century B.C. Then starts the Iron age at about c.500 B.C., J. Gernet, La Chine Ancienne, tr. R. Rudorff, sub.titl Ancient China from the Beginnings to the Empire, (London, 1968), 24-5.

3. Yi-Fu Tuan, The World's Landscapes: I China, (London, 1970), 47.

4. J. Gernet, loc.cit., 14, 16, 46. M. Freedman, Lineage Organization in Southeastern China, London School of Economics Monographs on Social Anthropology, No.18, (University of London, The Athlone Press, 1958, rpt. 1970), 9. On the main theme of Freedman's work, see B. Pasternak, 'The Role of the Frontier in Chinese Lineage Development', JAS 28 (1969) 3: 551-61.

Like the agricultural system, the Chinese familial institution and Chinese law go back to the remote past and, 'in fact, with the Chinese law, ... we are carried back to a position whence we can survey, so to speak, a living past, and converse with fossil men'.[1] Therefore, despite being ethnographically dissimilar and geographically divided by the Himalayas, China, with its ancient agrarian civilization of almost three thousand years,[2] provides a similar ecological setting [3] for the development of family law, as do the agricultural plains of India.

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1. E.H. Parker, 'Comparative Chinese Family Law', The China Review, 8 (1879-80), 67-107 at 69.

2. Agriculture was not the only occupation of the population. There were merchants, artisans and people of other professions, K.A. Wittfogel, 'Chinese Society: An Historical Survey', JAS 16 (1957)) 3: 343-364 at 364. But, it seems that non-agricultural activities were discouraged by society and the king. It is said in an 'Edict of Emperor Wen on the Primacy of Agriculture' (c. 163 B.C.) that natural calamity exists because many people are engaged in non-agricultural activities which are detrimental to agriculture, W.T. de Bary, ed., Sources of Chinese Tradition, (Columbia University Press, New York, 1960), 229. The Legalist School of 3rd and 4th centuries B.C. also believed that 'agriculture, as the basis of the economy, would be promoted intensively, while commerce and intellectual endeavour were to be severely restricted, as non-essential and diversionary', de Bary, ibid., 137. The classical literature of traditional times also frequently points to the inferior status of the merchant in society, B. Gallin, 'Chinese Peasant Values Toward the Land', in J.M. Potter, M.N. Diaz and G.M. Foster, ed., Peasant Society: A Reader, (Boston, 1967), 367-375 at 370. Cp. Gautama ordained agriculture as a mode of acquisition for the Vaiśya caste, Gautama, X.38-42. Also see Manu, X.116. For a discussion on these texts, see Derrett, ZVR, 64 (1962), 34: RLSI, 125-6. Also infra, 403-10.

3. On this see, L.E. Stover, The Cultural Ecology of Chinese Civilization: Peasants and Elites in the Last of the Agrarian States, (New York, 1974), 13-23.

II. Chinese Family System

Authors of the older generation put forward the view that since the archaic period,[1] the Chinese peasantry, who seem to have been an important group in the society, lived in great families, a pattern which became known as the large family system of China.[2] The family consisted not only of father, mother, children, and perhaps grandparents, but also of aunts, uncles, cousins, nieces, nephews and representatives of other varying degrees of blood relationship.[3] To these could often be added the adopted children, slaves and servants.[4]

However, modern sociologists hold the view that the large family system of China which structurally corresponds to the joint family of the Hindus,[5] was not universal [6] as a basic unit of Chinese society; the majority [7]

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1. The archaic period is considered as between 18th and 8th century B.C., J. Gernet, Ancient China, op.cit., 45.

2. H.D. Lamson, Social Pathology in China, (Sanghai, 1935), 496.

3. R.F. Johnston, Lion and Dragon in Northern China, (London, 1910), 142-3. W.L. Parish, Jr., 'Socialism and the Chinese Peasant Family', JAS 34 (1975) 3: 613-30 at 613.

4. H.D. Lamson, loc.cit., 496.

5. On the joint Hindu family, see Derrett, RLSI, Ch.12.

6. L.E. Stover, The Cultural Ecology of Chinese Civilization, op.cit., 104.

7. The great family system is identified with the landlord class who were in the minority, Yang Lien-Sheng, 'Great Families of Eastern Han', in E-tu Zen Sun and J. de Francis, ed., Chinese Social History, (Washington, 1956), 103-34.

of the families were much smaller in size.[1] In this respect, before we pass on to the juridical aspect of our discussion, Maurice Freedman's view on the structure of the Chinese family deserves closer attention. He suggests that economic factors determine the size of the family and the respective powers of father and son over family property. He points out that in this respect, legal traits should be sought in the interrelation of economic standards and the demographic pattern of Chinese society.[2] Freedman aligns himself with the view that in China some families were very large and could be

> looked upon as a large politico-economic corporation with much power vested in the chief member. But this corporation could not go indefinitely in membership, for with the death of its senior generation it split along the lines laid down by the constitution of the next generation, every son having a right to an individualized share of his father's estate on that man's death. 3

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1. On the size of Chinese families, Sybille van der Sprenkel says: 'the fact that it could include all these relatives led to exaggeration in the supposed size of the family: recent studies have all shown an average between four and six persons', Legal Institutions in Manchu China: A Sociological Analysis, (University of London, The Athlone Press, 1962), 14. H.F. Schurmann also pointed out that the small family containing less than ten members was the principal social nucleus of over 90% of the country since late Han times, 'Traditional Property Concept in China', Far Eastern Quarterly, 15 (1956), 507-16 at 512, also n.11 thereof. Same view of M. Freedman, 'The Family in China, Past and Present', Pacific Affairs, 34 (1961-2) 4: 323-36 at 326-7; also, Lineage Organization in Southeastern China, op.cit., 19-32.

2. M. Freedman, Pacific Affairs, 34 (1961-2), 327.

3. M. Freedman, 'The Family in China, 'Past and Present', Pacific Affairs, 34 (1961-2) 4: 327.

But

> at the other end of the social scale the family was, so to speak, scarcely Confucian. Poverty and powerlessness produced, instead of a strong patriarch, a weak father. He could rally no support from outside to dominate his sons. He had few resources to withhold from them. In fact, he might well have only one son growing to maturity. If, however, he had two or more sons reaching manhood, only one would be likely to stay with him, and perhaps even this one would leave him too. Demography, economics, and the power situation at this level of society ensured that families of simple structure were a constant feature of the landscape. 1

Freedman wants to emphasise that wealth was the agglutinative factor in 'the great families' of China and the decrease in wealth denotes a decrease in the size of the family,[2] and a corresponding waning of the power of the father.[3] But, despite its seemingly convincing tone, Freedman's hypothesis suffers from certain limitations. He overrates the part played by economic factors as a binding force in families of this archaic society. In few traditional societies do reverence for parents and obedience to their will depend on their wealth. Traditional people, in order to cling to social and religious mores, sublimate poverty; thus, to a son, poverty may not be perceived as a stimulus to separate;

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1. Ibid., 327.

2. Olga Lang's study of forty Chinese peasant families corroborates this view of Freedman, O. Lang, Chinese Family and Society, (New Haven, 1946), 350. But we must be conscious of the danger of generalizing from such a study on a vast population.

3. M. Freedman, Lineage Organization in Southern China, op.cit., 30.

on the contrary, it could be viewed as a divine admonition to accept the status quo.[1]

Irrespective of their economic standard, the spirit of a Chinese family is constituted of the moral obligation of all members towards each other, and at the centre of family morality is the doctrine of filial piety.[2] Confucius taught: 'when the parents are living, serve them with propriety; when they are dead, bury them with propriety'.[3] The moral teaching of Confucius found expression in the Code of Tang which juridically strengthened the view that 'the father is the Heaven of the son'.[4] This shows that moral duties are <u>ipso facto</u> legal duties in the sense that the law sanctions them by penalizing their breaches ... This is the enforcement of Confucian ethics by the technical methods of the Legalists.'[5]

Law and morals should be viewed through the prism of Chinese agrar - ian society, which was divided between elites and peasantry. Between these two extremes of peasant society, the Chinese gentry-scholar-official class served as a hinge group to integrate the society. They were the 'cultural .

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1. This attitude to poverty of the peasants of Calabria and Lucania is an interesting example, F.G. Friedmann, 'The World of "La Miseria"', in J.M. Potter, M.N.Diaz and G.M. Foster, ed., <u>Peasant Society: A Reader,</u> (Boston, 1967), 324-36 at 326.

2. H.D. Lamson, <u>Social Pathology in China,</u> op.cit., 496.

3. <u>The Analects,</u> 2:5, quoted by John C.H. Wu, 'Chinese Legal Philosophy: A Brief Historical Survey', <u>Chinese Culture,</u> 1 (1958) 4: 7-48 at 34. Also similar teaching of Confucius, Ki i, I.5, <u>The Texts of Confucianism,</u> tr. J. Legge, SBE, 28 (Oxford, 1885), 211.

4. J.C.H. Wu, ibid., 34.

5. J.C.H. Wu, ibid., 35.

brokers'[1] and custodians of ethico-juridic consciousness not altogether unlike the Brahmins of traditional India or the local nobility of Mediaeval Europe.[2] Thus, considering the cultural factors and value affiliations of traditional Chinese society, Stover seeks to explode the economy-based theory of the structure of family, as put forward by Freedman and others.[3] He states:

> It is true that some rich peasants have big families and some poor gentlemen have small families. But this continuum in family size between peasant and gentry, does not bridge the two life-styles. Folk culture includes both poor peasants and rich peasants; the latter may own enough land to encourage the married sons to stay and work it. Some men of high culture are so poor that their consumption habits are as restricted as those of the majority of peasants; and their family size may be as small as that of a poor peasant and reduced to a conjugal type. But these facts nonetheless do not allow a "typical" Chinese family to be created out of statistics. Reducing everything to a common denominator will yield an average family size of five persons. This is useless information. It does nothing to highlight the more important fact that a legal distinction exists between an élite population and a mass depressed nonélite population. The élite, rich or poor, are incumbents of a political privilege that allows them the luxury to orient themselves intellectually to the

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1. The phrase was used by E. Wolf, 'Aspects of Group Relations in a Complex Society: Mexico', American Anthropologist, 48 (1956), 1065-1078 at 1075-6.

2. M.N. Diaz and J.M. Potter, 'Introduction; The Social Life of Peasants', in Peasant Society, op.cit., 154-68 at 164-5.

3. Supra, 280-281.

> matters of high culture that are empire-wide in their distribution. And the families of these men tend to be large in number and organised as multigenerational joint families. The nonélite, excluded from political power, are captives of the Green Circle;[1] their outlook is not reflective and it is localized in the village and the marketing area. The families of these men, for the most part, are small and organized as conjugal families. No idea of a typical Chinese family can be made to prevail over the fundamental distinction in life ways as between folk culture and high culture. 2

The gist of Stover's argument is this: the rich members of the folk culture and the members of the élite culture, both rich and poor, lived in multigenerational joint families. In the case of poor élites, it was their standard of values, whereas in the case of rich non-élites, it was their economic prosperity, that constituted the binding factors resulting in joint living. So Freedman's generalization[3] that poverty connotes conjugal-family type is applicable only

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1. ch'ing chuan or Green Circle, the phrase is used in the sense of folk community that compose the rural landscape of China, L.E. Stover, The Cultural Ecology of Chinese Civilization, op.cit., 13.

2. Stover, ibid., 104-5.

3. W. Eberhard points out that to an individual of traditional society 'family means security and warmth, the outside world means insecurity and coldness', 'On three Principles in Chinese Social Structure', Chinese Culture, 11 (1970) 1: 21-33 at 30. In Chinese family too, the individual relinquished some of his freedoms to the family and the security and warmth of the family had a centripetal rather than a centrifugal effect on its members, Eberhard, ibid., 28-30. Earlier, Eberhard in his study of migrations of the Wu clan in South China, pointed out that sometimes an individual moved alone but often it was a migration of a nuclear family rather than of a lone individual, W. Eberhard, Social Mobility in Traditional China, (Leiden, 1962), 116.

to the non-élites.

Moreover, when sons assert themselves or leave the house of a poor father in search of a living,[1] poverty may be a contributory factor towards his weakness; but it does not necessarily prove the strength of the son in the sphere of property ownership, because families suffering abysmal poverty have hardly anything to divide or alienate. Thus, it would be fallacious to suppose, as indirectly suggested by Freedman,[2] that sons in poor families had more rights than those of rich families.

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1. The Hindu experience as projected by Sontheimer does not fully corroborate Freedman's generalisation in the Chinese context. Sontheimer initially postulates: 'Nuclear families where sons would leave the families at marriage would especially occur where there was little or no property to inherit and where sons would have to seek for a living, and could readily build their own hut or home', EHJFI,41 . But on practical consideration, he modifies his statement almost instantly by saying that 'whereas for poor parents sons were needed for protection in old age, the wealthy family would require at least one son who would look after the estate eventually and inherit it ...' EHJFI,41 . The Vedic literature does not show that in families with property joint living was universal. In families with means, the sons could have a share and set up their own households during the lifetime of the father, Tai. Saṃ.2,5,2,7, Kāṇe, HD, III, 565. Also Arthaśāstra, 3,5,21, Kangle, I, 104; II, 242. In classical Greece when a father's oikos was not large enough to provide a livelihood for all the sons, some of them used to leave the father's house and established for themselves a new home, W.K. Lacey, The Family in Classical Greece, (London, 1968), 16. A study on 94 households in Burma supports the view of Freedman: 'It is only the very rich who can hold on to their sons and have the sons' families live in the same compound and under the authority of the father and mother', M. Nash, The Golden Road to Modernity: Village Life in Contemporary Burma, (New York, 1965), 149. But, being a study on contemporary Burma, this does not falsify our view on traditional societies.

2. Supra, 281.

However, despite the claims of the sociologists to the contrary the juridical family in China does not seem to be so small as to hold only four to six members. This is apparent from the Code [1] of the Manchu dynasty which made numerous provisions to protect the solidarity of the family. Section 32 of the Code provides:

> All relations in the first and second degree and living under the same roof, maternal grandparents and their grandchildren, fathers and mothers-in-law, sons and daughters-in-law, grandchildren's wives, husband's brothers and brother's wives, when mutually assisting each other, and concealing the offences, one of another, and moreover, slaves and hired servants assisting their masters and concealing their offences, shall not in any such cases, be punishable for so doing. [2]

However, legal provisions also suggest that children could separate after the death of their father: 'All family property moveable and immoveable must be divided equally between all male children whether born of theprincipal wife or of a concubine or domestic slave'.[3]

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1. The Code, known as the 'Ta Tsing Lu Lee' or the General Laws of the Imperial Dynasty of Tsing, was promulgated in 1647, three years after the accession of the Manchu dynasty.

2. Quoted by G. Ohlinger, 'Some Leading Principles of Chinese Law', 8 Mich.L.Rev., (1910), 199-205 at 203.

3. Li.88 quoted by L.E. Stover, The Cultural Ecology of Chinese Civilization, op.cit., 102.

III. Relationship between father and son

Robert Lingat tells us that, irrespective of its kind, 'The Chinese family is of the patriarchal type'.[1] In a Chinese family, the senior male member was the ruling head and his authority was nearly as absolute as that of the Roman pater familias.[2] On the power of the head of the Chinese family Lingat adds:

> The head of the family, himself subject to the authority of the head of his clan (the clan includes all those individuals descended from the same founder), completely absorbs into himself the personality of lesser members, who are in the position of the alieni juris of Roman Law. The children and grandchildren cannot validly perform any act without his authorisation, and all they earn or acquire falls to the family patrimony, of which the head alone has the right to dispose. As long as the head of the family lives, the children are prohibited from demanding partition of the family property and from having a separate establishment. Even after marriage, the son remains under the authority of his father.[3]

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1. 'La famille chinoise est du type patriarchal', R. Lingat, Les Régimes Matrimoniaux du Sed-Est de l'Asie, (Hanoi, 1952), Vol.I, 16, tr. H. Kanitkar, Department of Anthropology, S.O.A.S.

2. H.D. Lamson, Social Pathology in China, op.cit., 496. T'ung-Tsu Ch'u, Law and Society in Traditional China, (Paris, 1961), 20.

3. 'Le chef de famille, soumis lui-même a l'autorité du chef de clan (le clan comprend tous les individus issus d'une même souche), absorbe complètement la personnalité de tous les membres inférieurs, qui sont dans la situation des alieni juris du droit romain. Ses enfants et petits-enfants ne peuvent faire valablement aucun acte sans son authorisation, et tout ce qu'ils gagnet ou acquierement tombe dans le patrimoine familial dont il a seul le droit de disposer. Tant que le chef de famille est vivant, il est défendu aux enfants de demander le partage des biens familiaux et d'avoir un establissement sépararé, Même quand il se marie, le fils reste sous la puissance du père', R. Lingat, Les Régimes Matrimoniaux du Sed-Est de l'Asie, op.cit., 16-17;

/Continued on next page:

In a comparative context, it is interesting to note that, while the authority of a Roman father emanates from patria potestas,[1] a Chinese father's authority is based on the doctrine of filial piety (hsiao).[2] This doctrine, being the linchpin of family morality, solidarity and perpetuation, demands absolute loyalty to ancestors living and dead.[3] Hsiao was regarded by the Confucianists as the root of all virtues. It does not merely refer to the reverence due to parents; it includes ancestor worship and succession. The former signifies continuity of love for one's progenitors, and the latter, the continuity of the family lineage.[4]

Note 3 - p.287 - Continued:

tr. H. Kanitkar, S.O.A.S. Also for the same view, see T'ung-Tsu Ch'u, Law and Society in Traditional China, op.cit., 20. J. Escarra, 'Chinese', sub. 'Law', Encyclopaedia of Social Sciences, ed., E.R.A. Seligman (New York, 1949), IX, 252.

1. For a discussion on the nature of Roman patria potestas, see R. Nisbet, "Kinship and Political Power in First Century Rome', in D. Black and M. Mileski, ed., The Social Organization of Law, (New York/London, 1973), 262-77 at 263-5.

2. According to G. Jamieson, the Chinese term hsiao, suggesting filial piety, should be translated as 'filial duty' or 'submission', Chinese Family and Commercial Law, (Sanghai, 1921), 4. On the significance of the term, also see, The Hsiao King, SBE, (Oxford, 1879), 3; Ch.I-II, 449-68. On the importance of hsiao on Chinese social life, see F.T. Cheng, 'Fragments of Chinese Law Ancient and Modern', Chinese Culture, 1 (1958), 3: 1-14 at 4. All schools of philosophers accepted the doctrine of hsiao, F. Yu-Lan, A History of Chinese Philosophy, tr. D. Bodde, (London, 1952), I, 357-61.

3. H.D. Lamson, Social Pathology in China, op.cit., 496.

4. Wen-Yen Tsao, 'Equity in Chinese Customary Law', Chinese Culture, 3 (1960), 2: 9-28 at 14. The Chinese evidence substantiates the theme of The Ancient City of Fustel de Coulanges. In The Ancient City, it has been stressed that ancient classical society was centred in the family in a wide sense of the word - joint family or lineage - and that what held this group of agnates together as a corporation and gave it permanence was the ancestor cult in which the head of the family acted as the priest. On this particular

/Continued on next page:

It would be wrong to suggest that Chinese hsiao was exactly similar to Roman patria potestas as we know it from developed Roman law. In this respect, Parker's comment is highly significant:

> China ... as regards the Patria Potestas ... remains in the position of the Roman Law - not of the later Empire, not even of the Antonine era; not even, again, of the early Empire, or the Republic at its prime; but of the Roman Law anterior to the publication of the Twelve Tables, 2,200 years ago. 1

Here Parker emphasised the customary aspect of Chinese Law and anticipated the observation of J. Dyer Ball who stated that:

> the Chinese customary law ... undoubtedly rests, as did the Roman Law before the publication of the Twelve Tables, on the mores majorum, that is ... upon customs long observed and sanctioned by the custom of the people. 2

Parker, who was a sinologue, says: 'We believe that there is no expression in the Chinese language which conveys the idea of "powers appertaining to the head of the family"'.[3] In Roman law a 'father possessed potestas over his

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Note 4 - p.288 - Continued:

point of The Ancient City, see E.E. Evans-Pritchard, Theories of Primitive Religion, (Oxford, 1972), 51. However, in China hsiao, and thereby, ancestor worship was left to one's private judgment, H. McAleavy, 'Chinese Law', in Derrett, ed., Introduction to Legal Systems, op.cit., 107.

1. E.H. Parker, 'Comparative Chinese Family Law', The China Review, 8 (1879-80), 67-107 at 69.

2. J. Dyer Ball, Things Chinese, (Sanghai, 1925), 330.

3. Parker, loc.cit., 91. Also the same view of G. Jamieson, Chinese Family and Commercial Law, op.cit., 4-5.

children (patria), and slaves (dominium); manus over his wife; and mancipium over his bondsmen.'[1] A Chinese father has all these powers yet they cannot be said to be exactly the same as the powers of a Roman father. Unlike patria potestas, hsiao is 'respectful submission to the will of the father, which is assumed to arise naturally out of the relationship (between father and son).'[2] This duty of submission on the part of the son extends not merely to the father but to all seniors in the agnatic group (Tsung).[3] Thus, the doctrine of hsiao points to a willing submission on the part of his son to his father.[4]

Although there is no definite information, it could be suggested that in a remote epoch of Chinese juridical history, a father had the power of life and death (jus vitae necisque) over a son; but from the time of the Han dynasty (former Han, c. 202 B.C. - 9 A.D.; later Han, c. 25 A.D. - 220 A.D.) it became illegal for a father to kill his son; and gradually the power of life and death was consigned to the sovereign.[5] However, in ancient China, a son could be banished for trivial reasons[6] and the selling of young children was also common.[7]

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1. E.H. Parker, 'Comparative Chinese Family Law', The China Review, 8 (1879-80), 91.

2. G. Jamieson, Chinese Family and Commercial Law, op.cit., 4-5.

3. Jamieson, ibid., 4-5.

4. T'ung-Tsu Ch'u, Law and Society in Traditional China, op.cit., 21.

5. Ch'u, ibid., 21-23. Jamieson, loc.cit., 4-5.

6. Ch'u, ibid., 27-28. This is also supported from the customs of the Chinese in Formosa, S. Okamatsu, Laws and Customs in the Island of Formosa, compiled, 1900, tr., 1902, (Taipei, rpt. 1971), Appx. xxiv.

7. Parker, loc.cit., 92.

IV. Rights of Father and Son in Family Property

a. Father's power and family property

In a society where father's authority seems to be supreme,[1] there is little scope for any limitation on father's ownership in family property. Parker thought that 'in respect of property, the power of the Chinese father appears to equal that of the earliest Roman father; no limit of age, and no circumstances of acquisition seems to deprive the father of his right to appropriate his son's property ...'[2] J. Escarra is also of the opinion that when the father was alive, an adult son was not permitted to hold property separately or live apart with his immediate family.[3] Ch'u takes this point further and says:

> Any inferior who, without the consent of the family head, used family property for his private needs was punished with from ten to one hundred strokes, depending upon the amount of property he had appropriated. Any pawning or sale of family property by a son or grandson was invalid before the law. [4]

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1. T'ung-Tsu Ch'u, Law and Society in Traditional China, op.cit., 30.

2. E.H. Parker, The China Review, 8 (1879-80), 92. The same view of R. Lingat, supra, 287.

3. J. Escarra, 'Chinese', sub. 'Law', En.So.Sc., IX, 252. Also, Ch'u, loc. cit., 29. Separate property of children was allowed for the first time in the third draft of the Code in 1925. The draft gave right to parents to the usufruct of children's separate property, but they could not dispose of it except in the interest of the child, Art.1088, see M. Van der Valk, An Outline of Modern Chinese Family Law, Journal of Oriental Studies of the Catholic University of Peking, Monograph, II, (Peking, 1939), 127.

4. Ch'u, loc.cit., 29.

The ancient Codes of China also uphold the view that sons did not have ownership during the lifetime of their father. As the Ta Ching Luli, [1] or General Code of Laws of the Ch'ing Empire, puts it: 'During the lifetime of grandparents or parents, the sons or grandsons are not allowed to set up separate establishments and register them as such, nor to divide the family property, under penalty of one hundred blows, but the parents or grandparents must be the complainants.' [2] The law is further explained thus: 'The full penalty of the above law is incurred if the sons separate and divide the property, though they do not register themselves. If, however, the parents permit the division, there is no objection to its being done'. [3] This envisages joint living without joint ownership, but before we draw a definite conclusion, we need a pause to examine some views which suggest the existence of son's co-ownership with the father.

b. Two views

Schurmann points out that in traditional China, ownership of property

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1. On this, supra, 286 n.1.

2. Lu.87, quoted by L.E. Stover, The Cultural Ecology of Chinese Civilization, op.cit., 103.

3. Li.87, quoted by Stover, ibid., 103.

was fundamentally different from the concept of absolute ownership [1] and, even in the early twentieth century, in village China one could find traces of multiple rights over the same property.[2] Indeed, 'it is generally recognised that some form of joint family property has existed in China for at least two millennia',[3] but the disagreement among the scholars is concentrated on the participants in such jointness. Schurmann puts forward the divergent views in these words:

> Among the Japanese sociologists, two theories have been current. One is a theory based on the private law of pre-war Taiwan. According to this theory, joint family property comes into being only upon the death of the common ancestor (father or grandfather). During the lifetime of the common ancestor, the property

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1. H.F. Schurmann, 'Traditional Property Concept in China', Far Eastern Quarterly, 15 (1956), 507-16 at 508-9. The same view of E. Kroker, 'The Concept of Property in Chinese Customary Law', in The Transactions of the Asiatic Society of Japan, 3rd Series, 7 (1959), 123-46 at 146. The terms, such as 'property', 'ownership', 'possession', used in context of Chinese property are not accurate. Schurmann says they are used as faute de mieux (for want of better). He stressed the difference between the Chinese concept of property and the German concept of Freies Eigentum, ibid., 508. On the importance of use, the terms such as 'proprietor' in English, 'eigenaar' in Dutch, 'Eigentümer' in German, 'proprietario' in Italian, 'proprietaire' in French, 'dominus' in Latin, see M. Gluckman, 'Concepts in the Comparative Study of Tribal Law', in L. Nader, ed., Law in Culture and Society, (Chicago, 1969), 349-73 at 357. Cp. Hindu concept of svāmī, see Derrett, 'Development of the Concept of Property in India c. A.D. 800 -1800', ZVR 64 (1962), 15-130 at 93-6.

2. Schurmann, ibid., 508.

3. Schurmann, ibid., 510.

> of the family is in fact the sole, personal property of the living common ancestor, in whom the rights of disposition are vested.[1] The second theory, expressed by Nakata Kaoru and Niida Noboru, is based largely on a study of medieval Chinese sources. This theory holds that joint family property exists between ascendants and descendants in the direct line (i.e. between sons, fathers and grandfathers). 2

If the second theory is correct, then it suggests the existence of an institution in China identical to the Mitākṣarā birthright of the Hindus. But Schurmann informs us that the Chinese medieval sources do not support the existence of joint ownership between father and son.[3] He favours the view that in China joint ownership meant ownership of brothers who held the estate jointly as co-heirs after the death of their father.[4] A commentary on a Ming statute suggests that, when brothers lived jointly, they lived as tenants in common:

> In common living and joint wealth, what is there that is not one's own possession? However, (all) is collectively managed by superiors and elders (tsun she vu tsun-chang). Inferiors and juniors must not arbitrarily (use it). (Legally) this is not called 'robbery' but 'appropriation'

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1. Cp. Dā.bhā.2.27.

2. H.F. Schurmann, Far Eastern Quarterly, 15 (1956), 510.

3. Schurmann, ibid., 510-11. This is also supported by J.W. Dardess, 'The Cheng Communal Family: Social Organization and Neo-Confucianism in Yuan and Early Ming China', Harvard Journal of Asiatic Studies, 34 (1974), 7-52.

4. Schurmann, ibid., 511-2.

> (shan). In effect, if inferiors and juniors use wealth, this is in accordance with the law. But they may be accused of arbitrarily using it without asking(their) superiors and elders. 1

Schurmann says that the passage implies equal ownership of co-heirs in a brother's consortium and does not indicate any descendant's right during the lifetime of his father.

But McAleavy, who examined the views of the Japanese scholars, claims that the second theory 'is supported by the weight of contemporary scholarship'. [2] He continues this argument by saying:

> Leaving aside the evidence from dynastic codes which declared, for instance, that theft could not be constituted between a son and father, and referred in what seem unmistakable terms to the existence of co-ownership between a father and his sons, the result of the Japanese inquiries in North China during the war reveal that in many places people would at any rate, not buy land from a father unless his sons joined in the conveyance. [3]

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1. Niida Noboru, Tōsō hōritsu monjo no kenkyū: The Critical Study on Legal Documents of the T'ang and Sung Eras, (Tokyo, 1937), 574, quoted by Schurmann, Far Eastern Quarterly, 15 (1956), 511 and n.7 thereof.

2. H. McAleavy, 'Certain Aspects of Chinese Customary Law in the Light of Japanese Scholarship', BSOAS, 17 (1955), 535-47 at 544. The view is supported by M. Freedman, Lineage Organization in Southeastern China, op.cit., 14, n.3.

3. McAleavy, ibid., 544; also 'Chinese Law', in Derrett, ed., An Introduction to Legal Systems, (London, 1968), 105-30 at 117.

This is supported by Johnston who records the procedure of sale of land in the Weihaiwei district of North China. He observed that when a man tries to dispose of his landed property he should fully discuss the whole matter with all the prominent members and elders of the village. In addition to the consultation with the village, Johnston points out, 'But he is not the less bound to satisfy his uncles and brothers and cousins, as well as his own sons, as for his desire to sell ...'[1] On this point, Maurice Freedman, whose study was concentrated on Southeastern China, states: '... a man held his land in trust for his sons and any sale required their concurrence'.[2]

It seems that in China, as in many other archaic societies,[3] the ideal of family continuity acted against alienation of the families' own land.[4] In most parts of China 'land was either alienable only within the lineage or alienable to outsiders only after options to lineage members had not been taken up',[5]

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1. R.F. Johnston, Lion and Dragon in Northern China, (London, 1910), 143.

2. M. Freedman, Lineage Organization in Southeastern China, op.cit., 14.

3. Aristotle declares that in many Greek cities it was not lawful to sell the kleros which had first been allocated to the family, Pol.VI, 2,5.(1319A). Plato considered the sale of land, although legal, as disgraceful, Laws, 923A; for a discussion on this, see W.K. Lacey, The Family in Classical Greece, (London, 1968), 22-3. For similar rules in ancient Jewish society, see our discussion at supra, 204 . Also Nuzi, supra, 191-4. Cp. Hindu, infra, 340-41.

4. Schurmann, Far Eastern Quarterly, 15 (1956), 544. Also, B. Gallin, 'Chinese Peasant Values Toward the Land', in J.M. Potter, M.N. Diaz and G.M. Foster, ed., Peasant Society, (Boston, 1967), 367-75 at 369-70.

5. Freedman, loc.cit., 14. Also Johnston, loc.cit., 143-4. E. Kroker, 'The Concept of Property in Chinese Customary Law', in The Transactions of the Asiatic Society of Japan, 3rd series, 7 (1959), 123-46 at 137-8.

and even though property became freely alienable by Sung and Yuan times, in the case of certain people the right of preemption was still retained. The three classes of option holders were: 9i(i) immediate agnates; (ii) neighbours; (iii) mortgage holders.[1] The first category consisted of direct relatives in the male line of descent for whom mourning had to be carried out.[2] Schumann points out that essentially the brothers belonged to the first category of preemptors, but the position of a son in the 'mourning charts' leads us to believe that a separated son also would be considered as one of the first option holders, since he is one of the nearest kin of the father.[3]

The two divergent Japanese views on joint ownership have recently

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1. Cp. preemptors in the Arthaśāstra, 3.9.1-9; jñāti-sāmanta-dhanikāḥ ...; also Bṛ. XVIII.20, Aiyangar, ed., 158. For a fuller discussion, see infra, 695-702.

2. The pre-code 'mourning charts' indicate the 'degrees of mourning' to which the members of the family were mutually obliged. According to the system contained in the charts, relatives were divided into three groups: (i) Tsung-ch'in (relatives descending through males from a common ancestor within the 8th Roman degree); (ii) Wai-ch'in (relatives on the mother's side); (iii) Ch'i-ch'in (relatives of the wife within 4th Roman degree), M. van der Valk, An Outline of Modern Chinese Family Law, Journal of Oriental Studies of the Catholic University of Peking, Monograph II, (Peking, 1939), 18, also Appx. I, 167. According to mourning grades, three relationships fall under nearest kin: 'the relation between father and son is one; between husband and wife is another; and between brothers is a third', Han Yi Feng, The Chinese Kinship System, (Philadelphia, 1937), 180. Cp. mṛtāśauca and sapiṇḍa relationship of the Hindus.

3. Han Yi Feng, The Chinese Kinship System, op.cit., 180.

been analysed by Shuzo Shiga,[1] who prefers the view that the father had major, if not the sole, control over family property; nevertheless, he makes the point that the son had a definite expectancy in the inheritance, although he could not dispose of it on the basis of that expectancy during the lifetime of the father.[2]

Coming back to the father's position as a trustee, we must bear in mind that the position of a Chinese father in traditional China should not be interpreted in terms of the modern law of trust. The role of a Chinese father should be viewed in context of the Weltanschauung of an archaic oriental society. In pre-industrialised agrarian societies, it was completely natural for a grown-up son to play a major part in sowing and reaping; so it was not unnatural for a father to consult his adult sons while alienating family lands.[3] Similarly, it was also pragmatic for the buyers to have an old man's sons around while buying his lands so that the sons might not dispute the transaction in future. The position and function of an adult son in the family makes him a de facto owner, although he may not assert his ownership in the de jure sense.[4]

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1. Shuzo Shiga, Chugoku Kazukuho no genri: Principles of Chinese Family Law, (Tokyo, 1967), 149-216.

2. Shiga's views are summarised, ibid., 206-16. Dr. P. Chen of the Law Department, S.O.A.S. informed me of Shiga's opinion. Dr. Chen also favours Shiga's interpretation on the point.

3. While alienating his own property, a separated son, in some parts of China, had to obtain the consent of his father. In the district of Kiangsi, even a separated brother's consent was required for the sale of land, E. Kroker, 'The Concept of Property in Chinese Customary Law', in The Transactions of the Asiatic Society of Japan, 3rd series, 7 (1959), 141.

4. Derrett, Law in the New Testament, (London, 1970), 104.

c. Conclusion

However, the geographical immensity of China implies appreciable variation in climate, landscape, mode of life, customs and dialect from one region to another,[1] so that, if any useful statements are to be made on the family law of the Chinese, they must be made keeping in mind the diversities within the Chinese world. Chinese family law has mainly grown out of custom;[2] and, despite legislation at different epochs, 'the customary law continued to exist in almost undiminished vigour until the People's Government in 1949'.[3] But we should not consider the customary law throughout China as homologous.[4] Thus, in some parts of China, testamentary disposition was allowed;[5] in other parts, not. As in the Indian subcontinent,

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1. J. Gernet, La View Quotidienne En Chine A La Veille de L'Invasion Mongole, 1250-1276, tr. H.M. Wright, sub. tit. Daily Life in China on the Eve of the Mongol Invasion, 1250-1276, (London, 1962), 3. Chang Chi-yun, 'Geographical Distribution of the Chinese People', Chinese Culture, 2 (1959), 1: 74-97.

2. Wen-Yen Tsao, 'Equity in Chinese Customary Law', Chinese Culture, 3 (1960), 2: 9-28 at 14.

3. H. McAleavy, BSOAS, 17 (1955), 535.

4. E. Kroker, TASJ, 7 (1959), 140.

5. E.H. Parker, The China Review, 8 (1879-80), 92, n.94. McAleavy holds the view that a father could not frustrate a son's expectations by testamentary disposition, 'Chinese Law' in Derrett, ed., ILS, 117. But, in fact, we come across a will as far back as the Western Han dynasty (c. 206 B.C. - 24 A.D.) T'ang-Yi-Pi Shih, tr. K.H. Van Gulik, (Leiden, 1956), 176-7. The work is a collection of 144 selected cases covering a period from c.300 B.C. to 1100 A.D., cited by Wen-Yen Tsao, Chinese Culture, 3 (1960), 2: 9-28 at 26. Niida Noboru points out that a father had unrestricted power of testamentary disposition, Tōsō hōritu monjo no kenkyū, 114, cited by Schurmann, Far Eastern Quarterly, 15 (1956), 511, also n.6 thereof.

custom may vary from one region to another, and accordingly, there could be the possibility of variation in the juridical norm in respect of the differing rights of father and son on family property. The two Japanese schools we mentioned above, may be leaning on diverse customs; but until more materials are available, we should be reconciled with the available opinions as they stand today. Nevertheless, there is much truth in the statement that ownership in China 'is by no means a limitless or absolute power'[1] of the individual over the property in his hands.

(2) Japanese Law

I. Background

From primitive times Japan had a framework of magico-religious customary law; and in the sphere of family law, this consisted mainly of rules of proper conduct within the family, clan or community.[2] Masajiro Takikawa points out that 'unfortunately, records do not sufficiently reveal the primitive state in which the purely native law of Japan prevailed. The society depicted by the oldest extant records had already begun to be influenced by Chinese culture and its indigenous magico-religious law was no

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1. E. Kroker, TASJ, 7 (1959), 146.

2. B. James George, Jr., 'Law in Modern Japan', in J.W. Hall and R.K. Beardsley, ed., Twelve Doors to Japan, (New York /London, 1965), 489.

longer free from secular elements'.[1]

Despite Japan's heavy borrowing from Chinese culture during the eighth century,[2] 'many of the basic structural elements of Japanese society had been derived from a tradition quite different from that of the Chinese and had been set many centuries before Chinese influence touched Japan in any significant quantity'.[3] Similarly, notwithstanding many overlays of Chinese influence, numerous aspects of Japanese familial institutions managed to remain unchanged and, matching the ebb and flow of Chinese influence, the Japanese legal system, like Japanese culture, presents its own variants.

However, 'the intellectual roots of pre-Meiji[4] Japanese law were unequivocally Chinese. This meant that law functioned in subordination to Confucian li ...'[5] Thus, as among the Chinese,[6] the Confucian ideology of filial piety(hsiao in Chinese = kō in Japanese)[7] was equally important among

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1. M. Takikawa, 'Japanese', sub. 'Law', En.So.Sc., IX, 255.

2. J.H. Hall, 'The Historical Dimension', in Twelve Doors to Japan, loc.cit., 122-84 at 160.

3. J.H. Hall, ibid, 161.

4. Meiji period was from c. 1868 A.D. - 1912.

5. R.W. Rabinowitz, 'Law and the Social Process in Japan', The Transactions of the Asiatic Society of Japan, 3rd series, 10 (1968), 5-96 at 13.

6. Supra, 288.

7. Y. Watanabe and M. Rheinstein, 'The Family and the Law: The Individualistic Premise and Modern Japanese Family Law', in A.T. von Mehren, ed., Law in Japan, (Cambridge, Mass., 1963), 364-98 at 368.

the Japanese. The relationship between parent and child was that of superior and subordinate and the child had to obey his parents unconditionally.[1]

II. Family in Japan

The Japanese family (kazoku)[2] system was patriarchal[3] and the system of inheritance was patrilineal.[4] The structure of the family was determined by Japanese custom.[5] In Japan, 'a household was a corporation in the political, economic, and ritual sense, and its head[6] combined in himself the positions of

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1. Y. Watanabe, ibid., 364, 368.

2. B. James George Jr., 'Law in Modern Japan', in Twelve Doors to Japan, op.cit., 509.

3. K. Steiner, 'The Revision of the Civil Code of Japan: Provisions Affecting the Family', FEQ 9 (1950) 2: 169-84 at 170.

4. For traces of matrilineal system in Japan, see H. Befu, 'Ecology, Residence and Authority: The Corporate Household in Central Japan', Ethnology, 7 (1968), 25-43 at 32. Chie Nakane argues that Japanese peasant society was not patrilineal. She holds the view that locality rather than kinship was the basis of corporate organization, Kinship and Economic Organization in Rural Japan, (London, 1967), 170. This study substantiates the view that the authoritarian patrilineal norm emanated from the elite group, see C. Madge, 'The Relevance of Family Patterns in the Process of Modernization in East Asia', in R.J. Smith, ed., Social Organization and the Applications of Anthropology: Essays in Honour of Lauriston Sharp, (Cornell University Press, Ithaca/London, 1974), 161-95 at 165.

5. B.B. Appleton, 'The Law of Japan', in Studies in the Law of the Far East and Southeast Asia, (The Washington Foreign Law Society, 1956), 1-28 at 18.

6. In the noble and Samurai families, only men were allowed to occupy the position of the head of a household. Since 1873, women are allowed to succeed to this position, I. Ryosuke, ed., tr. W.J. Chambliss, Japanese Legislation in the Meiji Era, (Tokyo, 1958), 664.

a political leader, manager of the household property, and priest to propitiate the deceased member. His position was not shared by others, such as brothers. He was not primus inter pares, though informally, he did take into consideration the advice and wishes of others in making a decision'.[1]

III. Ancestor worship and inheritance

Here it should be mentioned that the family system in Japan had its root in the practice of ancestor worship,[2] and this is still alive in the cultural and legal system of Japan.[3] The house-head is the continuator of the ancestral sacra and, being the representative of the ancestors, he owned the house property.[4]

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1. H. Befu, 'Ecology, Residence and Authority: The Corporate Household in Central Japan', Ethnology, 7 (1968), 1: 25-42 at 33.

2. B.B. Appleton, 'The Law of Japan' in Studies in the Law of the Far East and Southeast Asia, op.cit., 19. Ancestor worship was also practised among the Chinese, G. Jamieson, Chinese Family and Commercial Law, op.cit., 2.

3. R.J. Smith, Ancestor Worship in Contemporary Japan, (Stanford, California, 1974), 34. On the social and cultural importance of ancestor worship in modern Japan, see H. Wimberley, 'Self-realization and the Ancestors: An Analysis of two Japanese ritual procedures for Achieving Domestic Harmony', Anthropological Quarterly, 42 (1969), 1: 37-51 at 50.

4. B.N. Hozumi, Ancestor Worship and Japanese Law, (Tokyo, 1940), 163. Cp. Roman Pontifical law: 'Nulla hereditas sine sacris'; also Cicero, De Legibus, II, 19,20: 'Religion prescribes that property and the worship of a family shall be inseparable, and that the care of the sacrifices shall always devolve upon the one who receives the inheritance'. Cp. Manu, IX. 136: ... dadyāt piṇḍaṃ hared dhanam / Yājñ.II.132: piṇḍado 'ṃśaharaś caiṣām / Viṣṇu, XV.40: yaś cārthaharaḥ sa piṇḍadāyī /. For a discussion on these texts, see H. Chatterjee, The Law of Debt in Ancient India, (Calcutta, 1971), 90.

This cult of ancestor worship and its correlation with inheritance gave property a supragenerational entity and that is why 'the person who succeeds to the position of a house (sic) is usually called the atotsugi (the one who continues) ...', [1] and according to the Taiho Code (c.701 A.D.) succession meant - succession to the 'important duty'.[2] The official commentary on the Code, 'Ryo-no-gige' explained it thus: '"to succeed to the important duty" means "to succeed a father and inherit the sacra, for the matter of worship is the most important"'.[3] So succession in Japanese law was both a legal and a ritual transmission.

IV. Inkyo or retirement of the househead

The Japanese system indicates that the socio-cultural implication of inheritance was to continue the cult of the ancestors through the family. It is evident from the customary law of the Tokugawa Shogunate [4] (c. 1603 - 1867 A.D.) that the eldest son used to succeed to the family property and duty, either on the death of his father or on his retirement.[5] Normally the father

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1. Y. Kunio, tr. C.S. Terry, Japanese Manners and Customs in the Meiji Era, (Tokyo, 1957), 117-8.

2. Hozumi, loc.cit., 164.

3. Hozumi, ibid., 164.

4. J.H. Wigmore, ed., Law and Justice in Tokugawa Japan, X parts, (University of Tokyo Press, 1969), Pt. V, (1971), 99. In some districts, as in Izu kuni, Tagata Kori, irrespective of sex, the eldest child used to succeed to the headship, ibid., 111.

5. Wigmore, ibid., 98. Y, Watanabe and M. Rheinstein, 'The Family and the Law: The Individualistic Premise and Modern Japanese Family Law', in A.T. von Mehren, ed., Law in Japan, op.cit., 369.

on his sixty-first birthday, used to hand over the family property with its temporal and sacerdotal responsibilities to his eldest son.

The Japanese term signifying 'the retirement of the head' is *inkyo*,[1] which is comparable to the obsolete *vānaprastha* stage of the Hindus.[2] The socio-juridical implication of the institution of *inkyo* has been put forward by Kenne H-K. Chang in these words: 'An underlying ideology behind this formalized practice appears to be smooth succession of household headship by replacing an aging head with an active and young head under separate residential quarters for the functional continuity of a harmonious household, a basic corporate unit'.[3] Thus, in Japan, succession to a family property was inevitably linked with the succession to the headship of the house (*katoku-so-zoku*).[4]

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1. Kenne H-K.Chang, 'The Inkyo System in Southwestern Japan: Its Functional Utility in the Household Setting', *Ethnology*, 9 (1970), 4: 342-57 at 342-3.

2. For a discussion on this, see infra, 385-402 . Cp. Roman *otium*, infra, 401 . Sometimes a Chinese father to escape the worries of managing his property used to divide it among his children, but this was not exactly as the inkyo in Japan, S. Okamatsu, *Laws and Customs in the Island of Formosa, compiled*, 1900, (Taipei, rpt. 1971), Appx. xxiii. In Greece, fathers of adult sons often handed over the management of their *oikos* to their sons, and virtually stepped down from the management of the house, W.K. Lacey, *The Family in Classical Greece*, (London, 1968), 117. Also G.S. Kirk, 'Old Age and Maturity in Ancient Greece', *Eranos* 40 (1971), *The Stages of Life in Creative Process*, ed., A. Portmann and R. Ritsema, (Leiden, 1973), 123-58 at 131.

3. Chang, loc.cit., 343-4.

4. Okamatsu, loc.cit., Appx. xxi.

The mystique of ancestor worship and the practice of inkyo in Japan transcend ownership of property beyond the limit of a particular generation and considerably support the implication of Hoebel's generalisation that from the social anthropological point of view, inheritance is rather 'the transference of statuses from the dead to the living ...'[1] However, the Japanese system has an additional characteristic: in appropriate cases, through the inkyo, it could be a transference from the living to the living - from the father to the eldest son. And this transferee, the eldest son of the house, has a definite, and thereby innate, expectancy regarding the property of the family which materialises either at the death of the father or at his retirement (inkyo).

V. Variant customs

However, we must not overlook the fact that the custom of primogeniture was a traditional usage of the samurai or noble families of Japanese society.[2] Among people other than the warrior classes, a man and his wife were the joint heads of the family.[3] It has also been pointed out by

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1. E.A. Hoebel, The Law of Primitive Man: A Study in Comparative Legal Dynamics, (Cambridge, Mass., 1967), 60.

2. Y. Kunio, ed., Japanese Manners and Customs in the Meiji Era, op.cit., 119.

3. Kunio, ibid., 118-9. Cp. R.V. 5.61.8; Br.U.1.4.3. dharmeca artheca kāmeca ... Also the anonymous text in the Smrti-tattva, Jhā, HLS, II, 249; dāmpatyor madhyagam dhanam, for the significance of the text, see Derrett, ZVR 58 (1965), 219ff; University of Ceylon Review, 14 (1956), 105ff., at 119, n.86; BSOAS 18 (1956), 490; also ZVR 64 (1962), 62ff.

Takeyoshi Kawashima that concentration of authority in the hands of the head of the family was a feature only of the samurai family; in middle and lower class families, power tended to be diffused among the elders of the group.[1] However, the popular customs of the lower classes did not find their way into the Codes of Japan and the customary right of the first born, as practised among the warrior classes, was juridically endorsed.[2] The younger brothers could set up branch families and all members, including the aged parents after their retirement, had the right to be maintained from the family property.[3]

VI. Conclusion

Be that as it may, the Japanese system, despite being a contrast to the Mitākṣarā system is, nevertheless, a paradigm of the primitive social institution by which property ownership is not strictly atomized in the individual owner, but is bound up with the purpose of property as a means of continuing socially-determined cultic rituals while, in addition, serving as support for members of the family. The effects of the old and new Civil Codes on the property structure of the Japanese family are, of course, outside our present concern.

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1. Y. Watanabe and M. Rheinstein, 'The Family and the Law: The Individualistic Premise and Modern Japanese Law', in A.T. von Mehren, ed., Law in Japan, (Cambridge, Mass., 1963), 369 and n.

2. Y. Kunio, ed., Japanese Manners and Customs in the Meiji Era, op.cit., 119.

3. Y. Watanabe and M. Rheinstein, loc.cit., 369.

CHAPTER 11

AFRICAN LAW

1. Introduction

Our present study of the Mitākṣarā birthright would remain incomplete without putting it in a comparative framework with the customary laws [1] of traditional African societies. Although the philosophy behind the Mitākṣarā concept of co-ownership between father and son is extremely subtle, its ideational aspects, like the African concept of property, are antiquarian. Both in classical Hindu law and in the old indigenous customary law of Africa, concepts such as ownership,[2] possession, [3] and rights derived from such concepts,

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1. Our discussions is confined to the customary law of Africa. From a generic point of view, African law includes certain elements of European law (Roman Dutch, Portuguese, Belgian, French and English), M.G. Smith, 'The Sociological Framework of Law', in H. and L. Kuper, ed., African Law: Adaptation and Development, (Berkeley/Los Angeles, 1965), 24-48 at 24.

2. Expressions such as ownership and possession clearly bear witness to the struggle with English and European legal concepts, T.O. Elias, The Nature of African Customary Law, (Manchester University Press, 1956), 162-72. A.N. Allott, 'Family Property in West Africa: Its Juristic Basis, Control and Enjoyment', in J.N.D. Anderson, ed., Family Law in Asia and Africa,(London, 1968), 121-142 at 122-3. African ownership is certainly not synonymous with Roman dominium and less so with the concept of ownership which includes rights, 'utendi', 'fruendi', 'abutendi', 'fructus percipiendi', 'possisendi', 'alienandi', and 'vindicandi', W.W. Buckland, Elementary Principles of the Roman Private Law, (Cambridge, 1912), 64. T.E. Holland, The Elements of Jurisprudence, (Oxford, 1916), 209-10. J. Salmond, Jurisprudence, (London, 1924), 277-8. In developed Roman law, ownership'may be defined as the unrestricted right of control over a physical thing ...', H.F. Jolowicz, Historical Introduction to the Study of Roman Law, (Cambridge, 1972), 140. The right to individual property under the French Civil Code was 'a return to the Roman conception of dominium', C. Léwy, 'The Code and Property', in B. Schwartz, ed., The Code and the Common-Law World, (New York, 1956), 162-76 at 164. Article 544 of the Code envisages an absolute ownership: 'La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements', see Derrett, 'An Indian Contribution to the Study of Property', BSOAS 18 (1956) 3: 475-98 at 475,n.1. On

/Continued on next page:

viewed in the context of the social relationships in which they occur, have different semantic and jural content than in counterparts known to Western

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Note 2 - p.308 - Continued:

English concept of ownership, see G.B.J. Hughes, Jurisprudence, (London, 1955), 391-401. African concept of ownership does not envisage an absolute right. Similar to the Mitākṣarā concept of ownership, in African ownership there is a convergence of several rights. There are four main theories of African ownership of land: (i) African law or the customary law of a specific African population group does not recognise the ownership of land; (ii) another view is that ownership is vested in groups or communities, H.W.J. Sonius, Introduction to Aspects of Customary Land Law in Africa As Compared With Some Indonesian Aspects, (Leiden, 1963), 18. (iii) The third view is that the land belongs to the king or chief who holds it as a representative of the nation or as trustee for the tribe, K.E. Jensen, The Social System of the Zulus, (London, 1936), 176. M. Gluckman, 'African Land Tenure', The Rhodes Livingstone Journal, (Northern Rhodesia), Human Problems in British Central Africa, III, June 1945, 3. This coalesces with the Hindu idea contained in the text: dhanānām īśvaro rājā Brahmaṇā parikalpitaḥ / 'Brahmā arranged that the king was (to be) the owner of all wealth', Derrett, 'Bhūbharaṇa, bhū-pālana, bhū-bhojana: an Indian conundrum', BSOAS 22 (1959) 1: 108-123 at 114. (iv) The fourth view is that ownership of land is vested in individuals or in the joint descendants of individual owner, the family or extended family, G.B.A. Coker, Family Property Among the Yorubas, (London, 1958), 16ff. This type of ownership is also known among the Hindus. On African ownership of land, also see M. Gluckman, The Ideas in Barotse Jurisprudence, (New Haven, 1965), Ch.3.

N.3 - p.308:

For the difficulties in defining the term 'inheritance' in African context, see Derrett, 'Succession in Nigeria: the Patchwork of the Present Scene and the Common Problems of the Future', in Derrett, ed., Studies in the Laws of Succession in Nigeria, (Nigerian Institute of Social Science and Economic Research, 1965), 1-32 at 5-6.

legal thought.[1] The following passage from Andre R. Robert [2] contains the correct understanding of African ownership of property:

> Primitive law is essentially a law of persons, much more than a law of property. It is a law relating to life as it is lived (lit. 'law of life'), it is in no way a set of rules regarding property, its ownership and transfer. (R.P. Tempels, La philosophie Bantoue, op. cit., 97). Therefore, the law of property (is) subjective according to African custom: an item (of property) forms the basis of a law only in consideration of the person who owns it. It is not considered so of itself, but through its connection with individuals. The same item, then, could become the subject of different laws according to the occasion and by reason of the collective character of customary law, the same item will be capable of giving rise to different laws among different people. 3

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1. Allott, 'Law and Language in Africa', ZVR 74 (1974), 124-36.

2. "Le droit primitif est essentiellement un droit des personnes, bien plus qu'un code des biens. C'est un droit de la view, ce n'est point un droit des biens, de leur propriété. de leur translation". (R.P. Tempels, La philosophie Bantoue, op.cit., 97). En effet, le droit des biens dans les coutumes africaines subjectif: une chose n'est la source d'un droit qu'en considération de la personne qui en a la possession. On ne la considère pas en elle-même, mais par rapport aux personnes. Une même chose pourra donc faire l'objet de droits différents selon le sujet et en raison du caractère collectif du droit coutumier, la même chose sera susceptible de faire naître des droits distincts chez plusieurs personnes'. A.P. Robert, L'Evolution des Coutumes de l'Ouest African et la Législation francaise, thesis, (Strasburg, 1954), 85; quoted by H.W.J. Sonius, Introduction to Aspects of Customary Land Law in Africa, (Leiden, 1963), 24-5. The same observation of M. Gluckman, 'Property Rights and Status in African Traditional Law', in M. Gluckman, ed., Ideas and Procedures in African Customary Law, (London, 1969), 252-65 at 262.

3. Tr. Dr. H. Kanitkar, Department of Anthropology, SOAS.

In this, as well as in the interplay of collective and individual rights,[1] African customary law is closer to Hindu juridical concepts than the Western scheme of things.[2] Thus, in the following statement directed at the problem of African family law, Allott has spoken for Hindu law as well:

> In West Africa especially the family or lineage system is sustained by the law of intestate succession, and if the law is changed so that self-acquired property of deceased members no longer goes to enrich the corporate families, then the family as an institution will quickly wither and die. 3

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1. In this respect, Hoebel remarks that unlike the West, in African legal system, individual right is kept more or less hemmed in by the superior right of the collectivity, The Law of Primitive Man, (Cambridge, Mass., 1954), 225-7. But see Allott, 'African Law', in Derrett, ed., An Introduction to Legal Systems, (London, 1968), 131-56 at 147-49.

2. For a fuller discussion, see Derrett, Studies in the Laws of Succession in Nigeria, op.cit., 5-9.

3. A.N. Allott, 'The Future of African Law', in H and L. Kuper, ed., African Law ... , op.cit., 216-40 at 235. Elsewhere, Allott has pointed out that in West Africa, a family is entitled to succeed to the self-acquired property of its members who died without disposing of such property in his lifetime, A.N. Allott, 'Towards a Definition of Absolute Ownership', Journal of African Law, 5 (1961) 2: 99-102; rpt., E. Cotran and N.N. Rubin, ed., Readings in African Law (hereafter as RAL), (London, 1970), I, 264-7 at 266. On the definition of ownership in African context, Allott is criticised by S.R. Simpson, 'Towards a Definition of Absolute Ownership', JAL 5, No.3: 145-48; rpt., RAL, I, 267-9 at 269. For Allott's riposte to Simpson's criticism, see JAL 5 (1961) 3: 148-50. For specific customary practices in support of Allott's foregoing view, see Allott, The Akan Law of Property, Ph.D. thesis, (University of London, 1954), unpublished, 552. T.O. Elias, Nigerian Land Law and Custom, (London, 1953), 157. N.A. Ollennu, Principles of Customary Land Law in Ghana, (London, 1962), 33, 153-4. J. Matson, 'Testate Succession in Ashanti', Africa, Vol.23, International African Institute, (1953), 224-32, rpt., RAL, II, (London, 1970), 316. G. Goodman, 'The Family as a Corporation in Ghanaian and Nigerian Law', African Law Studies, 11 (1974), 1-35 at 14. Cp. Hindu law, Katama Nachiar v. The Raja of Shivaganga, (1863) 9 MIA 539; also Derrett, SCJ (1956), 103-11 and our discussion infra, 333-42.

The juridical canvas of pre-literate African societies portrays an assortment [1] of customary practices; but amidst this variegated panorama legal scientists of repute [2] have found an underlying unity [3] pervading the diverse African customs which sprang 'directly from African consciousness ...' [4]

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1. Allott, 'Modern Changes in African Land Tenure', RAL, I, 236-42 at 236. R.B. Seidman, 'Law and Economic Development in Independent English-Speaking, Sub-Saharan Africa', in T.W. Hutchison, ed., Africa and Law: Developing Legal Systems in African Commonwealth Nations, (The University of Wisconsin Press, 1968), 3-74 at 30. M.G. Smith,'The Sociological Framework of Law', in L. and H. Kuper, ed., African Law, op.cit., 44.

2. A.N. Allott, Essays in African Law, (London, 1960), 71.

3. The unity of African laws has been refuted by A.N.A., 'review', The Future of Customary Law in Africa, (being the transactions of the International Symposium on Customary Law organised by the Afrika Institute, Leiden, and The Royal Tropical Institute, Amsterdam, 1955), (Leiden, 1956), JAA 8 (1956) 4: 207-9 at 208.

4. Allott, 'The Future of African Law', in H. and L. Kuper, ed., African Law, op.cit., 216-40 at 218. Robert Seidman believes that in the judicial context, customary law in Africa 'cannot conceivably reflect the common consciousness of the people', R.B. Seidman, "Law and Economic Development in Independent English-Speaking Sub-Saharan Africa', in Hutchison, ed., Africa and Law, op.cit., 9. On this point of possible unity in diversity of African customary law, he remarks: 'Forging a "common" customary law based upon the lowest common denominator actually creates a new "customary" law that more likely than not, reflects nobody's Volksgeist, except perhaps the compiler's, ibid., 30. To this, one may add the observation of Gluckman on varieties of customary rights over land: 'the incidence of rights over land varies with the technology of the tribe concerned ...' M. Gluckman, 'Property Rights and Status in African Traditional Law', in M. Gluckman, ed., Ideas and Procedures in African Customary Law, (London, 1969), 252-65 at 252. However, we cannot say that there is any fundamental uniformity in African legal system or a single type of African law, but we can consider African law as a family of legal system which could be studied as a whole, Allott, ibid., 218.

Thus, from a general point of view, comparative appraisal of the Hindu and African systems of family property is a step in the right direction.

However, before going further in our discussion, we should remind ourselves that the Mitākṣarā system of inheritance is essentially a patrilineal transmission of property. In Africa we come across both patrilineal [1] and matrilineal [2] types of families.[3] Since we are interested in macro-tendencies rather than in

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1. More than half the population of Ghana and a small proportion of that of Nigeria are matrilineal. G. Goodman, 'The Family as a Corporation in Ghanaian and Nigerian Law', African Law Studies, 11 (1974), 1-35 at 6. Also C.K. Meek, Land Tenure and Land Administration in Nigeria and Cameroons, H.M.S.O., 1957, 128-39, rpt., RAL, I, 293-9 at 294. For a few examples of patrilineal system of inheritance, see T.O. Elias, on Yoruba succession; The Groundwork of Nigerian Law, (Routledge and Kegan Paul, 1954), 216-31. J.C.D. Lawrence, The Iteso, (O.U.P., 1957), 228-31. H. Cory, Sukuma Law and Custom, (O.U.P., 1953), 153-61. R.G. Armstrong, 'Intestate Succession among the Idoma', in Derrett, ed., Studies in the Law of Succession in Nigeria, op.cit., 213-20. N.N. Rubin, 'The Swazi Law of Succession: a Restatement', JAL 9 (1965) 2: 90-103 at 97-8.

2. On matrilineal succession, see J.M. Sarbah, Fanti Customary Laws, (London, 1968), 100-13. N.A. Ollenu, The Law of Succession in Ghana, (Accra, 1960), 35-7. On characteristics of matrilineal kinship organisation in Central Africa, see A.I.Richards, 'Matrilineal System', in J. Goody, ed., Kinship, (Penguin, 1971), 276-89.

3. Among some people, like the Ashanti, there is a combination of matrilineal and patrilineal descent; the two modes are followed concurrently. However, inheritance and succession to authority follow the female line, R.S. Rattray, Ashanti, (Oxford, 1923), 77-8. G.P. Murdock, 'Double Descent', American Anthropologist, 42 (1940) 4, pt.I: 555-61 at 555, 557. As a contrast, although the Maya of Mesoamerica followed double descent, their inheritance of property was strictly patrilineal and agnatic, T. Gann and J.E. Thompson, The History of the Maya from the Earliest Times to the Present Day, (New York, 1931), 174, 177. Also M.D. Coe, The Maya, (London, 1966), 144-5.

micro-comparison, the existence of matrilineal inheritance in Africa need not prove an obstacle to our present purpose.

II. Corporate Rights in Land

Preliterate agricultural communities have a personal and mystical association with land [1] and, in this respect, African societies are no exception.[2] 'Land throughout Africa has religious or supernatural significance ...',[3] and, especially in West Africa, it belongs 'to the ancestors as much as to the living occupiers'.[4] Thus, multiple supragenerational rights are tied up with the ownership of land in Africa. As a general norm, land in Africa is held on kinship and/or local group basis, and the individual's right is qualified by his membership of the group.[5]

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1. E. Friedl, 'Dowry and Inheritance in Modern Greece', in Peasant Society, op.cit., 57-62 at 62.

2. C.K. Meek, Land Law and Custom in the Colonies, (O.U.P., 1946), 11-27, rpt., RAL, I, 247.

3. A.N. Allott, 'Modern Changes in African Land Tenure', RAL, I, 238. T.O. Elias, The Nature of African Customary Law, op.cit., 162.

4. Allott, ibid., 238.

5. C.K. Meek, Land Law and Custom in the Colonies, op.cit., 11-27, rpt., RAL, I, 249; also Land Tenure and Land Administration in Nigeria and the Cameroons, H.M.S.O., 1957, 128-39, rpt., RAL, I, 293. Allott, RAL, I, 237. M. Gluckman, 'Property Rights and Status in African Traditional Law', in M. Gluckman, ed., Ideas and Procedures in African Customary Law, (London, 1969), 252-65 at 252, 262. The same tendency in East Africa, N. Mugerwa, 'Land Tenure in East Africa: Some Contrasts', in East African Law Today for British Institute of International and Comparative Law, 1966, 101-5, rpt., RAL, I, 252-4 at 252-3.

A concept of ownership which transcends generations implies a regime of property where the present holders act as trustees for the past, present and future generations, and in this respect, it comes very near to, though it is not completely identifiable with, the system of the Mitākṣarā co-ownership of property.

The predominance of the group over the individual in the ownership of land in Nigeria is described by Meek thus:

> However acquired, the lands of a lineage are held as by a corporation. Individual members have an absolute right to possession of a portion of lineage lands, but there is nothing analogous to tenancy in common as known to English law. Ownership is joint and indivisible, [1] no part being capable of being alienated by any individual occupier. A deceased member leaves no separate estate in lineage land which can devolve on his heir. But sons normally succeed to their father's holdings. [2]

The formation of the family or group is explained by P.C. Lloyd in the context of Yoruba family property. He states: 'New members of the group belong to it by virtue of their birth, and they accede to their rights at the time of their birth (or, one might more logically add, at the time of their conception).' [3]

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1. Lloyd considers the Yoruba descent group as joint tenants without any survivorship, P.C. Lloyd, Yoruba Land Law, (O.U.P., 1962), 78-9.

2. C.K. Meek, Land Tenure and Land Administration in Nigeria and the Cameroons, H.M.S.O., 1957, 128-39, rpt., RAL, I, 293-9 at 294.

3. Lloyd, loc.cit., 78. Cp. Smṛticandrikā, 258: 'By the birth itself', i.e. the meaning is by the very commencement (of the formation) of their body in the womb of the mother'. Also, the Ifugao custom, supra, 267.

But

> the interest of each member of a family in the family land is neither strictly usufructury in the Roman sense, nor is it a tenancy in common or a joint tenancy according to English land law. Again, it is not proprietary in the sense that it carries such a complete power of disposal as is enjoyed by an English fee simple owner of land; it is equally inaccurate to regard it as merely possessory, for the occupier ordinarily enjoys a degree of freedom of user which a fee simple owner might envy. 1

Despite close similarity to the Mitākṣarā birthright in respect of acquisition, the Yoruba system differs from the former in two major aspects. First, unlike the Mitākṣarā system, the rights held by the individual member in the Yoruba system are not heritable - they are extinguished by his death; or, we may say, they revert to the group.[2] Secondly, as opposed to the Mitākṣarā system, in some cognatic descent group, women could also be members of the Yoruba family property complex.[3] Under the Mitākṣarā system, which is an agnatic descent norm, a son's membership of a coparcenary, and thereby his right to the family property, so to say, are invariably dependant on his birth. A similar predominant position of interest in his father's land is strongly pronounced among the

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1. T.O. Elias, Nigerian Land Law and Custom, (London, 1953, rpt., 1956), 157.

2. Only the use and enjoyment of the family property devolve from one member of the family to another. M.O. Adesanya, 'Devolution and Distribution of Intestate Estates among the Yorubas', ZVR 74 (1974), 1-38 at 2.

3. P.C. Lloyd, Yoruba Land Law, op.cit., 78, 83. This is subject to what is discussed by Derrett, IMHL, §§ 413-4; Critique, I §§ 149-54.

Mbembe of South-Eastern Nigeria.[1] Rosemary Harris informs us that among the Mbembe: 'A man, in fact, maintains his claim to his father's land throughout his life; even if for any reason he is brought up by a different man, the son still has some claim on the land of his acknowledged father'.[2]

The customary law of Ghana also encapsulates the idea of supragenerational corporate ownership and shows the same tendencies that we have just discussed regarding the status of the individual vis-à-vis his group.

In Ashanti 'land belonged to the ancestors and all the generations yet to come,- and hence could only be alienated by all its co-owners, who would include the dead as well as the living'.[3] To understand the role of the group, which includes the dead, the living and the as-yet unborn, one must understand the institution of stool among the Akan people. The shrine containing the soul and spirit of the family, the tribe or a nation is called the stool or skin.[4]

The absolute ownership of the land of the village, tribe or town vests in the stool which means - 'The land belongs to the ancestors'.[5] So the ancestors

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1. We should note that the Mbembe have both patrilineal and matrilineal descent groups. For the nature of their law of succession, see R. Harris, 'Intestate Succession among the Mbembe of South-Eastern Nigergia', in Derrett, ed., Studies in the Laws of Succession in Nigeria, op.cit., 91-138.

2. R. Harris, ibid., 111.

3. A.N. Allott, 'The Ashanti Law of Property', ZVR (1966), 156-76, rpt., RAL, I, 356-67 at 365.

4. N.A. Ollennu, Principles of Customary Land Law in Ghana, (London, 1962), 6.

5. K.A. Busia, The Position of the Chief in the Modern Political System of Ashanti, (Oxford, 1951), 44.

the land, and its ownership, were inseparable.[1] Only the usufruct of the land was separable.[2] Thus, the highest title an individual member of a family can hold in stool land is an usufructory title,[3] which he can transfer inter vivos only 'by action of the entire lineage'.[4]

III. Alienation

In societies where ownership of property is vested in the group or family, alienation of property would naturally be forbidden or restricted by an individual member or even by the managing member. In African societies, inalienability of land

> is interwoven with magico-religious ideas in which the spirits of those buried in the land are involved; besides this it has, however, an unmistakably economic background, namely that the means of livelihood of the

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1. E.A. Hoebel, The Law of Primitive Man, (Cambridge, Mass., 1954, rpt., 1964), 226.

2. R.S. Rattray, Ashanti Law and Constitution, op.cit., 340; also Ashanti, (Oxford, 1923), 121-22.

3. N.A. Ollennu, loc.cit., 9-10. This is denied by K.M. Maini in context of customary land law in East Africa, Land Law in East Africa, (Nairobi, 1967), 5. However his subsequent observations at p.6 support our contention. To this, could be added the remark of Nwabueze: 'It is of course not true that individual ownership was foreign to customary law before the advent of the British', B.O. Nwabueze, Nigerian Land Law, (New York, 1972), 32.

4. Hoebel, loc.cit., 227. However, Ollennu gives the impression that an individual could alienate his right of usufruct by his free will, Ollennu, loc.cit., 10.

> group, which depends for its existence on agriculture (and/or cattle breeding), should not be lost. 1

This general norm of ancient agricultural societies is manifested in classical Hindu law as much as in African customs.[2] Apart from securing the maintenance of the family, the restriction on transfer was also a device to protect the rights of the natural heirs who, like their ancestors, would act as trustees of the family property; fictitously for the past, and actually for the present and future generations.

In Ashanti custom :

> a man had no legal power to affect succession to his estate; he could by inter vivos gift or by mortis causa bequest, give away his property temporarily or permanently; but, in order for such a gift or bequest to be valid and have permanent effect, it was necessary that it should have been made with the knowledge and concurrence of his family, or at least should have been ratified by them. 3

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1. H.W.J. Sonius, Introduction to Aspects of Customary Land Law in Africa, (Leiden, 1963), 22.

2. Cp. the texts: sthāvare vikrayo nāsti ..., Dh.K.1589b; Vyāsa, cited, Dā.bhā., II.27, Dh.K.1586b: na ca sthāvarasya ...; Vyāsa, Jhā, HLS, I, 276, Dh.K.1587: sthāvaram dvipadam ... ye jātā ye'pyajātaś ca ... vṛtti-lopaḥ-vigarhitaḥ: Nārada, Dh.K.1219b: ... sthāvarasya tu sarvasya na pitā na pitāmahaḥ. On these texts, see infra, 340, ns.1,3; 345, n.3; 354, n.4.

3. A.N. Allott, 'Ashanti Law of Property', ZVR (1966), 184, rpt., RAL, II, 312.

In Nigeria also 'a member of a lineage or "family" cannot legally give away a piece of his allotment of lineage land ...'[1] This is also supported by the customary practices of the Yorubas, by which a man could not bequeath inherited property 'outside the kin group of the original creator ...'[2]

IV. Testamentary Disposition

The corporate character of family property and, to a certain extent, of self-acquired property, is substantiated as much by the restriction on transfer inter vivos as on testamentary disposition. Thus, among the Akan people a man could make an oral will of his self-acquisitions, but the consent of the lineage to such a bequest was imperative.[3] Fanti customary law knew nothing of will as such, and even in death-bed dispositions (samansiw)[4] of self-acquired

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1. C.K. Meek, Land Tenure and Land Administration in Nigeria and the Cameroons, op.cit., 182. In customary law of the patrilineal Haya, a gift of landed property by a father to persons who are not entitled to the inheritance was not legal, H. Cory and M.M. Hartnoll, Customary Law of the Haya, (Lund Humphreys for International African Institute, 1945), 29, rpt., RAL, II, 315. This is also the implication of Swazi law, N.N. Rubin, 'The Swazi Law of Succession: a Restatement', JAL, 9 (1965) 2: 107. But, as a contrast in Sukuma customary law, a father's absolute power to disinherit a son is tolerated. H. Cory, Sukuma Law and Custom, (O.U.P., 1953), 169, rpt., RAL, II, 315.

2. P.C. Lloyd, 'Yoruba Inheritance and Succession', in Derrett, ed., Studies in the Laws of Succession in Nigeria, op.cit., 139-73 at 154.

3. J. Matson, 'Testate Succession in Ashanti', in Africa, Vol.23, (International African Institute, 1953), 224-32, rpt., RAL, II, 315-22 at 316.

4. Such dispositions, however, do not imply any right to make a will, J.M. Sarbah, Fanti Customary Laws, op.cit., 97.

property the presence of the relatives of the donor was compulsory.[1] However, 'the manager of family property has no power of testamentary disposition to alienate any part or portion of the family estate, moveable or immoveable from the family'.[2] In Sukuma customary law, the institution of oral will was not unknown, but, despite a father's independence to disinherit a particular son,[3] a testator could never appoint an heir outside the circle of those who were entitled to inherit;[3] the practice was used by a father only to express displeasure with a son.[4]

It may be urged that the śāstra allowed more freedom to the individual regarding alienation of self-acquired property.[5] Individual right was not altogether absent from the African scene,[6] but as in śāstric literature, it was generally confined to self-acquired property and chattels. In respect of personal chattels, Elias points out that 'the relationship between the owner and the thing owned is one of absolute dominium, untramelled by considerations of the

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1. J.M. Sarbah, Fanti Customary Laws, (London, 1968), 96.

2. Sarbah, ibid., 97.

3. H. Cory, Sukuma Law and Custom, (O.U.P., 1953), 167-8, rpt., RAL, II, 324-6.

4. Cory, ibid., RAL, II, 325.

5. See texts, infra, 334-9.

6. A.N. Allott, 'African Law', in Derrett, ed., An Introduction to Legal Systems, 131-56 at 149-50; 'Family Property in West Africa', in J.N.D. Anderson, ed., Family Law in Asia and Africa, (London, 1968), 121-42 at 127.

competing claims of the family ...'[1] In cases of self-acquired land as well, customary law allows the individual a free hand, with the rights and privileges of an absolute owner;[2] but although he is allowed to make a nuncupative will of his self-acquisitions, disherison of children is extremely rare.[3]

V. Conclusion

In general terms, one can draw parallels between the African and Hindu systems; but, in the Hindu context, even if we confine ourselves to the Mitākṣarā school,[4] the differences between the two are as numerous as their similarities.

In the African system, new members belong to the family property complex by virtue of their birth.[5] Although it sounds similar to the Hindu system, we should keep the distinction between 'joint Hindu family' and 'Hindu coparcenary' clear. Coparcenary is a much narrower body than the

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1. T.O. Elias, The Nature of African Customary Law, op.cit., 168.

2. Elias, ibid., 168. Same rule among the Fanti, J.M. Sarbah, Fanti Customary Laws, op.cit., 97. This is true in Nigeria as well, C.K. Meek, Land Tenure and Land Administration in Nigeria and Cameroons, op.cit., 182. P.C. Lloyd, 'Yoruba Inheritance and Succession', in Derrett, ed., Studies in the Laws of Succession in Nigeria, op.cit., 139-73 at 154.

3. Elias, ibid., 168.

4. In an undivided Dāyabhāga family the interest of a coparcener is considered as individual property, Sreemutty Soorjeemony Dossee v. Denobundoo, (1857), 6 MIA 526, 553.

5. P.C. Lloyd, Yoruba Land Law, op.cit., 78.

joint family.[1] A joint Hindu family consists of all persons lineally descended from a common ancestor. Wives and unmarried daughters are also included in the joint family. But all members of a joint family are not owners of the joint family property. The ownership is restricted to the members of the coparcenary who acquire by birth an interest in the joint or coparcenary property. The orthodox view is this, that to determine the coparceners

> the question in each case will be, who are the persons who have taken an interest in the property by birth. The answer will be, that they are the three generations next to the owner in unbroken male descent. Therefore, if a man has sons, grandsons and great-grandsons, all of these constitute a single coparcenary with himself. Everyone of these descendants is entitled to offer the funeral cake to him, and everyone of them obtains by birth an interest in his property.[2]

Thus, 'membership of the coparcenary is confined to the male descendants in the male line from a common male ancestor up to four degrees inclusive'.[3]

We should not lose sight of the fact that the Mitākṣarā birthright emanates from a secular concept of property. The African concept of corporate property is a conglomeration of magic, ritual, religion and norm.[4] Although

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1. Derrett, IMHL, § 404, Raghavachariar, Hindu Law, 4th ed., § 234.

2. Maine, Hindu Law and Usage, 11th ed., § 266.

3. Derrett, IMHL, § 405.

4. The view that property is meant for sacrifices (kratvartha) was rejected by Vijñāneśvara, see RLSI, 131 ff.

Vijñāneśvara slightly leaned on the doubtful text of Gautama (Mitā, I.i.23) his theorising in historical context is a major breakthrough toward secularisation of property. In the Mitākṣarā, in a purely proprietary sense, the ancestor has no role to play except by serving as a starting point, to determine the membership of the coparcenary and, in a partition, for computing the portions of the heirs; but in the African system, the ancestor is omnipresent,[1] he exists as an owner with the living and the as-yet unborn - thus, endowing property, especially land, with a metaphysical entity.

In the Mitākṣarā, the male descendant is a co-owner with his father and at the latter's death, a son's inheritance to his father's estate is automatic,[2] but in some African systems inheritance is selective.[3] Unlike the Hindu system,[4] in African customary law, if the father during his lifetime does not transfer his

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1. The role of the ancestor in Hindu coparcenary is explained thus: 'But while fresh links are continually being added to the chain of descendants by birth, so earlier links are being constantly removed from the upper end of the chain by death.' Maine, Hindu Law and Usage, 11th ed., §266.

2. Cp. Roman law, supra, 31.

3. A.N. Allott, The Akan Law of Property, Ph.D. thesis, (University of London, 1954), unpublished, 552. Also Allott, 'The Law of Inheritance, Family Structure and Modern Economic Order in Africa', ZVR 71 (1970), 105-118 at 112.

4. Katama Natchiar v. The Rajah of Shivaganga, (1863) 9 MIA 539, 589; on this see our discussion, infra, 832-43.

self-acquired property to his sons, at his death such property goes to the lineage,[1] and not to his descendants if these do not belong to it.

However, having taken into consideration their relevant dissimilarities in legal philosophy and social organisations, one broadly observes that both in the African and the Mitākṣarā systems kinship is the determining factor of ownership. But for more detailed observations, the following passages, sequentially placed, explain respectively the similarities as well as the differences of property rules in the family ownership of the two systems. From a general point of view, we can say that in African customary law:

> ... family property is vested in the family as a whole by a single, indivisible title. It seems almost unnecessary to add that the head of the family does not own the property, nor has he any larger title, share or interest in the property than other members. No member has a separable interest in the title to family property, nor is his right in the property attachable at law. It is incorrect to describe the members of the family as joint tenants, partners or tenants-in-common of the family property.[2]

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1. Allott, loc.cit., 552: 'The Future of African Law', in H. Kuper and L. Kuper, ed., African Law ..., op.cit., 216-40 at 235. K. Bentsi-Enchill, Ghana Land Law: An Exposition, Analysis and Critique, (London, 1964), 134. This is not the custom among the Northern Ewe-speaking people of Ghana. The general rule of Ewe law is that the family does not succeed to any interest in the self-acquired property of a deceased member. 'Succession is by right, as it were, by the proximate next-of-kin traced patrilineally', A.K.P. Kludze, Ewe Law of Property, Ghana I, Restatement of African Law: 6, ed., Allott, (London, 1973), 269 for details, see ibid., 280-3.

2. A.N. Allott, The Akan Law of Property, op.cit., 215-6.

In the _Mitākṣarā_ system:

> No individual member of the coparcenary can claim before partition that he owns a definite share either of the corpus or of its income. A coparcener, however, has the right to be maintained; to demand partition and an account of the state of the family property; to become manager; to alienate (in South India only) his undivided interest in the joint-family property; and to take so long as he remains undivided, by survivorship, his presumptive share of the interests of deceased coparceners which will become ascertained for the first time at a partition. Thus coparceners have a community of interest and unity of possession of the joint-family property and are comparable with joint-tenants in English law with benefit of survivorship, save their individual rights commence independently and by operation of law and, not by transfer between parties. 1

1. Derrett, IMHL, §408. Also Raghavachariar, _Hindu Law_, 4th ed., §236. _Katama Natchiar_ v. _The Rajah of Shivaganga_, (1863) 9 MIA 539, 543, 611.

CHAPTER 12

THE PRE-DHARMAŚĀSTRA AND THE DHARMAŚĀSTRA LITERATURE

1. Introduction

The birthright of a son in ancestral property and self-acquired property of his father was one of the most controversial topics among the mediaeval commentators on Hindu law.[1] Owing mainly to their divergence on this point, the two schools of Hindu law, namely the Mitākṣarā and the Dāyabhāga, have emerged and developed into two legal philosophies and, even today,[2] they govern the family law of property among the Hindus.

Most of the smṛti texts have come down to us in fragmentary form, mainly through the commentators.[3] These commentators have quoted these texts, manipulated and interpreted[4] them in order to establish their arguments

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1. See Mitā.I.i.27; Dā.bhā, 1.20. For a discussion, see Kāṇe, III, 553ff.

2. The statement should be read subject to the minor changes in the Hindu Succession Act, 1956. For a discussion of the Act, infra, 935-49.

3. For details, see Derrett, Dharmaśāstra and Juridical Literature, (Wiesbaden, 1973).

4. For a fuller understanding of the development of the śāstra on this line, see Derrett, Dharmaśāstra and Juridical Literature, (Wiesbaden, 1973), 18. Also R. Lingat, tr. Derrett, The Classical Law of India, (Berkeley/London, 1973), 107 ff. Cp. midrash (interpretation) in Jewish law, G. Horowitz, The Spirit of Jewish Law, (New York, 1953), 31; Derrett, Jesus's Audience, (London, 1973), 108; Law in the New Testament, (London, 1970, rpt. 1974), introd., xxxvi-xliii. Also H.L. Strack, Introduction to the Talmud and Midrash (Philadelphia, 1945, and New York, 1959). cp. the role of glossators in the Civil law system, W. Seagle, The History of Law, (New York, 1946), 167.

on the respective rights of father and son in family property. Thus commenting on the role of the commentators vis-à-vis the smrti texts, Mayne observes:

> They modified and supplemented the rules in the Smritis, in part by means of their own reasoning and in part in the light of usages that had grown up. They did their work so well that their Commentaries and Digests have, in effect, superseded the Smritis, at any rate, in very large measure. [1]

But whatever may be the role and motivation of the Commentators, the importance of the commentatorial literature can hardly be ignored in the development of Hindu law.[2] During the early Anglo-Hindu law period, the availability of the smrtis alongside the Commentaries created some judicial confusion. On this point, Derrett rightly observes:

> Sometimes the smrti was taken as a standard, and the commentators ignored, while at others the commentators were supposed the only valid authorities, whatever the smrti might appear to say literally. At times the commentators themselves were followed if local usage supported them; at others the local usage could be presumed. In all cases,

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1. S. Srinivasa Iyengar, ed., Mayne's Treatise on Hindu Law and Usage, (Madras, 1938), 42. Also, Lingat , CLI, 110. Earlier H.H. Wilson, ed., R. Rost, Works by the Late Horace Hayman Wilson, (London, 1865), III, 3. However, J.C. Ghose warned that 'the commentaries cannot override the law of the Smritis when it is clear and unambiguous', The Principles of Hindu Law, 3rd ed., (Calcutta, 1917), I, Preface, v.

2. On the importance of this literature, see Lingat , CLI, 109. Derrett, RLSI, 307. Lingat rightly remarks: 'Placed as they were between the immutable texts of Smrti and the mobile traditions of custom, they facilitated the passage from the one to the other. We could say that they were the real organisers of Hindu Law', tr. Derrett, CLI, 175.

> once the line of decisions had been established, the court was reluctant to depart from it even when it was shown that the dharmaśāstra, treated historically, went the other way.[1]

It is true that the commentators brought the texts together in an attempt to harmonise them;[2] they also enlivened the smṛtis by introducing a customary element into their exposition.[3] But one cannot overlook the fact that in their process of simplification and synthesis, the writers brew up the same old texts over and over again. They repeated them, and themselves, and they copied from each other.[4] Having taken these limitations of the commentatorial literature into consideration, historical research warrants a juridical survey of the smṛti texts. In order to examine whether a Hindu son had birthright or not it is better, for the time being, to dismiss the commentators,

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1. Derrett, Religion, Law and the State in India, (London, 1968), 299-300. See Muttu Vaduganadha Tevar v. Dora Singha Tevar, (1879) 3 Mad.309 at 310. The P.C. took a correct stand in The Collector of Madura v. Moottoo Ramalinga Sethupatty, (1868) 12 MIA 397 at 436: 'The duty, therefore, of an European Judge who is under the obligation to administer Hindoo Law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the District with which he has to deal, and has there been sanctioned by usage. For, under the Hindu system of law, clear proof of usage will outweigh the written text of the law'. The P.C. view wrongly criticised by N.C. Sengupta, Sources of Law and Society in Ancient India, (Calcutta, 1914), 101. For an exhaustive discussion of the problem, see Derrett, RLSI, 299 ff.

2. Lingat, CLI, 109.

3. Derrett, RLSI, 307.

4. Lingat, CLI, 109.

and try to study and analyse the smṛti texts as they are.[1]

II. Categories of Property in the Dharmaśāstra and Birthright

a. General remarks

In general, we may observe from the smṛti texts that property in the father's hands was categorised as ancestral[2] or self-acquired.[3] These two types of property could be either immovable or movable,[4] and the respective rights of father and son used to vary according to the category of property in the hands of the father. In most smṛtis we observe that in the property of the grandfather a son had co-ownership with the father and, in this respect, the majority of the texts do not make any distinction between movables and immovables.[5] But before we draw any conclusion, it is worthwhile to dwell a moment upon the texts as they stand.

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1. On the method of examining a text, see Derrett, '"Quid possit antiquitas Nostris Legibus Abrogare" The Role of the Jurist in Ancient Indian Law', Essays, I, 140-9 at 219-20. The core of the guiding principle is: 'Each smṛti text must be identified for what it is', ibid., 219. Also, Lingat, tr. Derrett, CLI, 143-75.

2. By 'ancestral property' we mean all property inherited by a male from his father, paternal grandfather or paternal great-grandfather, Kāṇe, HD, III, 576.

3. Kāṇe, HD, III, 576-9, Derrett, 'The Development of the Concept of Property in India c. A.D. 800-1800', ZVR 64 (1962) 15-130; rpt. Essays, II, 8-130 at 50-5.

4. Kāṇe, HD, III, 574.

5. For example, Yājñ. II. 121. Bṛ.xxvi.14.dravye pitāmahopātte jaṅgame sthāvare tathā, Kāṇe, HD, III, 554, n.1032.

b. Ancestral property

There is no doubt that the dharmaśāstra pays much attention to the mutual rights of father and son in family property.

Yājñavalkya enjoins equal ownership of father and son in property acquired by the grandfather and, in this respect, the verse does not make any distinction between movables and immovables.[1] "The ownership of both father and son is the same in land, a corrody,[2] or wealth [3] received from the

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1. Yājñ. II.121; Dh.K. 1775b. bhūr yā pitāmahopāttā nibandho dravyam eva vā / tatra syāt sadṛśam svāmyaṃ pituḥ putrasya caiva hi //.

2. nibandha has been inadequately translated by Colebrooke as 'cprrody', Kaṇe, HD, III, 575. 'Corrody' means 'a sum of money or allowance of meat, drink, and clothing due to the Crown from the abbey or other religious house, whereof it was founder, towards the sustentation of such one of its servants as is thought fit to receive it. It differs from a pension in that it was allowed towards the maintenance of any of the King's servants in an abbey; a pension being given to one of the King's chaplains, for his better maintenance, till he may be provided with a benefice', Wharton's Law Lexicon, 14th ed., (London, 1949), 261. Also see J.H. Tillotson, 'Pensions, Corrodies and Religious Houses: An Aspect of the Relations of Crown and Church in Early Fourteenth-Century England', Journal of Religious History, 8 (1974) 2: 127-43; 'The corrody is distinguished from the pension by the fact that whereas the latter was generally a grant of money, the corrody implied a grant of a definite supply of goods (food, drink, dress and fuel) from the common store of a religious house', ibid., 131. nibandha has strong resemblance with nivī (trust). On etymology and interconnection of the meaning of nivī, see 'nivī', Derrett, Vishveshvaranand Indological Journal, 12 (1974) 1-2: 89-95. nibandhas could be created by two ways, the one type created by private owners as a source of profit, such as a betel garden, the other type from official or royal grantors, such as a periodic payment or allowance in cash or kind, permanently granted by a King, a corporation, or a village or a caste, to a person, a family, a math or a temple, Kāṇe, HD, III, 575, n.1082. The term has been fully explained by Derrett, 'The Development of the Concept of Property in India', ZVR 64 (1962), 15-130 at 74-5; also Critique, §§ 518, 531.

3. Although the correct rendering of the word dravya is movable, sometimes, however, the word is employed in the sense of all property, whether movable or immovable, as in Bṛ.xxvi.14 dravye paitāmahopātte ..., Kāṇe, HD, III, 575. On this, see infra, 521-2.

grandfather "[1]

Viṣṇu also declares that father and son enjoy equal ownership in property acquired by the father's father.[2] "But in regard to wealth inherited of the paternal grandfather, the ownership of father and son is equal."[3]

In one of the texts of Bṛhaspati,[4] which is also attributed to Vyāsa,[5] co-ownership is conferred on the father and son only in respect of ancestral immovables. "Houses and landed property inherited from an ancestor shall be shared equally by the father and sons".[6]

An isolated study of this verse leaves us in doubt whether Bṛhaspati denies co-ownership of father and son in ancestral movables, but the doubt is resolved by another text which clearly ordains that father and son have equal ownership in property acquired by the grandfather.[7] "Of property acquired

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1. Tr. Colebrooke, Mitā, I, v.3. Cp. Arhannīti, 63: 'There is equality between father and son as to a thing acquired by the grandfather. The son may restrain the father's activity after (obtaining) a royal injunction', text and tr. Derrett, 'Hemācarya's Arhannīti: An Original Jaina Juridical Work of the Middle Ages', ABORI, 57 (1976), I-IV, 1-21 at 19.

2. Viṣṇu, XVII.2; Dh.K.1175a. paitāmahe tu arthe pitā putrayos tulyaṃ svāmitvam //

3. Tr. Jolly, SBE, VII, 68.

4. Bṛ. XXVI.10, Aiyangar, ed., 197; Dh.K.1180b. kramāgate gṛha-kṣetre pitā putrāḥ samāṃśinaḥ /

5. Dh.K.1180b.

6. Tr. Jolly, SBE, XXXIII, 370.

7. Bṛ. XXVI.14, Aiyangar, ed., 197; Dh.K.1179b. dravye pitāmahopātte sthāvare jaṅgame tathā (variant pivā) / samam aṃśitvam ākhyātaṃ pituḥ putrasya caiva hi //

by the grandfather, whether immovable or movable, father and son are declared to be entitled to equal shares".[1]

Like Yājñavalkya,[2] Viṣṇu,[3] and Bṛhaspati,[4] Kātyāyana also propounds the view that father and son have equal ownership in the property of the grandfather.[5] "Property of the grandfather is of equal ownership between both the father and his sons; but the son is not entitled to ownership over what is acquired by the father himself".[6]

c. Self-acquired property of the father

We have just seen in the second part of Kātyāyana's text,[7] that co-ownership of father and son did not extend to the self-acquired property of the father. Another eloquent example denying co-ownership to the son in self-acquired property of the father may be quoted from Bṛhaspati. It refers to any

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1. Tr. Jolly, SBE XXXIII, 370.
2. Yājñ. II. 121.
3. Viṣṇu, XVII.2.
4. Bṛ.XXVI.14.
5. Kāty. 839; Dh.K.1173b. paitāmahaṃ samānaṃ syāt pituḥ putrasya cobhayoḥ / svayaṃ coparjite pitrā na putraḥ svāmyam arhati // This text and the texts cited at n.2, 3, 4 above embody the central conception of the Mitākṣarā school as to the equal ownership of father and son in ancestral property, Kaṇe, Kātyāyanasmṛtisārodhvāra, (Bombay, 1933), 295, n.839.
6. Tr. Kaṇe, Kātyāyanasmṛtisāroddhāra, 295.
7. Kāty. 839b.

case in which a father recovers ancestral property which was lost; over such property and property which he acquired on account of his learning and valour, a father is said to have exclusive ownership and free power of disposition.[1]

> In property belonging to the grandfather which had been taken away and has been (afterwards) recovered by the father through his own ability, as well as in property acquired by sacred knowledge, valour in arms &c. the father's ownership has been declared.
>
> He may make a gift out of that property, or even consume it, at his will. But in his default, his sons are pronounced to be equal sharers. 2

While dealing with the topic 'resumption of gifts' (dattāpradānikam), Bṛhaspati again has another verse which clearly explains the incidents of self-acquired property. The sage declares:[3] "Self-acquired property may be given away at one's own pleasure".[4]

In respect of self-acquired property, the same idea has been expressed again and again in the dharmaśāstra texts. Yājñavalkya, who undoubtedly

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1. Bṛ.XXVI. 58-9; Aiyangar, ed., 205; Bṛ. XXV. 12-13, SBE, XXXIII, 371-2, Dh.K.1222a. paitāmahaṃ hṛtam pitrā sva-śaktyā yad-upārjitam / vidyā śauryādinā prāptaṃ tatra svāmyaṃ pituḥ smṛtam // pradānaṃ svecchayā kuryād bhogaṃ caiva tato dhanāt / tad abhāve tu tanayāḥ samāṃśāḥ parikīrtitāḥ //

2. Tr. Jolly, SBE, XXIII, 371-2.

3. Bṛ. XIV.5; Dh.K.803. svecchā deyaṃ svayaṃ prāptaṃ ... /

4. Tr. Jhā, The Vivādachintāmaṇi, (Baroda, 1942), 60.

advocated co-ownership of father and son in ancestral property,[1] declares in respect of self-acquisitions:[2]

> Whatever else is required by the coparcener himself, without detriment to the father's estate, as a present from a friend, or a gift at nuptials, does not appertain to the co-heirs. Nor shall he, who recovers hereditary property, which had been taken away, give it up to the parceners: nor that has been gained by science. 3

There are similar texts in the Manusmṛtī which run as follows:[4]

> If one earns something by his own effort without detriment to the father's property, that being property acquired by his desire he need not give, against his will.

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1. Yājñ. II.121, supra, 331-2.

2. Yājñ. II. 118-9; Dh.K.1215a. pitṛ dravyāvirodhena yad-anyat svayam-arjitaṃ / maitram-audhvāhikaṃ caiva dāyādānam na tad bhavet // kramād abhyāgataṃ dravyam hṛtam-abhyuddaret tu yaḥ / dāyādebhyo na tad dadyād vidyayā labdham eva ca //

3. Tr. Colebrooke, Mitā, I.IV.1. Edward Roer and W.A. Montriou renders pitṛ dravyāvirodhena as 'without diminishing the paternal estate', Hindu Law and Judicature from the Dharmaśāstra of Yājnavalkya, (Calcutta/London, 1859), 38-9. Vijñāneśvara interprets pitṛ dravyāvirodhena as without detriment to the estate of the father or the mother, Ghārpure, The Collection of Hindu Law Texts, Vol. II, Pt. IV, (Bombay, 1939), 1008. For a critical discussion on this point, see Derrett, Critique, §§ 91-103.

4. Manu, IX, 208: anupaghnan pitṛ-dravyaṃ śrameṇa yad upārjayet/svayam īhitalabdham tan nākāmo dātum arhati //
Manu, IX. 209: paitṛkaṃ tu pitā dravyam anavāptaṃ yad āpnuyāt/na tat putrair bhajet sārdham akāmaḥ svayam arjitam //

> If the father requires ancestral property which had not been recovered he need not, unless he wishes, divide that with his sons, for it is selfacquired. [1]

The above rendering of the text (Manu, IX.209) by Derrett agrees with those of Colebrooke,[2] Bühler,[3] Jhā[4] and Ghārpure,[5] but if we accept Sir William Jones's translation, it appears that this verse is not meant to say anything about ancestral property recovered by the father. Sir William Jones's rendering conveys the idea that lost paternal wealth, when recovered by any brother, should be treated as self-acquired and that brother is not obliged to share it with others; thus, the text has hardly anything to do with a partition by the father. Sir William Jones's rendering runs as follows:

> And if a son, by his own efforts, recover <u>a debt or property unjustly detained, which could not be recovered before by his father,</u> he shall not, unless by (his) free will, put it into parcenary with his brethren, since in fact, it was acquired by himself. [6]

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1. Derrett, <u>Bhārucī's Commentary on the Manusmṛti,</u> (Wiesbaden, 1975), II, 263-4. Note the printing mistake at the beginning of Verse IX.209; instead of 'It' it should be 'If'. I follow the rendering by Derrett, which he gave in the margin of my first draft.

2. Mitā, I. v.11.

3. Bühler, SBE, XXV, 375-6.

4. Jhā, <u>Manu-smṛti,</u> (Calcutta, 1926), V, 172.

5. Ghārpure, <u>The Collection of Hindu Law Texts, Yājñavalkya Smṛti,</u> (Bombay, 1939), II, IV, 1021.

6. Sir William Jones, <u>Institutes of Hindu Law: Or, The Ordinances of Menu, According to the Gloss of Culluca. Comprising the Indian System of Duties, Religious and Civil,</u> (Calcutta/London, 1796), 273.

As is well known, Sir William Jones based his rendering [1] primarily on the gloss of Kullūka. But even the comment of Kullūka,[2] by the words, '*putraiḥ saha na vibhajet*' (shall not share it with his sons), implies that a father, who recovered ancestral property which was lost, is not obliged to share it with his sons. And, indeed, even Jones's rendering supports, in general, the absence of co-ownership in self-acquired property by suggesting that ancestral property once lost, though subsequently recovered, loses (sentiment apart) its character as ancestral property and falls into the category of 'self-acquired' without the incidence of co-ownership.

There are similar texts in other *smṛtis* which help us to a better understanding of the text of Manu (IX. 209). Thus Kātyāyana declares:[3]

> All that (ancestral) wealth which was taken away (by force) from the family or was lost (to the family) and which was recovered by the father himself by his own efforts, the father is not liable to share with the sons at the time of the partition. 4

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1. Grady seems to support Jones's rendering but, indeed, he was carried away by the Bengali bias of Jagannātha and wrongly ignored the correct opinion of Sir Thomas Strange, S.G. Grady, *A Manual of Hindu Law*, (London, 1871), 214-6. The correct view of the majority, as expressed in the rendering of Derrett (Manu, IX.209) is accepted by N.C. Sengupta, *Evolution of Ancient Indian Law*, TLL, 1950 (Calcutta, 1953), 219, 221; Kāṇe, HD, III, 580.

2. paitṛkam iti / yat-punaḥ pitṛ-sambandhī dhanaṃ tenāsamarthenopekṣitatvāt anavāptam putraḥ sva-śaktyā prāpnuyāt tat svayamarjitam anicchan putraiḥ saha na vibhajet / Kullūka on Manu, IX.209.

3. Kāty. 866; Dh.K.1224a. svaśaktyāpahṛtam naṣṭam svayamāptaṃ ca yadbhavet / etat sarvam pitā putraiḥ vibhāge naiva dāpyate //

4. Tr. Kāṇe, *Kātyāyanasmṛti*, 307.

Śaṅkha, however, ordains: [1]

> Land (inherited) in regular succession, but which had been formerly lost and which a single (heir) shall recover solely by his own labour the rest may divide according to their due allotments, having first given him a fourth part. 2

It needs to be mentioned that in this text, Śaṅkha only deals with ancestral land and enjoins a fixed share (one-fourth) for the recoverer. He does not consider the whole of the recovered property as self-acquisition.[3] It seems that by ordaining apportionment, Śaṅkha is rewarding individual effort but at the same time, grudgingly upholding the rights of co-owners in ancestral land.

The Arthaśāstra, though not exactly an authority on sources of Hindu law, also upholds the impartibility of self-acquired property. Kauṭilya says:[4] "What is acquired by oneself is not to be divided, except what is brought into being out of the father's property".[5]

Viṣṇu also upholds a father's independence in respect of his self-acquisitions. The sage declares: [6] "If a father makes a partition with his

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1. Śaṅkha, Dh.K.1207a. pūrva-naṣṭām tu yo bhūmim ekaś cet uddharet śramāt / yathā bhāgaṃ bhajanty anye dattvāṃśaṃ tu turīyakam //

2. Tr. Colebrooke, Mita, I. iv. 3.

3. As we see in Manu, IX.209; Yājñ.II.119; Bṛ.XXVI.58 and Kāty.866.

4. Arthaśāstra, 3.5.3, Dh.K.1207b. svayamārjitam avibhājyam, anyatra pitṛ-dravyāt utthitebhyaḥ / R.P. Kāṅgle, ed., Kauṭilya Arthaśāstra, (Bombay, 1960), I.104.

5. Tr. Kāṅgle, ibid., (Bombay, 1963), II, 241.

6. Viṣṇu, XVII.1; Dh.K.1175a. pitā cet putrān vibhajet tasya svecchā svayam upātte'rthe /

sons, he may dispose of his self-acquired property as he thinks best."[1]

The exclusive ownership of the father in self-acquired property is again emphasised by Viṣṇu in another text,[2] which is reminiscent of Manu, IX.209. "But if a father recovers lost ancestral property, he shall not divide it, unless by his own will, with his sons (for it is) self-acquired".[3]

The foregoing texts on self-acquired property indicate that a son had no right to demand a share in the self-acquisitions of his father. Moreover, the texts on ancestral property,[4] too, indirectly strengthen this point by declaring that in grandparental property a son is co-owner with his father.

d. Movables and immovables

The texts on ancestral and self-acquired property, which we have just discussed [5] (with the exception of Śaṅkha's text),[6] do not make any distinction between movables and immovables in their consideration of the respective rights of father and son. But, in fact, there are texts which give more latitude to the father in dealing with his movables.

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1. Tr. Jolly, SBE, VII, 67,
2. Viṣṇu, XXVIII.43; Dh.K.1205. paitṛkam tu pitā dravyam anavāptam yad āpnuyāt / na tat prutrair bhajet sārdham akāmaḥ svayamarjitam //
3. The verse is identical with Manu, IX. 209, and we adopt Bühler's tr., SBE, XXV, 375-6.
4. Supra, 331-3.
5. Supra, 331-9.
6. Supra, 338.

Nārada divided property into two broad categories, namely, movables and immovables, and concerning their respective incidents did not make any distinction between ancestral and self-acquired properties in the hands of the father. He denies a father's exclusive ownership and unilateral power of dealing with immovables but declares him to be the master (prabhu) of the movables.[1]

> The father is master of the gems, pearls and corals, and of all other movable property but neither the father, nor the grandfather, is so of the whole immovable estate. By favour of the father, clothes and ornaments are used, but immovable property may not be consumed, even with the father's indulgence. 2

In respect of a son's co-ownership with his father, Vyāsa puts emphasis on immovables and thereby enjoins that even self-acquired immovables cannot be alienated by a father without the consent of his sons.[3]

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1. Nārada, Dh.K.1219b. maṇi-muktā-pravālāṇām sarvasyaiva pitā prabhuḥ / sthāvarasya tu sarvasya na pitā na pitāmahaḥ // pitṛ-prasādāt bhujyante vastrāny ābharaṇāni ca / sthāvaraṃ tu na bhujyeta prasāde sati paitṛke //

2. Tr. Colebrooke, Mitā, I, 1.21.

3. Vyāsa, Dh.K.1587; Jhā, HLS, I, 276. Sthāvaraṃ dvipadam caiva yadyapi svayam-arjitam / asaṃbhūya sutān sarvān na dānaṃ na ca vikrayaḥ // ye jātā ye'pyajātaś ca ye garbhe vyavasthitāḥ / vṛttim ca te 'bhikāṅkṣanti na dānaṃ na ca vikrayaḥ // variant reading of the last eighteen words: vṛtti-lopaḥ vigarhitaḥ : 'deprivation of maintenance is morally wrong', N.C. Sengupta, Evolution of Ancient Indian Law, op.cit., 209, n.78.

> Though immovables or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. They, who are born, as also they who are yet unbegotten, and they who are still in the womb, require the means of support; no gift or sale should, therefore, be made. [1]

Indeed, such *smṛti* texts on the importance of immovable property should not surprise us *a priori*. In the pastoral and agrarian economy of pre-industrial societies, immovables form the main corpus of family property, and it is small wonder they became the objects of multiple rights and special rituals.[2] In primitive societies, exclusive individual ownership is rare, and this feature of pre-literate society is repeated again and again in the *dharmaśāstra* texts.

Thus, Bṛhaspati ordains:[3] "Divided or undivided, all coparceners are equally entitled to the immovable property; no single co-parcener has the

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1. Tr. J.R. Ghārpure, The Collection of Hindu Law Texts, II.IV, *Yājñavalkya Smṛti*, (Bombay, 1939), 992. Jhā renders the second verse as follows: 'There can be no sale or gift of such property as would be the means of livelihood for sons already born and those yet to be born', HLS, I, 276. However, the prohibition of sale is not literally dependent on a condition of need for maintenance and for this reason, Jhā's rendering is misleading. Colebrooke's translation of the text (Mitā, I.i.27) is better than Jhā's but Ghārpure's is more literal than Colebrooke's.

2. M. Gluckman, The Ideas in Barotse Jurisprudence, (New Haven/London, 1965), 116-7.

3. Bṛ. XV.7; Dh.K.803b. avibhaktā vibhaktā vā dāyādāḥ sthāvare samāḥ / eko hy anīśaḥ sarvatra dānādhamana-vikraye // variant reading for *dāyādāḥ* is *sapiṇḍāḥ*; The variant does not make any change in the meaning, J.C. Ghose, Hindu Law, I, 406. The text has also been ascribed to Vyāsa, Dā.bhā., II.27.

power to give away, pledge or sell it."[1]

The text, in its literal sense, indicates that the consent of the 'divi - ded' coparceners, as well as that of the undivided coparceners, was required for alienation of immovable estate. Unless the text implies an idea of pre-emption, a rule such as this would make alienation of land very difficult indeed, if not impossible.[2] Alternately, one may be inclined to think that Bṛhaspati laid down a rule for a social order where land used to be owned jointly by the village community,[3] or by any members of a clan descending from a common ancestor. But it is not correct to say that alienation of land was altogether unknown in the time of Bṛhaspati; and our observation is strengthened by the fact that Bṛhaspati devoted reasonable space to documents concerned with land transactions.[4] And Lanman rightly comments that "... these rules represent actually prevailing legal custom and usage, even for the early centuries of our era, is absolutely certain".[5] Thus, the *śāstra* could not have propounded

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1. Tr. Jhā, *Vivādachintāmaṇi*, (Baroda, 1942), 42.

2. Anglo-Hindu law loosened this strict rule, Kāṇe, HD, III, 593.

3. N.C. Sengupta, however, disagrees with this view, see his comment on a similar text, Mitā, I.i.31, *Evolution of Ancient Indian Law*, op.cit., 205.

4. Bṛ. VIII, SBE, XXXIII, 304-9. In Bṛhaspati, 18.4, (See L. Renou, 'Notes sur la Bṛhaspati-Smṛti', *Indo-Iranian Journal* 6 (1962), 81-102 at 95-6) there is an elaborate *smṛti* sequence purporting to explain a formula that has been in use in conveyance of land for at least two thousand years, Derrett, *Dharma - śāstra: The Origin and Purpose of the Smṛiti*, in *Contributions to the Study of Indian Law and Society*, South Asia Seminar, University of Pennsylvania, (Philadelphia, 1966-67), cyclostyled, 18.

5. C.R. Lanman, 'Hindu Law and Custom as to Gifts', rpt. from *Anniversary Papers by Colleagues and Pupils of George Lyman Kittredge*, (Boston, 1913), 1-14 at 6. On epigraphic evidences to this effect, also see ibid.

such a rigid rule as is purported by the literal meaning of the text. It would be juridically rational to interpret this part of the text, namely, the necessity for the consent of 'divided' coparceners, as a requirement introduced to facilitate the transaction and avoid any future doubt.[1]

Thus, the *śāstra* has yet another text which lays down the formalities to be observed in transfer of land. Vijñāneśvara in his *Mitākṣarā* cites a text, which ran as follows:[2] "Land passes by six formalities; by consent of townsmen, of kinsmen, of neighbours, and of heirs, and by gift of gold and water".[3]

The text substantiates Maine's general observation that in ancient laws conveyance was not written but 'acted'[4] and that is why validity of the transfer of land was associated with gestures, words and other symbolic acts. The purpose of these acts was that transfer of land should be certain and well-

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1. See Mitā, I.i.30, Vācaspati Miśra by 'divided' coparceners means that a division has taken place but their respective shares have not been allocated and assigned; Jhā, ed., *Vivādachintāmaṇi*, op.cit., 62. Devaṇṇabhaṭṭa takes the view that the mention of 'divided' in the text is only to emphasise the rights of the undivided coparceners, *Smṛti-candrikā*, 447.

2. Anonymous text, cited, Mitā, I, i.31. sva-grāma-jñāti-sāmanta-dāyādānumatena ca / hiraṇyodaka-dānena ṣaḍbhir gacchati medinī //

3. Tr. Colebrooke, Mitā, I.i.31.

4. Maine, *Ancient Law*, 2nd ed., 296. Also W. Markby, *Elements of Law*, 6th ed., 263.

publicised.[1]

Indeed, the ṛṣis emphasised the importance of immovables and discouraged their dissipation by unilateral or secret transfers but, as consummate connoisseurs of society, they were conscious of the fact that any rule of alienation without flexibility could jeopardise the institution of family in time of temporal and religious needs. That is why, under special circumstances, even a single member of the family had the freedom to alienate immovables.

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1. Vijñāneśvara's interpretation that these acts were merely for the sake of publicity is supported by another text of Yājñavalkya: 'Let the acceptance be publick, especially of immovable property; and, delivering what may be given and has been promised, let not a wise man resume the donation', Colebrooke, Digest, (London, 1801), II, 160. The pouring of water as the accompaniment of a gift, is found as early as Āpastamba, II, 4.9.8, SBE II, 121. The usage is prescribed in other smṛtis : Gautama, V, 18-19, SBE II, 201; Viṣṇu, LIX, 15, SBE VII, 192; Cp. Mancipatio in Roman law, Gai, 1.119; T.C. Sandars, The Institutes of Justinian, op.cit., introd., xlvii, lvii. Salic law needed 9 witnesses for transfer of property and certain ceremonies were also required, Lex Salica, Evolution of Law, (Boston, 1915), I, 507. Among the Lombards, sale of land was allowed only on absolute necessity and such a transfer had to be public by reading the conveyance in Court and calling on the by-standers to witness the transaction, Bühler, Digest of Hindu Law, 3rd ed., I, 223, n.c. Also cp. Skeyting ceremony in the old law of Norway, (Gulathingslaw, 292), in transfer of Odal land, A. Taranger, 'The Meaning of the words Odal and Skeyting in the Old Laws of Norway', in Essays of the IVth International Congress of Historical Studies, (London, 1914, rpt. Nendeln/Liechtenstein, 1972), 159-73 at 159-60. Among the Ifugao of Northern Luzon, transfer of land being rare, could be made under dire necessity and only with full approval of kinsmen. To make the transfer public and complete, a ritual feast (ibuy ceremony) had to be held in the buyers house in presence of witnesses, E.A. Hoebel, The Law of Primitive Man, (HUP, Cambridge, 1964,), 105.

Thus, after pointing at the co-ownership of the dāyādas, Bṛhaspati eventually adds:[1] "Even a single individual may conclude a donation, mortgage or sale, of immovable property, during a season of distress, for the sake of the family, and especially for pious purposes".[2]

However, it should be conceded that alienation of immovable property[3] by an individual member of the family was the exception rather than the rule[4] which explains the paucity of such texts and rarity of such a common-sense provision. In a system of multiple ownership[5] over the same property, the foregoing text empowers a father or manager to meet the essential needs of a family when the consent of the dāyādas may not be forthcoming for a

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1. Bṛ. cited at Mitā, I.i.28; Dh.K.1588b. eko'pi sthāvare kuryāt dānādhamana-vikrayam / āpat-kāle kuṭumbārthe dharmārthe'pi viśeṣataḥ //

2. Tr. Colebrooke, Mitā, I.i.28.

3. An anonymous text completely forbids the sale of land: sthāvare vikrayo nāsti kuryād ādhim anujñayā /, Dh.K.1589b; tr. J.C. Ghose, Hindu Law, I, 470: 'Of land there cannot be a sale. It can only be mortgaged with the consent ...' The text is impractical and this proves that much of the śāstra was mere admonition, see supra, 342-3 . However, the text should be taken in the light of the mores of ancient societies. The biblical lawgiver also tried to forestal the permanent alienation of Palestinian land by introducing through the Jubilee Year, a periodic restitutio in integram, Maimonides, Code, Sekirut, 12, 14; also on this, see S.W. Baron, 'The Economic Views of Maimonides', in S.W. Baron, ed., Essays on Maimonides, An Octocentennial Volume, (New York, 1966), 127-264 at 167-8; also F. Berolzheimer, tr. R.S. Jastrow, The World's Legal Philosophies, Modern Legal Philosophy Series, (Boston, 1912), II, 43-4.

4. This is a feature of primitive society, Maine, Ancient Law, 1st ed., 258. Also, W. Markby, Elements of Law, (Oxford, 1885), 247-8.

5. Another feature of ancient law, Maine, ibid., 258.

reason such as legal incapacity.

It is indeed significant to note that the preceding texts deal with the special incidents of immovable property in general. The absence of any distinction between ancestral and self-acquired immovables would signify that even in self-acquired immovable property, a son had a right analogous to co-ownership, and it seems that he could interdict an improper alienation by the father of all categories of immovables.

III. The Father's power of Alienation

a. Introduction

In the preceding sections, we have noticed that in the property acquired by the grandfather, and also in the immovable property acquired by the father, many ṛṣis enjoined co-ownership of a son with his father. Of course, we should not overlook the fact that certain dharmaśāstras [1] made the father the master of all categories of movables. However, the two ideas could well co-exist.

The picture illustrating the respective rights of father and son becomes clearer when we analyse the rules laid down in the smṛtis regarding alienation of property. Indeed, one co-owner's right would negate or restrict the power of alienation of the other co-owners over the same property.

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1. Nārada, Dh.K.1219b; supra, 340, n.1.

The smṛti rules, in this respect, fall mainly into three categories. In some of the texts, the smṛtikāras have mingled the rules of gift with those of sale. But in others, they have only dealt with sale, while in the third category, the texts deal only with gift. However, in general, the texts deal with alienation of different types of property and persons by the father. Our enquiry is to find out the extent of the limitation upon the father's power of alienation of property in the presence of a son.

b. Father's power of making an alienation (gift or sale)

In the age of the dharmaśāstras, the act of making a gift was held in high esteem and believed to be rewarded in heaven.[1] Yājñavalkya says:[2] "Having given land,[3] lamps, food, clothes, water, sesamum, clarified butter,

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1. The idea has its foundation in the Vedas. In the Taittirīya Saṃhitā, 6,1,6,3, a gift of one's wealth is declared to be tapas. That character continued in the later times, Medhātithi on Manu, IV, 5. Among the late medieaval commentators, Hemādri in his Catur varga-cintāmaṇi devotes a volume of over a thousand pages on gift.

2. Yājñ.I.210. bhū dīpanścānna-vastrāmbhas-tila-sarpiṣ-pratiśrayān / naiveśikaṃ svarṇa-dhuryaṃ dattvā svarge mahīyate //

3. Kāṇe says: 'The gift of land has been enlogized as the most meritorious of all gifts from ancient times', HD, II, 858. This should not mislead us to believe that gift of land is also mentioned in the early Vedas, J. Gonda, 'Gifts', in his Change and Continuity in Indian Religion, (Mouton, The Hague, 1965), 198-228 at 223-4. We come across reference to land as a grant in the Brāhmaṇa literature, Ai.Br.8, 20; Śat.Br.7, 1, 1,4. In the Mahābhārata laudatory comment on the gift of land, M.bh. 13, 62, 19. Also Vasiṣṭha dh.sū.XXIX, 16; SBE 14, 137. yatkiṃcit kurute pāpaṃ puruṣo vṛttikarṣitaḥ / api gocarmamātreṇa bhūmidānena śudhyati // 'Whatever sin a man distressed for livelihood commits, (from that) he is purified by giving land, (be it) even "a bull's hide"', tr. Bühler, SBE 14, 137.

asylum, naiveśika, gold and bull, he is glorified in heaven".[1]

However, a text in the ācāra portion of the śāstra should not lead us to believe that it is laying down a definite juridical rule on gift of land. The text is only a recommendation. Despite such recommendation and despite the belief that the donor derives some unseen spiritual merit[2] (adṛṣṭa or puṇya) by making a gift, the act of actually giving away has to pass through all the juridical formalities, and the donor cannot ignore the rights of other dāyādas in the same property. Thus, significantly, Bṛhaspati requires the consent of kinsmen for the validation of a gift of ancestral property.[3]

> When (a) Marriage-gift, (b) an Ancestral Property, (c) What has been won by valour is given away with the consent - (a) of the Wife, (b) of Kinsmen, and (c) of the Master, - then the gift acquires validity. 4

Moreover, Bṛhaspati seems to forbid the giving away of the ancestral property in toto:[5] "In the case of property received as a marriage portion, or

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1. Tr. S.C. Vidyārṇava, Yājñavalkya Smṛiti, (Allahabad, 1918), I, 297.

2. Gonda, loc.cit., 211.

3. Bṛ.XV.6; Dh.K.803b; HLS, I, 272. saudāyikaṃ kramāyātaṃ śaurya-prāptaṃ ca yat dhanam / strī-jñāti-svāmyanumataṃ dattaṃ siddhimavāpnuyāt //

4. Tr. Jhā, The Vivādachintāmaṇi, op.cit., 61.

5. Bṛ.XV.5, Dh.K.308a; HLS, I, 272. vaivāhike kramāyāte sarva-dānaṃ na vidyate /

inherited from an ancestor, the bestowal of the whole is not admitted".[1]

Again in respect of alienation, Bṛhaspatī categorically declares that joint property, which is indeed the property of the co-heirs, cannot be an object of gift.[2]

> That which may not be given is declared to be of eight sorts, joint property, a son, a wife, a pledge, one's entire wealth, a deposit, what has been borrowed for use, and what has been promised to another.[3]

However, Bṛhaspatī ordains (seemingly) that even land, whether ancestral or self-acquired, may be given away; but only what remains in excess of provision for the feeding and clothing of the family.[4] "What remains after defraying (the necessary expenses for) the food and clothing of his family, may be given by a man".[5]

The text indicates that donable gift is what is left over after all the outgoings for the family have been met. In another text, Bṛhaspatī enumerates which properties are donable.[6] "Whether ancestral or self-acquired, a dwelling-

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1. Jolly, SBE, XXXIII, 342.

2. Bṛ.XV.2; Dh.K.802a; HLS, I, 265. sāmānyaṃ putra-dārādhī-sarvasva-nyāsa-yācītam / pratiśrutaṃ tathā'nyasya na deyaṃ tvaṣṭadhā smṛtam //

3. Tr. Jolly, SBE, XXXIII, 342.

4. Bṛ. XV.3; Dh.K.802b; HLS, I, 270. kuṭumba-bhaktāvasānāt deyaṃ yad atirīcyate /

5. Tr. Jolly, SBE, XXXIII, 342.

6. Bṛ.XV.4; Dh.K.803a; HLS, I,270. saptāgamāt gṛha-kṣetrāt yad yat kṣetraṃ pradīyate / pītryaṃ vatha svayaṃ prāptaṃ tad dātavyaṃ vīvakṣītam //

house and lands are declared to be what may be given away - out of what has been acquired through the seven sources of property".[1]

Although one may be inclined to infer from this text that Bṛhaspati ordains a general power of gift of ancestral and self-acquired immovables, one should always read this in conjunction with his other text which says that a single co-heir has no power to make a gift or sale of immovables.[2] Also, one should take note that Bṛhaspati enjoins that only 'self-acquired property may be given away at one's own pleasure'.[3]

Then Bṛhaspati mentions certain properties which could be donated as 'valid gift'. The sage, however, allows a gift of affection and, in this respect, he does not make any overt distinctio n between movables and immovables, though the context certainly suggests movables.[4]

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1. Tr. Jhā, The Vivādachintāmaṇi, op.cit., 60.

2. Bṛ. XV, 7; Dh.K.803b; HLS, I, 268. Kāty, 854 is identical. Also attributed to Vyāsa in Dā.bhā, II, 27, Dh.K. 1587a. The text is quoted, supra, 341, n.3.

3. Bṛ.XV.5. Jhā, The Vivādachintāmaṇi, 60. The text is quoted, supra, 334, n.3.

4. Bṛ. XV.8; Dh.K.803b; HLS, I, 274. vṛtis tuṣṭayā paṇyamulyaṃ strīśulkam upakāriṇe / śrāddhānugraha-samprītyā dattamaṣṭavidham smṛtam // Should be read with Bṛ. XXVI.62, K.V. Rangaswami Aiyangar, ed., Bṛhaspatismṛti (Reconstructed), (Baroda Oriental Institute, 1941), 206; pitṛ-prasādād bhujyante vastrāṇy ābharaṇāni ca / Nārada, Dh.K.1219b; and, Vṛddha-Yājñavalkya, Dh.K.1588a, with slight variation (siddhanti in place of bhujyante), is identical.

> The following eight sort of gifts are recognised as valid by persons acquainted with the law of gifts, viz. wages, (what was given) for the pleasure (of hearing bards, or the like), the price of merchandise, the fee paid for (or to) a damsel, (and what was given) to a benefactor (as a return for his kindness), through reverence, kindness, or affection. 1

There is no doubt that the dharmaśāstra pays much attention to what is adeya (ungivable) and, apart from Bṛhaspati, other sages also have dealt with the topic.

Thus, Yājñavalkya also prohibits the giving away of one's entire property when one has descendants,[2] and in this respect, the text is indeed significant for our present purposes.

> Only such things may be given away as do not injure one's own family, the Wife and the Son being always excepted; the Entire Property also should not be given away, if there is progeny; nor should one give away what has been promised to another person. 3

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1. Tr. Jolly, SBE, XXXIII, 343. Although Jolly's rendering of this text abounds in parentheses, it is certainly better than Jhā's clumsy translation at HLS, I, 274. However, Jhā's rendering in The Vivādachintāmaṇi, 63, is more organised.

2. Yājñ.II.175; Dh.K.796b. svaṃ kuṭumbāvirodhena deyaṃ dāra-sutād ṛte / nānvaye sati sarva-svaṃ yac cānyasmai pratiśrutam //

3. Tr. Jhā, Vivādachintāmaṇi, op.cit., 60. svaṃ kuṭumbāvirodhena is rendered by Mandlik as 'without causing detriment to the family property', V.N. Mandlik, The Yājñavalkya Smṛti, (Bombay, 1880), 228-9. But I prefer Jhā's 'as do not injure one's own family', Jhā, ibid., 60. Derrett also suggested at the margin of my first draft, 'without injury to his own family'.

Dakṣa goes further than Yājñavālkya in safeguarding the rights of descendants. He declares the entire property as 'ungivable' if there is progeny, even in times of distress.[1]

> Common property, what has been borrowed for a special occasion, a deposit sealed or open, a pledge, wife, wife's property, and the entire property if there is off-spring - these nine have been declared by the wise to be ungivable even in times of distress. 2

In similar vein, Nārada discussed the conditions which justify retraction of gift. The positive conditions, however, are to be inferred from concrete and partly negative examples.[3]

> A Bailment for Delivery, an article borrowed for a special occasion, a Pledge, Common Property, Deposit, Son and Wife and the Entire Property when there is progeny - and also what has been promised to another - these the Teachers have declared to be what should not be given away, even under distressful circumstances. 4

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1. Dakṣa, Dh.K.807; HLS, I, 269. samānyaṃ yācitaṃ nyāsah ādhir dārāśca taddhanam / anvāhitaṃ ca nikṣepaḥ sarva-svaṃ cānvaye sati // āpatsv api na deyāni nava-vastūni paṇḍitaiḥ //

2. Tr. Jhā, HLS, I, 269. Derrett suggests in the margin of my first draft, a better and more literal rendering of na deyāni nava-vastūni paṇḍitaiḥ as 'the learned must not give these nine things even in times of distress'.

3. Nārada, IV. 4-5; Dh.K.798b, HLS, I, 268. anvāhitaṃ yācitakam ādhiḥ sādhāraṇaṃ ca yat / nikṣepaḥ putra-dāraṃ ca sarva-svaṃ cānvaye sati // āpatsv api hi kaṣṭāsu vartamānena dehinā / adeyāny āhur ācāryā yac cānyasmai pratiśrutam //

4. Tr. Jhā, The Vivadachintamaṇi, op.cit., 58. Derrett suggests a better rendering in the margin of my first draft of the portion: āpatsv api hi kaṣṭāsu as 'when the individual is (barely) existing in dire distress.'

Nārada also includes 'common property' (sādhāraṇam)[1] among eight 'non-donable' properties. Ungivability of all these eight just shows 'the lack of unqualified ownership, that is, non-capacity in the owner to give'.[2]

In respect of ancestral property, Kātyāyana also takes a similar view and declares that a single coparcener cannot make a sale or gift of such property.[3] "A single (coparcener) has not in every-day life the absolute power to make even a partition of ancestral estate.[4] One can only enjoy (the ancestral estate) but one cannot (by himself) make a gift or sale of it".[5]

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1. In the Mitākṣarā school the sādhāraṇa-dhana or samudāya, 'common estate' belonged to the several generation jointly. In the smṛtis, the manager of such common estate is called Kuṭumbin 'family possessor'; gṛhin, gṛhapati, 'householder'; prabhu, 'boss'; pradhāna, 'chief'. These expressions coalesce with modern kartā 'officiant', Kāṇe, HD, III, 592. Derrett, 'The Development of the Concept of Property in India, c.800-1800', ZVR 64 (1962), 15-130 at 57; rpt. Essays, II, 8-130 at 50.

2. C.R. Lanman, 'Hindu Law and Custom as to Gifts', rept. from Anniversary Papers by Colleagues and Pupils of George Lyman Kittredge, (Boston, 1913), 1-14 at 3.

3. Kāty, 853, Kāṇe, ed., Kātyāyanasmṛti ..., 103. loke ṛktha-vibhāge'pi na kascit prabhutām iyat / bhoga eva tu kartavyo na dānaṃ na ca vikrayaḥ //

4. Tr. Kāṇe, Kātyāyanasmṛti, 300. Kāṇe renders ṛktha as 'ancestral property'. Although it may well mean ancestral property, the significance of the term is not wholly brought out by such artificial rendering. ṛktha may include dāya. dāya implies the share in the property of a deceased or living man. ṛktha has similarity with 'hereditas' - being inheritance (i.e. properties) left by the deceased. For a discussion on this, G.D. Sontheimer, The Concept of Dāya: A Comparative Study, London University Academic Postgraduate Diploma in Law, (1962), unpublished, 15-16; also Sontheimer, Ph.D. Thesis, EHJFI, 69-70. Derrett, ZVR 64, (1962), 34.

5. Tr. Kāṇe, Kātyāyanasmṛti ... , 300.

Similarly, Vṛddha [1] Yājñavalkya explicitly ordains that there can be no gift or sale of ancestral property and immovables cannot be given away as a gift of affection.[2]

> By the affectionate gift of the father, the clothes and ornaments are gained; immovable property is not gained even with the father's indulgence. No one is master of the inheritance descended from ancestors, even when there is partition of wealth. It is simply to be enjoyed; there can be no gift or sale of the same. 3

A verse from Vyāsa suggests that immovable property should not be alienated by a single coparcener without the consent of other co-owners.[4]

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1. The names with prefix like Vṛddha or Vṛhat does not necessarily mean any older sage from the point of view of chronology, Kāṇe, HD, I, Pt.I, (Poona, 1968), 581.

2. Vṛddha Yājñ, Dh.K.1588a. pitṛ-prasādāt siddhyanti vastrāṇy ābharaṇāni ca / sthāvarāṇi na siddhyanti prasāde paitṛke sati // kaule ṛktha vibhāhe'pi na kiñcit prabhūtām iyāt / bhoga eva tu kartavyo na dānaṃ na ca vikrayaḥ //

3. Tr. J.C. Ghose, Hindu Law, I, 409-10.

4. Vyāsa, cited in Dā.bhā, II, 27; Dh.K.1586b. na ca sthāvarasya samastasya gotra-sādhāraṇasya ca / naikaḥ kuryāt krayaṃ dānaṃ paraspara-mataṃ vinā // The word 'gotra' has been defined by Brough as an 'exogamous patrilineal sibship', J. Brough, The Early Brahminical System of Gotra and Pravara: A Translation of Gotra-Pravana-Manjarī of Puruṣottama-Paṇḍita, (Cambridge University Press, 1952), introd., 2. On its evolution, ibid., 2-5. Derrett points out that gotras are members of the same patrilineal clan. In a not unimportant sense, the gotra seems to have been a residual adhikārī, whose rights were to a large extent overshadowed by those of the King (except in the instance of the property of Brahmaṇs), and whose rights cannot have been a collective right in any technical sense. But the Hindu custom of preemption is a survival of gotra right, Derrett, 'The Development of the Concept of Property c. A.D. 800-1800', ZVR 64 (1962), 15-130 at 64-66. On the origin of gotra, B.N. Datta surmises that it is derived from common pasturage, Dialectics of Land-Economics of India, (Calcutta, 1952), 7. Kosambi also investigates the origin of gotra, D.D. Kosambi, 'On the Origin of Brahmin Gotras', Journal of the Bombay Branch, R.A.S., 26 (1950), 21-80. Kosambi is criticised by Brough, ibid., Preface, xiv-xv.

"A single parcener may not, without consent of the rest, make a sale or gift of the whole immovable estate, nor of what is common to the family".[1]

Later [2] smṛtis are more severe and more explicit on the prerequisite of consent of co-heirs in an alienation of immovable property. Thus, a text of Prajāpati shows that a father's power could be more openly questioned. The sage declares that in the absence of co-heir's consent any sale of immovable property is totally voidable.[3]

> Not being assented to by the co-heirs, whatever has been done in regard to immovables, that wholly is to be regarded as not done, if even one does not agree. Houses, lands, sacrificial perquisites as also gift by the father, as also from the mother when pleased, a division of these is not made. 4

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1. Tr. Colebrooke, Dā.bhā. II.27.

2. Here we are not saying that in classical literature, chronology is accurately possible. The problem is discussed by Lingat, tr. Derrett, CLI, 123ff. But 'the more evolved smṛtis worked upon earlier material, ... deployed it, and restated it', Derrett, Dharmaśāstra and Juridical Literature, (Wiesbaden, 1973), 26.

3. Prajāpati, cited in J.R. Ghārpure, ed., The Collection of Hindu Law Texts, (No.11), The Smṛitichandrikā, Vyavahārakaṇḍam, (Bombay, 1918), (2), 277. dāyādair nabhyanujñātaṃ yat kiñcit sthāvare kṛtam / tat sarvam akṛtaṃ jñeyaṃ yady eko'pi na manyate // gṛha-kṣetrāṇi yājyāśca prasādo yaśca paitṛkaḥ / mātṛkaśca prasādo yas tad-vibhāgo na vidyate // The text should be read with Bṛ. cited in Mitā, I.i.28; Dh.K.1588b: eko'pi sthāvare ..., supra, 345, n.1.

4. Tr. J.R. Ghāpure, The Collection of Hindu Law Texts, Vol.XXXI, The Smṛti-chandrikā Vyavahāra Kāṇḍa - Part III, (Bombay, 1952), 597.

c. The Prohibitions on alienation: an appraisal

After a long discussion, such as this, on texts either allowing or pro-hibiting gift or sale of certain properties, a modern reader may be tempted to de-duce certain positive rules on alienation of property in the dharmaśāstra, but that is extremely risky if we are dealing with a pre-legal epoch. Indeed, when we attempt to discern the effects of these prohibitions in a purely legal context, our investigation is bound to be fraught with difficulties and confusion.

The difficulties are enhanced by the fact that 'the śāstra contains no rules of law which must be followed by judges on pain of illegality ...'[1] The śāstra only contains 'precepts',[2] and for this reason, one without inward know-ledge of early Hindu civilization may mistake the precepts for principles. Pro-hibitions are also negative precepts and, although there are considerable diffi-culties in interpreting them, 'subtle distinction may be drawn between the pro-hibited act which is valid in law and the prohibited act which not only draws vengeance upon the perpetrator but is otherwise legally ineffective'.[3]

Although, at this stage of our study, we are not directly dealing with the commentators, it will not be altogether irrelevant to have a general and dis-passionate observation of their opinion on this point. Derrett informs[4] us that

1. Derrett, Dharmaśāstra and Juridical Literature, (Wiesbaden, 1973), 3.

2. Ibid., 3.

3. Derrett, 'Prohibition and Nullity: Indian Struggles with a Jurisprudential Lacuna', BSOAS, 1957, XX, 203-15 at 203-4. Cp. the distinction between 'forbidden' and 'void' in Islamic law, J.N.D. Anderson, 'Invalid and Void Marriages in Hanafi Law', BSOAS, XIII, 2, 1950, 357-66.

4. Ibid., 207.

up to the twelfth century, and in some instances until long afterwards, jurists were inclined to assume that if an alienation was forbidden, it was voidable.[1] Although the matter is obscure, in all probability absolutely void alienations cannot have been known in ancient and mediaeval India except perhaps in cases of alienation by non-owners or by some owners limited by dependence (pāratantya).[2]

However, the solution was often very inconvenient, and therefore, even from the late smṛti period conditions began to be attached to the words of the rule in question so as to make the prohibition consort more happily with common sense and usage. The problem was complicated by the fact that usage varied from district to district, and what was an acceptable transgression in one part was shocking in another.[3]

Thus, marrying the words of the texts with usage did not work, and eventually mediaeval authors had to put the jurisprudential question: were the transactions, as such, in defiance of prohibitions voidable or, on the contrary, valid? On this, three schools of thought emerged.

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1. Ibid., 207.

2. Ibid., 207, n.5. On pāratantrya ('non-independence'), see Derrett, 'The Development of the Concept of Property in India", ZVR 64 (1962), 15-130 at 96-7.

3. Derrett, BSOAS, 1957, XX, 203-15 at 207-8.

> According to one, the transaction is valid, but the transgressor sins and is perhaps liable to punishment, depending upon the case. According to the second, the transaction is voidable and the transgressor does not sin. The third opinion holds that the transaction is voidable and the transgressor does sin and is liable to punishment in an appropriate case. [1]

Jīmūtavahana's explanation of the prohibition coalesces with the first of these three opinions. The shrewd Bengali, who excelled in manipulating the smṛti texts to his own advantage, said that although texts tend to prevent a father's alienating self-acquired immovable property without his sons' consent, the alienation without such prior consent would be an offence merely in conscience, and not an offence at law. He holds the transaction itself as valid and he comments, 'a fact cannot be altered by a hundred texts'. [2]

At the dawn of Anglo-Hindu law, Jagannātha Tarkapañcānana, quite naturally, understood the importance of the texts on prohibition and in his Vivāda-bhaṅgārṇava engaged himself in a lengthy discussion of the problem. [3]

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1. Ibid., 208. For an analysis of the first opinion, see Jagannātha, Colebrooke, Digest, I, 399–422. For the second and third opinions, see the translation by Derrett of a vluable extract from Saṅkara-bhaṭṭa's [Dharma-] dvaita-nirṇaya (c.1580-1600), Derrett, ibid., 209-13. The original is edited by J.R. Ghārpure, (Bombay, 1943), 123–4. Note the misprints as pointed out by Derrett, ibid., 209,n.1.

2. Dā.bhā.II.30. For support of Jīmūtavāhana's dictum, see U.C. Sarkar, Law Review, 18 (1966),7. For jurisprudential significance of the dictum, Derrett, 'Factum Valet', 7 I.C.L.Q (1958), 280; RLSI, 91. The P.C. was strongly influenced by the famous dictum of Jīmūtavāhana in Raja Rao Balwant Singh v. Rani Kishori (1898) LR 25IA 54 and in Sri Balusu Gurulingaswamy v. Sri Balusu Ramalakshmamma, (1899) LR 26 IA 113; for a discussion infra, 745-6.

3. Jagannātha Tarkapañcānana, Vivāda-bhaṅgārṇava: A Digest of Hindu Law on Contracts and Successions: With a Commentary by Jagannatha Tercapanchanana

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Jagannātha opines that co-owners who violate the rule about alienating undivided property are liable to correction (he suggests actually punishment), but the transaction as such is not void.[1] However, Jagannātha's observations are 'coloured by a characteristic "Bengali" bias'.[2]

Unfortunately and inexplicably, Kāṇe in his History of Dharmaśāstra, has not paid the proportionate attention to the problem that it really deserves.[3] While Kāṇe remains silent, the Bengali biases of Jīmūtavāhana and Jagannātha were given additional support by Priyanath Sen. He observes:

> ... having regard to the general principles of transfer of ownership, I think it will be going too far to say that although the owner makes a gift of his own property, no title will pass, simply because the Sastras have condemned such a gift as improper.[4]

But, surprisingly, Sen did not apply his original mind to the problem, partly because he took Jagannātha's analysis as the final say on the point, and partly because he was eager to establish that Hindu law on this point could be accommodated by the fundamental and universal principles of jurisprudence.[5]

Note 3 - p.358 - Continued:

from the Original Sanskrit by H.T. Colebrooke, Esq., ..., (Madras, 1864-5), I, 399-422.

1. RLSI, 91.
2. Derrett, BSOAS, 1957, XX, 204.
3. Kāṇe, HD, III, 471-5.
4. P.N. Sen, General Principles of Hindu Jurisprudence, TLL, 1909, (Calcutta, 1918), 86.
5. Derrett, BSOAS, 1957, XX, 204.

'*Quot homines - tot sententiae*' [1] - this remark of Terence best characterises the wide variety of opinions concerning the texts on prohibition; and, despite the attention of *śāstras* at different epochs, much of the juridical mystery of the texts remained unsolved. Small wonder is it that once again in our time Derrett dealt with the problem and gave a coherent picture of the extent of these prohibitions.[2] We gratefully adopt his profound *śāstric* and juridical insight [3] on this point.

The texts which we have quoted on prohibition may be arranged into four categories:

The *Śāstra* prohibits:

(1) alienation of land by sale; [4]

(2) alienation by gift of all one's assets;[5]

(3) alienation of common assets;[6]

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1. 'As many men so many minds or opinions', Terence, *Phormio*, II.4.14.
2. Derrett, BSOAS, 1957, 203-15.
3. ibid.; also RLSI, 75-96, 91, 248.
4. Anon. *Mitākṣarā* On Yājñ. II.114, *Yājñavalkyasmṛti*, 5th edn., (Nirnaya Sagar Press, Bombay, 1949), 219-20; J.C. Ghose, *Hindu Law*, I, 470; Dh.K.1589b.
5. Yājñ.II.175, Dh.K.796b; Nārada, V, 4, Dh.K.798b; Dakṣa, Dh.K.807a, HLS, I, 269; Bṛ. XV, 2, Dh.K.802a.
6. Yājñ. II.179 (only Viśvarūpa's *Bālakrīḍā*); Nārada, V,4; Dakṣa, Dh.K.807a; Bṛ. XIV,2, Dh.K.829.

(4) alienation of ancestral assets without the consent of male issue, except under exceptional provision of law;[1]

(5) alienation of son or wife.[2]

At this point, we should remind ourselves that the dharmaśāstras contain three parts: (1) ācāra ('conduct'), vyavahāra[3] ('civil law') and prāyaścitta ('penance'). Strictly speaking, of these three, only the vyavahāra materials are directed to the assistance of the King in solving disputes.[4] The more modern of the dharmaśāstras contain a relatively large volume of vyavahāra material. Indeed, all civilizations regulate the acquisition and protection of proprietary rights and, expecting vyavahāra to be taken seriously by judicial assessors, the more modern jurists increasingly brought it within their concern because the purposes of the Vedas could not be carried out without some tenure of property.[5]

From an ethno-juridical point of view, the rules found in the ācāra and prāyaścitta sections of the śāstra were intended to be applied in a pre-legal environment as extra-legal rules. A transgressor of extra-legal rules

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1. Bṛ.XIV., 5 and 6, Dh.K.803a, b.

2. Yājñ. II.175; Nārada, V,4; Bṛ. XV, 2, Dh.K.802a, HLS, I, 265. Kātyāyana, 638-9, ed. Kāṇe, (Bombay, 1933), 79, Dh.K.804a, 805a.

3. On the development of this part, see Derrett, Dharmaśāstra and Juridical Literature, (Wiesbaden, 1973), 18.

4. Derrett, BSOAS, 1957, XX, 214.

5. Derrett, DJL, 21.

might be socially boycotted, but the transgression did not affect the practical affairs in civil law (vyavahāra).[1] Consequently prohibitions, in non-vyavahāra contexts, are prohibitions which do not invalidate transactions in breach thereof. Thus, prohibition (1) in our list, namely, prohibition against alienation of land by sale, may be taken as a mere admonition of the śāstra, but prohibitions (2) - (5), appearing in a vyavahāra context, would render transactions in breach thereof liable to be declared void.[2]

However, having said that, it is indeed worth mentioning that a King's duty of 'protection of his subjects' (prajānām paripālanam) [3] 'covers the whole scope of dharma, as the smṛtis conceived it to be: ācāra, prāyaścitta and vyavahāra'.[4] The King must warn his subjects against committing sins and also see to it that penances enjoined upon sinners in order to expiate their sins are actually carried out.[5] Thus, in classical epoch the three departments of the

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1. See Medh. on Manu, VIII, 164; for a discussion, Derrett, 'The Concept of Law According to Medhātithi, A Pre-Islamic Indian Jurist', Essays, I, 174-197 at 191.

2. Derrett, BSOAS, 1957, XX, 215.

3. Lingat, tr. Derrett, The Classical Law of India, op.cit., 222-3.

4. Ibid., 223.

5. Ibid., 223. Note that even in vyavahāra context some smṛtis prescribe penances for breaches, Viṣṇu, qu. Sarasvatī-vilāsa (Mysore, 1927), 278, Dh.K.794b; Nārada, V,6, Dh.K.799a; Dakṣa, anon.qu. Bhavasvāmī, Nāradīya-manu-saṃhitā-ṭikā, V,5, Dh.K.807b; Hārita, qu.var. Dh.K.808a; and cp. Mitā on Yājñ. III.290.

smṛtis are not distinctly separable.

We have observed that in a vyavahāra context, the prohibitions render the transactions void (or voidable). From the point of view of ownership, it shows that 'the Hindu paterfamilias ... holds his property subject to the rights of his dependants';[1] also the prohibitions in the non-vyavahāra sections, in their wider social context, highlight almost the same point because a 'gift' in transgression of a prohibition will not bring the desired unseen merit. As to giving that on which the family has a prior claim, Bṛhaspati in an appropriately Apocalyptic phrase, observes that the religious merit of the man who does it, 'though tasting like honey at first, will change into poison in the end'.[2]

Thus, both the vyavahāra and non-vyavahāra materials point to one thing, namely, that the Hindu father is not the unqualified and absolute master of the family property. His ownership is subject to the co-ownership of his male issue and the relevant rights of other dependants.

Although this conclusion is not consistent with the traditional Bengali solution of such problems,[3] in the śāstra the common ownership of property between a father and his male issue is as ancient as it is inexorable.[4]

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1. C.R. Lanman, 'Hindu Law and Custom as to Gifts', rpt. from Anniversary Papers by Colleagues and Pupils of George Lyman Kittredge, (Boston, 1913), 1-14 at 3.

2. Bṛ.XV.3, SBE, XXIII, 342.

3. Dā.bhā.II.30; Jagannātha, I, 411-12.

4. Textual authority may be claimed, Tai.saṃ.III.1.9.4. Manuḥ putrebhyo dāyaṃ vyabhajat, Kāṇe, HD, III, 543-4. Also R.V. I. 70.5, Kāṇe, HD, III, 564-5.

d. Conclusion

From the texts discussed above, we may draw the following conclusions:

(1) The father or the head of a family was forbidden to give away or sell the whole of the family property; especially so when he had offspring joint with him.

(2) Consent of the co-heirs (presumably only joint, or even separate) was necessary to alienate ancestral property.

(3) Under normal circumstances, immovable property, whether ancestral or self-acquired, could not be alienated without the consent of other coparceners. However, under special circumstances, such as in time of distress, for the sake of the family and for pious purposes, land could be alienated even by a single individual.

(4) In relevant circumstances, a father had the freedom of making a gift of affection to his children from his movables.

IV. Partition

a. Time of partition

In many of the texts discussed above, we have noticed that the dharmaśāstras enjoin various elements of co-ownership between father and son in certain types of properties. Co-ownership of a son may indeed exist quite independently of his right to demand partition against the will of his father. But, like a son's power to interdict an improper alienation of family property by his father, the

right to demand partition is also another manifestation of his co-ownership in the same property with the father. Therefore, naturally, the question arises: did the dharmaśāstras allow a son to demand partition against the will of his father? Let us see what the smṛtikāras have to say on this particular question.

Gautama ordains: [1] "After the father's death let the sons divide his estate. Or, during his lifetime, when the mother is past child-bearing, if he desires it." [2]

Similarly, Āpastamba does not say anything on the right of a son to demand partition against the will of his father. However, he disapproves the preferential share of the eldest son and significantly enjoins that a father, during his lifetime, should divide his wealth equally amongst his sons.[3] "He should, during his lifetime, divide his wealth equally amongst his sons, excepting the eunuch, the mad man, and the outcaste." [4]

It seems that Baudhāyana does not advoaate the initiation of partition by a son without the consent of his father. Thus, he declares: [5] "While the

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1. Gautama, XXVIII.1-2; Dh.K.1144b. ūrdhvaṃ pituḥ putrā rikthaṃ vibhajeran / nivṛtte rajasi mātur jīvati cecchati //

2. Tr. Bühler, SBE, II, 299.

3. Āp.dh.sū. II.6.14.1; Dh.K.1164a. jīvan putrebhyo dāyaṃ vibhajet samaṃ klībam unmattaṃ patitaṃ ca parihāpya // The equal division among sons is also ordained in a passage attributed to Manu in the Nirukta, III, 4. aviśeṣeṇa putrāṇāṃ dāyo bhavati dharmataḥ / mithunānāṃ visargadau manuḥ svāyambhubo 'bravīt // In the extant Manu this passage is not be found; however, there can be no doubt of its authenticity, see Āp.dh.sū. II.6.14.6, 10-12, Kāṇe, HD, III, 566. B.N. Chobe, Principles of Dharmaśāstra, (Allahabad, 1948), 27.

4. Tra. Bühler, SBE, II, 132.

5. Baudhāyana, II.2.8; Dh.K.1146b. pitur anumatyā dāya-vibhāgaḥ sati pitari / Also Śankha-likhita.dh.sū, Dh.K.1148b. jīvati pitari riktha-vibhago'numataḥ/

father lives, the division of the estate takes place (only) with the permission of the father".[1]

These texts of Gautama (XXVIII.1-2), Āpastamba (II.6.14.1), Baudhāyana (II.2.8), and Śaṅkha-Likhita (Dh.K.1148b) declare that during the lifetime of a father, a partition can be made only with his consent.

Manu and Yājñavalkya opine that brothers could divide the property amongst themselves after the decease of both the parents. Manu explains that this is ordained because the sons are not 'masters' of the property during the lifetime of their parents. However, it is doubtful whether the verse [2] is indicative of complete lack of ownership by the sons while their parents are alive. "After the death of the father and of the mother, the brothers shall assemble and may divide the ancestral wealth. They are not masters of it while the two parents live".[3]

Devala ordains partition after the decease of the father and declares that sons have no ownership during the lifetime of their father.[4] "When

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1. Tr. Bühler, SBE, XIV, 224.

2. Manu, IX, 104; Dh.K.1149b; Derrett, Bhārucī, I, 170. ūrdhvaṃ pitus ca mātuś ca sametya bhrātaraḥ saha / bhajeran paitṛkaṃ riktham anīśās te hi jīvatoḥ // variant reading bhrātaraḥ saha as bhrātaraḥ samam, The Manusmṛti, (10th ed., Nirnaya Sāgar Press, Bombay, 1946), 382. Bühler followed 'samam' and translated as 'in equal shares', SBE, XXV, 345.

3. Tr. Derrett, Bhārucī, II, 236. Yājñ.II.117; Dh.K.1151b. vibhajeran sutāḥ pitror ūrdhvaṃ riktham ṛṇaṃ samam: 'Let sons divide equally both the effects and the debts, after [the demise of] their two parents', tr. Colebrooke, Mitā, I, iii.1.

4. Devala, Dh.K.1156a. pitary uparate putrā vibhajeyur dhanaṃ pituḥ / asvāmyaṃ hi bhaved eṣāṃ nirdoṣe pitari sthite //

the father is deceased, let the sons divide the father's wealth; for sons have not ownership while the father is alive and free from defect."[1]

Nārada also supports the view that sons should divide their father's property after his death,[2] but at the same time, he enjoins that this is not the only occasion when a partition of father's property takes place. He declares that even during the lifetime of the father, there can be a partition of his property under the following circumstances:[3] "When the menstruation of the Mother has ceased, when the Sisters have been given away, or when the Father's capacity for enjoyment has ceased, or when the Father has ceased to have any desires".[4]

The text indicates a family situation in which there is no possibility of the birth of another child to the parents. This is a safeguard against reopening a partition or readjusting the shares in case another child, especially a son, is born in the family. The *śloka* is significant in the sense that it upholds the innate right in property of those who are yet unbegotten and indirectly implies that perhaps sons could demand a partition from their father if the conditions laid down in the text were present.

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1. Tr. Colebrooke, Dā.bhā.I.18.

2. Nārada, XVI.2; Dh.K.1152b. pitarī ūrdhvaṃ gate putrā vibhajeyur dhanaṃ pituḥ (var. vibhajeran dhanaṃ kramāt): 'After the death of the father the sons shall divide their father's property', tr. Jolly, SBE, XXXIII, 189.

3. Nārada, XVI.3; Dh.K.1152b. mātur nivṛtte rajasi prattāsu bhaginīṣu ca / nivṛtte vā'pi ramaṇe pitary uparata-spṛhe // Also Bṛhaspati, XXVI.9; Dh.K. 1155a. pitror abhāve bhrātṛṇāṃ vibhāgaḥ sampradarśitaḥ / mātur nivṛtte rajasi jīvator api śasyate //

4. Tr. Jha, *The Vivadachintamaṇi*, op.cit., 173.

Perhaps we may conclude that the texts denying a son the right to demand partition during the lifetime of his father may have been intended to discourage a son from enforcing his right of co-ownership in order to maintain peace and cohesion in the familial institution. As precepts, the śāstric texts against demanding a partition against the will of the father can hardly be divorced from their social context. The societal aspects of the texts are clearly visible in one of Gautama's, which implies that, in strict vyavahāra context, a son could enforce a partition of the family property against the will of his father; but such a son was not socially acceptable.[1]

> Let him not feed ...
> Nor, (sons) who have enforced a division of the family estate against the wish of their father. 2

Here Gautama gives a list of people who should not be invited to a śrāddha dinner, and one of the persons to be excluded from such a feast is a son who has enforced a division of family property against the volition of his father.[3]

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1. na bhojayet ... pitrā cākāmena vibhaktān, Gautama, XV, 15 and 19. The Smriti Sandarbha, Gurumandal Series No. IX, (Calcutta, 1954), IV, 1900. Kāṇe, HD, III, 567. Kāṇe remarks: 'One may concede that this sentiment continued long after even Gautama and Apastamba and even in the 20th century, a Hindu son suing his father for partition incurs great opprobrium', ibid., 567. Cf. Albanian customary law, supra, 94.

2. Tr. Bühler, SBE, II, 253-5.

3. See also Manu, III, 151, gives a list of persons who should be excluded from śrāddha feast (... śrāddhe na bhojayet). Manu includes in this list a son 'who wrangles or goes to law with his father': pitrā vivadamānaśca ... , Manu, III, 159; tr. Bühler, SBE, XXV, 105. Medhatithi's comment on this part of the verse is significant: 'He who wrangles or goes to law with his father, e.g. who forces him to divide the family estate', SBE, XXV, 105, n. Also Kāṇe, HD, IV, (Poona, 1953), 392-3.

When the smṛti texts on time of partition are taken together, from their literal meaning it becomes really difficult to reconcile the respective rules contained in the two groups [1] of texts, unless we accept that the dharma-śāstras did not presume the right to demand partition by the son against the will of the father as an indispensible component or incident of ownership.

It is apparent from the texts that, on the one hand, the ṛṣis enjoin a son's co-ownership in all categories of ancestral property,[2] and self-acquired immovables [3] of his father but, on the other, they seem to be reluctant to approve the right of a son to demand partition against the will of his father, or to make such a right socially acceptable. Probably, in the days of the dharmaśāstras, the social norm was joint living as enjoined in a text by Vyāsa: "For brothers a common abode is ordained so long as the parents live".[4] But it is too early to draw any conclusion before we take into consideration all other texts, and to put too much emphasis on an unproved social factor [5] in

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1. The 1st group advocating partition within the lifetime of the father with his consent: Gautama, XXVIII.1.2, Dh.K.1144b; Āpastamba, II.6.14.1, Dh.K. 1164a; Baudhāyana, II.2.8, Dh.K.1146b; Śaṅkha-likhita.dh.sū, Dh.K. 1148b. Man , IX, 104, Dh.K.1149b. The second group: Guatama, XV.15 and 19: indirectly Manu, III, 159.

2. For example, Yājñ.II.121, Dh.K.1175b; Bṛ. XXVI.10, Dh.K.1180b; Bṛ. XXVI.14, Dh.K.1179b; Viṣṇu, VII,2, Dh.K.1175a.

3. Vyāsa, Dh.K.1587a, HLS, I, 276; Nārada, Dh.K.1219b.

4. Vyāsa, cited in Dā.bhā.III.8. bhrātṛṇām jīvatoḥ pitroḥ sahavāso vidhīyate / tr. Colebrooke, Dābhā.III.8.

5. Cp . other texts implying that if, instead of remaining united, brothers separate there is increase of spiritual merit; vibhāge tu dharmavṛddhiḥ, Gautama, XXVIII. 4. But see Manu, IX.III; III.67; For a discussion, Kāṇe, HD, III, 571-2.

the age of the dharmaśāstras might defeat our purpose.

b. Partition during the lifetime of the father : the pre-dharmaśāstra literature

Our preceding study of the dharmaśāstra texts has shown that a partition of family property among the sons during the lifetime of their father was not unknown in ancient India. Indeed, the text of Gautama [1] also indicates that, although socially reprehensible, sons could partition the family property against the will of their father.

The pre-dharmaśāstra literature also shows that what is implied in the text of Gautama is not the ṛṣi's own invention; it has support from similar Vedic and brāhmaṇa texts. There are hymns in the Vedas and passages in the saṃhitās and the brāhmaṇas which show that sometimes a father in his old age used to divide his property among his sons. Faint traces of this idea may be found in the Ṛg-veda:[2]

> Agni, confer excellence on our valued cattle, and may all men bring us acceptable tribute; offering in many places

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1. Gautama, XV. 15 and 19; Kāṇe , HD, III, 567.

2. R.V.1.70.10, Dh.K.1158a. goṣu praśastiṃ vaneṣu dhiṣe bharanta viśve baliṃ sarṇaḥ / vi tvā naraḥ purutrā saparyan piturna jivrervi vedo bharanta //

sacrifices to thee, men receives riches
from thee, as (sons) from an aged father.[1]

The Nābhānesdiṣṭha[2] legend of the Ṛg-veda also alludes to son's division of family property during the lifetime of their father:[3]

. . . .

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1. Tr. H.H. Wilson, Rig-Veda-Samhita, (London, 1850), I, 186. Zimmer thought this hymn to be a parallel evidence of the ancient Germanic custom of exposing old parents, H. Zimmer, Altindisches Leben, (Berlin, 1879), 326-8, cited by A. Kaegi, tr. R. Arrowsmith, The Rigveda: The Oldest Literature of the Indians, (Boston, 1886), 16, 112-3. It seems that Kaegi seems to disagree with Zimmer's view, ibid., 113. The view is also criticised by J.C. Ghose, Hindu Law, I, 489. Note different renderings of the last part of the hymn: 'as sons (divide) the property of the aged father', SBE, XLVI, 71; 'as sons obtain ...', 'as sons take ...', J.C. Ghose, Hindu Law, I, 88, 488; '... parting, as it were, an aged father's wealth', R.T.H. Griffith, The Hymns of the Rigveda, (Benares, 1896), I, 94. One should take the hymn as a whole. When we read both the lines of the hymn, the meaning and the simile become clear and the juridical implication thereof comes to the fore. As Sāyana comments: 'tvatto viśeṣeṇa haranti / gṛhṇantītyarthaḥ / ... then he explains the simile: yathā putrā vṛddhāt pituḥ sakāśād-dhanam haranti tadvat / Dh.K.1158a. Kāṇe considers this hymn as an evidence 'that sons divided the father's property during his lifetime when the father grew old', HD, III, 564. Cp. Jai.Br.III.156: tad u hovācābhi-pratārano jīrnaś śayānaḥ / putrā hāsya dāyaṃ vibhejire / Jaiminīya-Brāhmaṇa, ed., R. Vira and L. Chandra, (Nagpur, 1954), 419.

2. Literally means 'nearest to the navel' - an old word which could be found in the form of nabānazdista in the Zend Avesta, M. Haug, The Aitareya Brahmanam of the Rigveda, (Bombay, 1863), I, 24-7.

3. R.V.10.61.1. idamitthā raudraṃ gūrtavacā brahma kratvā śacyāmaṃta-rājau / kraṇā yad asya pitarā mamhaneṣṭāḥ parṣatpakthe ahannā sapta-hotṛn //

> Nābhānediṣṭha (the son of Manu) being ready recited this hymn (1) pleasant to Rudra, accomplished by wisdom, in the midst of the sacrifice (celebrated by the Aṅgirasas who had forgotten it) to the seven Hotṛis on the sixth day. That hymn which his parents (and his brothers) who were dividing (the family property without giving him a share) advised him to recite as a means of his acquisition of cattle. 2

The legend has been elaborated in the Aitareya-brāhmaṇa,[3] and in in the Taittirīya-saṃhitā [4] with its context. The Nābhānediṣṭha legend shows that the elder brothers divided the property of their father without alloting any portion to Nābhānediṣṭha, the youngest of the brothers, while he was away engaged in Vedic learning at the house of his teacher.[5] At the completion of this period, Nābhānediṣṭha came back and asked his brothers about his share in the paternal wealth. His brothers advised him to go to the adjudicator (niṣṭāva), that is, to their father.[6]

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1. R.V.10.61.1. idamitthā raudraṃ gūrtavacā brahma kratvā śacyāmaṃta-rājau / kraṇā yad asya pitarā maṃhaneṣṭāḥ parṣatpakthe ahannā sapta-hotṛn //

2. Tr. J.C. Ghose, Hindu Law, I, 489.

3. Ai.Br.V.14 (xii.9), Dh.K. 1662a, Kāṇe, HD, III, 565.

4. Tai.Saṃ.III.1.9.4; Kāṇe, HD , III, 565.

5. Kāṇe, HD, III, 565.

6. Ai.Br.V.14 (xii.9), Dh.K.1162a. nābhānediṣṭham vai mānavaṃ brahmacaryyaṃ vasantaṃ bhrātaro nirabhajanso'bravīdetya kiṃ mahyamabhāktetyetameva ... /

> Nābhānedīṣṭha Mānava when he was performing his studentship (1), his brothers deprived of any share (in his father's property). Having returned, he said to them, "what have you allotted to me?" 2

According to Kāṇe, the legend "shows that the elder brothers divided all the father's property among themselves, and excluded Nābhānedīṣṭha during the father's lifetime, apparently without any protest from him or in spite of it". If Kāṇe's assumption is correct, then the legend depicts the positive norm regarding a son's right to divide his father's property against his will. However, Kāṇe's interpretation is not supported by the legend. The legend shows that after the protest of Nābhānedīṣṭha, the elder brothers advised him to go to the adjudicator,[3] i.e. their father, and this negates the alleged defiance of paternal authority by the elder brothers.

In the Taittirīya-saṃhitā, the story of Nābhānedīṣṭha is told with a slight variation, and the utterance becomes more definite, stating that Manu himself divided his property among his sons, and did not allot any share to Nābhanedīṣṭha who was away for his Vedic studies.

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1. Martin Haug renders more literally: brahmacaryaṃ vasantam as 'after his investiture in the house of Guru', The Aitareya Brahmanam of the Rigveda, op.cit., II, 341.

2. Tr. A.B. Keith, Rigveda Brahmaṇas: The Aitareya and Kauṣītakī Brāhmanas of the Rigveda, HOS, 25 (Cambridge, Mass., 1920), 236.

3. Haug, loc.cit., II, 341.

The crucial part of the text runs as follows:[1] "Manu divided his wealth among his sons".[2]

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1. Tai. Saṃ. III.1.9.4, Taittirīya Saṃhitā, (Bharat Press, Aundh, 1945), 132; Dh.K.1161a; Kāṇe, HD, III, 565. manuḥ putrebhyo dāyaṃ vyabhajat / Dāya = share originally comes from the root dā = 'to share', 'to divide ', Derrett, 'The Development of the Concept of Property in India', ZVR 64 (1962), 15-130 at 53, rpt. Essays, II, 8-130. Jīmutavāhana's dīyate iti vyutpattyā dāya-śabdo, i.e. dā means to give is wrong, Dā.bhā. I, 4. Kāṇe's adoption of Jīmutavāhana's definition is careless, Derrett, ibid, 53. Definition of dāya, Bhāruci: pitryaṃ jñāti-dhanam vā, 'that which belonged to the father, or the property of a relative', Derrett, Bhāruci, I, 226, II, 333; similar is Aparārka on Yājñ. II, 115, 720. Medhātithi on Manu, IX. 115: anvayāgatam dhanam, 'property acquired by succession'. Jīmūtavāhana: pūrva-svāmi-sambandhādhīnaṃ tat-svāmyoparame yatra dravye svatvam tatra nirūḍho dāya-śabhaḥ, 'the word dāya is used in a specialised sense in respect of property in which property arises upon the cessation of the previous owner's ownership, Property itself dependent upon a relationship with that owner', Dā.bhā.I.3. Such a theory is not unknown. It is consistent with the maxim of English law: nemo est haeres viventis, but is widely different from the Mitākṣarā concept of ownership, H. Cowell, The Hindu Law, TLL, 1870, 8 (Calcutta, 1870), 94. Vijñāneśvara: yad dhanaṃ svāmī-saṃbandhād eva nimittād anyasya svaṃ bhavati tad ucyate, 'it is called dāya when it is property which becomes the sva of another merely by reason of relationship with the Owner', Mitā. prooem to Yājñ. II.114, Dh.K.1132a. An explicit definition of the Mitākṣarā school: pitā-putra-samudāya-dravyam. vibhāgārham pitṛ-dravyam, 'a thing common to father and son; a thing belonging to the father which is fit for partition, Sarasvatī-vilāsa, Foulkes, ed., §§ 5, 8. For an exhaustive discussion on dāya, Derrett, ibid., 53ff; also, Sontheimer, The Concept of Dāya, op.cit., passim.

2. Tr. J.C. Ghose, Hindu Law, I, 88.

There are evidences in the Śatapatha-brāhmaṇa that a father used to lead a retired life in his old age, leaving the management of property to his sons, and presumably he may have done so after dividing the property among his sons.[1] "Whence in early life the sons subsist on (the resources of) their father ... whence in later life the father subsists on (the resources of) his sons".[2]

The above texts indicate that a father was not always, not exclusively, the absolute master of the family property. Moreover, if we accept Kāṇe's interpretation[3] of the Nābhānediṣṭha legend, we find that the will of the father was not always the ultimate determining factor in a partition during the father's lifetime.

However, on the other extreme, we have the legend of Śunaḥśepa, who was sold by his father.[4] We come to know from the legend that Viśvāmitra adopted Śunaḥśepa and, using his patriarchal authority, deprived his natural sons of their right of primogeniture.[5]

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1. Śat.Br.XII.2.3.4, Kāṇe, HD, III, 565. tasmāt pūrva vayase putrāḥ pitaram upa-jīvanti / tasmād uttara-vayase putrān pitopa-jīvati // Gopatha Brāhmaṇa IV.17 is identical with slight variation; in line one Go.Br. reads purve in place of pūrva. In line two uttame in place of uttara, Dh.K.1163a. This idea of father's retirement and living under sons' dominion or to become a sannyāsin is also found in Kauṣītakī Br. Upaniṣad, see Kāṇe, HD, III, 565.

2. Tr. Eggeling, SBE, XLIV, 157.

3. Kāṇe, HD, III, 565.

4. Ai.Br. XXXIII.1ff. Kāṇe, HD, III, 563; Lingat, CLI, 9.

5. Ai.Br. VII.3.17. viśvāmitraḥ putrāṇāmamtrayāmāsa madhuchandāḥ śṛṇotana ṛṣabho reṇuraṣṭakah ye keca bhrātaraḥ stha nāsmai jyeṣṭhayāya kalpadhvam iti /

> Viśvāmitra then addressed his sons as follows: "Hear ye now, Madhuchhandah, Rishabha, Reṇu, Ashṭaka, and all ye brothers, do not think yourselves (entitled to the right of primogeniture, (1) which is his (Śunaḥśepa's)". (2)

The texts discussed in this section should be interpreted with caution.[3] They do not lay down any rule of law as such, but they relate to certain customs prevalent in those days which can be deduced from them. Moreover, we should not lose sight of the fact that the stories of Nābhānediṣṭha and of Śunaḥśepa are primarily legends.[4] Thus, on the juridical significance of these legends, Robert Lingat remarks:

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1. The award of the preferential share (jyeṣṭāṃśa or uddhāra) to the eldest son (or brother) is a usage closely connected with primogeniture under which the eldest son is the sole heir subject to the maintenance of his younger brother. Traces of both are found in the Vedas, Ṛg-veda, IV.17.11, tr. Griffith, (Benares, 1890), II, 120; Pañcaviṃśa Brāhmaṇa, XVI.4, 3-4. tr. W. Caland, (Calcutta, 1931), 431. Āpastamba (II.6.14.6, 10-12) enjoins equal division among sons and disapproves giving a major part of the estate to the eldest alone, Kāṇe, HD, III, 566. Preferential share to the eldest son is included in the text on Kalivarjya, Kāṇe, HD, III, 926.

2. Tr. Haug, The Aitareya Brahmanam, II, 469.

3. Kāṇe, HD, III, 564.

4. Kāṇe, HD, III, 564. According to Haug, Nābhānediṣṭha had no real existence. He is symbolic. His assistance is required when the sacrificial priests are producing the new celestial body of the sacrificer. In a mystical sense he is the guardian of all seeds. He looks down from heaven at his relative, that is, the seeds containing the germ of new life are poured out mystically by the Hotṛs in their prayers, Aitareya Brāhmanam, I, 27.

> In effect the dharma which is expressed in that part of Revelation which has reached us has, by reason of its origin, an absolute an unquestionable authority. But it was necessary that any passage in the Vedic texts which was actually invoked should really amount to a rule of conduct, that is to say, it should be an injunction (vidhi). If it merely reported a fact, no rule of an imperative character could be derived from it; it was a simple arthavāda. For example, it is said in the Yajurveda (Taittirīya-saṃhitā, III.1.9.4) that Manu divided his goods amongst his ten children. Is this only a story, suggesting no obligation upon fathers of families to follow Manu's example? Or is it a practice inspired in Manu by a consideration of the spiritual benefits which it might procure and which ought, thereafter, to be converted into a rule by any person concerned for his salvation? Upon the answer to this question depends the value of any Vedic text which is invoked as a source of dharma. In the same way the story of Ṛjrāśva in the Ṛgveda, (1) the story of Śunaḥśepa (who was sold by his father) in the Aitareya-brāhmaṇa, and that of Naciketas (who was offered by his father to Yama) in the Kaṭha-upaniṣad, raise the problem of the limits of paternal authority. (2)

It may be assumed from these texts that the customs of some unknown part of the country were interwoven into the texture of the story and the smṛti-kāras took notice of these customs in their works.[3] The texts reflect a

1. In Ṛg-veda, I, 117,17, it is stated that the eyes of the Ṛjrāśva were put out by his father because the former gave a hundred rams to a she-wolf. Kāṇe opines that the verse might have some esoteric meaning or might refer to some celestial phenomenon, HD, III, 564.

2. Lingat, tr. Derrett, The Classical Law of India, op.cit., 8-9.

3. See Āp.dh.sū.2.14.10, Dh.K.1166a.

civilization [1] in which sophisticated concepts of proprietary rights were yet to develop; and in a pastoral and agricultural society [2] physical fitness was indeed a determining factor in qualifying for the management of the family property. And that is why the father in his old age had to lead a retiring life in a son's house as revealed in the texts.[3]

It is significant to note that, in the Śunaḥśepaḥ legend, Viśvāmitra's patriarchal power did not go unchallenged. The fifty sons who were older than Madhucchanda challenged his decision and Viśvāmitra had to suppress them by using his spiritual power of cursing. Similarly, in the Nābhānediṣṭha legend, although the old father could not redress the grievances of his youngest son by giving him a share of the estate, he had to find out a spiritual device [4] through

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1. The stage the civilization had reached could be inferred from the Śunaḥsepa legend which shows that sons could be sold. A father might have had this power in the hoary past but Āpastamba held that there could be no gift of a son, Āp.dh.sū.II.6.13, lo-12. The controversy over father's power is depicted by Yakṣa: strīṇāṃ dāna-vikrayātisargā vidyante na puṃsaḥ/ puṃso'-pit◡yeke śaunaḥśepe darśanāt / Nirukta, III,4. But Vasiṣṭha opines that sale of sons are mentioned in the Vedas, Vasiṣṭha, dh.sū,XVII.31-32, SBE, XIV,87. Śunaḥśepa legend also points to the prevalance of human sacrifice in the society, though condemned in the legend. Keith does not agree that the legend stands for any actual human sacrifice, A.B. Keith, <u>The Religion and Philospphy of the Veda and Upanishads,</u> (H.U.P. Cambridge, Mass., 1925), H.O.S. 32, 348. For an interesting study, see J.L. Sauvé, 'The Divine Victim: Aspects of Human Sacrifice in Viking Scandinavia and Vedic India', in J. Puhvel, ed., <u>Myth and Law among the Indo-Europeans: Studies of Indo-European Comparative Mythology,</u> (Berkeley, 1970), 173-91.

2. The <u>Vaikhānasa-dharma-praśna</u> mentions of four kinds of householders: (i) <u>vārtavṛtti</u> ('subsisting on agriculture'),(ii) <u>sālīna,</u> (iii) <u>yāyāvara,</u> (iv) <u>ghoracārika;</u> which shows that the civilization did not consist of organised settled population, Kāṇe, HD , I, 1, (Poona, 1968), 258.

3. Śat.Br.XII.2.3.4, Go.Br.IV.17; Kau.Up.II.15.

4. Manu advised Nābhānediṣṭha to help the Aṅgirasaḥ, who were performing the <u>sattra</u> sacrifice by reciting two hymns on the sixth day of the sacrifice, M. Haug, <u>The Aitareya Brahamanam of the Rigveda,</u> (Bombay, 1863), I, introd.,27;II,341-2.

which the youngest son received a thousand cows or other valuables.

In short, these legends may be taken as records of two norms, namely the patriarchal power of a father and a son's emerging self-assertion, which may have co-existed in comparatively early society of India.

c. Partition during the lifetime of the father and his power to regulate the quantum of the sons' share

Earlier in our discussion,[1] we have seen that, according to most of the dharmaśāstras, when the father was unwilling the sons could not demand a partition of the family estate during the lifetime of the father. Our next inquiry is as to the extent of a father's power of regulating the quantum of share when he is dividing the property amongst his sons. The purpose of this investigation is to gauge how far a father could act arbitrarily while dividing the estate amongst his sons, and thereby to assess the relative rights of father and son in the family property.

In the Vedic passages, there are evidences of unequal distribution of wealth amongst sons by the father, and also of his nominating any one son to succeed him at his pleasure.[2] The custom of primogeniture is also acknowledged

1. Supra, 365-7.

2. Ṛg-Veda, IV.17.1: Indra is acknowledged as the first-born and the leader and gods admitted his right of primogeniture, Griffith, II, 120. All his relations agree as (to his right) to the leadership, Ai.Br.IV.25; Haug, I, 103; II, 304. Śat.Br.V.IV.2.8; SBE, XLI, 97: 'And to him who is his (the King's) dearest son, he hands that vessel, thinking 'May this son of mine perpetuate this vigour of mine"'. Pañcaviṃśa Brāhmaṇa, XV.4.4: 'Therefore, they took upon those of the sons, who enters upon a (father's) biggest inheritance, as upon one who will have success in the world', tr. W. Caland, (Calcutta, 1931), 431, for the text with Sāyana's comment, see Tāṇḍyamahābrāhmaṇa or Pañcaviṃśa

/Continued on next page:

in the Vedas.[1] However, these texts were not universally accepted as the established norm and they do not seem to confer on the father any arbitrary power of division. They represent only flexible principles to suit the special needs of the individual son[2] by authorising the father to pursue his inclination.

Although Āpastamba was aware of the practice of allotting a preferential share to the eldest son, he advocated equal division of wealth amongst all the sons. He opined that giving a major part of the estate to the eldest alone was against the correct interpretation of the śāstra.[3]

> That (preference of the eldest son) is forbidden by the sāstras. For it is declared in the Veda, without (making) a difference (in the treatment of the sons): Manu divided his wealth amongst his sons.[4]

Note 2 - p.379 - Continued:

Brāhmaṇa belonging to the Sāma Veda, (Chowkhamba, Benares, 1936), II, 221. Tai.Saṃ.III.1.9.4. also speaks of the eldest son being established with ancestral wealth, Kāṇe, HD,III, 565-6. A father could take into consideration the individual needs and loyalty of his sons: Tai.Br.2.3.11.4. śuśrūṣuḥ putrāṇāṃ hṛdayatamaḥ; Jai.Br.2.18.3. yas tvāva putrāṇāṃ kṛpanatamo (poorest) bhavati, sa pitur hṛdayaṃ āpyeti, ed. R. Vira and L. Chandra, (Nagpur, 1954), 239. Texts indicating only the eldest son as the heir, Gautama, XXVIII, 3; Āpastamba, II.6.1.4.6; Manu, IX.105-10; Mahābhārata, Anuśāsana Parva, 105.17; Nārada, XIII.5. For a discussion, Kāṇe, HD, III, 566.

1. Āp.dh.sū.II.6.14.6 and 10-12, Kāṇe, HD, III, 566. N.C. Sengupta, Evolution of Ancient Indian Law, TLL, 1950, (Calcutta, 1953), 174.
2. See supra, 379, n.2.
3. Āp.dh.sū.II.6.14.10-11, Dh.K.1166a, Kāṇe, HD, III, 566. jyeṣṭho dāyāda ityeke / ... tacchāstrair vipratiṣiddham / Manuḥ putrebhyo dāyaṃ vyabhajad ity aviśeṣena śrūyate /

4. Tr. Bühler, SBE, II, 134.

With this śruti[1] text, Āpastamba refutes the advocates of unequal division but at the same time, he accepts the importance and place of honour of the eldest son. However, the ṛṣi does not recommend a definite share but ordains the gift of a valuable article to the eldest before dividing the property equally amonst all the sons.[2] "After having gladdened the eldest son by some (choice portion of his) wealth, ... he should, during his lifetime, divide his wealth equally amongst his sons, ..."[3]

By advocating equal shares for all the sons, perhaps Āpastamba was taking the stand of a purist and idealist.[4] Although his view goes a long way to prove the existence of the sons' inherent right in the family property, he ignored the fact that varied customs in different parts of the country could hardly be squeezed into a single rigid system of partition.[5] And in this respect Gautama shows more flexibility than Āpastamba.

Gautama does not enunciate a definite principle regarding the quantum of share in a partition. He gives four alternatives to the sharers to decide in

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1. Tai.Saṃ.III.1.9.4; Dh.K.1161a.
2. Āp.dh.sū.II.13.13 and II.14.1, Dh.K.1164a. eka-dhanena jyeṣṭham toṣayitvā / jīvan putrebhyo dāyaṃ vibhajet samaṃ ... /
3. Tr. Bühler, SBE, II, 132.
4. Kāṇe, HD, III, 566.
5. Kātyāyana quoted by Vīvāda-ratnākara, 505, and Arthaśāstra, III.7. declare that customs of countries, castes, villages and groups, varying rules of partition should be enforced by the King, Kāṇe, HD, III, 566. Also N.C. Sengupta, Evolution of Ancient Indian Law, op.cit., 175.

what ways they could divide the property. First, the eldest son may take the whole estate and can support his younger brothers as their father.[1] The second alternative ordains allotment of an additional share to all the brothers with the residue being divided equally amongst them.[2] According to Gautama's third alternative, the eldest could have two shares and the rest, one each.[3] If the sons opted for the fourth alternative, instead of taking a share from the whole property, each of them could take only one kind of property in satisfaction of his share.[4] Yet, in essence, Gautama does not deny the principle of equal division among the sons.[5] "All the remaining (property shall be divided) equally. Or let the eldest have two shares, and the rest one each".[6]

Baudhāyana ordains without any ambiguity that the father should divide the property equally amongst his sons. In the light of the text in the Taittirīya-saṃhitā (III.1.9.4), Baudhāyana declares:[7] "(A father may, therefore, divide his property) equally among all, without (making any) difference".[8]

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1. Gautama, XXVIII.3.

2. Gautama, XXVIII.8.

3. Gautama, XXVIII.9. Dh.K.1182b.

4. Gautama, XXVIII.11, Dh.K.1182b.

5. Gautama, XXVIII,8-10, Dh.K.1182b. samadhetarat sarvaṃ /8/ dvyaṃśī vā pūrvajaḥ syāt /9/ ekaikam itareṣām /10/

6. Tr. Bühler, SBE, II, 300.

7. Baudhāyana dh.sū.II.2.2.3, Dh.K.1146b. samo'ṃśaḥ sarveṣām aviśeṣāt /

8. Tr.Bühler, SBE, XIV, 224. However, Baudhāyana allows preferential share (uddhāra) of one-tenth to the eldest, Bau,II.2.6-7, Dh.K.1146b; N.C. Sengupta, Evolution of Ancient Indian Law, op.cit., 174.

Kauṭīlya, in his Arthaśāstra, recommends that the father should divide the property equally among his sons and should not exclude any one from inheritance without sufficient ground.[1] "In the case of partition during his lifetime, the father shall not show special favour to any one. And he shall not, without ground, exclude any one from inheritance".[2]

However, it should be mentioned that Kauṭīlya's sources are unknown; but probably, the rule stated in the text represents customary norms which, owing to their practicability and wide acceptance, were approved by him.

But some smṛtikarās seek to give the father an unfettered power to distribute property in whatever way he likes. Thus Nārada declares: "When a father has distributed his property amongst his sons, that is a lawful distribution[4] for them (and cannot be annulled), whether the share of one be less, or greater than, or equal to the shares of the rest; for the father is the lord[5] of all".[6]

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1. Arthaśāstra, III.5,16 and 17; ed., Kāṅgle, I,104. jīvad-vibhāge pitā naikaṃ viśeṣayet /16/ na caikam akāraṇān nirvibhajeta /17/

2. Tr. Kāṅgle, II, 242.

3. Nārada, XIII.15, Dh.K.1172a. pitraiva tu vibhaktā ye samanyūnādhikair dhanaiḥ / teṣāṃ sa eva dharmaḥ syāt sarvasya hi pitā prabhuḥ // variant reading, samanyūnādhikair = hīnādhika-samair; dharmaḥ = dharmyaḥ, Dh.K.1172a,n.1.

4. Jolly's rendering of teṣāṃ sa eva dharmaḥ syāt as 'that is a lawful distribution for them' does not bring out in śāstric context its real implication. A better rendering is: 'that is righteousness itself for them'. The meaning of the variant dharmyaḥ is: 'consistent with dharma (righteousness)', suggested by Derrett in the margin of my first draft.

5. 'prabhu is a word of wide meaning, implying rather independence of power than totality of ownership' Derrett on the margin of my first draft.

6. Tr. Jolly, SBE, XXIII, 192.

Bṛhaspati has also a text to the same effect with the addition that if the sons do not accept the unequal division, they will be punished [1] (with excommunication).[2] "Those (sons) for whom their shares have been arranged by the father, whether equal, less, or greater, must be compelled to abide by such arrangement. Otherwise (if they try to alter the arrangement), they shall be punished".[3]

Yājñavalkya also ordains that if the father acts righteously, an unequal distribution of his estate to his sons should be considered valid.[4] "A partition made by the father among sons separated with greater or smaller shares, if just is pronounced valid".[5]

To a hasty reader unfamiliar with the total complex of norms stated in our texts, the last three texts might seem to deny the existence of co-ownership of sons with their father in family property. But in a study of the dharma-śastras, one must try to understand the ancients on their own ground.

The texts are far from conveying the idea that a father could arbitrarily or whimsically distribute his property among his sons. In this respect, it is indeed clear that a father had to act as a righteous person and this is indeed implied

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1. Bṛ.XXV.4, Dh.K.1173a. samanyūnādhikā bhāgāḥ pitrā yeṣāṃ prakalpitāḥ / tathaiva te pālanīyā vineyās te syur anyathā //

2. Variant reading: patitāḥ syur anyathā, Dh.K.1173a, n.1.

3. Tr. Jolly, SBE, XXXIII, 370.

4. Yājñ. II.116b, Dh.K.1169b. nyūnādhika-vibhaktānāṃ dharmyaḥ pitṛ-kṛtaḥ smṛtaḥ /

5. Tr. Colebrooke, Mitā, I,ii.13.

by the use of the word dharmīyaḥ (consistent with righteousness') by Nārada [1] and Yājñavalkya.[2] Nor do these texts, by implying unequal division by the father, erode in any way the co-ownership of sons with their father as ordained in some texts.[3] Thus, when Nārada says: sarvasya hi pitā prabhuḥ,[4] - it does not mean that the father is the exclusive owner of the entire property; by the word prabhu, the sage merely emphasises that as gṛhapati the father has independence of power over the whole family property. Therefore, these last three texts only uphold a father's power of adjustment in a partition, considering the needs of particular sons; and it is most unlikely that in ancient Hindu society, a son would challenge a righteous action of his father.

V. Vānaprasthya (father's retirement into the forest) and the respective rights in property between father and son

a. Introduction

The structure of ancient Hindu society was the combination of a nominal vertical stratification of the population into varṇas and an equally nominal horizontal division of the male individual's span of life into āśramas.[5] The

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1. Nārada, XIII.15, Dh.K.1172a.

2. Yājñ. II.116b, Dh.K.1169b.

3. Yājñ.II.121, Dh.K.1175b; Bṛ.XXVI.10, Dh.K.1180b; Bṛ.XXVI.14, Dh.K. 1179b; also Nārada (maṇi-muktā ...), Dh.K.1219b.

4. Nārada, XIII.15, Dh.K.1172a.

5. āśrama signifies a 'stage' in the progress through life of the twice-born Hindu. Literally, āśrama means 'a stopping or halting place', K.V.R. Aiyangar, Aspects of the Social and Political System of Manusmṛti, (Lucknow, 1949), 137.

The general fact is certain enough, though there are disagreements, that the āśrama scheme of life was divided into four stages.[1]

Our enquiry is confined to the effect of this āśrama scheme on the respective rights in property between father and son, especially at father's retirement to the forest as a hermit.

b. Traces of the Order

In early texts vānaprastha is synonymous with vaikhānasa[2] and it is

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1. K. Motwani, Manu Dharma Śāstra (Madras, 1958), 58-60. Veda Mitra's division of each stage into 25 years is artificial and not supported by texts, India of Dharma Sūtras, (New Delhi, 1969), 6. There were prolonged studentship, Bau.dh.su.I-2,1-5, SBE, XIV,149; Gautama, II, 45-7; SBE, II, 189; Āpastamba, I.1.2.11-16, SBE, II,7; Manu, III,1, SBE, XXV,74; Yājñ.I.36, Mandlik, ed., (Bombay, 1880), 164-5; also Jhā, Manu III.1, Comparative, (Calcutta, 1929), 160. See Manu VI.2; Kāṇe, HD,III, 198. On the theory of the four stages of life, R. Lingat, tr. Derrett, The Classical Law of India, (Berkeley, 1973), 45 ff.

2. Vaikhānasagṛhyasūtram, IX.1, W. Caland, ed., (Calcutta, 1927), 122: gṛhasthaḥ soma-yājī putraṃ pautraṃ ca dṛṣṭvā tat-putrādin gṛhe saṃsthāpya mauṇḍyaṃ kṛtvā prājāpatyaṃ kṛcchraṃ caret / 'When a householder who has performed the sacrifice of soma, beholds his son and his son's son, he should establish his son, son's son and so on (after having made them marry) in his house, he should shave his hair off (except his top-lock and his eye-brows), perform the prājāpatya-kṛcchra penance and go forth', tr. Caland, (Calcutta, 1929), 197. Vaikhānasa is the name of a mythical group of ṛṣis, Vedic Index, II, 327. Traces in the Ṛg-veda, as a race of saintly hermits sprung from the nails of Prajāpati, Griffith, II, 318; also Tai.Ā.I.23 connects the vaikhānasa with the nails of Prajāpati: ye nakhās-te vaikhānasāḥ. The Mahābhārata explains vaikhānasas as preachers against the acquisition of material wealth, Śāntiparva, 20.6-7, (Poona, ed., 1949), XIII,76. For their classification, Bau.dh.sū.III.3, SBE, XIV, 291-4. Kālidāsa's Śākuntalam, I.26: vaikhānasaṃ kim anayā ..., HOS,XVI, (H.U.P., 1922), 13. Mallināthа in his commentary explains that vaikhānasa and vānaprastha are the same, (Calcutta, 1860), 23. Also on this, see Kaṇe, HD, I, 1, (Poona, 1968), 257-60. W. Caland, Vaikhānasasmārtasūtram, (Calcutta, 1929), introd., § 6, P.xvi. K. Rangachari, Vaikhanasa Dharma Sūtrā, (Madras, 1930), 15.

evident that the four orders of life were notorious at the time of Gautama.[1] "(The four orders are, that of) the student, (that of) the house holder, (that of) the ascetic (bhikshu), (and that of) the hermit in the woods (vaikhānasa).[2]

Baudhāyana explains that a vānaprastha is he who follows the duties expounded by Vikhanas.[3] "A hermit is he who regulates his conduct entirely according to the institutes proclaimed by Vikhanas".[4]

Gautama and Apastamba[5] place vānaprasthya as the fourth āśrama in order of sequence, but Manudeclares vānaprasthya as the third stage of life, the one immediately after the stage of householder.[6] "The student, the house-

1. Gautama, dh.sū.III.2. brahmacārī gṛhastho bhikṣur vaikhānasaḥ /

2. Tr.Bühler, SBE, II, 190.

3. Bau.dh.sū.II.6.11.14. vānaprastho vaikhānasa-śāstra-samudācāraḥ /

4. Tr. Bühler, SBE, XIV, 259. But Baudhāyana also states that originally there was only the order of the householder and the other orders were created by the demon (daitya) Kapila (different from the one in the Śvetāśvatara Upaniṣad, V.2, Vedic Index, I, 136) to weaken the gods, Bau.dh.sū.II.2.28, SBE, XIV, 345, Index to Vol.XIV. The legend is expanded by K.V.R. Aiyangar, Some Aspects of the Hindu View of Life According to Dharmaśāstra, (Baroda, 1952), 153; Aspects of the Social and Political System of Manusmṛti, (Lucknow, 1949), 137.

5. Gautama, dh.sū.3.2, SBE, 2, 190 and n.2; Āpastamba, 2.9.21.1, SBE 2,151, but see Āpastamba, 2.9.24.15, SBE 2, 159, where he is not rigid in placing one order before the other, though he is apparently against pure asceticism, ibid, n.15.

6. Manu,VI.87. brahmacārī gṛhasthaś ca vānaprastho 'tha bhikṣukaḥ / ete gṛhastha-prabhavāś catvāraḥ pṛthag āśramāḥ // This is the majority view, Vasiṣṭha, VII, 1-2; also Manu,III,77, SBE, XXV,85. Bau.dh.sū, 2.6.17. Support in the śruti Jābālopaniṣad, 4: brahmacaryaṃ pari-samāpya gṛhī bhavet, gṛhī bhūtvā vanībhavet, vanī bhūtvā pravrajet / For tr. S. Radhakrishnan, Principal Upaniṣads, (London, 1953), 896. These four stages are also seen in the epics and classical sanskrit literature, Rāmāyaṇa, II.106-21-2; II.2.9-10; V.13.38; III.9.23; III.9.27, see N. Vyas, India in the Rāmāyana Age, (Delhi, 1967), 70-1. The Mahābhārata, Śāntiparva, 245.1-14, Kālidasa, Raghuvaṃśam, 1.8, (Bombay, 1948),5. Mentions of these orders by Kālidasa may be a social norm of the day, B.S. Upadhyay, India in Kalidasa, (Allahabad, 1947), 174.

holder, the forest-hermit, and then the renunciate - all these four distinct stages of life spring from the householder".[1]

c. Time of entry into the order of Vānaprasthya

According to Manu and Yājñavalkya, entry into the order of forest-hermit is allowed only after the person[2] has served the world as a householder.[3]

> When one has paid according to the law, his debts to the great sages, to the manes, and to the gods, let him make over everything to his son and dwell (in his house), not caring for any worldly concern. 4

d. Superiority of the order of householder

By passing the order of householder and avoiding the responsibilities of worldly life have also been discouraged in the śrutis. We find this passage in the Aitareya-brāhamaṇa:[5]

1, Tr. Derrett, Bhāruci, II, 28.

2. Yājñ.III.45. Vānaprasthya was not meant for śūdra, it was only for the three higher classes, Manu, VI,I, SBE, XXV, 198.

3. Manu, IV, 257. maharṣi-pitṛ-devānāṃ gatvā-'nṛṇyaṃ yathā vidhi / putre sarvaṃ samāsajya vasen mādhyasthyam āśritaḥ //

4. Tr. Buhler, SBE, XXV, 169, also cp. Manu, VI, 34, SBE, XXV, 205. The sloka is very significant from the point of view of vyavahāra.

5. Ai.Br. VII.3.13, Haug, ed., (Bombay, 1863), I, 178. kinnu malaṃ kim ajinaṃkimu śmaśruṇi kim tapaḥ; putram brahmaṇa icchadhvaṃ sa vai loko 'vadāvadaḥ /

> What is the use of living unwashed, wearing the goat skin, and beard? What is the use of performing austerities? You should wish for a son, O Brāhmans. Thus people talk of them. 1

But according to some texts, a person is permitted to enter the order of sannyāsa (the fourth stage) even in childhood or immediately after finishing his studies of the Vedas.

A text in the Jābālopaniṣad runs as follows:[2]

> Otherwise(if a suitable occasion arises) let one renounce even from the state of a student or from the state of a householder or from that of a forest hermit. 3

Gautama took cognizance of these texts,[4] but like Manu, he also emphasised the importance of the order of householder.[5]

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1. Tr. Haug, Ai.Br. II, 461. On the superiority of the householder, see Bṛhadāraṇyakopaniṣad, I,iv,16.

2. Jābālopaniṣad, 4. Yadi vetaratha brahmacaryādeva pravrajet, gṛhād vā vanād vā /

3. Tr. Radhakrishnan, Principal Upaniṣads, op.cit., 896.

4. Gautama, III, 1, (Mysore, 1917), 58, SBE, II, 190. Also Vasiṣṭha, VII.3, SBE, XIV, 40.

5. Gautama, III.3. (Mysore, 1917), 63, SBE, II.190. Manu, VI.87.

The controversy was further continued by the vedāntins,[1] and the mīmāṃsakas[2] through the interpretations of śruti texts. The most controversial among these texts was one from the Chāndogyopaniṣad:[3]

> There are three branches of duty, sacrifice, study of the Vedas, alms-giving – that is the first. Austerity (4), indeed, is the second. A student of sacred knowledge (brahmacārin) (5) dwelling in the house of a teacher, settling himself permanently in the house of a teacher, is the third. All these become possessors of meritorious worlds. He who stands firm in Brahma attains immortality. (6)

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1. Vedānta is one of the six orthodox systems of Hindu Philosophy, founded on the Upaniṣads. Literally means, 'acme of the Vedas', Benjamin Walker, Hindu World, (London, 1968), II, 559-60; also Encyclopaedia Britannica, (London, 1970), XXII, 929.

2. School of Hindu Philosophy, founded by Jaimini, Hindu World, ibid., II, 70-1.

3. Ch.U.2.23.1, Eighteen Principal Upanisads, (Poona, 1958), I, 93. trayo dharmā skandhaḥ / yajño'dhyanaṃ dānamiti prathamaḥ / tapa eva dvitīyaḥ / brahmacāry ācarya-kula-vāsī tṛtīyo 'tyantam ātmānam ācarya-kule 'vasādayan / sarva ete puṇya-lokā bhavanti / brahma-saṃstho 'mṛtatvameti //. //

4. Self-mortification practised by householders during the third stage of life, Swami Nikhilananda, The Upaniṣads, (London, 1959), IV. 179.

5. Celibate student who dwells in the teacher's house studying the Vedas and practising continence and other spiritual disciplines. Two types: (i) upakurvāna, who leaves the teacher's house after the completion of his studies and becomes a householder; (ii) naiṣṭika, who dwells in the teacher's house till death, ibid., 179.

6. Tr. Hume, The Thirteen Principal Upaniṣads, (London, 1931), 200.

The text, by three divisions of dharma, described the four stages of life. The first division refers to the order of householder which is the second stage. The second division signifies the third stage, the stage of the forest - hermit and the third and the last division signify respectively, the stage of brahmacārin and sannyāsa.[1]

To some the goal of life is svarga (heaven) which is connected with the fulfilment of sakāma wishes; to others, the goal is mokṣa which is void of any desire or reward. To Hindus, both paths are open, and both are recognised and sanctioned in the śāstra.[2]

For both vedāntin and mīmāṃsaka, the ultimate goal of life is mokṣa (salvation), but they differ only with regard to the means of achieving it. The vedāntins take the view that without taking recourse to the order of householder, one is allowed by śruti and smṛti to belong to the other three āśramas, because atma-vidyā[3] (true knowledge) which leads to salvation is independent of action (karma).[4]

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1. Radhakrishnan, Principal Upaniṣads, (London, 1953), 374.

2. Derrett, 'The Basic Presuppositions of the Dharmaśāstra and their Relation to Hindu Society', History of Indian Law, (Leiden, 1973), 18. Also these two paths of pravṛtti and nivṛtti is explained by Derrett, RLSI, 68-72, 69-70, n.2. Also W. Caland, Vaikhānasasmārtasūtra, VIII, 9b, text (Calcutta, 1927), 118, tr. (Calcutta, 1929), 192-3. Manu, XII, 88, Derrett, Bhārucī, I, 283.

3. B. Walker, Hindu World, (London, 1968), I, 55.

4. On sacrifices and duties of the householder, see P. Deussen, The System of the Vedānta, tr. C. Johnston, (Chicago, 1912), 361-2.

The Vedānta says:[1] "And (knowledge belongs) to those who observe chastity (i.e. to sannyāsins) because (this fourth stage of life is mentioned) in the scripture".[2]

According to Jaimini, those śruti passages[3] contain no injunction, but only a reference and mere glorification[4] of āśramas other than those of a householder.[5] "Jaimini (thinks that the passages mentioned in the previous sūtra contain) a reference (only to sannyāsa) and not injunction, for (other texts)[6] condemn (sannyāsa)".[7]

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1. Vedānta Sūtra, III.4.17, Vedāntasāra, (Adyar Library, 1953), 345. Ūrdhva retaḥsu ca śabde hi /

2. Tr. Radhakrishnan, The Brahma Sūtra, (London, 1960), 509.

3. Here Jaimini speaks specially of Chā.U.2.23.1.

4. On injunction (vidhi) and explanatory material (arthavāda), Derrett, RLSI, 87-8. Cp. vidhi and arthavada respectively with midrash halachah (which lays down the law) and midrash haggadah (which uses the text to illustrate something else), of Rabbinical law, RLSI, 87. V.M. Apte, Brahma Sutra, (Bombay, 1960), 737.

5. Br.Sū.III.4.18. parāmarśaṃ jaiminir acodanāc cāpāvadati hi /

6. Isā.U.2; Tai.U.I.II.1; Śat.Br.XII.4.1.1; Tai.Br .VII.13.12. Cf. action lauded, St. James, II.26, St. Gregory, on Job, XXXI, 102, but contemplation as superior to action in Luke, X.38-42, Mary being contemplative chose the better path than the path of action, see Principal Upaniṣads, op.cit., 281.

7. Tr. Radhakrishnan, The Brahma Sūtra, op.cit., 510.

Bādarāyaṇa refūtes the interpretation of Jaimini [1] and holds the view that the three āśramas other than that of the householder are also sanctioned by the Vedas.[2] "Bādarāyana (thinks that sannyāsa or monastic life) is to be accomplished for the text (cited) applies equally (to all the four stages of life)". "Or rather (there is) an injunction as in the case of the carrying (of the sacrificial fuel)[3]".

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1. According to Jaimini Chā.U.2.23.1, implies that the order of the householder is to be compulsorily performed, the other orders are for those who are incompetent to be a householder. The order of the householder is the vidhi (injunction) as is the case of upavīta, Jai.Su.III.IV.1-9, Sacred Book of the Hindus, (Allahabad, 1923), XXVIII, I, 124-6, also Jai. Sū., III.IV.9.a.b. b.c., ibid., 139-40, where Jaimini re-emphasises his view. Radhakrishnan thinks that the mīmāṃsakas were exaggerating the importance of the Vedic rites, Indian Philosophy, (London, 1928), II, 449. But according to Śaṅkarācharya, Isa.U.2 is applicable only to the 'ignorant', his introduction to Aitareya Upaniṣad, The Upaniṣads, ed., Nikhilananda, (London, 1957), 16; but see Vāchaspati Miśra's interpretation of Jābāla 4, Bhāmatī, (a gloss on Śaṅkara Bhāṣya), I.I.1, (Benares, 1880), 47-8.

2. Br.Sū.III.4.19-20. anuṣṭeyam bādarāyaṇaḥ sāmya-śruteḥ / vidhir vā dhāraṇavat /

3. Tr. Radhakrishanan, The Brahma Sūtra, op.cit., 510. Here Bādarāyaṇa refutes Jaimini's view on Chā.U.2.23.1, by taking advantage of Jaimini's interpretation of Āpastamba Śrautra Sūtra, IX, II.8-9. Jaimini (śeṣa-lakṣaṇa), III,IV.9f, vidhis tu dhāraṇe'pūrvatvāt, The Sacred Book of the Hindus, ed. B.D. Basu, tr. M.L. Sandal, (Allahabad, 1923), XXVIII, I, 140-1. 'On the other hand, it is a vidhi in holding by reason of its being new'. As the last clause of Ā.S.Sū.IX. II.8-9 has been interpreted by Jaimini as an injunction because of its newness (a-pūrvatā), so also Chā.U.2.23.1, is an injunction, see Date, op.cit., 511; also V.M. Apte, Brahma Sūtra, (Bombay, 1960), 741-2. For a discussion on Jaimini and Bādarayana, see Kāṇe, H.D., (Poona, 1962), Vol.V, II, 1160-72. Kāne does not attribute Br.Sū.III.IV.20 to Bādarāyaṇa, ibid., 1168, but his reasons for the doubt are not convincing. Śaṅkara's view was qualified. He did not deny the mandatory nature of the sacrificial injunctions in the Vedas, but he thought those were meant for the ordinary people, but the upaniṣads were intended to be followed by the wise, S.N. Dasgupta, A History of Indian Philosophy, (London, 1932), I, 431, also S. Radhakrishnan, The Vedanta According to Śaṅkara and Rāmānuja, (London, 1928), 183.

These philosophical controversies were not divorced from society and life, rather both society and philosophy drew inspiration from each other. The mīmāṃsākas emphasis on the order of a householder seems to be a natural reaction against the Buddhist philosophy of asceticism. But this Buddhist impact on Hinduism should not be overemphasised.[1] Right from the śruti period, Hinduism itself contained a stream of philosophical thought which encouraged escapism from one's duty to the world. On the other hand, complete renunciation by all or an easy sannyāsa was never the accepted doctrine of Buddhism.[2]

Though many were avoiding their worldly responsibilities by resorting to a monastic life, the Purāṇic teachings of superiority of karma-yoga[3] over jñāna-yoga were not exclusively designed for the sake of opposition to Buddhism; they were a revival and restatement of a philosophy which derived its authority and strength from the Vedas and dharmaśāstras.

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1. As done by Dr. R.C. Hazra, Studies in the Purāṇic Records on Hindu Rites and Customs, (University of Dacca, 1940), 229. See K.V.R. Aiyangar, Rajadharma, (Adyar, 1941), 125-7.

2. Buddha did not advocate the abolition of the order of householder, he explains the duties of a householder to Dhammika, The Sutta-Nipāta, Dhammika Sutta, SBE, 10 , 2 (Oxford, 1881), 62-66 at 65 and 66. Sudinna Kālandaka, even after becoming a monk fulfils his duties towards his parents by procreating a son, Vinaya Pitaka, III, N. Wagle, Society at the Time of the Buddha, (Bombay, 1966), 81.

3. Matsya Purāṇa, 52,5b-7a; story of Indradyumma in Kūrma. Pu.1.1.60-1, (Calcutta, 1890), 9, Kūrma, Pu.1.12.249, ibid., 136; Agarwala, Matsya Purāna a Study, (Varanasi, 1963), 170. Mārk.Pu.95.19b (Calcutta, 1862), 491, tr. Pargiter, (Calcutta, 1904), 528.

The Purāṇas concentrated their teachings on the importance of varṇāśrama[1] by declaring that people must pass through all the stages of life, as enjoined by the śāstras and of all the four orders, the order of the householder, (gārhasthyāśrama)[2] was very much lauded.

The Vedic revival during the Purāṇic period turned Hinduism into a dogma of superficial rituals and Śaṅkarāchārya, 'tried to bring back the age from the brilliant luxury of the Purāṇas to the mystic truth of the Upaniṣads'.[3]

Apart from its temporary setback during the Buddhist period, varṇāśrama dharma remained as the potent force in the social scheme of ancient and medieaval society. There are definite evidences in the Purāṇas that people resorted to the forest during the third stage after the stage of leading the life of a householder.[4]

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1. Mārk.Pu. Chaps.95f, The story of Prajāpati Ruci, the paying of the three debts; also Garuda Pu. 88-90, (Varanasi, 1968), 243-55; Mārk Pu.95, 14b-16 and 19-20, tr. Pargiter, (Calcutta, 1904), 528; also N.Y. Desai, Ancient Indian Society, Religion and Mythology as Depicted in the Mārkaṇḍeya Purāṇa, (Baroda, 1968), 24. Matsya.R.141.61-2 (Poona, 1907) 264, Mat. Pu.22.80, ibid., 39; Viṣṇu, Pu.III.8, 9-11, (Gorakhpur, 1952), 228; Kūrma. Pu. I.12 (Calcutta, 1890), text, 136-7, tr. 249-50.

2. Kūr.Pu.I.2.51-2, (Calcutta, 1890), 26; Cf. Manu, 9.96, SBE, 25, 344; Mārk.Pū.71.9-11, (Calcutta, 1862), 383, tr. 430.

3. S. Radhakrishnan, Indian Philosophy, (London, 1927), 449. For an illuminating discussion on the reform movement of Śaṅkara, see K.V. Subramanya Aiyer, 'Religious Activity in Ancient Dekhan', in Historical Sketches of Ancient Dekhan, (Coimbatore, 1969), III, 31-64 at 49-55. Also A.K. Majumdar, 'Impact of Samkaracarya on Indian Thought', Visvabharati Quarterly, 37 (1971-72), 1:1-51.

4. Matsya. Pu.144.23-24, (Calcutta, 1876), 556; Mārk.Pu.36.4, (Calcutta, 1862), 219, tr. Pargiter, (Calcutta, 1904), 186, the story of Ritadhvaja who departs to forest after anointing his son; also Mārk.Pu.28.23-7, (Calcutta, 1862), 182, tr. Pargiter, (Calcutta, 1904), 150.

Śaṅkara's emphasis on jñāna-yoga could not stem the tide of popularity of varṇāśrama; and especially the order of the householder found shelter in the growing materialism in the society and, not to speak of sannyāsa, even the vānaprasthya gradually vanished as kali-varjya [1] (deprecated in the iron age of sin).

Apparently, entry into the order of forest-hermit was not compulsory.; In his introduction to Kṛtyakalpataru (Mokṣakāṇḍa), K.V.R. Aiyangar says about vānaprasthya and sannyāsa that 'being part of the enjoined order, they must be lived by those who elect them'.[2] Even taking the view that entry into the order was voluntary, the reason for its popularity lies not only in scriptural injunction but also in the psychology of an old person, who being deprived of his physical abilities in a pastoral and agricultural community, felt redundant and neglected by the younger generation.[3] In such a society, the range of vision towards life being very limited, an old person had only two alternatives left; either he could stay at home as a retired person, being

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1. atha kalau niṣiddhāni: māṃsa dānaṃ tathā śrāddhe vāna͡prasthāśramas tatha, Paṇḍit Hrishikesa Śāstri, ed., The Vṛhannāradīya Purāṇa, (Calcutta, 1891), 294. Kāśinātha Upādhyāya, Dharmasindhu, (Vārāṇasī, 1968), 705. Kāṇe, HD, III, 928, 941. B. Bhattacharya, The Kalivarjyas, (Calcutta, 1943), 68-74, 167.

2. Kṛtyakāl, 14, Mokṣakāṇḍa, (Baroda, 1945), 24. Manu, 6.36. Bühler translates mano mokṣe niveśayet as 'may direct his mind to (the attainment of) final liberation', SBE, 25, 205. Ganganath Jhā's translation, 'shall turn his mind towards liberation' strikes a mandatory note, Manu Smṛti, (Calcutta, 1922), III, I, 220, but see Medhatithi, ibid., 220-222, which puts the weight of evidence on Aiyangar's side and proves Bühler's translation to be correct.

3. Aiyangar, Some Aspects of the Hindu View of Life According to Dharmaśāstra, (Baroda, 1952), 151.

dependent on his son or he could lead an eremitical life in the forest.[1]

The procedural law reveals a society's attitude towards elderly people[2] by disqualifying them to act as witnesses, 'because of their tendency to be unmindful of the topics giving rise to lawsuits'.[3]

This apathy towards the elderly people was nothing peculiar to the ancient Hindu society. In many ancient societies, elderly people had little role to play.[4] There was a proverb in Rome, 'Sexagenarios de ponte',[5] meaning, 'sexagenerians from the bridge'.[6] The proverb used to be generally interpreted that once men had reached the age of sixty, they should be thrown in to the Tiber and drowned.[7] Ovid thought that the underlying

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1. Only a brāhmaṇa could take refuge in the contiguous wood, not others, Arthaśastra, 2.1.32.

2. Vyavahāracintāmaṇi, 283, ed. Rocher, (Gent.,1956), text, 87, tr.251; Narada, I.157, 158, also Vyavahāranirṇaya, (Adyar Library, 1942), 105, SBE, XXXIII, 82. Manu, VIII.65, SBE, XXV, 265.

3. Vy.Chi.ibid., n.1 at 251. Also Thakur, Hindu Law of Evidence, 73-4.

4. L.W. Simmons, The Role of the Aged in Primitive Society, (New Haven, 1945), 36-49, 177.

5. Sexti Pompei Festi, ed. W.M. Lindsay (Lipsiae, 1913), 450. Herafter cited as Festus.

6. Publii Ovidii Nasonis Fastorum Libri Sex, tr. Sir James George Frazer, (London, 1929), IV, 81. Hereafter cited as Fasti.

7. The custom developed during the famine, after the capture of Rome by the Gauls in 390 B.C., Festus, 452, Fasti, 81, n.3.

meaning of the proverb did not contain any idea of drowning the elders but there was a practice to disfranchise them at the age of sixty.[1] But whatever may be the interpretations, they undoubtedly show that old people in ancient Roman society had to face a similar fate, though in a different form, as their counterparts in the ancient Hindu world. With many ancient peoples there were customs either to kill their elderly folks or sometimes voluntarily aged peoples wanted to be killed by their kinsmen. The Massagetae [2] and the Wends [3] used to kill their old men and this was deemed to be the happiest of all deaths.

Among the Eruli, a Teutonic tribe who lived beyond the Ister (modern Danube), 'as soon as one of them was overtaken by old age or by sickness, it became necessary for him to ask his relatives to remove him from the world as quickly as possible'.[4] Similar customs were found in Fiji,[5] and in Vate [6] (or Efat), one of the New Hebrides.

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1. For a discussion, L.R. Taylor, Roman Voting Assemblies, Jerome Lectures, 8th series, (The University of Michigan, 1966), 92. J.P.V.D. Balsdon, Life and Leisure in Ancient Rome, (London, 1969), 169.

2. Herodotus, i, 216, tr. A.D. Godley, (London, 1920), 271.

3. The Fasti of Ovid, 110, n.2.

4. Procopius, De bello Gothico, (The Gothic War), History of the Wars, Bk.VI, 14, tr. H.B. Dewing, (London, 1919), text, 402, 404, tr. 403, 405.

5. Charles Wilkes, Voyage Round the World, Narrative of the United States Exploring Expedition, (Philadelphia, 1849), 396, 397.

6. George Turner, Samoa, (London, 1884), 335.

Vānaprasthya was a manifestation, in a different form, of the same psychosis of an old person. His prescribed foods [1] and his practising of severe austerities by standing in the midst of five fires, his standing in the open in rains by wearing wet garments in winter,[2] and his great journey (mahaprasthāna),[3] are nothing but a process of gradual physical deterioration, a form of slow suicide under the veneer of religious penance, sublimating the pains of self-mortification in expectation of attaining heaven.[4]

e. Juridical significance

Kāṇe [5] studied vānaprasthya only in the context of penance. He did not apply his mind to find out its effects on vyavahāra. But any study of vyavahāra is incomplete without exploring the other departments of the smṛtis. In traditional Hindu law, legal rules are oriented by the philosophy of religion. Hinting at this, Derrett has pointed out, 'this distinction between pravṛtti and nivṛtti is not mere philosophy divorced from law'. [6]

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1. Viṣṇu.95.5-6, SBE, 7,278; Manu,6.19-21, SBE, 25, 202; Yājñ.3.50, Mandlik, 155; Āpastamba, II.9.23.2, SBE, 2,156; Manu, 6.31,SBE,25, 204; also Viṣṇu.95.7-12, SBE, 7,278.

2. Manu.6.23-24, SBE, 25, 202-4; Yājñ.3.52; Mandlik, 156; Viṣṇu, 95. 2-4, SBE, 7, 277-8.

3. Manu.6.31, SBE, 25, 204; Yājñ.3.55, Mandlik, 156, HD, II, 924-7.

4. Baudhāyana, III.3.22, SBE, 14, 294, Lingat, CLI, 50.

5. Kāṇe, HD, II, 2, 917-29.

6. RLSI, 70.

Thus, vānaprasthya, though an order for undergoing penance, had significant implications on the mutual property relations between father and son. Before betaking to the forest, a father used to surrender all his properties to his son.[1] Manu provides that after the death of their parents, the brothers should divide the paternal estate.[2] Vānaprasthya being a symbolic death, the sons were entitled to divide their father's property after his departure to the forest; but, in fact, it was a division during the lifetime of the father, because he was disinterested in the property. This division by sons during the lifetime of father does not depend on any wish of the father excepting his decision to enter into the order of forest-hermit.

So, when the order of vānaprasthya was in vogue, as soon as the father resorted or decided to resort to the forest, the sons used to be the owners of their father's property. Even if the father stayed at home at his old age, he was not in actual control of his property. In pre-literate societies, even the most firmly entrenched property rights are difficult to enforce in the late stages of life.[3] Medhātithi on Manu IV.257, explains that after making over everything to his son, 'he (father) shall remain in the house "fixed in neutrality"'[4] (i.e. not caring for any worldly concern). It is clear that at

1. Manu, IV.257.

2. Manu, IX, 104.

3. L.W. Simmons, The Role of the Aged in Primitive Society, op.cit., 177.

4. Jhā, Manu, II, II, 499. Also SBE, XXV, 169, n.257.

this stage, the father lived as a dependant on his son.[1] These mutual dependencies and realisation of son's right in father's property at his vānasprasthya may be the incidents of a system of common ownership of property between father and son.[2]

The system becomes highlighted when we compare it with the Roman system of patria potestas vis-a-vis father's retirement at old age (otium). To the Romans, otium was 'to rest after their labours'.[3] It was an escape from the strain and bustle of active life into the calm of solitude but did not imply the existence of an anchorite.[4] Even in his retirement, a Roman father, unlike his Hindu counterpart, remained in control and owned his property,[5] until his decease.

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1. Śat.Br. 12.2.3.4. Dh.K.1163a.

2. For a comparative view, Lingat, CLI, 50.

3. usurpare otium post labores, Tacitus, The Annals, 14.55.2, tr. J. Jackson, (London, 1937), IV, 194-5.

4. extollens laudibus quietem et solitudinem, 'and to give his eulogies to quiet and solitude', Tacitus, The Annals, tr. J. Jackson, III, 74-5. Balsdon, Life and Leisure in Ancient Rome, (London, 1969), 170. Cp. Greek hylobios is a literal translation of vānaprasthya, Lingat, CLI, 48. J. Gonda opines that the usual identification between the hylobios and vānaprasthya 'is in all probability incorrect', Change and Continuity in Indian Religion, (The Hague, 1965), 274.

5. Tacitus, The Annals, op.cit., 14, 55.2.

f. Conclusion

When vānaprasthya as an order came under a cloud as kali-varjya,[1] the presence of the old father at home and his natural reluctance to part with his material wealth, and the son's insistence on realising his share in the property through a partition, probably became contributory factors in family quarrels and led to litigation between father and son.[2]

In the meantime, society also became complex. Trades and handicrafts flourished and old people by helping their family in different trades and crafts, found a role to play in the family. They became assets and not just liabilities to be maintained.

This change in the social atmosphere probably led to a movement amounting to a compromise between father and son regarding their respective rights in property. Vānaprasthya being deprecated as kali-varjya, texts like Manu, IV.257, became otiose and the father was no longer obliged to make over or distribute his property to his sons.

So in a way, vānaprasthya, though basically an order to be practised as penance, greatly influenced the respective rights in property of a father and son, and indirectly consolidated the concept of son's right by birth.

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1. See above, 396.

2. Fining a witness in a litigation between father and son was abolished as kali-varjya. It means that the society and the King did not discourage any more litigation between father and son, Kāne, HD, III, 932; Bhattacharya, The Kalivarjyas, (Calcutta, 1943), 103-4.

VI. Acquisition of Ownership of Property in the Smṛti Texts

a. Introduction

When we come to discuss Vijñāneśvara's theory of property, we shall see that the learned author consistently emphasised that property (svatva) is a matter of popular understanding and, therefore, property can arise by mere birth.[1] Counter to Vijñāneśvara's view is the theory that property (svatva) is to be understood from the śāstra alone.[2] Since these two theories, namely janma-svatvavāda and uparama-svatavāda, permeate the works of the commentators, it is worthwhile to see what the śāstra says on the modes of acquisition of property (svatva).

b. The smṛti literature

It is evident from the texts that the smṛtikāras made an attempt to give a juristic definition of the sources of property, but they were confronted with a society, based on the caste system,[3] where each caste had its own place in the society and members of a particular caste were supposed to pursue their prescribed trade or profession. On the theoretical and idealistic plane, only a a few smṛtikāras set up some code of conduct for acquisition of property by the

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1. Kāṇe, HD, III, 548.

2. Ibid., 548. For a scholarly discussion, Derrett, RLSI, Ch.5.

3. Derrett, RLSI, 125.

members of the four castes (varṇas).[1]

Gautama's list of the modes of acquisition of svatva is well-known. He declares:[2]

> An Owner occurs in cases of inheritance, purchase, partition, garnering and finding. For the Brahmin acquisition is an additional mode; for the Kṣatrīya conquest; for the Vaiśya and the Śūdra wages. For the Vaiśya additional modes are agriculture, trading, tending cattle, and money lending.[3]

Manu laid down seven 'dharmya' modes of acquisition of property:[4]

> Seven acquisitions of wealth are consistent with dharma: dāya (acquisition of joint family property by membership or ancestral property by advancement or inheritance), presents, purchase, conquest, lending at interest, employment in labour, and acceptance from a virtuous person.[5]

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1. Derrett explains four varṇas as four castes. However, he says, 'better, perhaps, "four classes", RLSI, 125.

2. Gautama, X.38-42, Dh.K.11229a, 1123a, 1124a. svāmī rktha-kraya-saṃvibhāga-parigrahādhigameṣu / brāhmanasyādhikaṃ labdham / kṣatrīyasya vijitam / nirviṣṭam vaiśya-śūdrayoḥ ... / vaiśyāsyādhikam kṛṣi-vaṇik-paśupālya-kusīdam /

3. Tr. Derrett, ZVR 64 (1962), 34, also RLSI, 125-6.

4. Manu, X.115, Dh.K.1126b. sapta vittāgamā dharmyā dāyo lābhaḥ krayo jayaḥ / prayogaḥ karma-yogaśca sat-pratigraha eva ca //

5. Tr. Derrett, ZVR 64 (1962), 34, also RLSI, 126. Sir William Jones, being influenced by the commentators, has divided the seven modes to different classes which is not found in the text, Manu, op.cit., 357. The rendering of dharmya as 'lawful' by Bühler, SBE, XXV, 426, and by Jones as 'virtuous' are artificial. Derrett's 'consistent with dharma' brings out the śāstric spirit of the word 'dharmya' which includes both civil and religious precepts.

Manuhas yet another verse which also enumerated ten additional means of subsistence.[1] "Learning, mechanical arts, working for hire, service, cattle-keeping, trade, agriculture, contentment (or restraint?), begging, and, money-lending: these are the ten means of livelihood".[2]

Nārada's enumeration of the modes of acquiring ownership is more elaborate than those of Gautama and Manu. He divides property, in general, into three types[3] according to its modes of acquisition and these cover twenty-one types of modes, seven types being in each category. This broad division shows the degrees of approval or condemnation by the śāstras of a particular type of acquisition. Nārada says:[4] "Again wealth is of three kinds: white, spotted, abd black.[5] Each of these (three) kinds has seven sub-divisions".[6]

Apart from these three broad divisions of property, Nārada says that there are twelve different modes of acquisition of ('pure') wealth, of which three are open to all castes and the rest are modes peculiar to each caste:[7]

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1. Manu, X.116, Dh.K.1127a. vidyā śilpam bhṛtiḥ sevā go-rakṣyam vipaṇiḥ kṛṣiḥ / dhṛtir bhakṣyaṃ kusīdaṃ ca daśa jīvana-hetavaḥ // Cp. Yājñ.III, 35-42.

2. Tr. Derrett, Bhāruci, II, 334.

3. As 'pure', 'impure', and 'partly impure', Derrett, RLSI, 128.

4. Nārada, IV.44, Dh.K.1129b. tat punas-trividhaṃ jñeyam śuklam sabalam eva ca / kṛṣṇaṃ ca tasya vijñeyaḥ prabhedaḥ saptadhā pṛthak // variant reading punaḥ in place of pṛthak.

5. Cp. the expressions in modern India: 'black money', 'black market'.

6. Tr. Jolly, Nārada, I.44, SBE, XXXIII, 53.

7. Nārada, IV.50, Dh.K.1130b. tat punar-dvādaśa-vidhaṃ prati-varṇāśrayaṃ smṛtam / sādhāraṇam syāt trividhaṃ śeṣaṃ nava-vidhaṃ smṛtam //

> Wealth is again declared to be of twelve sorts, according to the caste of the acquirer. These modes of acquisition, which are common to all castes, are threefold. The others are said to be ninefold. 1

These different modes of acquisition, prescribed by Gautama, Manu and Nārada are similar in their general tone, but they are not consistent with regard to their categorisation. According to Nārada, [2] a 'partly impure' wealth (spotted) can be a pure acquisition by a lower caste, viz., commerce and tillage in the case of Vaiśya,[3] which is generally prescribed by Manu.[4] For all as 'means of substistence' [5] (in times of distress).[6] Again, 'lending at interest' is one of the seven modes of 'dhamya' acquisition ordained by Manu,[7] which is considered as 'partly impure' by Nārada. [8] It is very significant for us that neither Manu nor Nārada mentions vibhāga (partition) as a mode of acquisition by which one becomes owner according to Gautama.[9]

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1. Tr. Jolly, SBE, XXXIII, 53.
2. Nārada, IV.46, Dh.K.1130a.
3. Nārada, IV.54, Dh.K.1131b.
4. Manu, X.116, Dh.K.1127a.
5. Derrett, ZVR 64 (1962), 34.
6. Bühler, SBE, XXV, 426; also Sir William Jones, Manu, op.cit., 357.
7. Manu, X.115, Dh.K.1126b.
8. Nārada, IV.46, Dh.K.1130a.
9. Gautama, X.38, Dh.K.1122a.

Bṛhaspati, by implication, accepted the seven modes of acquisition prescribed by Manu: [1] "Whether ancestral or self-acquired, a dwelling house [2] and lands are declared to be what may be given away - out of what has been acquired through the seven sources of property." [3]

Besides, seven sources ordained by Manu, there are texts in the Manusmṛti which show that the modes of acquisition of property could exist in different forms at different stages of civilization. Moreover, the following verse suggests that the seven modes ordained by Manu were not exhaustive.[4] "The knowers of antiquity call this Earth the wife of Pṛthu. They declare the field to belong to the one who cleared the jungle, and the deer to the owner of the dart".[5]

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1. Bṛ.XV.4, Jhā, HLS, I, 270, Dh.K.803a. saptāgamāt gṛha-kṣetrāt yad yat kṣetram pradīyate / pitryaṃ vātha svayaṃ-prāptaṃ tad dātavyaṃ vivakṣitam //

2. An improvement on HLS, I, 270, where it was translated as 'other property'.

3. Tr. Jhā, Vi.ci, 246. The accent of the text is on the need to give out lands acquired by one of the seven dharmya methods.

4. Manu, IX.44, Dh.K.1127b. pṛthor apimāṃ pṛthivīṃ bhāryāṃ pūrva-vidho viduḥ / sthāṇu-cchedasya kedāram āhuḥ śalyavato mṛgam //

5. Tr. Derrett, Bhāruci, II, 221. Acquisition suggested in this śloka comes within adhigama of Gautama, X. 38-42. The same idea among the Eskimos, A. Hoebel, The Law of Primitive Man, (Harvard U. Press, 1954), 79: 'game that can be taken by individual effort belongs to the person who makes possible the kill'. '... ancient Indian law knew the principle of a res nullius, or a res derelicta', L. Sternbach, Juridical Studies in Ancient India, (Delhi, 1967), II, 21. Cp. Apastamba, II, 10,4, mentions collecting of nivāra (wild paddy) as a means of life for Brahmin, see K.V.R. Aiyangar, Aspects of Social and Political System of Manusmṛti, (Lucknow, 1949), 113.

The concept of acquisition revealed in this text represents the norm of a society in which men were hunters or cultivators, and it is well-known that at the primitive stage of civilization unoccupied land was res nullius.

c. Conclusion

Excepting Gautama, Manu, Nārada, Viṣṇu [1] and Bṛhaspati, [2] no other smṛtikāra has dealt directly [3] with the subject of acquisition of ownership. It is also difficult for any jurist to enumerate the modes of acquiring property for all times and all ages. Every society is passing through a process of evolution, and with the passage of time, human relations become more complex and a new variety of property relations emerges every day. So no jurist can reach the stage of finality in enumerating modes of acquisition of property. We should admit that in spite of the religious and śāstric gloss, the smṛtikāras were also bound by these limitations because of the changing pattern of the then society. That is why Kāṇe says: "It must be remembered that the enumeration of the means of acquiring property in the dharmaśāstra works is not exhaustive but only illustrative".[4]

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1. Viṣṇu cited in the Sarasvatīvilāsa, 402, Dh.K.1125a.

2. Also see Baudhāyana, II, 2.16, SBE., XIV, 235.

3. It is dealt with indirectly by Vyāsa, I.84; Viṣṇu, V, 186; Yājñ. II,24, and Nārada, I,78, while dealing with adverse possession as a means of acquisition of ownership.

4. HD, III, 550, n.1027. Same view of P.N. Sen, The General Principles of Hindu Jurisprudence, (Calcutta, 1918), 53.

Derrett cast a legitimate doubt regarding the professional conduct of the members of the four varṇas. He thinks that probably even during the dharmaśāstra age, the different castes were intruding into the profession of other castes, and were contravening the modes of acquisition prescribed or endorsed by the śāstra. He rightly remarks: "Perhaps as early as Gautama himself, it was common for Brahmins to earn by methods appropriate to administrators and commercial folk".[1] At the time of the Buddha, significantly, Wagle observes:

> Though there was considerable division of labour and much active trade, trade differentiation also does not seem to have crystallised into a rigid caste system as yet. People might often change their occupations. 2

Thus, the rigid hereditary occupational classification prescribed by the śāstra [3] could not be strictly followed on practical grounds,[4] and the theory

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1. RLSI, 125. For an opinion of the paṇḍits, in this respect, see Vyavasthā No.21: The question was: Whether buying and selling of spirituous liquor by two Brahmins were approved by the śāstra in Bengal and in the Western Provinces. The paṇḍits opined that it was not approved by the śāstra as a mode of acquisition for Brahmins. However, they added that the profit could be divided by the two Brahmins in equal shares, S. Jhā, ed., Dharmaśāstrīya Vyavasthā Saṅgraha: A Collection of the Opinion of the puṇḍits on Hindu Law, (Allahabad, 1957), 63.

2. N. Wagle, Society at the Time of the Buddha, (Bombay, 1966), 157.

3. For a discussion on occupational classification, K.V.R. Aiyangar, Aspects of the Social and Political System of Manusmṛti, (Lucknow, 1949), 112-24.

4. For example, see the opinion of five paṇḍits of Patna; they opined that sauṇḍikas were originally kṣatriyas but because of their profession, namely dealing in spirituous liquor, they became Vaiśyas, Vyavasthā-patra, (Allahabad, 1926), 5, 9, India Office Library, San.B.876(P.). (Vyavasthā in Hindi).

that 'property is to be understood from the śāstra alone' was artificial and, therefore, property could well be 'a matter of popular understanding'.[1]

VII. Father and Son Relationship in the pre-Dharmaśāstra and Dharmaśāstra Works

The respective property rights between a father and his son may be influenced by a particular society's attitude towards its male children; and, therefore, our present study needs an investigation into the attitude to sons reflected in the śāstric literature.

In the Vedic, Brāhmaṇa and the smṛti literature, it is consistently found that the desire for a son was very ardent among Hindus. In the Ṛg-veda there are several invocations for a son.[2] "O agni, give us this good (wealth) that we get (a son) who would perform the sacrifice (yajna) and be of good mind".[3]

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1. For a discussion, Derrett, RLSI, 145-6.

2. R.V.7.4.10. Yetā no agne subhagā didihyapi kratuṃ sucetasaṃ vatema / Invocation for son also in R.V.1.64.4, tr. Griffith, I.89. Prayer for son in R.V.3.4.9, tr. Griffith, I,322. Invocation to Indra for sons to a bride in R.V.10.85.45, tr. Griffith, II, 506.

3. Tr. J.C. Ghose, Hindu Law, I,49. Griffith (II,7) in his translation of the hymn does not mention a son. But if we read the hymn with R.V.7.4.8. the allusion to a son becomes clear. In R.V.7.4.8, it is said that men do not look with pleasure and affection at an adopted son. They want to have their own. The last half-verse of R.V.7.4.8 has been interpreted by Wilson as an invocation for a son; so R.V.7.4.10 may be treated as an extension of the idea contained in R.V.7.4.8, see Griffith, II, 6,n.8.

The Veda enjoins that a father attains immortality by seeing the face of a son, born living.[1]

> Inasmuch as I who am a mortal
> earnestly invoke three who art
> an immortal, praising thee with
> a devoted heart; therefore,
> Jātavedas, (2) grant us food,
> and may I obtain immortality
> through my posterity (3)

The continuation of the Vedic idea could be found in the smṛtis. Thus, Vasiṣṭha states:[4] "The father throws his debt on the (son), and obtains immortality, if he sees the face of a living son".[5]

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1. R.V.5.4.10 Dh.K.1253a (partly), yas tvā hṛdā kīriṇā manyamāno 'martyaṃ martyo johavīmī / jātaveda jaco asmāsu dhehi prajābhir agne amṛtatvaṃ asyām // Also Tai.Saṃ.I.4.46.1; same idea in Ai.Br.VII.13 (xxxiii.1), Dh.K.1259b, tr. Keith, H.O.S. 25 (rpt. Delhi, 1971), 299-300.

2. Jātavedas= Agni.

3. Tr. Wilson, Rigveda, (London, 1857), III, 241-2. Wilson at III,242, n.1 explains immortality through our progeny as the 'unbroken succession of descendants'. The idea is also in R.V.10.39.14: the son is described as 'our stay for ever'. Wilson interprets this as 'the eternal performer of rites', see Griffith, ibid., n.14. In R.V.10.56.6, an offspring is described as 'a thread continuously spun out', Griffith, II, 460.

4. Vasiṣṭha, dh.sū.XVII.1, Dh.K.1271b. ṛṇam asmin-saṃnayati amṛtatvam ca gacchati / pitā putrasya jātasya paśyeccej jīvato mukham // Viṣṇu, XV.44, Dh.K.1279a is identical. Bandhāyana, II.9.16.6 slightly differs; he says through grandsons one attains immortality. Also Manu, IX.137; though Manu is speaking of the eldest son, the idea is the same in Manu, IX.107.

5. Tr. Bühler, SBE, XIV, 84.

It is also ordained in the Vedas,[1] that men are born with three debts and they repay their debt to their forefathers (pitrs) by the procreation of a son. This indebtedness of a man to his forefathers is illustrated in the Taittiriya-samhita.[2]

> A Brahman on birth is born with a threefold debt, of pupilship to the Rsis, of sacrifice to the gods, of offspring to the Pitrs. 3

This idea continues in the Dharmaśāstras,[4] and the birth of a son, apart from being an occasion of worldly rejoicing, attained a spiritual and metaphysical significance.[5]

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1. The Atharvaveda, 6.117.3, Whitney, ed., (Berlin, 1924), 136; SBE, XII, 190, n.1. For a discussion, see H. Chatterjee, The Law of Debt in Ancient India, (Calcutta, 1971), 84.

2. Tai.Sam.6.3.10.5, Dh.K.1258b. jāyamāno vai brāhmaṇas tribhir-ṛṇavā brahmacaryeṇa ṛṣibhyo yajñena devebhyaḥ prajayā pitṛbhya / Also one additional, Śat.Br.1.7.2.1. (... pitṛbhyo manuṣyebhyaḥ), Dh.K.1261-2. The Mahābhārata, I.120.17 mentions of four debts (ṛṇaiś caturbhiḥ), Dh.K.1283b; also Jaimini, 6.2.31, B.D. Basu, The Sacred Book of the Hindus, (Allahabad, 1923), 325. Jhā, Śabara-bhāṣya, (Baroda, 1934), II, 1037-8.

3. Tr. A.B.Keith, The Veda of the Black Yajus School entitled Taittiriya Sanhita, Part 2: IV-VII, H.O.S. XIX, (Cambridge, Mass., H.U.P., 1914), 526.

4. Baudhāyana, 2.9.16.5 and 7, Smṛiti Sandarbha, 3, 1836, SBE, 14, 21, quotes this passage. See also Āpastamba, 2.9.24.1, SBE, 2, 158. Manu, 9.137; Viṣṇu, 15.46, Dh.K.1279a are identical. A slight variation in Vasiṣṭha, 11, 48, SBE, 14,56. Atri also mentions that the debt to the ancestors is paid by the father as soon as a son is born, Dh.K.1352b.

5. A son is also considered as one who delivers (trāyate) the father from the hell called put: put, a hell, and trā, to protect. See Go.Br. I.1.2, Dh.K.1262; Manu, 9.138, Dh.K.1290a; Hārita, Dh.K.1264b; Viṣṇu, 15.43, Dh.K.1279a. Other derivation of putra; putra from pur, to fill, and tra to deliver, who fills /Continued on next page:

It is revealed in the Śruti and Brāhmaṇas that men are supposed to conquer three worlds as a duty. Of these, the world of men is conquered by a son.[1] "Next there are verily three worlds, the world of men, the world of the fathers, the world of the Devas. The world of men can be gained by a son only, not by any other work (sacrifice)".[2]

Baudhāyana restated the passage with a slight difference and identical ideas can also be found in the works of other smṛtikāras. Baudhāyana says:[3] "Through a son he conquers the worlds".[4]

For both spiritual and secular reasons, Hindus crave for more than one son. This wish for plurality of sons goes back to the time of the Vedas.[5] The

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Note 5 - p.412 - continued:

the holes left by the father, a stop gap, see Br.U.1.5.17, SBE, 15, 96, fn.2, also see S. Radhakrishnan, Principle Upaniṣads, (London, 1953), notes 179-80.

1. Br.U.1.5.16, Eighteen Principal Upaniṣads, (Poona, 1958), I, 195. atha trayo vāva lokāḥ / Manuṣya-lokaḥ pitṛ -loko deva-loka iti so'yaṃ manuṣya-lokaḥ putreṇaiva jayyo nānyena karmaṇā //. Śat.Br.14.4.3, 24-5, Dh.K.1262a is identical.

2. Tr. Max Muller, SBE, XV, 95-6. Also for tr. see Hume, Thirteen Principal Upaniṣads, (New York, O.U.P., 1921), 89; S. Radhakrishnan, loc.cit., 178-9.

3. Baud.dh.sū.2.9.16.16, Smṛti Sandarbha, III, 1836. Manu, IX, 137, Dh.K. 1289, excepting the last two words of the śloka, is identical. Saṅkha-Likhita, Dh.K.1282; Viṣnu, XV.45, Dh.K.1279a; Vasiṣṭha, XVII, 5, Dh.K.1271-2 and Hārita, Dh.K.1264b are identical with Manu. Also same idea in Yājñ. 1.78, Mandlik ed., 105 and 171.

4. Tr. Bühler, SBE, XIV, 271.

5. R.V.10.85.45. Yajur-veda, 19.48, Griffith, 213.

śāstras enjoin that offering of piṇḍa at Gayā by a son paves the way to heaven for the soul of deceased ancestors. So if one has many sons, at least one can go to Gayā and perform the śrāddha, in case others fail or predecease the father. Also, in an agricultural and pastoral society, the possession of more than one son would be a multiple asset to the father.

Thus, Atri says:[1] "Many sons should be secured if even one may go to Gaya [2] or perform the horse-sacrifice or dedicate the Nīla-bull".[3]

A father also wishes for a son so that in old age he can be maintained and protected by the son. In Bṛhaspati we see the blending of spiritual and material benefit derived by a man from a son.[4] "(The son will affect the dedication of a bull, will perform (the prescribed) domestic and public sacrifices,

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1. Atri, Dh.K.1352b. eṣṭavyā bahavaḥ putrā yadyeko'pi gayāṃ vrajet / yajeta vā'śvamedhena nīlam vā vṛṣam-utsṛjet // The śloka, though attributed to Bṛhaspati by Golāp Śāstrī, Hindu Law, 4th ed., 121, and included by Aiyangar in Bṛhaspatismṛti (V.64), 335, there are doubts about its attribution to Bṛhaspati, see Aiyangar, Introd., Bṛhaspatismṛti, Baroda, ed., 175. The text is also found in the Vālmīkirāmāyaṇa, 2.107.13, Dh.K.1328-9; Uśana, III, 134, Smṛti Sandarba, (Calcutta, 1952), III, 1573.

2. On significance of Gayā, C. Jacques, Gayā Mahātmya, (Pondichery, 1962), passim; also Kāṇe, HD, IV, 643-77.

3. Tr. Golāp Chandra Śāstrī, Hindu Law, 4th ed., 121. vṛṣotsarga is the dedication or letting loose of a bull and heifer to the southern direction during śrāddha which enables the spirits of the deceased to cross the hot-stream Vaitarinī in the other world. By this, it is believed by the Hindus, the preta-condition of the departed comes to an end and enables him to cross the ocean of mortality, Pandey, Hindu Sanskaras, (Delhi, 1969), 266. For details, Kāṇe, HD, IV, 539-42.

4. Bṛ.V.66, Aiyangar, ed., 335, Dh.K.1349a. kariṣyati vṛṣotsargaṃ iṣṭā-pūrtaṃ tathaiva ca / pālayisyati vārdhakye śrāddhaṃ dāsyati cānvahaṃ //

will protect his parents in their old age;[1] and perform funeral and commemorative ceremonies for them".[2]

From the above discussion, it appears that a son was very important in the worldly as well as in the spiritual life of a father. Against this background, of the eulogized and exalted position of a son, we are to analyse a few texts and legends which seem to hint at the patria potestas of a Hindu father over his son.

From the Ṛg-Veda[3] we come to know that Ṛjrāśva[4] was robbed of his eyesight by his father. From the Śūnaḥśepa legend, we learn that King Hariś-chandra proposed to sacrifice[5] his son Rohita to the god Varuṇa. The sacrifice was put off by the King under different pretences. A brāhmaṇa named Ajīgarta

1. Cp. Śat.Br.XII.2.3.4, Dh.K.1163a; Go.Br.IV.17; Manu, IV.257.

2. Tr. based on K.V.R. Aiyangar, Bṛhaspatismṛti, 175, and improved by Derrett in my first draft.

3. R.V.1.116.16; R.V.1.117.17; Muir, 1.101, tr. Griffith, i,156. Ṛjrāśva's blindness is also alluded to: R.V. 1.112.8.

4. Ṛjrāśva was one of the sons of Vṛṣāgir, see R.V.1.100.17. The she-wolf (vṛkī) for whom he killed the sheep was one of the asses of Aśvins in disguise, who consequently restored to him the eyesight. See Wilson, (London, 1850), 1,311, n.b,c; Griffith, 1,156, n.16, mark the printing mistake in the n. instead of 1.101.17, it should be 1.100.17, see Wilson, 1,259. Macdonell and Keith consider it to be 'a legend of quite obscure meaning', Vedic Index, 1,108 and 109.

5. B. Bhattacharya thinks that the legend is a 'definite piece of evidence' for the existence of human sacrifice in ancient time, Kalivarjyas, (Univ. of Calcutta, 1943), 23. Kāṇe includes 'Human Sacrifice' in his list of Kalivarjya and thereby accepts the prevalence of this practice in ancient times. See HD,III, 961and 928, n.1798.

sold his son Śunaḥśepa to be sacrificed in place of Rohita. Ultimately, Śunaḥśepa was released and Viśvāmitra adopted him as his son.[1]

Naciketas, according to the legend,[2] was offered by his father to Yama, the King of Hades.[3]

If these legends are taken literally, we get the picture of a Hindu father in ancient India as an autocratic pater familias, fully endowed with the patriarchal power of selling or killing a son. But it is of much significance that in each case the sacrifice was averted at the end. This may be for the

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1. Ai.Br.7.14-17, Haug, (Bombay, 1863), 1, 179-83, tr.2, 462-5; also Keith, H.O.S. (rpt. Delhi, 1971), 25, 301-9. In the Rāmāyaṇa, Bālakāṇḍa, Adhyāya, 60, 61, we find the legend. There Śunaḥśepa is described as the son of the sage Richika and was sold to King Ambarīśa to be offered to the gods in sacrifice, Rāmāyaṇa, (Baroda, 1960), 320-8.

2. Tai.Br.II.11, 8; Katha.U.I.1-4, Macdonell and Keith opine 'his historical reality is extremely doubtful', Vedic Index, I, 432.

3. Hume thinks that Naciketas voluntarily offered himself to be sacrificed, Thirteen Principal Upaniṣads, (New York, O.U.P., 1921), 341. Radhakrishnan's view is also the same, and he adds the spiritual interpretation to the legend. He says that to a sannyāsin personal relation has no meaning and 'there can be no quickening of the spirit until the body die', Principal Upaniṣads, (London, 1953), 596. Cp. St. Paul: 'Thou fool, that which thou sowest is not quickened except it die', I Corinthians, 15.36. The higher stage of a sannyāsin is explained in the Bṛhadāraṇyaka Upaniṣad, 4.3.22: atra pitā apitā bhavati mātā amātā lokā alokā devā adevā vedā avedāḥ / tr. Roer, (Calcutta, 1908), 241: 'Then the father is no father, the mother no mother, the worlds no worlds, the gods no gods, the Vedas no Vedas'. So, according to its spiritual interpretation, the legend has not much relevance to the relationship between a father and son. On this, also see Kāṇe, HD, V, II, (Poona, 1962), 1555.

reason that strict implementation of patria potestas was not in conformity with the social ethos of the time. Moreover, most of these legends have no historical basis.[1] As legends they are intended for disseminating moral virtues rather than any legal rules. But it is difficult from the materials available before us to form an opinion and pass a judgment in favour of any particular standard. We have instances of curtailment of father's power over his sons,[2] and the Vedas abound in evidences of filial love.[3] Kapadia [4] thinks that a Hindu father lacked strict patriarchal power. He portrays a father as the very embodiment of natural love and affection, but in his idealistic way he misses the point that natural love and affection and property relations are two different things. In the former, people are guided by their instincts and in the latter, they face the hard facts of life. Moreover, Kapadia does not take any notice of the vast Buddhist literature which has a direct bearing on the contemporary social and legal system.

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1. Supra, 376, n.4; 416, n.3.

2. The Nathanediṣṭha legend, R.V.10.61.1; Ai.Br.22.9.5.14, Dh.K.1162a. Tai.Saṃ.3.1.9.4, Dh.K.1161a.

3. R.V.1.1.9, father depicted as 'easy of access' to his son, Wilson, (1850), I, 5. R.V.1.38.1, father as dear to his son, Griffith, I,53. R.V.1.68.5., 'as sons obey their sire's behest', Griffith, 1,92. R.V.3.53.2b, a child grasps his father's garment's hem, Griffith, I, 372. R.V.4.17.17. 'as Friend, as Sire, most fatherly of fathers', Griffith, I, 415. R.V.5.43.7. 'as on his father's lap the son, the darling', Griffith, I,508. R.V.7.103.3., 'greets him with cries of pleasure as a son his father', Griffith, II,97. A.V.3.30.2, Whitney, ed., (Berlin, 1924), 48; A.V.5.14.10, ibid.88, Āsva.Gr.Sū.1. 15.3, SBE, 29, 182.

4. Hindu Kinship, (Bombay, 1947), 83.

It is depicted in the Pali Canon that on the ideal plane the relationship between parent and son is that of love and affection.[1] As Wagle quotes, "Parents are like Brahmā; they are the ancient teachers, they are worthy of gifts. The wise worship them, honour them and satisfy their material needs, for they are compassionate to their children".[2] But there are other instances which show that sometimes sons used to show disrespect to their parents,[3] and as an extreme case it can be cited that Ajātasattu killed his father Bimbisāra for the throne.[4] Buddha himself saw a rich Brāhmaṇa looking worn out and ill-dressed and enquired about his state. The Brāhmaṇa replied that his four sons and their wives had driven him out of the house.[5]

Smṛti texts indicate that a father had power to apply corporal punishment to correct his son but (we are told) he should apply the rope or stick only on the back part of the body.[6] A son also, in turn, had to show respect to his parents.[7] However, this does not mean that the atmosphere was one of implicit obedience by the son. The dharmaśāstras reveal that the smṛtikāras had to make

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1. N. Wagle, Society at the Time of the Buddha, (Bombay, 1966), 81.
2. Anguttara Nikāya, II, 70, cited by Wagle, ibid., 81.
3. Wagle, ibid., 81.
4. Dīgha Nikāya, I, 85-88, cited by Wagle, ibid., 81.
5. Samyutta Nikāya, I, 176, cited by Wagle, ibid., 82.
6. Manu, VIII, 300, also Manu, IV, 164; Gautama, II.43-4, SBE, II, 189.
7. Manu, II, 225, 226, 228, 232, 234, 237 and III.159.

rules to dissuade the sons from suing their fathers.[1] According to some smṛtikāras, as we shall presently see, a litigation between a father and son is completely non-justiciable; others devised social[2] or legal[3] deterrents; but they could not completely ignore the existence of such litigation. Although in procedural law, a father or a son could not bring a suit against each other as adversaries, the King by his inherent jurisdiction suo motu could take cognizance when a legal matter arose between a father and a son.[4]

VIII. The Concept of Identity of Father and Son

a. Son as the father reborn

The idea of identity of father and son or the idea of son as the father reborn[5] might have influenced the relationship between father and son in the social and legal spheres. The idea of son as the father reborn could be found

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1. Bṛ.I.124; Aiyangar, ed., 21.
2. Gautama, XV. 19, Kāṇe, HD, III, 566-7; HD, IV, 392-3. Manu, III, 159, HD, IV, 392-3; SBE, XXV, 105, n. thereof.
3. Viṣṇu, V, 120-1; Nārada, I, 187.
4. Nārada, XVII.3. For a discussion on this, infra, 452.
5. The idea of reappearance of father in the body of the son was prevalent among the Jews, Ecclesiasticus (Sirachides), 30:4, cited by Derrett, Jesus's Audience, (London, 1973), 32, n.8.

in the Ṛg-veda:[1] "Gracious to our fleet courser be the hero: may we transplant us, Rudra, in our children".[2]

The concept is well-known also in the dharmaśāstras. Baudhāyana acknowledges the idea and quotes:[3] "Now they quote also (the following verse): 'From my several limbs (of my body) art thou produced, from my heart art thou born; thou art "self" called a son; mayest thou live a hundred autumns'".[4]

Apart from its biological truth and spiritual significance, the idea of the father being reborn in the son probably contributed to a great extent to the tone of the law of inheritance among the Hindus.

b. Death bed transmission

The birth of a son is the emergence of father through the son and on the eve of his death, he again transplants his own personality, physical and psychic, in the son. So, according to this idea, the son is not a separate entity from the father; throughout his existence he is the alter ego of his father.

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1. R.V.2.33.1. abhī no vīro arvatī kṣameta prajayemahī rudra prajābhīḥ /.

2. Tr. Griffith, I,299. Also Śat. Br. 5.4.2.9, SBE, XLI, 97, 'him who is the son, he makes the father, and him who is the father, he makes the son'. Also Ai.Br.7.3.13, Haug, I,178-9, Keith, 299-300. Śat.Br.12.4.3.1., SBE, XLIV, 187, Dh.K. 1262a.

3. Baud.dh.sū. II.2.15.16, Dh.K.1268, SBE, II, 14. athāpyudāharantī - aṅgād aṅgāt-sambhavasī hṛdayāt-abhījāyase / ātmā vai putra-nāmāsī sa jīva śaradaḥ śatam iti //

4. Tr. SBE, XIV, 226. Baudhāyana's text is identical with Kau.U.2.11, but slightly differs from Śat.Br.14.9.4.8. The same idea is in Āpastamba, II,9. 24.1-2. Manu, IV, 184, IX.8 and Yājñ.I.56.

It is very much revealed in the ancient ritual act of father's 'transmission' to his son.[1]

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1. Cowell, ed., Kauṣītakī Upaniṣad, 2.15, (Varanasi, 1968), 68-72. Also S. Radhakrishnan, ed., The Principal Upaniṣads, (London, 1953), 772. athātaḥ pitā-putrīyaṃ sampradānam-iti cācakṣate pitā putraṃ preṣyann āhvayati. navais-tṛṇair-agāraṃ saṃstīryāgnim-upasamā-dhāyodakumbhaṃ sapatram-upanidhāyāhatena vāsasā sampracchannaḥ pitā śeta etya putra upariṣṭād-abhinipadyata indriyair-indriyāṇi saṃspṛśyāpi vāsmā āsīnāyābhi-mukhāyaiva sampradadhyād-athāsmai samprayacchati vācam me tvayi dadhānīti pitā vācaṃ te mayi dadha iti putraḥ prāṇaṃ me tvayi dadhānīti pitā prāṇaṃ te mayi dadha iti putraḥ cakṣur-me tvayi dadhānīti pitā cakṣus-te mayi dadha iti putraḥ śrotraṃ me tvayi dadhānīti pitā śrotraṃ te mayi dadha iti putro'nna - rasān-me tvayi dadhānīti pitā-anna-rasaṃste mayi dadha iti putraḥ karmāṇi me tvayi dadhānīti pitā karmāṇi te mayi dadha iti putraḥ. sukha-duḥkhe me tvayi dadhānīti pitā sukha-duḥkhe te mayi dadha iti putraḥ ānandaṃ ratiṃ prajātiṃ me tvayi dadhānīti pitā ānandaṃ ratiṃ prajātiṃ te mayi dadha iti putraḥ ityāṃ me tvayi dadhānīti pitetyāṃ te mayi dadha iti putro mano me tvayi dadhānīti pitā manas-te mayi dadha iti putraḥ prajñāṃ me tvayi dadhānīti pitā prajñāṃ te mayi dadha iti putro yadyu vā upābhigadaḥ syāt samāsenaiva brūyāt-prāṇān-me tvayi dadhānīti pitā prāṇāṃste mayi dadha iti putro-atha dakṣiṇāvṛd-upaniṣkrāmati taṃ pitānumantrayate yaśo brahma-varcasaṃ kīrtis-tvā juṣatām-ityathetaraḥ savyam-aṃsam anvavekṣate pāṇināntardhāya vasanāntena vā pracchādya svargān lokān kāmān āpnuhīti sa yadyagadaḥ syāt-putrasyaiśvarye pitā vaset pari vā vrajet ... // 15 //

   After karmāṇi (deeds), some versions add a sentence about śarīraṃ (body) śarīraṃ me tvayi dadhānīti pitā śarīraṃ te mayi dadha iti putraḥ, tr. Radhakrishnan, 773, 'The Father: "Let me place my body in you". The son, "I take your body in me"'. Variant reading, pitā śete: Father remains lying; svayam śyetaḥ: himself in white, Radhakrishnan, ibid., 773.

Next follows the father's tradition to the son. Thus do they in truth relate it. The father, when about to die, calls his son. Having spread the house with new grass, and duly laid the fire, and placed a vessel of water with a pot of rice - clothed with an unworn garment, the father lies (awaiting him). The son having come approaches him from above, having touched all his organs with his own organs; or else let the father perform the tradition with his son seated in front of him. Then he delivers the organs over. "Let me place my speech in thee", saith the father; "I take thy speech in me", saith the son. "Let me place my breath in thee", saith the father; "I take thy breath in me", saith the son. "Let me place my sight in thee", saith the father; "I take thysight in me", saith the son. "Let me place my hearing in thee", saith the father; "I take thy hearing in me", saith the son. "Let me place my flavours of food in thee", saith the father; "I take thy flavours of food in me", saith the son. "Let me place my actions in thee", saith the father; "I take thy actions in me", saith the son. "Let me place my pleasure and pain in thee", saith the father; "I take thy pleasure and pain in me", saith the son. "Let me place my enjoyment, dalliance and offspring (1) in thee", saith the father; "I take thy enjoyment, dalliance and offspring in me", saith the son. "Let me place my walking (2) in thee", saith the father; "I take thy walking in me", saith the son. "Let me place my mind in thee", saith the father; "I take thy mind in me", saith

1. Rendered by Radhakrishnan, 'procreation', op.cit., 773.

2. Alt. rendering 'going', Hume, op.cit., 318, 'movement', Radhakrishnan, op.cit., 772.

> the son. "Let me place my knowledge (1) in thee', saith the father; "I take thy knowledge in me", saith the son. Or if the father be unable to speak much, let him say at once, "Let me place my vital airs in thee", and let the son say, "I take thy vital airs in me". Then the son goes out, having walked around his father, keeping his right side towards him, and the father cries after him, "May glory, holiness and honour attend thee". Then the son looks back over his shoulder, holding his hand (2) or the end of his garment before his face, (saying), "Obtain thou the swarga worlds and thy desires". Should the father afterwards recover let him dwell in the authority of his son (as a guest) or let him become a wandering ascetic. (3)

A father's benediction and transmission of charge has also been related in the Bṛhadāraṇyaka-Upaniṣad.[4] "When a father who knows this, departs this

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1. Alt. rendering, 'intelligence', Hume, ibid., 318, 'wisdom', Radhakrishnan, 772.

2. pāṇīnāntardyāya vasanāntena vā pracchādya, rendered by Radhakrishnan: 'Having hidden his face with his hand or having covered it with the hem of his garment'. Hume's rendering is also similar to Radhakrishan's.

3. Tr. Cowell, Kauṣītakī Upaniṣad, (Varanasi, 1968), 159-60. On this, see Minoru Hara, 'Transfer of Merit', Adyar Library Bulletin, 31-2 (1967-68), 382-411 at 387. 'Deliverance' in the sense of ritual transfer of rights and duties to a son has been mentioned in Br.U.1.5.17. Also Bhārucī on Manu, VI, 86, Derrett, Bhārucī, II, 27. Cp. the death bed blessing administered by the patriarchs in the Patriarchal Narratives, Gen.27.1-40; On this, E.A. Speiser, 'I Know Not the Day of My Death', in J.J. Finkelstein and M. Greenberg, ed., Oriental and Biblical Studies, (Philadelphia, 1967), 89-96. Nuzi texts on death bed declarations are interpreted as records of bequeathing material goods, HSS 16 56, E.A. Speiser, in R.H. Pfeiffer and E.A. Speiser, 'One Hundred Selected Nuzi Texts', AASOR 16 (1934-35), 107. Also cp. the transmission by a Samoan chief to his son: 'Receive the succession of my office with all the wisdom necessary for its fulfilment', L.W. Simmons, The Role of the Aged in Primitive Society, (New Haven, 1945), 242.

4. Br.U.1.5.17, Eighteen Principal Upanisads, (Poona, 1958), 1, 195. sa yadaivam-vid-asmat-lokāt praiyathaibhir-eva prāṇaiḥ saha putramāviśati /

world, then he enters into his son together with his own spirits (with speech, mind and breath)." [1]

In *Kauṣītakī-Brāhmaṇa Upaniṣad*, the ritual is more elaborate than in the *Bṛhadāraṇyaka Upaniṣad*, but in the latter it is more subtle and transcendental than in the former. It is a total transmission of a father's personality to the son.

From the *vyavahāra* point of view, the ritual is very significant. This is a *donatio* which is immediately taking effect from the moment of transmission and unlike *donationes mortis causa*, there is no revocation at the survival of the donor. If the father recovers he dwells under the authority of his son, or wanders about as an ascetic (*vānaprasthya*).

Pawate [2] commenting on K.U.2.15 says, 'there is not a single word said in it about property'. By saying so, he misses the significance and symbolism of the ritual. If property would have been mentioned in so many words, the sublimity of the moment would have been marred. Moreover in ancient India, there was a strong view that property was in existence only for sacrifices [3] (*kratvartha*).

So when the father says, "tvam brahma tvam yajnah tvam loka iti [4] (you [5] are Brahman, you are sacrifice and you are the world)" and the son answers,

1. Tr. Max Muller, SBE, XV, 96.

2. *Res Nullius*, (Hubli, 1938), 187; his quotation from K.U. is numbered as 2.10, which does not tally with Cowell, Hume, R.K. and the Poona ed., 1958, and seems to be incomplete.

3. For a fuller and erudite discussion, see RLSI, 122-47.

4. Br.U.I.5.17.
5. Tr. Radhakrishnan, *Principal Upaniṣads*, op.cit., 179.

'aham brahma, aham yajnah aham loka iti [1] (I am Brahman, I am the sacrifice, I am the world)', the transmission of property seems to be symbolically included. As Sir Henry Maine rightly says, 'Among the Hindoos, the religious element in law has acquired a complete predominance. Family sacrifices have become the keystone of all the law of Persons and much of the law of things'.[2]

This act of transmission was evidently a civil death of the father, at the same time, it is his spiritual resurrection in the son. This notion of survival in the son was also known in primitive Roman Law. 'Haereditas est successio in universum jus quod defunctus habuit' ('an inheritance is a succession to the entire legal position of a deceased man').[3] Maine goes on explaining this, "the notion was that, though the physical person of the deceased had perished, his legal personality survived and descended unimpaired on his Heir or co-heirs, in whom his identity was continued". Anquetil du Perron also on K.U.2.15 says: 'hoc testamento pater ens suum totum ad filium suum transfert, in illum transfundit et sic in eo et deinceps in filii filio vivit' [4] ('By this testament the father transfers to his son all his entity (or being). He pours it into him and so he lives in him and thereafter in the son of his son').[5]

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1. Variant reading, brahmāhaṃ yajño'haṃ loka iti.

2. Ancient Law, (London, 1930), 213. Modern scholarship would substitute for the two underlined words: 'maintained' and 'are'.

3. Maine, ibid., 213.

4. K.V. Cowell, ed., (Varanasi, 1968), 160, n. Anquetil translated K.U. from Persian.

5. Translated to me by Derrett with a note that, as Anquetil was a pioneer, all his studies must be used with caution.

c. Conclusion

The difference between primitive Roman Law and Hindu Law on this point, is this, that in the former the father is actually deceased while in the latter, there is not always an actual death. But both the systems reveal that the legal personality of the father continues in the son. From his very birth, the son seems to have a vested right being the prospective heir or donee of his father's property at his death or transmission. This sort of son's vested right can also be found in the Code of Hammurabi.[1] The father could not disinherit the son at his will. The son's fault had to be proved by the father in a court. In ancient Egypt during the Pharaonic time, it has been found[2] that the son was the inheritor of parents' property excluding others. These instances do not show any co-ownership between father and son, but they prove that the son had an expectancy, a dormant right in the property of his father. Even if

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1. Tr. Rev. A.H. Sayce, 'If a man decides to thrust out (disinherit) his son, and say to the judge, "I will thrust out my son"; then the judge shall examine into his reasons, and if the son have no grievous fault, which justifies his being thrust out, the son may not be cut off from sonship', Code, § 168; Primitive and Ancient Legal Institutions, Evolution of Law Series, ed., Kocurek, A. and Wigmore, J.H., (Boston, 1915), 1, 422. But see supra, 174.

2. The case of Mes v. Khay, Egyptian inscription of MES, discovered by Professor Lorret in the tomb of MES at Sakkara, where by appeal the son's right of inheritance was upheld when he proved his descent from his parents, Kocurek and Wigmore, ibid., I, 537-63, n.1 at 557. Cp. Manu, IX, 185; Yājñ.II.135-6. Also N. Wagle, Some Aspects of Indian Society ..., Ph.D. Thesis, London University, 1962, the story of gahapati Poṭaliya who hands over the inheritance to his son during his lifetime, 190, n.1.

we do not go so far as to call it a quasi-birthright, at least it did not appear antagonistic to the idea of a true birthright as devised by the later commentators.

IX. The Juridical Position of the Son and his Dependence on the Father

a. Introduction

We have seen in some texts [1] that a father could not alienate the joint property in general and immovable property in particular, without the consent of his unseparated sons. This limitation on a father's power of alienation supports the concept of co-ownership between a father and his son. But there are texts in the dharmaśāstras which leave scope for doubt regarding the true nature of a son's co-ownership with his father. These texts, on the surface, have denied any proprietary right to a son and have also emphasised his incapacity to enter into any transaction.

b. Manu, VIII, 416

(i) Literal meaning of the text

Manu declared that the father was the absolute master in the family and denied any right in property to the wife and son like the slaves.[2]

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1. Supra, 340-46.

2. Manu, VIII.416. bhāryā putraś ca dāsaś ca traya evādhanā smṛtāḥ / yat te samadhigacchanti yasya te tasya tad dhanam //

"The wife, the son, and the slave, these three are known by tradition to be property-less: whatever they acquire is the property of him to whom they belong".[1]

Indeed, this verse (on the surface) is in conflict with the idea of co-ownership between a father and his son. This is also in direct conflict with the idea of self-acquisition by the son for himself. But before we go further, the text [2] deserves closer attention.

(ii) mīmāṃsā (exegetical) interpretation

We shall presently see that the text does not stand the test of mīmāṃsā.[3] The text seems to deny women the right to property. But the Vedic text svargo kāmo yajet applies equally to all men and all women,[4] because both sexes have a desire for svarga (heaven). To attain svarga one should perform sacrifice and the Veda insists that sacrifices must be performed with property (sva).[5] Here property

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1. Tr. Derrett, Bharucī, II, 209-10. The same śloka is repeated in a slightly different form in The Mahābhārata, 5.33.57, V.S. Sukthankar, ed., The Mahābhārata: Udyogaparvan, ed., S.K. De, (Poona, 1940), 134. The Mahabharata has glorified certain texts of Manu, but that does not give any added juridical significance to the texts, Kāṇe, HD, (Poona, 1930), I, 136. On relationship between Manu and The Mahābhārata, see ibid., 136-9, 151-9.

2. Manu, VIII, 416.

3. On mīmāṃsā or exegetical interpretation, see Lingat, The Classical Law of India, op.cit., 148 ff.

4. A.S. Natarāja Ayyar, Mīmāṃsā Jurisprudence, (Allahabad, 1952), 37.

5. Derrett, RLSI, 132.

means only those objects over which one has undisputed ownership.[1] Thus, Manu, VIII. 416, is in conflict with the Śruti.

The mīmāṃsakas say that "When there is a conflict between the Smriti and the Vedas, the Smriti should be disregarded; because it is only when there is no such conflict there is an assumption of the Vedic text in support of the Smriti".[2] Śabara concludes:[3] "The woman who desires the result of Swarga following from a sacrifice should set aside the authority of the Smriti, should acquire property and should then perform the sacrifice".[4]

On Manu, VIII.416, Śabara says that it is wrong to say that the wife and the rest are devoid of property'.[5]

(iii) Texts inconsistent with Manu, VIII.416

There are texts in the Manusmṛti which declare that the wife could have property of her own; this contradicts the purport of verse VIII.416. Manu says:[6]

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1. Taittirīya-saṃhitā, VI.1.6.3. Jaimini, VI, i, 10-24, 39-40; iii,21; vii, 5,7.

2. Ayyar, loc.cit., 35. Jaimini, I,iii,3. virodhe tu anupekṣaṃ syāt asati hi anumānam.

3. tasmāt falārthinī satī, smṛtim ca apramāṇīkṛtya dravyaṃ ca pari-gṛhṇīyāt yajet ca iti, quoted by Ayyar, loc.cit., 37.

4. Ayyar, ibid., 37.

5. Śabara on Jaimini, VI,i.14, Śabara-Bhāṣya, tr. Jhā, (Baroda, 1934), II, 981. Kāṇe, HD, III, 578.

6. Manu, IX.194. adhyagnyadhyāvāhanikaṃ dattaṃ ca prīti-karmaṇi / bhrātṛ-mātṛ-pitṛ-prāptaṃ ṣaḍ-vidhaṃ strī-dhanaṃ smṛtam //

> What (was given) before the (nuptial) fire, what (was given) on the bridal procession, what was given in token of love, and what was received from her brother, mother or father, that is called the six-fold property of a woman. 1

Manu also upholds property of children when he says that at the wife's death, her property would be inherited by her children, even though the husband was still alive.[2]

> Also whatever gift is made subsequently or by a husband out of affection, that property shall belong to her offspring if she dies while her husband is still alive.[3]

Moreover, in verse IX.217, Manu accepts by implication that the son could have property of his own during the lifetime of the father.[4] "A mother shall obtain the inheritance of a son (who dies) without leaving issue, and, if the mother be dead, the paternal grandmother shall take the estate".[5]

The verse implies that when a childless son dies, according to Manu, the mother inherits the property of such a son and not the father.[6] These verses

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1. Tr. Bühler, SBE, XXV, 370-1.
2. Manu, IX.195. anvādheyaṃ ca yad dattaṃ patyā prītena caiva yat / patyau jīvati vṛttāyāḥ prajāyās tad dhanaṃ bhavet //
3. Tr. Derrett, Bhārucī, II, 261.
4. Manu, IX.217. anapatyasya putrasya mātā dāyam avāpnuyāt / mātary api ca vṛttāyāṃ pitur mātā hared dhanam //
5. Tr. Bühler, SBE, XXV, 379.
6. See Bhārucī on Manu IX.217, Derrett, Bhārucī, II, 265.

show that sons and wives were capable of holding property, independently of the head of the family.

But, how could the son have property, if full effect is given to verse VIII.416? This shows that The Manu-smṛti does not contain the idea of proprietary right of any particular period. It has come down through the ages and the rules have been promulgated by different authors at different periods of history.[1] "Many passages show that the author, far from having been the first legislator, had numerous predecessors".[2] The author of our Manu expected them [3] to be interpreted in such a way as to enable them to make sense together. We may say that verse VIII.416 represents the idea of a period when the father's power was at its apex.

(iv) Commentatorial remarks

At this stage, parenthetically, we may note that the literal meaning of the text (Manu, VIII.416) is not borne out by commentatorial literature. Bhārucī in his The Manu-śāstra-vivaraṇa, the oldest extant commentary on Manu, states:

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1. Kāṇe, HD, I, 152-3.

2. R. Lingat, The Classical Law of India, op.cit., 87.

3. Manu, VIII.416 and IX.194, IX.195, IX.217.

> The words "wife", "son" here do not have their normal meaning, for they appear in this section so as to throw a particular light on the "slave", whom they resemble. Consequently it is not the propertyless-ness of these three which is the principal point of the verse. On the contrary, we must gather that their goods may be utilised only with their consent ... Their "propertyless-ness" must be understood to be propounded in a secondary (or figurative) sense.[1]

Medhātithi, the most famous of the commentators on Manu,[2] said: "What is meant by the text is only that they are dependant".[3]

(v) Light thrown by Hindu juridical concept of property (svatva)

Indeed, the significance of the text is related with the concept of dependence (pāratantrya) in classical Hindu jurisprudence. According to Hindu juridical theory, a person may have ownership (svatva) but he may not have independence (svātantrya). This shows that, unlike Western jurisprudence, property (svatva) is by no means dependent upon independence (svātantrya).[4] One who is independent (svatantra) needs to ask no consent of others to deal with his property. Although a male Hindu at Mitākṣarā law is born with his

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1. Derrett, Bhāruci, II, 210. evaṃ ca sati gauṇam eṣāṃ nirdhanatvaṃ vijñeyam, Bhāruci, I, 155.

2. pāratantrya-vidhānam etat, Medhātithi on Manu, VIII.416, Jhā, II, 239; tr. Jhā, V, 435. Kāṇe, HD, III, 771. Also Kullūka, etacca bhāryādīnāṃ pāratantrya pradarśanārthaparam, The Manusmṛti, 10th edn., (The Nirṇaya Sāgar Press, Bombay, 1946), 363.

3. Lingat, CLI, 111-12.

4. Derrett, 'The Development of the Concept of Property in India ...', ZVR 64 (1962), 15-130 at 98.

birthright (janma-svatva) in the family property, pāratantrya ('non-independence') is the state in which all persons are born and, in this respect, a Mitākṣarā male is no exception.[1] Svātantrya (independence) is acquired by relatively few. Nārada says:[2] "Three persons are svatantra in this world: the king, and also the spiritual teacher; and in every caste, caste by caste, the master of the house in his own house".[3]

Svātantrya comes with age, seniority, and the death of ancestors. A son is never svatantra during the lifetime of his father unless the father hands over the property to his son. Nārada explains:[4] "Non-independent are women (wives), sons, and slaves together with the household. Independent there is the householder, to whomsoever it has come by descent (or, in order)."[5]

Kātyāyana also declares:[6] "The father whose own father is living is not independent, nor a brother, a nephew, a younger undivided relative, likewise a slave, or a free labourer".[7]

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1. Ibid., 96.
2. Nārada, IV.32, Dh.K.561a. Kāṇe, HD , III, 413. trayaḥ svatantrā loke'smin rājācāryas tathaiva ca / prati varṇañ ca sarveṣām varṇānām sve gṛhe gṛhī //
3. Tr. Derrett, ibid., 96.
4. Nārada, IV.31, Dh.K.560a, 695a. asvatantrāḥ striyaḥ putrā dāsāśca saparigrahāḥ / svatantras tatra gṛhī yasya syāt tat kramāgatam //
5. Tr. Derrett, ZVR 64 (1962), 15-130 at 97.
6. Kāty. 466, Dh.K.563a. Kāṇe, Kātyāyanasmṛti, 59. pitā 'svatantraḥ pitṛmān bhrātā-bhrātṛvya eva ca / kaniṣṭo 'vavibhakta-stho dāsaḥ karma-karas tathā //
7. Translated to me by Derrett, a better rendering than those of Kāṇe, Kātyāyansmṛti, 207 and J.C. Ghose, Hindu Law, I, 408, 'The karma-kara differs from these two (means dāsas and āhika, the person pledged with the creditor when contracting a debt) in that he is not in the power of another person. He only contracts to do a specific work for a specified wage', Kangle, Arthaśāstra, III, 227-8.

(vi) Disposition of property by non-independent person

The absence of independence of a son might lead to a popular conclusion that as a non-independent person he had no power to deal with property. This popular notion is strengthened by the rule that a contract of sale is invalid when the vendor is a person who is not independent.

Bṛhaspati declares: [1]

> What has been sold by one intoxicated
> or insane, or at a very low price, or
> under the impulse of fear, or by one
> not his own master, or by an idiot shall
> be relinquished (by the purchaser, or it)
> may be recovered (from the purchaser)
> ... 2

According to Kātyāyana, a dependent person has no power of his own to enter into a valid transaction unless he is authorised by his master.[3]

> The gift, mortgage and sale of fields,
> housese and slaves entered into by
> those who are dependent do not attain validity, if they are not approved [4]

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1. Bṛ.VIII.4, Aiyangar, ed., 155. Similar is, Yājñ.II.32, Dh.K.557b. mattonmattena vikrītaṃ hīnamūlyaṃ bhayena vā / asvatantreṇa muḍena tyājyaṃ tasya punar bhavet //

2. Tr. Jolly, SBE, XXXIII, 350. The text illustrates that 'non-independence' is a sort of incapacity and not a state of 'propertyless-ness', see our discussion on disqualified coparceners, infra, 861-63.

3. Kāty. 467-8, Dh.K.563a. na kṣetra-gṛha-dāsānāṃ dānādhamana-vikrayāḥ / asvatantra-kṛtāḥ siddhiṃ prāpnuyur nānuvarṃitāḥ // pramāṇaṃ sarva evaite paṇyānāṃ kraya-vikraye / yadi saṃvyavahāraṃ te kurvanto hy anumoditāḥ //

4. The word anuvarnita is rendered as:'permitted' or 'authorised', Dh.K., I, 1, index, 4.

> (by those on whom they are not dependent). All these (dependent persons) have authority for sale and purchase of marketable goods, if they are supported (by their masters) when they enter into the transaction. 1

Nārada says:[2] "If a son has transacted any business without authorisation from his father, it is also declared an invalid transaction. A slave and a son are equal in that respect".[3]

It is true that ownership in the public mind and in Western jurisprudence[4] is inseverable from mastery and the power to deal with property, but juridical distinction between svatva (ownership), svātantrya (independence), and pāratantrya (dependence) in Hindu jurisprudence points to the fact that although a non-independent person could not enter into a valid transaction, he could well be an owner.

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1. Tr. Kāṇe, Kātyāyanasmṛti, 207-8. Also Hārīta, Dh.K.1146a: jīvati pitari putrāṇām arthādāna-visargākṣepesv asvātantryam: 'While the father is living the sons have no independence in respect to the appropriation, gift or realisation of property'.

2. Nārada, IV.30, Dh.K.559b: putreṇa ca kṛtaṃ kāryaṃ yat syād acchandataḥ pituḥ / tad apy akṛtam evāhur dāsaḥ putraśca tau samau //.

3. Tr. Jolly, SBE, XXXIII, 50. Cp. similar rule in Roman law, A.A. Schiller, 'The Business Relations of Patron and Freedman in Classical Roman Law', in M. Radin and A.M. Kidd, ed., Legal Essays in Tribute to Orrin Kip McMurray, (Berkeley, 1935), 623-9; discussion, supra, 70 n.2.

4. See T.E. Holland, The Elements of Jurisprudence, (Oxford, 1916), 209-10. J. Salmond, Jurisprudence, (London, 1924), 277-8.

c. Father's power to sell or abandon their children

Vasiṣṭha declares:[1]

> Man formed of uterine blood and virile seed proceeds from his mother and his father (as an effect) from its cause. (Therefore) the father and the mother have power to give, to sell, and to abandon (2) their (son).(3)

When the son was not independent and when he could be an object of sale or gift by the father, it is quite logical that the son's position as a co-owner with the father should be doubted.

However, it seems that Manu condemns the sale of an offspring when he forbids a father to receive a gratuity for giving his daughter in marriage.[4] "No father who knows (the law) must take even the smallest gratuity for his daughter ; for a man who, through avarice, takes a gratuity, is a seller of offspring".[5]

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1. Vasiṣṭha dh.sū., Smṛti Sandarbha, III, 1506; P.N. Sen, The General Principles of Hindu Jurisprudence, TLL, 1909, (Calcutta, 1918), 252. śoṇita-śukra-sambhavaḥ puruṣo māta-pitṛ-nimittakaḥ / tasya pradāna-vikraya-tyāgeṣu māta-pitarau prabhāvataḥ //

2. Better is 'relinquish'.

3. Tr. Bühler, SBE, XIV, 75. Cp. similar power of father in Germanic and Roman law, S.J. Stoljar, 'Children, Parents and Guardians', International Encyclopaedia of Comparative Law, IV, 16-17, for a discussion, supra, 126, 63.

4. Manu, III.51. na kanyāyāḥ pitā vidvān gṛhṇīyāc chulkam aṇvapi / gṛhnan śulkaṃ hi lobhena syān naro'patya-vikrayī //

5. Tr. Bühler, SBE, XXV, 84.

In the Kātyāyanasmṛtī, we find a qualification of the general power conferred to a father in Vasiṣṭha's [1] text. With regard to the father's power of selling the son, Kātyāyana seems to deduce a conclusion from the śāstras that only in time of adversity may one sell or give away one's wife or son, also he introduced the element of consent on the part of the wife or the son in such transaction.[2]

> Wives and sons, if unwilling, should not be made the subjects of sale or gift, wives, sons and one's entire wealth could be employed by a man himself (for any purpose of his own); but in times of adversity one may sell or give away (even one's wives and sons), but he should not proceed to do so otherwise (i.e. in the absence of adversity). This is the definite conclusions of the sastras. 3

Then Kātyāyana clarifies the father's power over his dependent and his power of selling the son. He declares:[4]

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1. Vasiṣṭha, SBE, XIV, 75.

2. Kāty. 638-39, Dh.K.804: vikrayaṃ caiva dānaṃ ca na neyāḥ syur anicchavaḥ / dārāḥ putrāśca sarvasvam ātmanyeva tu yojayet // āpatkāle tu kartavyaṃ dānaṃ vikraya eva vā / anyathā na pravarteta iti śāstra-viniścayaḥ //

3. Tr. Kāṇe, Kātyāyanasmṛti, 250. In Sasanian law 'only the father is entitled to sell his children into slavery and that under adverse circumstances', M.Shaki, 'The Sassanian Matrimonial Relations', archiv orientalni, 39 (1971), 322-45 at 336.

4. Kāty. 471, Dh.K.563b: sutasya suta-dārāṇāṃ vaśitvaṃ tvanuśāsane / vikraye caiva dāne ca vaśitvaṃ na sute pituḥ //

> The dependence (on the father or husband) of the son or of the wife (consists only) in his (father's or husband's) right to control them (or their actions), but the father has no power over the son so far as selling or gifting him is concerned. [1]

d. Concluding remarks

Kātyāyana, 471, is in conflict with the text of Vasiṣṭha [2] which empowers a father to sell his son. To a casual reader of the *dharmaśāstras,* conflict of the literal meaning of one text with that of the other is indeed confusing. But the techniques of *śāstric* interpretation and the predicament of a lay scholar are, fundamentally, two different things. The principal task of the interpreters was to extract the rules of *dharma* from the mass of authoritative texts, [3] and according to the rules of interpretation, a provision in one text does not automatically invalidate another text with a contradictory provision. On this point, Derrett says:

> The necessity of interpreting each text in the light of parallel, and often apparently inconsistent texts in equally valuable and binding sources - according to

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1. Tr. Kāṇe, *Kātyāyanasmṛti,* 208.
2. Supra, 436 n.1; also with Kātyāyana, 638-9.
3. Lingat, CLI, 157. On techniques of interpretation, ibid., Ch.I, Derrett, RLSI, Ch.3.

> the hermeneutic theory of ekavākyatā (1) (all the sages were in harmony) - leaves ample scope for the introduction of alternatives, and the application of conditions, where the text gives no hint of such. (2)

The ṛṣis envisaged a situation in which the literal meaning of two texts might conflict with each other. That is why Yājñavalkya says: "In case of a conflict between two smṛtis, reasoning (nyāya) guided by the practices of the past has (more) force".[3]

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1. The principle of ekavākyatā insists on the equal validity and harmony of all texts on dharma. It is rare to find an expression of revolt from accepted rule in a smṛti unless in still more ancient works the divergence of view expressed by the revolt finds a basis, and by a consequent option (vikalpa) the right to differ is conceded. The Śākhāntarādhikaraṇa of Pūrvamīmāṃsā maintains that all śākhās speak with one voice, K.V.R. Aiyangar, Rājadharma, (Adyar, 1941), 81-2, 150-2; also Bṛhaspati, (Baroda, 1941), Introd., 129-30. However, it was a pretention that the sages spoke with one voice, when there were in fact, a great many unresolved alternatives, Derrett, 'Intellectual Weaknesses in the Dharmaśāstras', History of Indian Law, (Leiden, 1973), 36. Cp. In Jewish law the great difficulty of reconciling divergent opinions on a point of law was met with the blank assertion, 'They are all the words of the One Living God', (Erubin, 13b). However, it is a Mishnaic tradition that even after the Halakha was established, dissenting opinions were recorded and studied in order to enable a later generation to prefer the view which was discarded to that which was adopted (Eduyot, I, 4-6), H.H. Cohn, Jewish Law in Ancient and Modern Israel, (Ktav Publishing House, Inc., 1971), 'Introduction', x-xi.

2. Derrett, RLSI, 86.

3. Yājñ.II.21: smṛtyor virodhe nyāyas tu balavān vyavahārataḥ, tr. CLI, 168. Kāṇe, HD, III, 866. Ghārpure and Mandlik translate nyāya as 'equity'. But the translation of nyāya by equity is debatable, see Lingat, CLI, 161, n.40.

Yājñavalkya's phrase 'the practices of the past' leaves ample scope for usages in the interpretation of texts. Lingat says: ' ... the usages practised by the men of the past, that is to say from time immemorial, are comfortable to the teaching of the Sages'.[1] Thus, the texts discussed above, should not be taken literally as inconsistent with each other. One should see how far the rules contained in these texts were confirmed by custom and the norms of Hindu family life consistent with dharma.

X. Litigation between Father and Son

a. Nature of litigation

In general terms, the dharmaśāstras allowed parties to bring their cases to court when they suffered injuries cognisable in law.[2]

> If one, aggrieved by others in a way contrary to the smrtis and the established usage, complain to the King, that (subject) is one of the titles of Vyavahāra or a judicial proceeding.[3]

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1. CLI, 168. Colebrooke says: 'The usage presumes a recollection, which again presupposes revelation', H.T. Colebrooke, Miscellaneous Essays, 3 Vols. (London, 1873), II, 338. The practices of good men and the usage of particular communities are not contrary to the Veda, A.S. Natarāja Ayyar, Mīmānsā Jurisprudence, (Allahabad, 1952), 50.

2. Yājñ.II.5, Dh.K.I.1, III, smṛtyācāra-vyapetena mārgenādharsitaḥ paraiḥ / āvedayati ced rājñe vyavahāra-padam hi tat //

3. Tr. Mandlik, Yājñavalakya-smṛti, (Bombay, 1880), 128.

The general rule was that in all types of cases, the parties had to initiate their proceedings before a judge.[1] This shows that ancient Hindu law had what we call in modern terms an adversary system of litigation.[2] Under the adversary system, in a judicial contest between two parties, the role of a judge is like that of an impartial umpire. Theoretically, this was also the procedure in classical Hindu law[3] but, in cases the judge could ask questions to the parties.[4] However, the system of litigation in classical

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1. Gautama, dh.sū.13.27 (New Delhi, 1969), 205, SBE, 2,245; Manu, 8.43; Vasiṣṭha, dh.sū.16.2-3, SBE, 14, 78; Kātyāyana, 27,30, Kāṇe, ed., 3, Agni Purāṇa, 253, 35 (Varanasi, 1966), 368, a re-statement of Yājñ. 11.5; Abhilaṣitārthacintāmaṇi or Mānasollāsa of King Someśvara, 1.2.1265 and 1.2.1275, (Mysore, 1926), 175, 176.

2. On the nature of adversary system, see I.H. Jacob, 'The Present Importance of Pleading', in Current Legal Problems, 1960, 175. On two parties at the bar, Derrett, 'Vyavahāra: Light on a Vanished controversey from an Unpublished fragment', B.S.O.A.S., 1953, XV, 3, 598-602 at 601.

3. Nārada, I.34: samaḥ syāt sarva-bhūteṣu ...; also Rocher, ed., Vyavahāra-cintāmaṇi, (Ghent, 1956), text, 40-41, tr.171. R. Lingat, CLI, 249-50. For the system of trial, Kāṇe, HD, III, 279-80. See the tale of the cat as judge between the partridge and the hare in the Pañcatantra, L. Sternbach, Juridical Studies in Ancient India, (Delhi, 1967), II, 14-30 at 29. Another secondary and juridically unreliable evidence of trial in Śudraka's Mṛcchakaṭika, ed., R.D. Karmakar, (Poona, 1937), Ch.IX, 253-91.

4. Indirectly proved; the judge could not question one who ought not to be questioned, Arthaś, 4.9.14, Kāngle, ed., I, 143, II, 322. In Medhātithi's view, the judge must act as inquisitor, Medh. on Manu, VIII, 14; Derrett, 'The Concept of Law According to Medhātithi, a Pre-Islamic Indian Jurist', in Essays in Classical and Modern Hindu Law, I, 174-97 at 181.

Hindu law was not purely adversary.

> Many disputes could not be brought by the aggrieved parties, but were promoted suo motu as the outcome of the King's officers' enquiries, including espionage. Pupils could not with propriety bring actions against their teachers, nor wives against their husbands nor sons against their fathers, but the substance of such disputes would come within the King's jurisdiction on the basis of what would, in our Canon law, be called "instance procedure". 1

b. Parties with special relationships

It seems that upon the broad principles laid down by Yājñavalkya [2] and others [3] regarding initiation of a suit, the śāstras have put restriction in a few cases where the parties had a special relationship with each other.

Bṛhaspatī declares: [4] "A lawsuit cannot be instituted mutually between a teacher and his pupil, or between father and son, or man and wife, or master and servant". [5]

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1. Derrett, 'The Corpus Iuris of Hindu Law in 1972', History of Indian Law, (Dharmaśāstra), (Leiden, 1973), 13.

2. Yājñ. II.5.

3. Supra, 441, n.1.

4. Bṛ., Dh.K. I, 1, 121: guru-śiṣyau pitā-putrau dampatī svāmī-bhṛtyakau / eteṣāṃ samavetānāṃ vyavahāro na sidhyati // Vyavahāra-mātṛkā, A. Mookerjee, ed., (Calcutta, 1912), 285, cites the text as of Bṛhaspatī; Mitā. on Yājñ. II.32 as anonymous with variant reading: in place of eteṣāṃ samavetānāṃ, virodhe tu mithas-teṣām, 'even if they are at conflict with each other', tr. Ghārpure, Mitākṣarā, (Bombay, 1938), III, 750.

5. Tr. Jolly, SBE, XXXIII, 234.

Superficially, the text seems to convey a meaning that a conflict between father and son is not to be considered as a litigable issue. But elsewhere, while enumerating the topics of litigation, Bṛhaspati has accepted that there can be a litigation between husband and wife,[1] or master and servant.[2] Moreover, there is a variant reading in the Vyavahārasaukhya[3] where in place of na sidhyati it is na vidyate which literally means 'not known'[4] and does not carry as strictly a prohibitory sense as na sidhyati. Though Jīmūtavāhana has attributed this verse to Bṛhaspati,[5] Vijñāneśvara was doubtful about its authorship and cited it as anonymous.[6] Jolly has attributed the text to Nārada,[7] and K.V.R. Aiyangar has included the verse in his reconstruction of the Bṛhaspatismṛti.[8] Rocher has accepted both Bṛhaspati and Nārada as its authors.[9]

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1. Bṛ.II.7, (Baroda, 1941), 2; SBE, 33, 284.

2. Bṛ.II.3, SBE, 33.283; Smṛti Ch. (Bombay, 1918), 1.

3. See Bṛhaspatismṛti, (Baroda, 1941), 21, n.9.

4. V.S. Apte, The Practical Sanskrit English Dictionary, (Bombay, 1912), 856; L. Rocher has translated na sidhyati as 'not accepted', i.e. 'not acceptable', i.e. 'not to be recommended' which is worth noting, 'Matrimonial Causes According to the Dharmaśāstra' in Family Law in Asia and Africa', J.N.D. Anderson, (London, 1968), 116.

5. Vyavahāramatṛkā, in op.cit., 285.

6. Mitā on Yājñ. II.32; on anonymous texts and their admissibility see, K.V.R. Aiyangar, Rājadharma, (Adyar, 1941), 152.

7. SBE, 33, 234.

8. Bṛhaspatismṛti, (Baroda, 1941), 21.

9. Rocher, ubi cit., 111.

If we accept that both Nārada and Bṛhaspati were the authors of this text, it is possible that each of them attached a different meaning to it. We have shown above that Bṛhaspati like other *smṛtikāras*[1] accepted a conflict between husband and wife or master and servant as topics for litigation which could be initiated by the respective parties against each other (*vādī-kṛta*).[2] It is not likely that he should declare such investigations as absolutely prohibited.[3] Nārada has included a litigation between father and son in his chapter on *prakīrṇaka*. The topics for litigation enumerated under this chapter are not instituted by the parties, but are investigated and initiated by the king. From this we can infer that Nārada only meant by the verse under discussion that a litigation between father and son cannot be instituted as *vādī-kṛta* but their respective rights can be determined as *prakīrṇaka*, *suo motu* by the king.

But these internal studies do not lead us very far. An isolated study of a particular text, conveying a doubtful meaning, should be interpreted in the light of other *smṛtis* and for finding out the correct principle lying behind such text, all other *dharamaśāstras* stand in equal importance.[4]

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1. For a taxonomy of *vyavahārapadas* (topics for litigation), see Kāṇe, HD, III,249.

2. Mark the comment of Rocher, 'Matrimonial Causes According to the Dharmaśāstra' op.cit., III, n.3. Medhātithi says a dispute between husband and wife 'is to be brought up before the King', *rājanī vivaditavyam iti*, Jhā, *Manu-Smṛti*, text, (Calcutta, 1939), II, 241, tr. (Calcutta, 1926), V, 1.

3. Nārada, XVIII, 3, SBE, XXXIII, 214.

4. See the principle of *ekavākyatva* (the theory of the unity of idea between the different sources of Hindu Jurisprudence), K.V.R. Aiyangar, *Rājadharma*, (Adyar, 1941), 150-2, also his *Some Aspects of the Hindu View of Life, According to Dharmaśāstra*, (Baroda, 1952), 81-2; C.S. Sastri, *Fictions in Hindu Law*, (Adyar, 1926), 166ff, especially 172, 179. Also supra, 439, n.1.

Even in the Arthaśāstra, there are clear indications that father and son, master and servant and preceptors and disciples could sue each other,and Kautilya respectively makes provisions for fines in case of their being defeated in a suit.[1] "And in case of their suing each other, the betters,[2] if defeated shall pay one-tenth (as fine), the inferiors, one-fifth".[3]

c. Father and son

There are evidences in Gautama [4] and Manu [5] that litigation between father and son did exist. Gautama has stated that a son who has enforced a division of family estate against the wish of his father should be excluded from being an invitee to a śrāddha dinner. [6] This implies a dispute and perhaps one that, at least, went to arbitration.

Similar is also the implication of Manu.III.159.[7] Medhātithi's

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1. Arthaś. 3.11.33. Kāṅgle, ed., (Bombay, 1960), I, 113. 'parasparābhiyoge caiṣām uttamāḥ paroktāḥ daśa-bandhaṃ dadyuḥ, avarāḥ pañca-bandham / should be read with Arthaś. 3.11.32. Also see Arthaś 3.1.19-20.

2. Means the respected ones, e.g. masters, priests, and preceptors and parents, Kāṅgle, Arthaśāstra, II, 264, n.33.

3. Tr. Kāṅgle, II, 264.

4. Gautama, dh.sū.XV.19, SBE, II, 255.

5. Manu,III.159.

6. pitrā 'kāmena vibhaktān. Gautama Dharma Sūtra, (Delhi, 1969), 265, SBE, II, 255. Kāṇe, HD, III, 566-7; HD, IV, 393.

7. Manu.III.159. pitrā vivada-mānaś ca ...

comments on the verse coalesce with the injunction contained in the text of Gautama.[1] Medhātithi explains, 'pitrā vivāda-mānaś ca: 'He who wrangles or goes to law with his father ... ' of Manu as 'He who quarrels with his father; i.e. talks rudely to him; and goes to court against him as party to a suit instituted for partition'.[2]

The question arises, what happens to a son who does not care for this social sanction, or who does not care for an invitation to a śrāddha dinner, or the ostracism this implies? The obvious answer is that at least in law (vyavahāra) nothing prevents him from suing his father for division of the family estate. But the answer may not be as simple as that. The question must be answered in the light of contemporary social setting during the times of Gautama and Manu, and in those days, very few sons would be bold enough to invite śāstric sanctions and social indignation as a penalty for realising his legal rights.

Commenting on the supposed non-justiciability of disputes between father and son etc., in the text of Bṛhaspati under discussion, Jīmūtavāhana says that this text was applicable only to offences of a minor character (alpāparādha viṣayam).[3] But when a son finds that his father is dissipating the entire property to prostitutes and degraded people, he can resort to an officer of justice and a

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1. Gautama, dh.sū.XV.19.

2. Jhā, Manu-Smṛti, (Calcutta, 1932), I, 276, the number of the verse is III.149; tr. (Calcutta, 1921), II(1), 182. Mandlik, Mānava-Dharma Śāstra, (Bombay, 1886), 377. Bühler, SBE, XXV, 105, n.159. Also see our discussion on Medhātithi on Manu, infra,463.

3. Vyavahāra-mātṛkā, ed. A. Mookerjee, (Calcutta, 1912), 285.

suit will arise even between father and son.[1] Here Jīmutavāhana unconsciously recognises some vested right of a son in family property during the lifetime of a father. Vijñāneśvara opines that a son could sue a father in order to interdict a sale of land, acquired by the grandfather, because in such land the ownership of father and son is equal.[2] But Vijñāneśvara was conscious of the social implications of such suits and he put forward worldly and spiritual reasons to prevent a son from coming to court. He comments,

> Therefore the purport of the verse beginning with "Between preceptor and the pupil etc." is that as a dispute with a preceptor etc. will bear no good result in this world or the next,[3] so the pupils and others should in the first place be induced away (better, dissuaded) by the King in company with assessors. 4

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1. Ibid., 285; to Rocher, Jīmūtavāhana's interpretation is unsatisfactory. But in explaining this text, Jīmūtavāhana was on a precipice, he could not go further at the risk of acknowledging a birthright in the son. Significant that Jīmūtavāhana does not justify it by the doctrine of factum valet, as at Dāyabhāga, II.30, Colebrooke, (Calcutta, 1810), 32. Of course, by general agreement, giving away of entire property by father is an example of void grant, adatta, (ungiven), P.N. Sen, General Principles of Hindu Jurisprudence, (Calcutta, 1918), 85-6; Derrett, 'Prohibition and Nullity: Indian Struggles with a Jurisprudential Lacuna', BSOAS, 20 (1957), 203ff at 205, 206 and 215 hold this transaction as void; same view Medhātithi on Manu,8.164, giving away of entire property, a void contract, text. Jhā, Manu-smṛti, (Calcutta, 1939), tr. Jhā, (Calcutta, 1926), IV.1.213-4. For discussion, supra,356-63.

2. Yājñ.II.121.

3. dṛṣṭa (seen), adṛṣṭa (unseen), for a discussion, see A.S. Natarāja Ayyar, Mīmāṃsā Jurisprudence, (Allahabad, 1952), 10-13; Colebrooke, Miscellaneous Essays, (London, 1873), 11, 343; Lingat, CLI, tr. Derrett, 155-6; for dṛṣṭa and adṛṣṭa, though discussed in a different context, see Derrett, RLSI, 131-3.

4. Tr. Gharpure, Yājñavalkyasmṛti, (Bombay, 1938), II (3), 750.

In these words, Vijñāneśvara is suggesting an idea of preventive justice [1] through a machinery which could arrange an amicable settlement out of court. This is not a total deprivation of the right to redress as conferred in broad terms by Yājñavalkya [2] and other smṛtikāras, but only a discouragement of litigation between persons standing in particular relationships.[3]

But certain issues may be too complex or serious to be settled out of court and human emotion and psychology also play major parts in the aetiology of litigation. Vijñāneśvara, like Jīmūtavāhana,[4] was conscious of these possibilities and that is why he added: [5] "If however, the parties press hard, a suit has to be commenced even (when instituted) by the pupil etc." [6]

In our time, N.C. Sengupta airs a particular point of view concerning Bṛ. XXVII.1,[7] and Nārada XVIII.1,[8] saying, "The exclusion of these topics of

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1. On 'Preventive Justice', S.C. Misra, Studies in Law, Patna Law College Golden Jubilee Commemoration Volume, (Bombay, 1961), 195-209 at 198, 202.

2. Yājñ.II.5.

3. See S. Varadachariar, The Hindu Judicial System, (Lucknow, 1946), 137-8.

4. Vyavahāra-mātṛkā, op.cit., 285. Also B. Bhattacharya, The Kalivarjyas, (Calcutta, 1943), 104.

5. Yājñavalkyasmṛti, (Varanasi, 1967), 196. atyanta-nirbandhe tu śiṣyādīnām apy ukta-rītya pravartanīyo vyavahāraḥ /

6. Tr. Ghārpure, Yājñavalkyasmṛti, (Bombay, 1938), II (3), 751.

7. SBE, XXXIII, 386.

8. SBE, XXXIII, 214.

law from what is meant to be a chapter on vyavahāra means only this, that these were not matters which came up in his days, before the King's court for litigation".[1] However, Sengupta's argument appears to be fallacious. With a careful scrutiny, he might have doubted whether the real situation in those days[2] was not the opposite of what he had thought. Bṛhaspati _included_[3] in his _vyavahāra-padas_ a litigation between husband and wife, master and servant, and Nārada mentioned litigation between father and son on his chapter on _prakīrṇaka_ which were litigations directly under the King (_nṛpāśraya_).[4] Rocher says, "... the stanza of Nārada and Bṛhaspati implies that such lawsuits could exist, that they did exist, but that they should be avoided as much as possible".[5] The true explanation may well be no more than this - that litigation of this type, even if justified,was injurious to _dharma_ in general and, therefore, to be deprecated - further, from a practical point of view the emotional tensions in those relationships ought not to be released by the initiative of the parties concerned.

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1. N.C. Sengupta, _Evolution of Indian Law,_ (Calcutta, 1953), 231.
2. By 'in his days', Sengupta means the days of Brhaspati (whichever they were).
3. Emphasis mine.
4. See _Daṇḍaviveka_ of Vardhamāna, ed., K.K. Smṛtitīrtha, (Baroda, 1931), 262.
5. L. Rocher, 'The Theory of Matrimonial Causes According to the Dharmaśāstra', op.cit., 116.

As we have seen before, the two of the many plausible reasons [1] for which a son could sue his father were to interdict his father's alienation of the entire family estate,[2] or land,[3] which was acquired by the grandfather,[4] and suing the father for a partition.[5]

d. prakīrṇaka

Probably the influences of social factors were so overwhelming that, in spite of having a good cause of action, a son had to refrain from using his strictly legal right of suing his father. This might explain why Nārada put a litigation between father and son under miscellaneous heads, (prakīrṇaka).

The lawsuits under prakīrṇaka [6] depend on the king. The king initiates the case, 'when, and only when he thinks it appropriate'.[7] Bṛhaspati clearly points out the difference between disputes which are commenced by the parties (vādī-kṛta) and those which are instituted [8] by the king (prakīr-

1. Another subject-matter of litigation between father and son could be abandoning each other which comes under sāhasa, Yājñ. II.237.

2. Jīmūtavāhana, Vyavahāramātṛkā, op.cit., 285.

3. Vijñāneśvara on Yājñ.II.32.

4. The question of the son's birthright in the father's acquired property is dealt with below at pp. 518-27.

5. Gautama, dh.sū.XVII. 1; Medhātithi on Manu, III.159.

6. The root meaning of the word is 'relating to what is scattered', V.S. Apte, The Practical Sanskrit English Dictionary, (Bombay, 1912), 639.

7. Lingat, CLI, 238, Kāṇe, HD, III, 264.

8. Though the initiation was by the king, the general adversary system of procedure in trial continued. The king had to take upon himself the position of a defendant (prativādī) in such cases, Smṛti Candrikā, (Bombay, 1918), Vy,9, tr. (Poona, 1948), I, 15.

naka).[1] "This (aggregate of rules concerning) lawsuits has been declared; I will declare (next the law concerning) Miscellaneous Causes instituted by the king (in person)."[2]

The cases under prakīrṇaka comes under the extraordinary jurisdiction of the king. In this respect, Varadachariar observes: "The general theory of the king's duty to protect his subjects involves the recognition of a kind of residuary or miscellaneous jurisdiction in him somewhat on the analogy of the king being Parens Patriae".[3]

Describing the nature [4] of the topics dealt with under miscellaneous, K.P. Jayaswal (?) states that:

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1. Bṛ.XXVII.1, SBE, XXXIII, 386; Aiyangar, ed., XXIX.1, 266. eṣa vādi-kṛtaḥ prokto vyavahāraḥ samāsataḥ / nṛpāśrayaṃ pravakṣyāmi vyavahāraṃ prakīrṇakam //

2. Tr. Jolly, SBE, XXXIII, 386. The definition of prakīrṇaka is the same in Nārada, XVIII.1, SBE, XXXIII, 214 (No. of the text, XVII.1). In the Agni Purāṇa, 253.30, (Varanasi, 1966), 368, nṛpāśraya is substituted by nirāśraya (bereft of shelter or initiator). B. Mishra thinks that the Purāṇa definition 'denotes a general lessening of the importance of the Royal writs and the king's authority', Polity in the Agni Purāna, (Calcutta, 1965), 126. Mishra is entitled to hold his own view but the Purāṇic substitution does not change the fundamental character of these litigations.

3. Sir S. Varadachariar, The Hindu Judicial System, (Lucknow, 1946), 87. The role of the king as parens patriae is found in Śākuntala, of Kālidāsa, VI, 23, ed. Kale, (Bombay, 1957), 246-7. Also Manu, VII.3; VIII.27.

4. In Canon Law this is called 'instance procedure', Derrett, 'Corpus Iuris of Hindu Law', in 1972, History of Indian Law, (Dharmaśāstra), (Leiden, 1973), 13.

> they all bear more or less public aspect. It is very rarely that individuals qua individuals are affected by them and the king acts not as an arbiter between subject and subject but as the guardian of the social order and public organisation. 1

Litigation between father and son, looked upon as a duel between two contestants, is discouraged by śāstras, nevertheless the king as the 'guardian of social order' had to redress certain grievances between father and son through this inquisitorial jurisdiction.

Nārada's inclusion of litigation between father and son as a topic within prakīrṇaka served two purposes. It saved a son from social stigma for bringing an action against his father on his own initiative, and at the same time, a son's grievances were redressed by the king's court at its own motion.

Nārada mentions the disputes under prakīrṇaka:[2] "Disputes between father and son, neglect of (prescribed) penances, abstraction of gifts (made to worthy persons), the wrath of anchorites"[3] (as well).

Apparently, to discourage a father and his son from suing each other, as well as to avoid publicity due to the involvement of third parties, and to

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1. K.P. Jayaswal, 'The Miscellaneous Chapter', CWN, 15 (1911), cxxxviii-cxli at cxxxix; reference of this article could be seen, K.P. Jayaswal, Manu and Yājñavalkya, a Basic History of Hindu Law, TLL, 1917, (Calcutta, 1930), 2, n.2.

2. Nārada, XVII.3 (Calcutta, 1960), 61, SBE, XXXIII, 214 (Text No.VIII.3). pitā-putra-vivādaś ca prāyaścitta-vyatikramaḥ / pratigraha-vilopaś ca kopa āśramiṇām api //

3. Tr. Jolly, SBE, XXXIII, 214.

discourage the latter from embroiling families, a witness used to be fined for giving evidence in such litigation.[1] "For witnesses in a feud between father and son, the fine is three panas".[2]

The amount of this fine, for being a witness in these cases, appears to have increased, which could be an indication that despite the provision laid down by Yājñavalkya, people were coming forward to act as witnesses.[3] To deter the public at large from taking part in family quarrels, Viṣṇu[4] increased the fine to 10 paṇas.[5] This upward tendency of fine could be taken to suggest an increase in number of litigations between father and son.[6]

The evidence of a witness could be vital to a case, but its absence was not completely fatal to the cause of action because other evidences, such as documents etc., were admissible.[7] Moreover, in absence of any evidence, the

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1. Yājñ.II.239, Mandlik, ed., 146. pitā-putra-virodhe tu sākṣiṇām tri-paṇo damaḥ /

2. Tr. Mandlik, 236. paṇa is a copper coin of certain weight, Vardhamāna's Daṇḍaviveka, op.cit., introd., vii. Vardhamāna enumerates eight categories of state offences of which the fifth one is 'Quarrel between father and son'. Punishment for the fifth offence (i.e. furnishing grounds for the quarrel between father and son) is the fine of uttama-sāhasa (i.e. copper coins ranging between six hundred and one thousand), ibid., introd., xxii.

3. Kāṇe, HD, III, 932.

4. Viṣṇu, V.120-1, Adyar Library ed., (Madras, 1964), I, 115. Kṛtyakalpataru: Vyavahārakāṇḍa, (Baroda, 1953), 563, SBE, VII, 35.

5. During the Purāṇic age this was 200 damas, Matsya Purāṇa, 227,198, (Poona, 1907), 481.

6. It is not usually believed that fines expressed in numerals were to be taken literally. Taken as a group, they indicated relative severity.

7. On the relative importance of different kind of evidences, A. Thakur, Hindu Law of Evidence, (Calcutta, 1933), 11-12.

king's decision was final.[1]

In family transactions and especially in dealings between father and son, documentation was likely to be rare. Therefore, the evidence of witness became necessary in meting out justice and as an inevitable result, the restriction of witnesses in form of fine was abrogated as kali-varjya (deprecated in the kali age).[2] "Fining a witness in a dispute against the father (is one of the) five things to be deprecated in the kali age".[3]

e. Conclusion

The above discussion reveals that litigation between father and son as a topic of vyavahāra provoked attention in classical Hindu law. The discouragement and disapproval of such litigation by smṛtikāras and commentators and the ultimate abolition of the provision of fine for witnesses are developments having a bearing on the substantive right in property between father and son. From Gautama,[4] it appears that sons used to demand a partition of property even against the will of their fathers,[5] and this demand presupposes the existence

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1. Pitāmaha and Vyāsa, cited in the Smṛti Chandrikā, (Bombay, 1918), 54.

2. Dharmasindhu, (Varanasi, 1968), 709. ... pitṛ-vāde sākṣi-daṇḍam kalau pañca vivarjayet.

3. Tr. mine. Also on this, see Kāṇe, HD, III, 932. B. Bhattacharya, The Kali-varjyas, (Calcutta, 1943), 11. On the kali-varjya theory, Lingat, CLI, 189-95.

4. Gautama, dh.sū.XV.19.

5. For the modern discussion of this subject, Derrett, Critique, ¶ 204. Also infra, 865-86.

of the right of a son in family property from his birth. However, it is apparent that social considerations stood in the way of this legal right of a son and cohesion and harmony in a family were matters of prime concern for the *smṛtikāras*, commentators and also (in their view) for the king. But the abolition of fining a witness in a litigation between father and son, as *kali-varjya*, signifies that social factors or commentatorial opinion could not suppress the substantive right of a son any longer.[1]

1. Kāṇe, HD, III, 932.

CHAPTER 13

EARLY MEDIAEVAL COMMENTARIES

1. The Birthright and the Manubhāṣya of Medhātithi

The commentator *par excellence* on Manu is Medhātithi. However, the *bhāṣya* of Bhāruci (called *Manu-śāstra-vivaraṇa*) is the oldest extant commentary on the *Manu-smṛti*.[1] Bhāruci represents a southern tradition, but his comments are short to be used for frequent comparison.[2] Medhātithi, the author of the *Manubhāṣya*, had Bhāruci before him, in any case.[3] Very little is known about Medhātithi save that he lived in Kashmir.[4] Medhātithi's area of origin gives added importance to his work. The topography and historical isolation of Kashmir from the rest of the subcontinent saved it from many changes and spe-

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1. Lingat, CLI, 111. Bhāruci is now available in print. Edited and translated by Derrett, *Bhāruci's Commentary on the Manusmṛti*, 2 Vols.,(Franz Steiner Verlag, Wiesbaden, 1975). For the date of Bhāruci, Derrett, ibid., I, introd., 9-17.

2. Lingat, CLI, 112.

3. Lingat, ibid., 112. On the importance of Bhāruci, Derrett, 'Bhāruci on the Royal Regulative Power in India', JAOS, 84 (1964), 4: 392-5; 'A Newly-Discovered Contact Between Arthaśāstra and Dharmaśāstra: the role of Bhāruci, *Zeitschrift der Deutschen Morgenländischen Gesellschaft*, 115 (1965), 134-52; *Bhāruci*, I, introd., 1-36.

4. Lingat, CLI, 112. Bühler, SBE, XXV, introd., cxxiii-cxxiv. Kāṇe, HD, (Poona, 1968), I, 1, 574-5. *Manu-smṛti* (Bhāratīya Vidyā Bhavan, Bombay, 1972), introd., xi.

cially from the influences of the Deccan.[1] Being representative of north Indian view on Manu during the 9th century,[2] Medhātithi's work is of immense value to historical jurisprudence.

To reach the age of Medhātithi, we have to come a long way from Manu. During the centuries which elapsed between Manu and Medhātithi, probably quite a few commentators on Manu emerged,[3] and also customs and popular practices made inroads into the area of dharma. He interpreted Manu in the light of other dharmaśāstras and prevailing customs and frequently supplemented Manu's utterances with his own opinion.[4] In this respect, he used the comparative method and could be called an early exponent of comparative jurisprudence in South Asia.

Strangely enough, no verse has been attributed to Manu similar to Yājñavalkya II,121 or Bṛhaspati 26.14,[5] which directly conveys a meaning

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1. M.A. Stein, Kalhaṇa's Rājataraṅginī, (Westminster, 1900), Preface, xvi. However, Bhāruci was available to Medhātithi certainly throughout the Seventh Book, Derrett, 'Bhāruci on the Royal Regulative Power in India', JAOS, 84 (1964) 4: 392-5 at 394.

2. Medhātithi is supposed to have flourished between 825 and 900 A.D., Kāne, HD, I, 1, 583, SBE, XXV, cvii. Manu-smṛti, Bhāratīya Vidyā-Bhavan, ed., (1972), xi.

3. SBE, XXV, introd., cviii, cxx.

4. R.K. Sarvādhikārī, The Principles of the Hindu Law of Inheritance, TLL, 1880, (Calcutta, 1882), 322. Lingat, CLI, 112.

5. Dh.K.1179b, also Bṛ.26.10, Dh.K.1180b, and Viṣṇu, XVII.2, Dh.K.1175a.

that in ancestral property, the ownership of father and son is co-extensive. In a number of verses, Manu ordained that self-acquired property was not partible.[1] Manu ordains that if a father recovers ancestral property which was lost, he does not need to share it with his sons, because it is his self-acquired property.[2] Manu's specific utterances on self-acquired property might be taken to suggest that a father had to share ancestral property with his sons, thereby perhaps implying that a son had a birthright in the property of his grandfather, but he avoids saying this - and it is significant.

Medhātithi was fully aware of the texts which conferred a birthright to sons in their grandfather's property. This becomes apparent when he quotes Yājñavalkya's text (II.121) and comments:[3] "Having this right, all the sons are entitled to equal shares in their grandfather's property; since shares only follow the right",[4] Or rather,

> And because the son has ownership, all of them are, without any exception, entitled to share in the paternal grandfather's assets as long as the property has not reached their hands (literally, "to the extent that they have not got it"), for partition has Property as its precondition. 5

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1. Manu, IX, 206; IX.208.

2. Manu, IX.209.

3. Medh. on Manu, IX.209, Jhā, Manu-smṛti, (Calcutta, 1939), II, 302. satyapi ca putrasya svāmye yāvad aprāptas tāvat sarvathā viśeṣābhāvāt sarve pitāmaha-dhana-bhājaḥ svatvapūrvakatvād vibhāgasya /

4. Tr. Jhā, Manu-smṛti, (Calcutta, 1926), V, 173. This is a good example of Jha's loose style of translation.

5. An improvement by Derrett on the margin of my first draft.

Here Medhātithi explicitly admits that partition follows a pre-existing right but being fettered by śāstric considerations, he cannot accept the right of a son to force a division of ancestral property against the will of a father, because such a division would be against dharma and the sons would incur sin.

He says:[1]

> In actual practice, even though, under the circumstances, the sons have a right over ancestral property, yet from the deprecatory assertion - "the sons who divide the property against the father's wish are to be deprecated" - it follows that the sons who force the partition on their father incur sin. Such as even though one may acquire property by receiving constant gifts, yet the act of acquiring such property is blameworthy. Similarly, even though the property (thus shared with the unwilling father) is the hereditary property of the sons, yet it is open to censure. 2

But despite prohibitive injunction of the śāstra, Medhātithi concedes that in time of extreme necessity the sons could ask for a division of ancestral property from their father.[3] "For this reason, so long as they have any other

1. On Manu, IX.209, Jhā.II, 302. ācāreṇa satyapi cāsyām avasthāyāṃ putrāṇāṃ svāmye 'pitrā cākāmena vibhaktān iti' nindā-darśanād balād-vibhājayantaḥ pāpā ity anumīyate / yathā sakṛt-pratigraheṇa bhavati svāmyṃ doṣas tu puruṣasya / tenānvayāgatamitīdṛśām aśuddham eva /

2. Tr. Jhā, V, 173. For 'open to censure' read 'tainted (wealth)'.

3. Medh. on Manu, IX.209, Jhā,II,302. ataḥ saṃbhavaty-upāyāntare na pitā 'rthanīyaḥ /adharmo hi tathā syāt /

means the sons should never ask their father for a partition: as such asking would be immoral".[1]

This indicates the existence of a sob's birthright in ancestral property; but Medhātithi, according to whom acquisition of wealth should be through the rules of dharma, dissuaded a son from realising his birthright by demanding a partition against the will of his father. He was aware of 'actual practice' (ācareṇa satyapi) [2] and the juristic purport of Yājñavalkya's text (II.121) [3] but he could not outsoar his age, in which the division of property by sons against the wish of their fathers was deprecated, and property acquired by sons through such forced division used to be considered impure (aśuddha).[4]

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1. Tr. Jhā, V, 173. For 'immoral' read 'contrary to dharma'. Bhāruci's comment on Manu, IX.209 is very useful. He says: pitā mahā-dhanasyetare 'piśata ity anayā śaṅkayā pratiṣedhaḥ / anena ca darśanena satyām vibhāga-pratipattau vittaṃ sarvam vibhajanīyam / pitṛ-putra-vibhāgasyaitad darśanam / jīva-pitṛkaṇam asti vibhāga ity etad darśayati /, Derrett, ed., Bhāruci, I. 185: 'This is a prohibition, for one might suspect that the others are masters of it because it was (originally) the grandfather's property. This example shows that when a partition is instituted every item of property must be divided. This also exemplifies the fact that sons may divide from their father; that is to say it makes plain the fact that there can be a division between sons of a father who is still alive', tr. Derrett, Bhāruci, II, 264.

2. Medh. on Manu, IX, 209, Jhā, II.302.

3. Colebrooke thinks that this verse contains the rule regarding son's birthright in ancestral property, Digest, V, xci, (London, 1801), 34. But Bühler seems to have apprehended that Medhātithi on Manu, IX.209, misunderstood that Manu admitted son's birthright in ancestral property, SBE, XXV, 376, n.209.

4. Medh. on Manu, IX, 209, Jhā.II.302.

The 'superimposed corrective'[1] of this *śāstric* gloss may appear arbitrary, but it is consistent with Medhātithi's conception of ownership. He admits that the sons have an innate ownership (*svāmya*) in property from their birth but by that ownership they do not become masters (*īśa*)[2] before the decease of their parents or before a partition made by the father himself.[3]

Medhātithi emphasises:[4] "In fact, the revered teachers have declared that as soon as the son has been born, he becomes the owner of entire property".[5]

From this opinion of the *ācaryas* quoted by Medhātithi, one might be tempted to think that he accepted the son's birthright but subsequently he qualifies this general remark by reference to Manu's text (IX.104).[6]

> Since it has been declared that "son becomes the owner of the property as soon as he is born" (so that the ownership of all brothers over the ancestral property is innate in them); but as long

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1. G.D. Sontheimer, The Joint Hindu Family, Ph.D. Thesis, unpublished, University of London, (1965), 205.

2. Īśa means 'master', Monier Williams, Sanskrit English Dictionary, (Oxford, 1899), 171, Col.1. Apte, 252, col.2.

3. Medh. on Manu, IX.209.

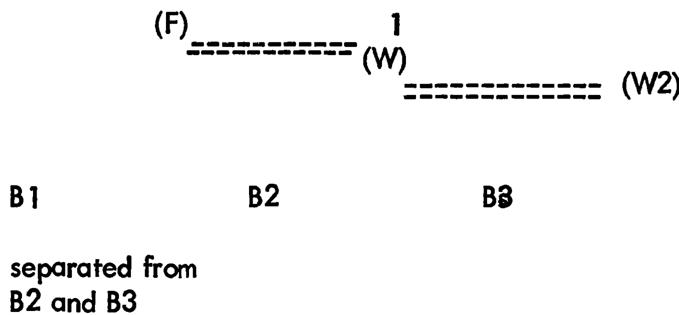
4. Medh. on Manu, IX.156, Jhā, II, 291. 'utpanno vārthasvāmyam ity ācaryā' iti/

5. Tr. Jhā, V, 144. Bracket 'entire'.

6. Medh. on Manu, IX.212, Jhā, II, 303. yata uktam - 'samutpanno vācyaḥ svāmiti / aniśāste hi jivatoḥ (IX.104) iti tatra pitur-ūrdhvaṃ samanantaram eva putrāṇāṃ svāmyaṃ darśayati /

> as the parents are alive, they have no mastery over it" (9.104) which shows that the sons acquire ownership immediately after the father's death. [1]

A son, according to Medhātithi, is anīśa during the lifetime of his parents, nevertheless he admits that the son's right to inherit does not accrue from the moment of their parents' decease, but originates from the moment of the sons' birth. This is apparent from Medhātithi's interpretation of Manu, IX. 212. This verse deals with the problem of devolution of the property of a deceased brother of the full blood,[2] who was separated from some or all other brothers before his death. One illustration will explain Medhātithi's view on this point.



Even though B1 was separated from the rest of the brothers before B2 died, B1 being a brother of the full blood with B2, will exclude B3 from inheritance.

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1. Tr. Jhā, V, 176. For 'becomes' read 'is called'.

2. Jhā, V, 175, and Bühler, SBE, XXV, 376, have translated sodara as uterine brother. Though literally correct (samānam udaram yasya saḥ), it is substantially wrong. In the Hindu sense sodara should be rendered as 'brother of whole blood', see Bühler, SBE, XXV, 377, n.212, where he rectified himself; also Monier Williams, 1248-1249; Apte, 999. Cp. Arabic akhwah-li-ūm (uterine brothers, literally brothers through the mother). Also see Yājñ.II.138. Yājñ.II.139 is similar to Manu, IX.212. On these two texts of Yājñavalkya, see K.L. Sarkar, Mimansa Rules of Interpretation as Applied to Hindu Law, (Calcutta, 1909), 399-405.

Medhātithi explains why a brother of the half-blood, even though united with the deceased brother, is excluded by the brother of the full blood who is separated from the deceased. He says, 'among uterine brothers, even when separated there is always some sort of "proximity" (sānnidhyam)'..[1] This proximity means that the right of the separated brother of full blood did not accrue from the moment of death of the united brother, but it accrued from his birth, because ownership of all brothers over ancestral property is innate in them.[2]

Despite this acceptance of son's innate right in ancestral property, a son can gain complete mastery over it either at a partition by the father or at a partition after the retirement or death of the father.[3]

But some sons may transgress the śāstric injunction and may divide property against the wishes of their fathers. According to Medhātithi, property acquired at such partition confers absolute ownership on the sons, but in the eye of dharma such ownership is tainted. Such property is considered by Medhātithi as impure, because purity and impurity can only be determined from the śāstra.[4] "So that it is only from the scriptures that it can be determined what is purity and what is impurity".[5]

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1. Medh. on Manu, IX.212, Jhā, II, 176.
2. Ibid.
3. On son's pāratantrya (non-independence), see Derrett, 'The Development of the Concept of Property in India', ZVR 64 (1962), 95-101, also above pp. 432-5.
4. Medh. on Manu, V.110, Jhā, I,474. ataḥ śuddhyāśudho ubhe api śāstrāvaseye /
5. Tr. Jhā, III, 1, 137.

However, the relevance of this passage is ritual. Indeed, scrupulous Brahmins would not perform ceremonies for families who paid them out of 'tainted' wealth, but by the time of the Mitākṣarā such scruples were regarded as unnecessary[1] and even Medhātithi took a liberal view on the subject.[2]

Medhātithi's view on partition and ownership is also explained by his definitions of dāya. According to him, dāya is 'property acquired by succession'. It means, dāya stands for that property which is obtained by descent. This definition implies that property will first belong to the father before it devolves on the son.

In another instance, Medhātithi has explained dāya to mean property 'which is given'[4] by a father to the son when the latter has finished his study of the Vedas and is about to take to the order of householder. However, the one definition will not exclude the other, for an advanced share naturally adeems a share at a partition later, or at the father's death.

Medhātithi has also used the term 'dāyāda' in the sense of owner.[5] Pointing out the significance of such use, Derrett says, 'dāya was not an expectancy but a subsisting right subject however to obstructions and limitations

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1. Derrett, RLSI, 137-40.

2. Medh. on Manu, IV, 226, Jhā, II, 2, 476-7.

3. Medh. on Manu, X.115, Jhā, II, 363. dāyo 'nvayāgataṃ dhanam /

4. Medh. on Manu, III.3, Jhā, I, 205. dīyata iti dāyo dhanam / tr. Jhā, II, 1, 16.

5. Medh. on Manu, VIII, 27, Jhā, II, 84, tr. Jha, IV, 1, 38. dāyādaḥ svāmyotrocyate /

of one kind or others',[1] which also sums up Medhātithi's treatment of the son's birthright. He acknowledged its existence subject to the restriction that the father had a power of deciding on partition during his lifetime. Medhātithi highlights the purport of Yājñ.II.121, by emphasising the need for such a restriction.[2] "As a matter of fact, if there were no such restrictions, the sons would become entitled to their grandfather's property as soon as they were born".[3] (The emphasis here is on the word īśate).

Medhātithi does not accept the notion that a Hindu father had patria potestas like his Roman counterpart, as one might think from a superficial interpretation of the famous verse Manu, VIII.416.[4] According to Medhātithi, a son could acquire property,[5] but he lacked the power to deal with it freely during his father's lifetime or until he gets his share in a partition made by his father. He explains the meaning of the śloka by saying,[6] "What is meant by

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1. Derrett, Journal of Indian History, 30 (1952), 36ff at 42. dāyāda also meant svāmī (owner), sapiṇḍa and son, Hatāydha, Abhidhānaratnamālā, 833, cited by Derrett, ibid., 42, n.21. Also Derrett, ZVR 64 (1962), 53.

2. Medh. on Manu, IX,209, Jhā, II, 301. anyathā tu yadaiva prāptāḥ putrā bhavanti tadaiva te pitāmaha-dhanasyeśyate /

3. Tr. Jhā, V, 173. For 'entitled' read 'masters of'.

4. Manu, VIII.416. bhāryā putraś ca dāsaś ca traya evādhanāḥ smṛtāḥ / yat te samadhigacchanti yasya te tasya tad dhanam // See above pp. 427-440.

5. See Derrett, RLSI, 137.

6. Medh. on Manu, VIII. 416, Jhā, II, 239. atrocyate / pāratantrya-vidhānam etat / asatyaṃ bhartur anujñāyāṃ na strībhiḥ svātantryeṇa yatrakkvacid-dhanaṃ viniyoktavyam / evaṃ putra-dāsayor-api dṛṣṭavyam /

the text is only that they are dependant, subservient; the meaning being that "without the husband's sanction, the wife should not employ her wealth anywhere she may choose'. Similarly with the son and the slave".[1]

It seems that according to Medhātithi, a son's subservience does not continue for the whole period of his father's lifetime. He places some weight on the fact that at the age of sixteen, a son becomes entirely master of himself,[2] but this is a dangerous argument. Probably he meant one reaches legal competence at the age of sixteen. We have already pointed out one achieves svātantrya on the death of parents.[3]

Elsewhere, Medhātithi explains:[4]

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1. Tr. Jhā, V, 435. For similar view, see Śabara on Jaimini, VI, I, 14, Sabara says it is wrong to say that the wife and the rest are devoid of property: nirdhanatvam anyayam-eva śrutivirodhāt, Kāṇe, HD, III, 578; Śabara Bhāṣya, tr. Jha, (Baroda, 1934), II, 981. For Jaimini, B.D. Basu, ed., The Sacred Book of the Hindus, (Allahabd, 1923), XXVII, I, 302. On this point, the overriding authority of the Śruti over smṛti is explained by A.S. Nataraja Ayyar, Mīmāṁsā Jurisprudence, (Allahabad, 1952), 36-7.

2. Below, n.4.

3. Supra, 433.

4. Medh. on Manu, VIII.163, Jhā, II.154. putrasyāpi yat-pitari pārantantryaṃ tad apṛthak-kṛtasya tad-gṛhe nivasataḥ / yadā tu pitṛ-vibhakto dhanaṃ svayam-arjitavāṃs tadā "ūrdhvaṃ tu ṣoḍaśād varṣāt-putram mitravad ācaret" iti svātantryam eva /

> And what is meant by the son's subjection to his father refers to the state in which the son lives with the father and has not set up a separate household and acquired his own property, then, 'the son shall be treated as a friend, after the age of sixteen years'; which means that he is entirely master of himself. [1]

Indeed, the unseparated son is like a minor son, no matter how old he is, but the psychological, social and legal subjection of the son is not to be so neatly disposed of.

Merely attaining the age of sixteen, indeed, will not entitle a son to be the master of ancestral property. If a father divides the property and allots a share to his son, then only will a son be the effective owner of the property because in order to be owner Medhātithi would not accept any other means of acquisition except the modes prescribed by the śāstra, and the father's granting division does amount to his abdication of his superior authority, at least to a notable extent.

Adhering to his conceptions of property and ownership, Medhātithi says:[2] "Acquisition by itself does not produce property".[3]

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1. Tr. Jhā, IV, I, 212.

2. Medh. on Manu, VIII, 416, Jhā, II, 239. A.S. Nataraja Ayyar, 'The Mīmamsa View of Property', *Vyavahāra Nirṇaya*, 4 (1955), I: 46-64 at 64, arjanaṃ svatvaṃ nāpadayati /

3. Tr. Derrett, RLSI, 136. The text remained obscure in Jhā's inept translation, Jhā, IV, 2, 434. Medhātithi used this Pūrvapakṣa view 'in establishing the rights to property of the son, the slave and the wife who were all thought to be deprived of their acquisitions', A.S. Nataraja Ayyar, ibid., 64. Cp. Prabhākara, *Mitākṣarā*, Colebrooke, I, i.10, RLSI, 139 ff.

Here Medhātithi distinguishes between mere possessory title and property. By acquiring goods one may have possession but all possessions will not confer property (svatva) unless acquired by the rules of dharma, (śāstra-niyatāgama).[1] Medhātithi uses the term property (svatva) in a purely juristic and technical sense. Svatva is the intangible aspect of a thing but most vital for having īśa (mastery) over that thing. So to have īśa, one must acquire property through the modes prescribed by the śāstra,[2] and must not suffer from legal or social impediment of the order of subservience (pāratantrya), as in the case of a son during the lifetime of his father. It is easy to see how some jurists over-emphasise pāratantrya (incorrectly) to deny the subject's svatva and most of the discussion of our problem turns on the delicate balance between the concepts. One who is pāratantrya has svāmitva but not the total bundle of rights amounting to svatva,[3] but what happens when he becomes svatantra? Some jurists (as we shall see) made his svatva retrospective to his conception.

A son's right to demand partition against the will of his father is a corollary of his birthright. Medhātithi accepts that svatva precedes partition but since he holds the view that partition against a father's wish is against dharma, he had to make a compromise between the innate right of a son in property and

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1. Derrett, RLSI, 137.

2. Medh. on Manu, XI , 194, SBE, XXV, 470, Jhā, XI, 192, Vol.II, 432, XI, 193, tr. Jhā, Vol.V, 500.

3. For an exhaustive discussion on svatva, svāmitva, svātantrya and pāratantrya, see Derrett, 'The Development of the Concept of Property in India', ZVR, 64 (1962), 95-101.

the prohibitory injunction of the śāstra against forced division by a son.

Medhātithi upholds joint ownership of father and son by preventing a father from alienating ancestral property except for the maintenance of the family.[1] "The father, after the birth of his son, shall not invest his ancestral property in mortgages and purchases; but using it for the proper maintenance of his family however has been permitted."[2]

This general endorsement of son's birthright in ancestral property has been tempered by śāstric denunciation of a forced devision by son which, in turn, is concomitant with Medhatithi's idea of the origin of property.

Despite his cognizance of customs and actual practices, he never lost sight of the śāstra, and especially of Manu. He knew that the spirit of the śāstra was very far from the flexible and that is why practicability of the law was his first consideration. In the course of his exposition, he continually brings in views opposed to his own, and disposes of them by reasoning, rather than by the citation from other smṛtis.[3] His reasonings are often too substle, but they are as often practical and have an eye to actual usage. "He was probably the greatest jurist of his science".[4]

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1. Medh. on Manu, IX.209, Jhā, II, 302. bandha-krayādi-kriyāsu pitṛ-dhanaṃ jāta-putreṇa na niyoktavyam / yoga-kuṭumba-bharaṇādau tu viniyogo darśitaḥ /

2. Tr. Jhā, V, 173. Also Medh. on Manu, VIII.164, where he considers giving away of one's entire hereditary property as an "illegal" contract, (śāstrācāra-viruddham), Jhā, II, 154, tr. IV.1,214; also on Manu, VIII, 197-9, where Medhatithi says, and onauthorised sale or gift is void and is a punishable offence, see Derrett, 'Unauthorised Alienations of Joint Family Property: Can They Ever be Void Rather than Voidable', Bombay L.R.J. 55 (1953), 105-111 at 107.

3. Derrett, 'The Concept of Law According to Medhātithi, a pre-Islamic Indian Jurist', Essays, I, 174-97 at 176.

4. Ibid., 175.

II. Son's Birthright in the Bālakrīḍā of Viśvarūpa

As well as being the earliest known commentary[1] on the Yājñavalkya-smṛti, Viśvarūpa's Bālakrīḍā is of great importance to the study of the Mitākṣarā birthright. Possibly Vijñaneśvara being nearer in time to Viśvarūpa than we are, came across a commentary on the vyavahāra section of the Yājñavalkya-smṛti by Viśvarūpa, as voluminous as his acāra and prāyaścitta[2] sections, which could not be restored. Though his vyavahāra section is conspicuously slender, yet the contents embodied in the section illuminate the views of Southern jurists concerning interpretation of son's birthright in the dhamraśāstras.

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1. Though not very sure, Kāṇe thinks Viśvarūpa flourished between 800 to 825 A.D., H.D., (Poona, 1968), I, 1,564. U.C. Sarkar uncritically agrees with Kāṇe's chronology, Epochs in Hindu Legal History, (Hoshiarpur, 1958), 174. Sarvādhikārī's conjecture that Viśvarūpa's time was 11th century is certainly wrong, The Hindu Law of Inheritance, (Calcutta, 1882), 329. According to Derrett, the Bālakrīḍā was written not later than the end of the 7th century, 'The Corpus Iuris of Hindu Law in 1972', History of Indian Law, (leiden, 1973), 15. From the internal evidences put forward by T. Ganapati Śāstrī, Derrett's view seems to be the correct one, see introduction, The Yājñavalkyasmṛti with the Commentary of Viśvarūpācārya, (Trivandrum 1922), iv. Lingat, CLI, 113, doubts Kane's chronology. J.C. Ghose, while writing about the commentators, covering the period between A.D. 600 to 1000, puts Visvarūpa as the first commentator; by implication placing Viśvarūpa in the 7th century: The Principles of Hindu Law,(Calcutta, 1917), II, 1.

2. See Vijñāneśvara's remark on Viśarūpa's work as vikaṭa (profound), Yājñavalkyasmṛti, (Varanasi, 1967), 1. Kāṇe, HD, I, 1, 553. Kāṇe thinkts that some texts of Viśvarūpa in the Vyavahāra section are either corrupt or deficient, ibid., 560.

Viśvarūpa has not stated anything specifically on the concept of son's birthright, nor, like Medhātithi, is there anything such as quoting views of other jurists [1] on the topic in the extant pages of the Bālakrīḍā. His views on the birthright are to be deduced from his comments on partition and origin of ownership.

In paternal grandfather's property, Viśvarūpa admits the co-ownership of father and son. He accepts the plain meaning of Yājñavalkya's text and in unambiguous terms explains, [2] "In land derived from the grandfather, indestructible property [3] or other movable property, the right of both father and son is equal. This is undoubted". [4]

In support of his views, Viśvarūpa refutes the three arguments which are generally put forward against the existence of co-ownership between father

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1. Medh. on Manu, IX.209, IX.212. On Medhātithi's technique, Derrett, 'The Concept of Law According to Medhātithi, a pre-Islamic Jurist', Essays, I, 174-97 at 175-6.

2. Viśvarūpa on Yājñ. II.121, II.124, (Trivandrum, 1922), 244-5. S. Sītārāma Śāstrī, ed., (Madras, 1900), 3. J.C. Ghose, The Principles of Hindu Law, (Calcutta, 1917), II, 22. Dh.K.1175b. bhūr-yā pitāmahopāttā nibando vā akṣaya-nidhiḥ anyad eva vā dravyam, tatra pitā-putrayos-tulyaṃ prabhutvaṃ syāt pratyetavyam / It is important to note that Viśvarūpa glosses svāmyam by prabhutvam thus eliminating doubt as to whether any discretion attached to the male issue.

3. i.e. right to income from a capital held on trust or otherwise. On nibandha, supra, 331, n.2.

4. Tr. J.C. Ghose, Hindu Law, II, 5. Alternatively: 'this (i.e. the mastership, ownership) is what is to be understood'.

and son. Firstly, the objectors say the common ownership by father and son contravenes the Vedic injunction of performing sacrifices through one's own wealth and since it would be impossible for a father, having co-ownership with his son, to obey the Vedic injunction, it is to be understood that the Vedas ordained absolute ownership of father in property.

Secondly, if co-ownership of father and son is accepted, the text of Yājñavalkya [1] which leaves the mode of partition to a father's discretion, would appear incongruous.

Lastly, one cannot argue that a sacrifice (at the birth of a son) could be performed with the permission of a son, because a person does not attain legal competence to give permission as soon as he is born.

Viśvarūpa refutes these arguments one by one and establishes his interpretation that ownership is pre-existent to partition. He answers that co-ownership between father and son in ancestral property cannot be an impediment to obeying the Vedic injunction, because a father is free to perform sacrifices with his self-acquired property. In absence of a sufficiency of a father's self-acquired property, he can initiate a partition with his sons in order to procure the necessary property for the performance of a sacrifice. Viśvarūpa considers that a father's absolute discretion regarding modes of partition, as ordained by Yājña-

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1. Yājñ. II. 114, II. 118, Trivandrum, 241. icchayā (at the pleasure); moreover if one takes the 'through the father' at II.123, to mean 'at the father's discretion', is translation which would beg the question.

valkya,[1] is applicable only in respect of self-acquired property.[2]

> As for the objection to the impossibility of performing sacrifices, etc., they can be performed with the self-acquired wealth, or by instituting a partition of a portion then and there. As for the text of smṛti which lays down partition at his pleasure alone, that is applicable to the owner of self-acquired property. Therefore, it is settled that right to partition arises only from possession of ownership.[3]

Yājñavalkya ordains that if a son is born subsequently to a partition made between father and sons or even after a partition made by the sons after their father's death, in the former situation, the after-born son will exclusively succeed to his father's property and in the latter, the partition will be reopened and he will take his shares from his brothers.[4] From the point of view of the

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1. Yājñ.II.114.

2. Viśvarūpa on Yājñ. II. 121 , II.124, Trivandrum, 245; Dh.K. 1175b. yattvanuṣṭhāna-virodhādi codyaṃ, tat svayamārjitenāpi tat-siddherna kiñcit / tadānīm-eva vā vibhajyānuṣṭhānam astu / yā tvicchayā vibhāga-smṛtiḥ sā svayamupātta-dravyavato draṣṭavyā / ataḥ svatve sati vibhāga iti siddham /

3. Tr. Sītārāma Śāstrī, 5.

4. Yājñ.II.122, Sītārāma Śāstrī ed., II. 119; Trivandrum, II.125, J.C. Ghose, Vol.II, 22-3. A controversial text, and there are considerable differences among the commentators regarding the construction of the verse. Vijñāneśvara splits the verse into two according to the two situations of partition, Yājñavalkya-smṛti, (Varanasi, 1967), 277-9, tr. Ghārpure, (Bombay, 1939), II (4), 1023-4. Aparārka agrees with Vijñāneśvara, (Poona, 1904), 729. Śūlapāṇi regards the whole text as applicable to the latter of the two situations, Ghārpure, ibid., 1026.

son's birthright, Viśvarūpa's comment on this verse is very significant. He does not accept the purport of Gautama's [1] text that ownership is created at a partition. He points out that if ownership originates from partition, the son born after a partition would not get any share. But this rule of Yājñavalkya proves that son's right to property does not accrue from partition, but his ownership inheres in the property from his birth (i.e. conception). Viśvarūpa substantiates his view with a logical argument,[2] "If however, right to property were to accrue from partition, then no share will go to the after-born son. But it is here stated that he also has a right to the property".[3]

He emphasises this point by saying:[4] "Therefore, it has been said that only where there previously exists ownership, there is partition".[5]

Viśvarūpa accepts the innate right of a son in ancestral grandparental property, but he does not explicitly say that a son can demand partition during the lifetime of his father. From his comment on two verses [6] when read with his comment on Yājñ. II.121, it appears that the sons could not demand a partition of ancestral property against the will of their father, but at the same time, when

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1. Gautama X.38-42. Quoted at above p.404, n.2.
2. Viśvarūpa on Yājñ. II.119, Trivandrum, II.125 at 245. yadi hi vibhāgena svatva-sambandho 'bhaviṣyat, tato vibhakta-jasya dravya-sambandho nopapatsyata / asmin punar astyeva tasyāpi dravya-sambandhaḥ /
3. Tr. Sītārāma Śāstrī, 3.
4. Viśvarūpa on Yājñ. II.119, Trivandrum, II.125 at 245. tasmāt svatve satyeva ity-uktam /
5. Tr. Sītārāma Śāstrī, 3.
6. Yājñ. II. 114, II.116.

a father makes a division of ancestral property of his own accord he had to make an equal distribution among his sons. Only with regard to his self-acquired property did a father have absolute discretion regarding the time and mode of distribution.[1] "The meaning is that the father shall not be compelled to make a partition or to make it in a certain manner by his sons at their pleasure".[2]

Again on Yājñ.II.116, Viśvarūpa says that by authority of smṛti texts, a father's decision is final with regard to the allotment of shares to the sons.[3] "The meaning is that that partition alone which is affected by the father among the sons is declared to be lawful".[4]

But this general statement of the father's absolute discretion has been qualified by Viśvarūpa and should be taken as only applicable to self-acquired property of the father.[5] "As for the text of smṛti which lays down partition at his pleasure alone, that is applicable to the owner of self-acquired property".[6]

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1. Viśvarūpa on Yājñ.II.114, Trivandrum, II.118 at 242; Dh.K.1168a. ... na putrecchayā / na putraiḥ pitā vibhāgaṃ viśeṣa-niyamaṃ vā kārayitavya ityarthaḥ /

2. Tr. Sītārāma Śāstrī, I. Also see Jhā, Vivādacintāmaṇi, (Baroda, 1942), 174, n. Also J.C. Ghose, Hindu Law, II, 1.

3. Viśvarūpa on Yājñ. II.116, Trivandrum, II, 120 at 242; Dh.K.1169b, vibhāga-dharmaḥ pitrā yaḥ kṛtaḥ, sa eva smrto vihita ity-arthaḥ /

4. Tr. Sītārāma Śāstrī, 2.

5. Viśvarūpa on Yājñ. II, 121, Trivandrum, II, 124 at 245; Dh.K.1175b. yātv icchayā vibhāga-smṛtiḥ sā svayam-upātta-dravyavato draṣṭavyā /

6. Tr. Sītārāma Śāstrī, 5. Kāṇe's statement that Viśvarūpa allows the father unrestricted freedom of distribution of property among his sons during his lifetime is not wholly correct. Kāṇe states it as a general rule of Viśvarūpa's opinion on partition in all categories of property. At this stage, he seems to have overlooked Viśvarūpua on Yājñ.II.121, HD, I, 1,560; but see Hd, III, 557, n.1040, where he cites the comment which he overlooked at VolI, as proof of son's birthright.

Viśvarūpa as a commentator remained close to Yājñavalkya, and in spite of his unambiguous acceptance of son's ownership with his father in ancestral property, he did not elaborate the incidents of such ownership, which makes his work a little less striking.

Despite this seeming deficiency, the most pioneering contribution of Viśvarūpa as a jurist was (apparently) his declaration that wealth is one of the four objects of human endeavour by which he means that the object of wealth is also worldly and, not exclusively, the performance of sacrifice.[1]

> As wealth is an object of human purpose. The Texts that ordain that wealth should be taken away, when sacrifices like the Agnihotra are not performed, are meant as warning to wrongdoers and not as laying down that the only object of wealth is the perfomance of sacrifices. 2

He used this interpretation to establish that all brothers should get equal shares in a partition, irrespective of their standard of Vedic learning or zeal for performing the Agnihotra.[3] This implies that a son gets his share not as a consideration for performing sacrifices or as a reward of his Vedic learning, but as a satisfaction of his worldly status as a son which, in turn, is the crystallisation of a pre-existing right from his birth.

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1. Viśvarūpa on Yājñ.II.117, Trivandrum, II, 121 at 243. J.C. Ghose, Hindu Law, II,21. tatru puruṣārthatvād dravyasyāyuktam evetī gamyate / yānī tv agnihotradyākaraṇe dravyāpaharaṇādī-vacanānī, tāny anyāyavarti-puruṣa-praśāsanārthānī, na tu dravyasya kratvarthatā-pratīpādakānī /

2. Tr. J.C. Ghose, Hindu Law, II, 3.

3. Viśvarūpa on Yājñ. II.117, Trivandrum, II, 121.

Thus, Viśvarūpa, by importing the doctrine of Pūrvamīmāṃsā [1] opened a new vista of juridical interpretation and by his statement that the purpose of wealth could be worldly, he anticipated Vijñāneśvara who developed the worldly concept of property for justification of his theory of the son's birthright.[2]

III. Aparārka

When Aparārka [3] commented on the Yājñavalkya-smṛti, the birthright of a son, whether by the influence of local customs or by that of commentatorial literature [4] had become well-established,[5] at least in property acquired by the paternal grandfather. Aparārka went so far as to say that not only sons but also daughters [6] acquired rights in the property of their fathers from the

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1. Kāṇe, HD, I, 255-6.

2. See Derrett, RLSI, 131-40.

3. Aparārka (to be dated A.D. 1115 to 1130) was a contemporary of Vijñāneśvara. The work was compiled at the order of Aparāditya-deva I, (A.D.1110-1140) of the Śilāhāra family of the Koṅkana, Deccan, K.V.R. Aiyangar, ed., Lakṣmīdhara, Kṛtya-Kalpataru, Dāna-kāṇḍa, Introd., 21, 24, 45.

4. Kāṇe, HD, I, 328-34. Aiyangar and Kāṇe claim that Aparārka had knowledge of Vijñāneśvara's work, Aiyangar, ibid., 21, and Kāṇe, ibid., 330-1. But their claim has not been conclusively proved, Derrett, 'A New Light on the Mitākṣarā as a Legal Authority', JIH, 30 (1952) 49-58; also, Dharmaśāstra and Juridical Literature, in A History of Indian Literature, (Wiesbaden, 1973), IV, 50.

5. The work being compiled at the order of the King was obviously followed in Koṅkana but it had great influence in Kashmir as well, J.C. Ghose, Hindu Law, II, Introd., vii.

6. Derrett, JIH, 30 (1952), 50; also 'The Relative Antiquity of the Mitaksara and the Dayabhaga', MLJ (1952), 1-9 at 2.

moment of birth.[1] "It should be understood that, in the case of daughters, ownership in the father's wealth arises by birth itself, as in the case of a son".[2]

But this general remark on birthright in the property of a father should not be construed as all-pervading. His comment on Yājñ. II.121, clarifies that it is only in ancestral paternal, grandparental property that son's ownership is co-extensive with his father's. Moreover, where Viśvarūpa is non-committal, Aparārka gives full effect to the son's birthright in paternal grandparental property by his unambiguous utterance that a son could demand a partition of such property even against the will of his father and the father was obliged to make an equal division among his sons.[3]

> In the grandfather's property, the grandson has an ownership equal to that of his father. Therefore, even if not willing to make a partition, the father should make a partition of his father's wealth at the desire of his (own) son. The division should be an equal one, and not an unequal one as in the case of his self-acquired property. 4

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1. Aparārka on Yājñ. II. 135, (Poona, 1904), 746. duhitṛṇāṃ putravaj-janmanaiva pitṛ-dhane svāmī-bhāva-siddhir iti veditavyam /

2. Tr. Śrīnīvāsa Aiyar, Aparārka on Yājñ. (Madras, 1911), 44. Cp. Bhāruci, Sarasvatī-vilāsa, ¶402 and Vijñāneśvara on Yājñ. II.114, who admitted birthright only of the son.

3. Aparārka on Yājñ. II, 121 (Poona, 1904), 728. pitāmaha-dhane pautrasya svapitrā tulyaṃ svāmyaṃ, tena vibhāgam anicchann api pitā sva-pitṛ-dhanaṃ putravibhāgecchayā vibhajet / samaś ca vibhāgo na svārjita-dhanavad-viṣamaḥ kāryaḥ /

4. Tr. Śrīnivāsa Aiyar, (Madras, 1911), 16.

According to Aparārka, partition cannot be the origin of ownership, because it merely apportions into particular shares the property which is owned by father and son in common (sādhāraṇam).[1] He tackled the śāstric purport of Gautama's text on partition as one of the approved modes of acquisition of ownership, by accepting it in its very narrow and mathematical connotation. Aparārka considers that partition simply applies to the fact of settling individual ownership in a specific portion of the property out of the joint stock.[2]

On the relationship of ownership with partition, Aparārka says:[3]

> The origin of ownership is not by partition; because (in that case), the father will not be the owner before partition; while partition settles the ownership of each owner in particular portions of the common properties that belong to several owners, it does not create new ownership. 4

Aparārka consistently adheres to the view that ownership pre-exists partition, and ownership in paternal grandparental property being already created at birth, cannot be created again at partition. He considers that it is

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1. sādhāraṇam = sa + ādhāra; ā + 'dhṛ' (dharati) = to hold, keep, support. sā dhāra literally means 'having or resting on the same support'. Sādhāraṇam generally means common property in partnership, business or joint property of the brothers after father's death. But Vijñāneśvara and Aparārka used it in a technical sense as the common property of father and son. Sontheimer, Dāya, 52-63; also EHJF, 91-7. Derrett, JIH, 30 (1952), 43-4; ZVR 64 (1962), 15-130.

2. Aparārka's definition of vibhāga (partition) has a striking resemblance with that of the Mitākṣarā, I.i.4. See Derrett, JIH, 30 (1952), 50.

3. Aparārka on Yājñ.II, 121 (Poona, 1904), 729. na ca saṃvibhāgāt svāmyotpattir, yena prāg-vibhā gat-pita na svami syat / saṃvibhago hi sādharaṇa-dhanānaṃ svāmināme ekaikatra bhāge svāmina ekaikasya svāmyaṃ vyavasthāpayati, nāpūrvam utpādayati /

4. Tr. Śrīnivāsa Aiyar, 18.

fallacious to accept that partition creates ownership. To have the right to demand partition one must have ownership in the property concerned, and from Aparārka's view, it emerges that a son's pre-partition ownership exists in the property of the paternal grandfather only. In the self-acquired property of the father, he does not speak of any such pre-existing right on the son's part.

He argues that a forced division of father's self-acquired property by a son would create ownership, if partition had been the origin of ownership. But in the absence of a pre-existing right, the son would not acquire ownership even though he might divide and possess his father's property by force.[1] "If partition is the cause of ownership, it will create it in the case e.g. of a compulsory partition".[2]

With regard to the objection that a father having common ownership with his son would not be able to obey the Vedic injunction of performing sacrifices with one's own wealth, Aparārka put forward three solutions. He says that a father can perform the Agnihotra either by permission of his son, or by separating and setting aside the share of his son, or by acquisition of other wealth.[3]

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1. Aparārka on Yājñ. II, 121, (Poona, 1904), 729. yadi ca vibhāgaḥ svāmitve hetus tadā haṭhādinā kriyamāno'pi taj janayet /

2. Tr. Śrīnivāsa Aiyar, 18.

3. Aparārka on Yājñ. II, 121, (Poona, 1904), 729. na hi jāta-putrasya dhane svāmyam apaiti, yena sva-dhana-sādhyārthāḥ śrutayo virudhyeran / yady-api tad-dhanam svasya putrasya ca sādhāraṇaṃ tathāpi putrānumatyā putra-vibhāga-pṛthak-karaṇena dravyāntarārjanena vā śakyata evāgnihotrādi kartum /

> The ownership of the father is not lost by the birth of a son by reason of the inconsistency (that will arise) to the srutis laying down the objects (ceremonies like Agnyādhāna etc.) that should be accomplished by one's wealth. Though that wealth (grandfather's wealth) is common to himself and his son, yet the performance of Agnihotra, etc. if possible either by permission of the son or by making the son's share separate or by acquisition of other wealth. 1

Aparārka contends that son's innate right in ancestral immovable property [2] cannot be destroyed by a supervening loss or usurpation. So when a father recovers ancestral immovable property, which was lost, without the consent of the co-owners, he is not entitled to the whole as his self-acquisition. A father recovers such property on behalf of all co-owners and in absence of their consent, he must divide it among his sons and as a reward of his exertion, he gets one-fourth as an extra share.[3]

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1. Tr. Aiyar, ibid. This agrees closely with Viśvarūpa's ideas, supra, Also on Aparārka's view, see Derrett, MLJ (1952), 8.

2. Also on Yājñ.II.175, Aparārka reiterates that a father cannot give away enti entire property (ancestral and particularly, immovable) when there are sons. Derrett, JIH, 30 (1952), 51.

3. Aparārka on Yājñ.II. 119, (Poona, 1904), 724. yat-pūrva-puruṣa-kramāyātaṃ kṣetrārāmādikaṃ dravyaṃ katham-api pareṇāpahṛtaṃ yo dāyādānumat yā'-bhyuddharet tad asau dāyādebhyo na dadyāt / yat-punar-dāyādānumatim-antareṇoddhṛtaṃ tasya caturtham-aṃśam-uddhartā gṛhṇīyāt / śeṣam uddhārakeṇa saha sarve vibhajeran /

> That which is descended from ancestors downwards, such as lands, gardens, etc., but which had been taken away by strangers and received (rather 'recovered') by one with the permission of coparceners need not be given to them (the coparceners). Of that which is recovered without their permission, the acquirer should take a fourth. The rest, all, including the redeeemer, shall share. 1

Aparārka attaches great importance to ancestral property and especially to immovables and to support his interpretation, he goes beyond the purport of Yājñavalkya's text (II.119) and cites Ṛṣyaśṛṅga as his authority.[2] "If one alone redeems property that has been lost previously that (property) the rest shall share proportionately after giving the redeemer a fourth share".[3]

At another place,[4] on this point, while interpreting Bṛhaspati's text,[5] Aparārka takes the majority view on ancestral property recovered by a father, by declaring it as purely self-acquired and endows exclusive ownership on the father.[6]

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1. Tr. Aiyar, 11. Jīmūtavāhana's allotment of shares in this situation is the same as Aparārka's, but he does not deal with the situation where permission has been given prior to the recovery, Dā.bhā. VI.ii. 38-9.

2. Cited by Aparārka on Yājñ. II, 119 (Poona, 1904), 724. pūrva-naṣṭāṃ tu yo bhūmim-ekaś cābhyuddharet kramāt / yathāṃśaṃ tu labhante 'nye dattvāṃśaṃ tu turīyakam //

3. Tr. Aiyar, 11.

4. Aparārka on Yājñ. II, 121, (Poona, 1904), 728.

5. paitāmahaṃ hṛtam pitrā ..., cited on Yājñ. II, 121, (Poona, 1904), 728.

6. tatra pitur-eva svāmyaṃ na putrāṇām / Aparārka, (Poona, 1904), 728.

But the use of the two words, dāyādānumatyā and dāyādānumatī,[1] reveal that Aparārka was talking about the consent of the sons.[2] So by introducing this element of consent, Aparārka establishes that a son's right in ancestral property is inherent from his birth.

Like Viśvarūpa,[3] Aparārka looks at self-acquired property of the father as a distinct category from ancestral property. Medhātithi also accepted the division of property into ancestral and self-acquired,[4] but with regard to the mutual rights of father and son, he held both categories to be father's property until the division of such property by the father among his sons, or devolution on the sons at their father's decease. Unlike Medhātithi, in Aparārka we find more indivualism of a son so far as his rights in the family property are concerned. According to Viśvarūpa, a father has absolute power to determine the time and mode of partition of his self-acquired property,[5] but in Aparārka's opinion, a father's power depends much on the nature of its acquisition. In self-acquired property, Aparārka restricts co-ownership to a very narrow limit. A son has no

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1. Aparārka on Yājñ. II, 119, (Poona, 1904), 724.

2. Aparārka equated dāya to riktha, dāyo riktham, on Yājñ. I.51, which he explains as property of the father, Aparārka, 77. Again on Yājñ. III.227, he says dāyam pitrordhanam, Aparārka, 1046. So dāyādanumatyā would mean consent of the sons. dāyādaḥ means putraḥ, Halāyudha, (Varanasi, 1958), 352. According to Aparārka, dāyāda includes also daughters, Derrett, JIH, 30 (1952), 50.

3. Viśvarūpa on Yājñ. II.121.

4. Medhātithi on Manu, IX.209.

5. Viśvarūpa on Yājñ. II.121.

ownership in father's self-acquired property if such property was not acquired by the help of the property of the grandfather.[1]

By implication Aparārka extends the son's birthright to self-acquired property of a father, proportionate to the help incurred by a father from grandfather's property in the accumulation of his self-acquisition.[2]

A father could make an unequal division of his self-acquisitions among his sons, but such division should not be considered as the manifestation of a father's absolute power but it was so because of <u>śāstric</u> rules.[3] Aparārka explains Nārada's text[4] on father's power of partition:[5] "The rule of preference is not by reason of the father's free agency (or 'discretion'), but because of the śāstra."[6]

So, a father who was more or less a patriarch in Medhātithi emerged as a manager in Aparārka. Moreover, while living jointly with their father,

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1. Aparārka on Yājñ. II, 121, (Poona, 1904), 728. tr. Aiyar, 16.

2. Aparārka vaguely anticipated the line of thought put forward by Derrett, 'Acquisition of Joint Family Property through a Coparcener: Let Sastric and Equity Principles Join Hands', <u>Bombay LRJ</u>, September, (1969), 87-93, especially at 77 and ns.9 and 10 thereof. <u>Also Critique</u>, 73-4, 7-10 at 74. More clearly in 'Acquisition of Joint Family Property and Recent Decision of the Supreme Court', S.C.W.R., XIII, 24, J . (1969), 29-35, n.6 at 32-3.

3. Aparārka on Yājñ. II.114, (Poona, 1904), 717. Also Jhā, ed., <u>Vivādacintāmaṇi,</u> (Baroda, 1942), n. at 174.

4. Cited by Aparārka on Yājñ.II. 114, (Poona, 1904), 717, pitraiva tu vibhaktā ye ...

5. Aparārka on Yājñ. II, 114, (Poona, 1904), 717. na hy uddhāre pituḥ prabhutvaṃ kiṃ tu śāstrasya /

6. Tr. Aiyar, ibid.

the sons could have property of their own if it was acquired without the help of (i.e. without their being currently maintained by) the paternal estate and the sons were not obliged to share it with their father. Aparārka squeezes self-acquisition and its impartibility to a narrow limit which betrays a great Southern influence in his work.[1] "If the brothers had acquired wealth jointly (i.e. by 'joint enterprise')" without detriment to the paternal estate, then even if the father be living, the brothers alone are the participators in the wealth".[2]

In Aparārka, we come across an elementary family, where an individual member, especially father or son, may have ownership in three types of property, either jointly or severally, at the same time. Firstly, the common ownership of father and son in paternal grandfather's property turns it into a common fund. Secondly, the self-acquired property, if acquired through the help of ancestral property, also constitutes a common fund, the extent of ownership of which between a father and a son, varying proportionately to the detriment (or help) of the joint stock. Thirdly, there may be purely self-

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1. Aparārka on Yājñ. II. 135, (Poona, 1904), 743. tatrāpi caiṣā vyavasthā yadi tad-bhrātṛbhiḥ sva pitṛdhanānupaghātena saṃbhūya samutthānena dhanam arjitam,tadā pitroḥ sadbhāve'pi bhrātara eva dhana-grāhiṇaḥ / On Yājñ.II.118, (Poona, 1904), 723, Aparārka defines anupaghātena (without detriment) as anupajīvanena (without living off it), see Derret, JIH 30 (1952), 50.

2. Tr. Aiyar, 38. The context in which this question is dealt with is the right of the widow, whose right to the property held jointly by her husband and brothers is expressly excluded.

acquired property, acquired either by a son or a father without the help of the joint ancestral property. Though, in this way, ownership of family property became diffused and computation of shares, at a partition, difficult, yet a three-tier system of property owning obtained, according to the origin and nature of the relevant acquisition.

The situation was undoubtedly complex because of the simultaneous co-extensive interests of the family members in the common property,[1] but Aparārka saved the structure of family in the South by a synthesis. On the one hand, he saw the father as a manager of a joint concern, but on the other, he continued the son's non-independence[2] during the lifetime of his father. Here, he also made a compromise between son's birthright and father's pre-dominant interest in the family.

Like Vijñāneśvara,[3] Aparārka did not make much use of the mīmāṃsā doctrine to establish son's co-ownership with the father. He brought together different smṛti texts and commented on them. By the force of his argument, he pointed out the paradox in Gautama's text, and showed that partition could not be the origin of ownership. Here, indirectly, he was shifting towards the

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1. G.D. Sontheimer, The Evolution of Hindu Joint Family, London University Ph.D. Thesis, unpublished, (1965), 215.

2. Unseparated son's asvātantrya admitted by Aparārka on Yājñ. II. 114, (Poona, 1904), 718.

3. Mitā, Colebrooke, I.i.8-10.

concept that ownership could originate by means outside the modes prescribed by the *śāstra*. It is apparent that he was conversant with the rules of *mīmāṃsā* and did not agree with the orthodox view that property was only for sacrifices. On this point, he is closer to Viśvarūpa [1] than to Vijñāneśvara, because like Vijñāneśvara, he does not attempt to establish that property is temporal. Though in a different context,[2] Aparārka simply doubts the authority of the proposition that all kinds of wealth are for the purpose of sacrifices.[3] "For there is no authority (for the position) that the production of all kinds of wealth is for the purpose of sacrifices".[4]

Whatever might be the line of argument, it remains to be said that in Aparārka, a son's birthright in the property of the grandfather is well entrenched, and a father's absolute ownership is confined only to those self-acquisitions which are acquired without any detriment to the grandparental estate.

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1. Supra, 476-7.

2. On Yājñ. II. 135. Here Aparārka refutes the argument that a wife whose husband is deceased without leaving a son cannot take wealth since wealth is for sacrifices, and a woman is not fit for performing sacrifices.

3. Aparārka on Yājñ. II, 135, (Poona, 1904), 743, sarvasyā eva dhanotpatter yajñārthatve pramāṇābhāvāt /

4. Tr. Aiyar, 39.

IV. Son's Right by Birth in the Mitākṣarā

a. Introduction

The Mitākṣarā,[1] Vijñāneśvara's comprehensive commentary on the Yājñavalkya-smṛti, was published between 1120 and 1125 A.D.[2] The pre-Mitākṣarā age in the Deccan[3] is marked by its continuing assimilation of Āryan influence on the way of life of the local people. Thus, the juridical framework of the South could not stay aloof from this transition; but, while the Āryan notion of jurisprudence was beginning to take effect, the dharamaśāstras were

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1. Means 'measured in its syllables'. Purports to be an abridgement of Viśvarūpa's commentary, the Bālakrīḍā. It is also described as Ṛjumitākṣarā or Pramitākṣarā, Kāṇe, HD, I, 287.

2. Kāṇe thought that the Mitākṣarā was written between 1070 and 1110 A.D., HD, I, 290. K.V.R. Aiyangar disagrees with Kāne, see Kṛtyakalpataru, Dānakāṇḍa, (Baroda, 1941), introd., 31, 34-8, especially 35 and n.2 at 38, where he rightly explains Vijñāneśvara's panegyric. There are evidences that the Mitākṣarā was unquestionably published between 1120 and 1125 A.D., see colophon to the Mitākṣarā which points to the period of the greatest prosperity of the Calukya emperor, Vikramāditya VI of Kalyāṇa (formerly in the Nizam's Dominions, now in Mahārastra) who reigned between 1076 and 1127 A.D., Derrett, 'The Relative Antiquity of the Mitākṣarā and the Dāyabhāga', M.L.J., 1952, Vol.2, Journal Sect.9-14; also 'A New Light on the Mitākṣarā as a Legal Authority', JIH, Vol.30 (1952), 35-55 at 36. Also his Dharmaśāstra and Juridical Literature, A History of Indian Literature, (Wiesbaden, 1973), 50 and n.322 thereof.

3. That Vijñāneśvara's home was in South India is undoubted, see the 4th verse at the end of the Mitākṣarā, where he gives his personal history, Kāne, HD, I, 288-9. Lingat, CLI, 113. Mark K.P. Jayaswal's glaring mistake in supposing that the author of the Mitākṣarā was from Western India, TLL, 1917, Manu and Yājñavalkya, (Calcutta, 1930), 264, again at 267.

merely superimposed on traditional local customs. As a result, in many cases, the rules of *vyavahāra* and such customs existed concurrently, much to the confusion of the people as well as of the judges. Moreover, by the beginning of the twelfth century, this dichotomy had (if we may safely judge by the outcome) led to a demand that the *smṛti* rules be interpreted in the light of the prevailing customs and popular usages.

Vijñāneśvara, the *yogin* [1] (ascetic) and (it has been guessed) at one time a judge,[2] with his profound scholarship and practical knowledge of the law, was best suited for bringing about a fusion between *vyavahāra* and custom, and reinterpreting the *dharmaśāstras* in their ecological surroundings.[3] This was done, not with a sense of revulsion either from the *śāstra* or towards custom, but with manipulation and resolution of the two.

Whether or not he was actually ever appointed a judge, Vijñāneśvara probably frequently encountered legal problems between father and son, and he most likely observed that strict adherence to *śāstric* interpretation of the northern commentators, like Medhātithi, might amount to a denial of justice to the parties, if in practice these followed their own usages and their rights had mainly fallen to be determined according to popular custom.

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1. Kāṇe, HD, I, 288. Lingat, CLI, 113.

2. Derrett, JIH, 30 (1952), 37, n.6. In an extant letter to Derrett, Kāṇe denies any recognisable trace of Vijñāneśvara's held any judicial appointment.

3. Derrett, 'Vijñāneśvara and the Future of Hindu Law', *Allahabad University Law Journal*, 2 (1967), 4-11.

b. Birthright: Vijñāneśvara's contribution

Vijñāneśvara gave a new impetus to the concept of the son's birthright and what was a passing reference in Medhātithi,[1] or an obscure analysis in the Bālakrīḍā,[2] found bold expression in the Mitākṣarā and became the linchpin of proprietary rights in the joint family, especially as between father and son. He enlivened the customs and popular practices of property ownership by the force of the śāstra and derived a rule regarding a son's birthright which was as such, very probably, beyond the scope and ordination of the smṛtis.[3] Though some smṛtis (as we have seen) espoused the doctrine of janmasvatvavāda,[4] yet its range was not so wide as enunciated by Vijñāneśvara. Therefore, because of Vijñāneśvara's handling of the smṛti texts, many of the local customs of the South were endowed with the force of the śāstra (were made, i.e. śāstrically viable) and, as a result, on the one hand the aspirations of the people found a juridical expression, and on the other, the task of a judicial tribunal in the South must have become easier.[5]

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1. Medhātithi on Manu, IX, 209, Jhā, (Calcutta, 1939), II, 302; supra, 458-9.

2. Viśvarūpa on Yājñ. II. 121; supra, 471.

3. Derrett, Allahabad University Law Journal, 2 (1967), 9.

4. Texts discussed supra, 331-33.

5. The Mitākṣarā was accepted as an authority in South India but, at the time of or immediately after its publication, it was not an authority in Northern India: Sir Gaṅgānātha Jhā, Hindu Law in its Sources, (Allahabad, 1930), I, 17. This was natural.

Vijñāneśvara was not the originator of the concept of the son's birthright, but it is appropriate to call him the grand compiler of a school of thought which was running parallel to the patriarchal notion of society and śāstric origin of property.[1] His compilation was not a blind imitation of a particular school of ideas, and he was conscious of the fact that mere imitation would not serve his purpose. He wanted to formulate legal rules to suit the exigencies of his time and the area in which he lived, and in order to achieve this aim, apart from resorting to other methods, he became selective in his choice of definition of the various legal concepts.

c. dāya

(i) Definition

The definition of dāya which Vijñāneśvara used was not his own.[2] He adopted it because it agreed with his ideas concerning a son's birthright and the common ownership of property among the dāyādas. To suit his purpose and to uphold the idea of multiple ownership in property, he defines dāya as property

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1. Kāṇe, HD, III, 557. B.N. Sampath, 'The Joint Hindu Family Retrospect and Propsect', Banaras Law Journal, I (1965), 1, 33-77 at 37. IS. Pawate goes so far as to say that the Mitākṣarā theory is older than the śāstric theory of property, Dāya-vibhāga, (Dharwar, 1945), Preface, ii-vi. Mayne, Hindu Law and Usage, 10th ed., 330.

2. Asahāya's definition of dāya was similar to that of Vijñāneśvara, Sarasvatīvilāsa, ed., Foulkes, (London, 1881), 5. Also see Derrett, JIH, 30 (1952), 46, n.35.

which becomes the sva of another merely by reason of relationship with the owner.[1] "It is called dāya[2] when it is property which becomes the sva of another merely by reason of relationship with the owner".[3]

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1. Mitākṣarā, prooemium to Yājñ. II. 114, Dh.K. 1132a. yad dhanaṃ svāmi-saṃbandhād eva nimittād anyasya svaṃ bhavati tad ucyate /

2. dāya is rendered by Colebrooke, (Mitā, I.i.2) as 'heritage', but this is not the correct rendering; Golāp Śāstrī, Hindu Law, 4th ed., 200. It is better to keep it as dāya, which is derived from the root, dā = to cut, divide, mow, and it implies the share in the property of a deceased or living man. While rendering dāya as 'heritage', probably Colebrooke had in mind the legal maxim of Roman Law of the classical period - 'hereditas est successionis in universum ius quod defunctus habuit'. The Brāhamaṇa literature tends to show that dāya is derived from the root dā and supports the Mitākṣarā concept of dāya, Tai. Saṃ. 3.1.9.4-6; Pañ. Br. 16.4.3-4; Jai.Br.3.156; Ai.Br.5.14.2ff. Kaṇe, HD, III, 546, wrongly followed Jīmūtavāhana's (Dā.bhā.I.4-5) faulty understanding of the word dāya, where he took the meaning of the root dā as 'to give'. A.B. Shinde, despite his scholarly discussion of the topic, has blindly swallowed Kāṇe's following of Jīmūtavāhana, 'What is dāya?', ABORI, 53 (1972), 236. There is no mention of dāya at Gautama, 10.39 but his riktha may include dāya. Riktha is derived from ric = 'to leave', literally means 'what is left', i.e. the property over which the son's power has arisen after the cecession of father's power, Sontheimer, EHJF, L.U. Ph.D. thesis, 1965, 63. Mention of dāya in Manu, X.115 implies a share in the estate of a deceased or a living man. Pawate doubts the sanskrit origin of the word dāya and stretches his imagination to the Dravidian root Dāñ = 'stretch beyond'. The use of the word in the Ṛg Veda, 10.114, in Brahmaṇa literature and in the smṛtis makes Pawate's claim weak, if not improbable. For different definitions of daya and a detailed discussion, see Sontheimer, The Concept of Dāya, London University Diploma in Law, thesis, 1962, 12-3; also his EJHF, ibid., 213-6. Derrett, ZVR, 64 (1962), 53.

3. Tr. Derrett, ibid., 54.

(ii) Unobstructed (apratibandha) and obstructed (sapratibandha) dāya

The dāyādas, according to their proximity or remoteness of relationship to the owner, form two concentric circles of relations which are comprised out of two distinct types of adhikāras (rights) in the property of (dhana).[1] To explain these two circules, Vijñāneśvara adopted the terminology of older commentators.[2] After defining the term dāya, Vijñāneśvara distinguishes and illustrates the two types of dāya.[3]

> It is of two sorts: unobstructed (apratibandha) or liable to obstruction (sapratibandha). The wealth of the father or of the paternal grandfather becomes the property of his sons or of his grandsons, in right of their being his sons or grandsons: and that is an inheritance not liable to obstruction. But property devolves on parents (or uncles), brothers and the rest, upon the demise of the owner, if there be no male issue: and thus the actual existence of a son and the survival of the owner are impediments to the succession; and on their ceasing, the property devolves (on the successor) in right of his being uncle or brother. This is an inheritance subject to obstruction.[4]

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1. Derrett, ibid., 55.

2. Derrett, JIH, Vol.30 (1952), n.35 at 46. He might have improved on Bhāruci's; see Sarasvatī-vilāsa, ed. Foulkes, §403.

3. On Yājñ. II.114. The variant readings do not affect our discussion. sa ca dvi-vidhaḥ / apratibandhaḥ sapratibandhaś ca / tatra putrāṇāṃ pautrāṇāṃ ca putratvena pautratvena ca pitṛ-dhanaṃ pitāmaha-dhanaṃ ca svaṃ bhavatīty-apratibandho dāyaḥ / pitṛ(vya)-bhrātrādīnāṃ tu putrābhāve svāmy-abhāve ca svaṃ bhavatīti putra-sadbhāvaḥ svāmī-sadbhāvaś ca pratibandhas, tad-abhāve pitṛ(vya)tvena bhrātṛtvena ca svaṃ bhavatīti sapratibandho dāyaḥ /

4. Tr. Colebrooke, I.i.3. Ghārpure renders apratibandha as 'unobstructible' and sapratibandha as 'obstructible'; same rendering by Mayne, Hindu Law, §274. Pawate pointed out that the rendering of both Colebrooke and Ghārpure were opposed to the rules of Sanskrit grammar and vocabulary and did not convey the sense of dāya as used in the Mitākṣarā. Pawate renders the two words respectively

/Continued on next page:

The sapratibandha-dāyādas comprise the outer circle and their coming into ownership is dependent on a possibility namely, the extinction of the dāyādas who form the inner circle.[1] An understanding of sapratibandha-dāya is not germane to our purpose, but an analysis of its nature and incidents is indirectly helpful to understand apratibandha-dāya, with which we are directly concerned. Both the types of dāya become property of the dāyādas, 'merely by reason of relationship with the owner',[2] but the basic and fundamental difference between the two is this: in the case of apratibandha-dāyādas, their birth puts them into the position of co-owners, but in the case of sapratibandha-dāyādas, birth has no such significance except in establishing a relationship with the owner. Of course, we should not overlook the point that even in the case of sapratibandha-dāyādas, by birth they acquire a subsisting right in the dāya, though this right is subject to obstructions and remains dormant so long as the apratibandha-dāyādas

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Note 4 - p.493 - continued:

as 'existing with no obstruction' and 'existing with one or more obstruction', Dāya-vibhāga, (Dharwar, 1945), 43-55. The sapratibandha/apratibandha distinction is found in no smṛti. Mention of this commentatorial distinction (from the Mitākṣarā onwards, i.e. A.D. 1125 +) is found in the Jaina legal work Arhannīti, v.2, Derrett, 'Hemācārya's Arhannīti: An Original Jaina Juridical Work of the Middle Ages', ABORI, 57 (1976) 1-4: 1-21 at 21, n.90.

1. Cp. It could be vaguely assumed that the oldest Germanic rule of heritable succession rested upon a distinction between a narrower and a wider circle of heirs. But it is only with difficulty that evidence can be drawn from the sources for an answer to the question according to what rule the more remote kindred were called to the inheritance, Huebner, A History of Germanic Private Law, op.cit., 722.

2. Mitā, Prooemium to Yājñ.II, 114, tr. Derrett, ZVR 64 (1962), 54. Also Colebrooke, I.i.2.

exist. But the right of a sapratibandha-dāyāda should not be confused with a mere expectancy, as Vijñāneśvara expounds it, it is a subsisting adhikāra 'but from the practical point of view it is purely contingent upon the death etc., of the owner without leaving any heirs of a nearer category surviving him'.[1]

To come into ownership a sapratibandha-dāyāda has to be freed from two obstacles (pratibandha) namely, the life of the particular owner and also the survival of those who stand as apratibandha-dāyādas in relation to that particular owner.

Pawate tried to explain pratibandha by showing the similarity between the predicament of a mortgagor and sapratibandha-dāyāda.[2] But Pawate failed to comprehend that the pratibandha (obstruction) in a mortgage and in sapratibandha-dāya were not of the same type. A mortgage is a pratibandha in a very limited sense and nothing prevents the mortgagor from making a gift or sale of the property subject to the mortgage.[3] Moreover, in all types of mortgage the mortgagor had the right of redemption unless such right was surrendered by an agreement.[4]

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1. Derrett, ZVR, 64 (1962), 55.

2. Dāya-vibhāga, (Dharwar, 1945), 27-42.

3. Derrett, ibid., 82 and n.270a thereof, second mortgage was not allowed only in mortgages of landed property, ibid., 84. P.N. Sen, TLL, 1909, The General Principles of Hindu Jurisprudence, (Calcutta, 1918), 201-2.

4. Yājñ.II.62; Bṛ. X.66; Kāty. 178-80. See L. Sternbach,* Juridical Studies in Ancient Indian Law, (Delhi, 1965), Pt.1,109-52;P.N.Sen/Opinions of pundits in their vyavasthā, Macnaghten, Hindu Law, II, 1809, (case 17 on sale), 307. On the rules of equity of redemption, see Megarry and Wade, The Law of Real Property, (London, 1966), 884-6, 931-3; also R.W. Turner, The Equity of Redemption, (Cambridge, 1931).

* GPHJ, 193.

Pawate's analogy is valid only in cases where the morgagor contracts out his power of exercising his right of ownership, such as his right to redeem, sell or mortgage the property for the second or subsequent time. In the case of sapratibandha-dāya, the pratibandha is removed by operation of law, but in the case of mortgage, the pratibandha [1] is created or removed by act of parties.

The adhikāra of an apratibandha-dāyāda is vested from the moment of his birth and unlike the case of a sapratibandha-dāyāda, the vesting does not depend on the extinction of any impediment.[2] The sons, grandsons, and other agnatic descendants, being apratibandha-dāyādas, occupy the inner circle and this categorisation into two types of dāyādas becomes the bedrock of Vijñāneśvara's theory of the son's right by birth. Vijñāneśvara's definition of dāya limits the acquisition of property 'vested in possession' by birth to a limited category of relations, namely, the son and the grandson.[3]

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1. pratibandha should be compared with sambandha. sambandha = claim and pratibandha (apart from mortgage analogy pointed out by Pawate) implies negation of claim, non-claim, so 'bar'. At Epigraphica Carnatica VI Kadūr 152 (? 1235 A.D.), a lady renounces claims on land or its income. The word 'sambandha' occurs twice. "I have no claim on the land ..." At a mahazar (1611 A.D.) pointed at V.K. Rajavade, Marāthyarīcyā Itihāsacīṃ Sādhane, 15 (Bombay, 1912), No.6, 22-8: sambandha nāhīṃ = I have no claim.

2. P.N. Sen, The General Principles of Hindu Jurisprudence, op.cit., 128.

3. Extended to great-grandson by Mitra Miśra on Yājñ. II, 121, Ghārpure, Yājñavalkya Smṛti, (Bombay, 1939), 1021. See Sampath's criticism of Mitra Miśra's opinion, Banaras Law Journal, I (1965), 1, n.1 at 41.

d. Vijñāneśvara's theory of Property (svatva)

Vijñāneśvara was not fully satisfied by merely defining dāya or relating his interpretation of Yājñavalkya and other smṛti texts to the customs of the area in which he lived, to which indeed he refers very casually and imperfectly here and there. To endow his commentary with an authority of universal acceptance, he had to establish first that birth could also be one of the modes of acquisition of property. In order to establish birth as one of the means of acquisition of ownership, Vijñāneśvara had to surmount the monumental obstacle of Gautama's text,[1] which ordained the five approved modes of acquisition of property and did not include birth as one of those modes.

To establish the son's right by birth, Vijñāneśvara had to prove first that property could be acquired by modes other than those prescribed by the śāstra. Throughout his commentary, Vijñāneśvara has emphasised meticulously that the idea of property has its basis on popular recognition without any dependence on the śāstra.[2] With a shrewd analytical approach, he first discusses[3] the views of those who advocate that ownership is deducible only from the commands of the sacred texts. Then he demolishes their arguments one by one, and attempts to establish the view that property is temporal. From the point of view of historical jurisprudence, the temporality of property is more sound than the idea of its śāstric

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1. X.38-42. But see: utpattyaivārthaṃ svāmitvāl labhate, Gautama quoted in the Mitā. on Yājñ. II.114, Dh.K.1124a.

2. On Yājñ. II.114; Colebrooke, I.i.9-10.

3. Colebrooke, I.i.8.

origin. In anthropological terms, Vijñāneśvara's view is that property is an outcome of social evolution and smṛtikāras like Gautama and Manu, merely compiled the socially acceptable modes of acquisition of ownership, like Pāṇini, who did not create or lay down new words but simply laid down with an original technique, a principle of their formation and application which were already in existence.[1] So according to the Mitākṣarā view, words such as inheritance, purchase, partition, seizure or finding are 'mere physical events which are invested with the sense of proprietary rights by the voice of the people'.[2] To be more precise, we can say that the 'right of acquisition not merely historically preceded the formulation of the rules of Gautama and the rest, but deprived those rules of exclusive right to describe it legally".[3]

Vijñāneśvara deliberately spends a few paragraphs on this topic, and ultimately concludes that property is temporal. As he puts it, the objectors try to prove with a citation from the dharmaśāstra of Manu that right of ownership is deducible only from the śāstra. Manu ordains, "A Brāhmaṇa who seeks to obtain anything, even by sacrificing or by instructing, from the hand of a man, who had taken what was not given to him, is considered precisely as a thief".[4]

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1. Kāṇe, HD, III, 551.

2. K.L. Sarkar, TLL, 1905, The Mīmānsā Rules of Interpretation as Applied to Hindu Law, (Calcutta, 1909), 391.

3. Derrett, RLSI, 135. Also Kāṇe, HD, III, 551.

4. Manu was discussing the extended application of the term 'thief'; Manu, VIII.340, tr. Colebrooke, I.i.8. Medhātithi on Manu, IV.226, took a liberal view on this point.

If property were temporal, Manu would not have prescribed punishment for a Brāhmaṇa who acquired tainted wealth by means ordained by sacred texts. A worldly idea of property should give the Brāhmaṇa a good title, but in that case, Manu's text would be irrelevant. Moreover, objectors argue that if ownership be a purely worldly matter, there would be chaos in society and mere possession of a thing by a trespasser or a thief would give him good title; against the true owner.[1]

Vijñāneśvara refutes these arguments by emphasising that property is apprehended from worldly usage. To support his contention by way of illustration, he draws an analogy between different characters of svatva and of fire. He points out that a Vedically consecrated fire has two separate characters, (the sacred one) of oblation, and the worldly one of combustion. In the strict theoretical sense, the Āhavanīya fire serves only the spiritual function relating to the offerings in it and is not useful for effecting worldly purposes. Vijñāneśvara admits that even the Āhavanīya fire has the capacity to boil food but such boiling is effected not by its śāstric nature but by its ordinary nature as fire.[2] In other words, he says that a sacred fire cannot perform secular acts in its sacred capacity. Similarly, he wants to show by analogy, that if svatva were apprehended only from śāstra, it could not have secular manifestations,

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1. Colebrooke, 1.1.8.

2. It is submitted that Vijñāneśvara's view is scientifically untrue. It is also logically wrong, Derrett, JESHO, 1/1 (1957), 87.

such as acts like sale or mortgage.[1] Like fire, each item of property has two characters. One is its visible form and the other is the intangible aspect of ownership (property or svatva) in that particular item of property.

The objector argues that gold or other valuables would effect the secular purpose of sale and purchase, in its character as gold or such like, not in that of property, and to effect these worldly transactions property need not be temporal. Vijñāneśvara replies that these transactions are worldly and property is also worldly because the sale or purchase of a thing is effected not through its visible form but by reference to property (ownership) in that thing.[2];

> But, here, it is not through its visible form, either gold or the like, that the purchase of a thing is effected, but through property only. That, which is not a person's property in a thing, does not give effect to his transfer of it by sale or the like. 3

Vijñāneśvara continues and puts to an objective test by comparative method,[4] the śāstric idea of property and shows that the śāstric doctrine has no universal acceptance and it cannot be a general rule applicable to the whole human race.

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1. Transactions like sale do not conflict with śāstric origin of property. Manu, (X.115) has categorically mentioned kraya (purchase) as one of the modes of acquisition and every purchase presupposes a sale.

2. On Yājñ.II.114. iha tu suvarṇādi-rūpeṇa krayādi-sādhanatvam, api tu svatvenaiva / nahi yasya yat svaṃ na bhavati tat tasya krayādyartha-kriyāṃ sādhayati /

3. Tr. Colebrooke, I.i.9.

4. Such comparative method must be used with the greatest caution, Derrett, JESHO, 1/1, (1957), 91, n.1.

Even among the inhabitants of the countries [1] of the frontier or those who have no knowledge of the practice enjoined by the sacred institute, the idea of property arising from purchase, sale and other transaction is observed.[2] This proves that property is apprehended from worldly usage and *śāstric* modes are merely compilations of existing practices among the people.

This secular and sociological interpretation of the concept of property was not likely to be acceptable by the *śāstrins* who were steeped in the tenets of the *śāstra*. To have an universal acceptance of his theory among the *dharmaśāstrins*, Vijñāneśvara resorted to the aid of *mīmāṃsā*, 'the logic of the law'.[3] The *mīmāṃsā* interpretation -

> was used by Vijñāneśvara as a lever to shift an encumbrance that was as troublesome to lawyers as to the lay public, and which could not have been shifted by independent juristic pronouncement, that is to say, so long as traditional śāstric techniques were to be adhered to. 4

The *laukika* concept of property was not Vijñāneśvara's original innovation - that was his reliance on and manipulation of Prabhākara's interpreta-

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1. *pratyantavāsī*, according to *Amarakośa*, 'the country of the Mlecchas, *pratyanto mlecchadeśaḥ syāt*, *Amara*, 2.1.7. Colebrooke translated as 'inhabitants of barbarous countries', I.i.9.

2. Colebrooke, I.i.9.

3. Colebrooke, *Miscellaneous Essays*, (London, 1873), II, 342.

4. Derrett, RLSI, 132.

tation [1] of Jaimini IV.i.1-3. Vijñāneśvara's purpose in exploring the mīmāṃsā was to establish that svatva was laukika. Though he does not find a definite utterance in Prabhākara [2] to this effect, yet the conclusion of Prabhākara that acquisition itself is puruṣārtha [3] (subserving the aims of man) helped him to establish that property being the effect of acquisition is also puruṣārtha and thus laukika.[4]

Vijñāneśvara explains:[5]

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1. Admitted by Vijñāneśvara with the word 'Guruṇā', on Yājñ.II.114. 'Guru' was Prabhākara, see Jhā, The Prabhākara School of Pūrva Mīmāṃsā, (Allahabad, 1911), 14, also 312 and n. thereof. Derrett, RLSI, 142. That 'Guru' was Prabhākara is established from another manuscript, Gurusammata Padārthaḥ (Trivandrum, 1954), introd., 1. On the popularity of Prabhākara as a leader of a school of mīmāṃsā in the Deccan (Vijñāneśvara's home country), see the inscription referred to by Derrett at History of Indian Law, (Leiden, 1973), 23, n.6 (an inscription of Vijñāneśvara's lifetime).

2. It was for Bhavanātha to say: loka-siddhaṃ vārjanaṃ janmādi, cited, Madanaratna-pradīpa, ed., Kāṇe, (Bikaner, 1948), 324. Kaṇe, HD, III, 550, n.1027. Derrett, RLSI, 135, n.1.

3. Literally means for the man in contrast to 'directed to the ceremony/observance/ritual'. It is what a man ordinarily undertakes for securing the reward of happiness, Kāṇe, HD, V, II, 1232-5. Jhā, Pūrva Mīmāṃsā in its Sources, (Benares, 1942), 292-7. K.L. Sarkar, Mīmāmsa Rules of Interpretation, (Calcutta, 1909), 391-3. Derrett, RLSI, 132.

4. Derrett, RLSI, 144.

5. On Yājñ. II.114; the underlined words are the actual words of Prabhākara, see manuscript 91117 of S.O.A.S. copied from a manuscript, shelf No.38.B.6.4. of the Adyar Library (Jaimini, IV.i.2 only), 1-6 at 2 and 4. Text followed from Yājñavalkyasmṛti, ed. Dr. Umesh Chandra Pandey, (Vārānasī, 1967), 266. kiñ ca, niyatopāyakaṃ svatvaṃ loka-siddham eveti nyāya-vido manyante / tathā hi -- lipsā-sūtre tṛtīye varṇake dravyārjana-niyamānāṃ kratvarthatve svatvam eva na syāt / svatvasyālaukikatvād iti pūrva-pakṣāsambhavam āśankya, dravyārījanasya pratigrahādinā svatva-sādhanatvaṃ loka-siddham iti pūrva-pakṣaḥ samarthito Guruṇā -- nanu ca dravyārjanasya kratv arthatve svatvam eva na bhavatīti yāga eva na saṃvarteta / pralapitam idaṃ kenāpi 'arjanaṃ svatvam nāpādayatīti vipratisiddham iti vadatā / tathā siddhānte'pi svatvasya laukikatvam aṅgīkṛtyaiva vicāra-prayojanam uktam, ato niyamātikramaḥ puruṣasya na kratoḥ

/Continued on next page:

Moreover, such as are conversant with the science of reasoning deem regulated means of acquisition a matter of popular recognition. In the third clause of the Lipsā sūtra, the venerable author has stated the adverse opinion, after (obviating) an objection to it, that, "If restrictions, relative to the acquisition of goods, regard the religious ceremony, there could be no property, since proprietary right is not temporal"; (by showing that) "the efficacy of acceptance and other modes of acquisition in constituting proprietary right is a matter of popular recognition". Does it not follow, "if the mode of acquiring the goods concern the religious ceremony, there is no right of property, and consequently no celebration of a sacrifice?" (Answer) "It is a blunder of any one who affirms, that acquisition does not produce a proprietary right; since this is a contradiction in terms". Accordingly, the author, having again acknowledged property to be a popular notion, when he states the demonstrated doctrine, proceeds to explain the purpose of the disquisition in this manner, "therefore a breach of the restriction affects the person, not the religious ceremony": and the meaning of this passage is thus expounded. "If restrictions, respecting the acquisition of chattels, regard the religious ceremony, its celebration would be perfect, with such property only, as was acquired consistently

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Note 5 - p.502 - continued:

iti / asya cārtha evam vivṛtaḥ: -- yadā dravyārjana-niyamānām kratv-arthatvam, tadā niyamārjitenaiva dravyeṇa na kratu-siddhir iti na puruṣasya niyamātikrama-doṣaḥ pūrva-pakṣe / rāddhānte tv arjana-niyamasya puruṣārthatvāt tad-atikramenārjitenāpi dravyeṇa kratu-siddhir bhavati, puruṣasyaiva niyamātikramadoṣa iti niyamātikramārjitasyāpi niyamatikramārji tasyāpi svatvam aṅgīkṛtam, -- anyathā kratu-siddhyabhāvāt /

> with those rules; and not so, if performed with wealth obtained by infringing them; and consequently, according to the adverse opinion, the fault would not effect the man, if he deviated from the rule: but, according to the demonstrated conclusion, since the restriction, regarding acquisitions, affects the person, the performance of the religious ceremony is complete even with property acquired by a breach of the rule; and it is an offence on the part of the man, because he has violated an obligatory rule". It is consequently acknowledged, that even what is gained by infringing restrictions, is property: because, otherwise, there would be no completion of a religious ceremony. 1

Colebrooke's rendering, in spite of being old-fashioned and unidiomatic, has acquired an authority of its own, and authors like J.R. Ghārpure, follows it very closely. Now an improved translation of the passage is available from the pen of Derrett, which brings out its meaning somewhat better:

> Moreover scholars of mīmāṃsā believe that Property, the means of acquisition of which are limited, is a concept of a secular character. For example, in the third clause of the Lipsā sūtra, two interpretations of the pūrvapakṣa (prima facie view) are possible. According to the first, the proposition is this: "If the niyamas (restrictive precepts) regulating the acquisition of assets were directed to the purpose of the sacrifice, Property itself would fail to exist, since Property is a secular concept". According to the second, it means "The fact that (technical) means of acquisition, starting from (religious) acceptance, cancreate Property is itself a secular fact". Prabhākara realised that the first was impossible, and accepted (or propounded) the second.

1. Tr. Colebrooke, I.i.10.

> He said, "It is objected that sacrifice itself could not take place, since Property would not exist if the acquisition of assets subserved the purpose of the sacrifice. The nonsensical statement that acquisition does not produce Property is a contradiction in terms". When he comes to the siddhānta (conclusion) he admits that Property is a secular concept, and states the object of the discussion: "Consequently breach of the niyama [niyama means "restrictive rule of a facultative character"] affects the individual sacrificer and not the sacrifice itself."
>
> This is the meaning : the pūrva-pakṣa would suggest that if the niyamas relating to the acquisition of assets subserved the purpose of the sacrifice, the sacrifice would be achieved only with objects acquired according to the regulations, but not with the aid of objects acquired by or in breach of a regulation, whereas the individual sacrificer would not be tainted by the fault of breaking the niyama. But the conclusion - on the contrary -, relying upon the doctrine that the niyama-s relating to acquisition subserve the purposes of the individual himself, is that the sacrifice can be achieved successfully even with the aid of assets which have been acquired in breach of those regulations, while the individual himself is tainted by breach of the regulations. Such a conclusion involves the admission that Property exists in a thing acquired in breach of a niyama. Unless this were admitted the achieving of the sacrifice would be prejudiced. 1

Once, Vijñāneśvara, by the help of Prabhākara's interpretation, established that property was laukika, he had no difficulty in reasserting the

1. RLSI, 144-5.

mīmāṃsā doctrine that the modes of acquisition of property were not creatures of the dharmaśāstras.[1] This temporal concept of property did not conflict with the Vedic injunction of performing sacrifices, because according to Prabhākara, "the wealth acquired by temporal means can certainly be used in the performance of sacrifices".[2] Property tainted through acquisition by reprehensible means could be used for performing sacrifices and the taint would affect only the sacrificer and not the sacrifice, although the sacrificer would have to perform some expiatory rites.[3]

Vijñāneśvara did not probe the rationale of Prabhākara's doctrine;[4]

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1. Prabhākara's Bṛhatī is a comment upon Śabara's Bhāṣya on Jaimini. Prabhākara does not normally differ from Śabara, but here he deviates and outstrips Śabara to the advantage of Vijñāneśvara, Jhā, Prabhākara Mīmāṃsā, (Allahabad, 1911), 12. For exhaustive and critical discussion, RLSI, 137, 142-4. Also A.S. Nataraja Ayyar, 'The Mimamsa View of Property', Vyavahāra Nirṇaya, 4 (1955), 1: 46-64.

2. Jhā, ibid., 312. Jaimini, IV.1.5: "the object being not connected (with the cause)", The Sacred Books of the Hindus, XXVII, (Allahabad, 1923), I,201.

3. Jhā, ibid., 312. Colebrooke, I.i.10. Derrett, 'An Indian Contribution to the Study of Property', BSOAS, 1956, XVIII/3, 480; RLSI, 145.

4. K.L. Sarkar explains as to why Vijñāneśvara relied exclusively on Prabhākara: 'You should also notice that Vijñāneśvara utilises the Mimansa Adhikarana as interpreted by Guru Prabhakara who is reputed to be an heterodox propounder of the Mimansa Sutras, while the orthodox interpretation of the Adhikarana as given by Savaraswami and Kumārila Bhatta gives no support to Vijnānesvara's views. For these commentators explain the Adhikarana as merely showing the difference between Kratu Dharma and Manushya Dharma without any reference to the idea of popular recognition', K.L. Sarkar, Mīmāmsā Rules of Interpretation, op.cit., 395. Nataraja Ayyar does not agree with Sarkar and opines that there is no basic difference among the views of Śabara, Kumārila and Prabhākara. 'There is a unanimity of opinion among the three jurists; and each has arrived at the same conclusion on the same basis of reasoning with explanations having only some minor shades of difference', Vyavahāra Nirṇaya, 4 (1955) 1:64. It seems that Sarkar did not have the relevant passage of Kumārila before him. However, 'These conundrums defeat the specialists no less easily than general readers of the texts', Derrett, RLSI, 143, n.1.

to strengthen his thesis, he simply used his interpretation as a jurist's aid which had its foundation in Jaimini,[1] and also in the Vedas.[2]

The objector argues that if property be temporal, even what is obtained by robbery or other nefarious means is property. Vijñāneśvara had no difficulty in tackling this objection of the pūrva-pakṣin. He pointed out that even the popular notion of proprietary rights which is based on accepted general moral conduct of the people does not approve of robbery[3] and such like means as any basis of 'acquisition'.[4] "It should not be alleged, that even what is obtained by robbery and other nefarious means, would be property. For proprietary right in such instances is not recognised by the world".[5]

Regarding the objection that if the concept of property is temporal, no one can complain that 'my property has been taken away by him', Vijñāneśvara says that this line of thought is not correct. Even a tribunal which accepts the temporal concept of property would entertain such complaints and would verify the validity of worldly transactions such as purchase and sale, and a defective

1. Jaimini, IV.1.2. For Śabara's comment, Jhā, Śabara Bhāṣya, (Baroda, 1934), II, 707-13. Also A.S. Nataraja Ayyar, loc.cit., 46-64.

2. Tai. Br.II, ii, 4.6; see Mitā. on Yājñ.II. 135-6, Colebrooke, II, i.23. Ghārpure, 1078-9, also n.1 at 1079. Jaimini, III,IV.8, Jhā, ibid., 510-12, RLSI, 145.

3. For a discussion, Derrett, 'An Indian Contribution to the Study of Property', BSOAS, XVIII/3, 480-1.

4. On Yājñ.II.114. na caitāvatā cauryādi-prāptasyāpi svatvaṃ syād iti mantavyam / loke tatra svatva-prasiddhyabhāvāt, vyavahāra-visaṃvādāc ca /

5. Tr. Colebrooke, I.i.11.

transaction would definitely vitiate the proprietary right arising from such a transaction, in its worldly context.[1]

> As for the remark that, if property were temporal, it could not be said "my property has been taken away by him"; that is not accurate, for a doubt regarding the proprietary right does arise through a doubt concerning the purchase, or other transaction, which is the cause of that right.[2]

After discussing the mīmāṃsā doctrine and putting forward these commonsense arguments, Vijñāneśvara turns to the śāstra. He opines that even Manu by implication accepted the wordly nature of property. Manu (XI.193) ordains: "When Brāhmaṇ have acquired wealth by a bl̆amable act, they are cleared by the abandonment of it, with prayer and rigid austerity".[3]

Vijñāneśvara's comment on this verse is very interesting. He says:[4]

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1. On Yājñ. II. 114. yad api mama svam anenāpahṛtam iti na brūyāt svatvasya laukikatva iti; -- tad apy asat; svatva-hetu-bhūtakrayādi-sandehāt svatva-sandehopapatteḥ /

2. Tr. Colebrooke, I.i.15.

3. Tr. Colebrooke, I.i.15.

4. On Yājñ.II.114. śāstraika-samadhigamye svatve garhitenāsat-pratigraha-vāṇijyadīnā labdhasya svatvam eva nāstīti, tat-putrāṇām tad vibhājyam eva / yadā tu laukikaṃ svatvam tadāsat-pratigrahādilabdhasyāpi svatvāt tat-putrāṇāṃ tad vibhājyam eva / 'tasyotsargeṇa śuddhyanti' iti prāyascittam arjayitur evam, tat-putrādīnām tu dāyatvena svatvam iti, na teṣāṃ doṣa-sambandaḥ; 'sapta vittāgama dharmyā dāyo lābhaḥ krayo jayaḥ / prayogaḥ karma-yogas ca sat-pratigraha eva ca // iti (10.115) Manu-smaraṇā t /

> Now, if property be deducible only from sacred ordnances, that which has been obtained by accepting presents from an improper person, or by other means which are reprobated, would not be property, and consequently would not be partible among sons. But if it be a worldly matter, then even what is obtained by such means is property, and may be divided among heirs; and the atonement abovementioned regards the acquirer only: but sons have the right by inheritance, and therefore no blame attaches to them, since Manu declares "There are seven virtuous means of acquiring property, viz. inheritance (daya), etc. [1]

Vijñāneśvara's interpretation of Manu, XI.193, in the light of Manu. X.115, betrays his motivation for establishing the laukika concept of property with the aid of śāstric texts. His argument is that Manu at XI.193, only lays down a penance for the acquirer but does not specifically deny that wealth obtained by such reprehensible acts becomes his property. Here, Vijñāneśvara places emphasis only on penance, but he does not say anything about Manu's prescription for abandonment of such wealth. Medhātithi's interpretation of this verse is very different from that of Vijñāneśvara. Medhātithi says that utsarga (abandonment), japa (repeating of texts) and tapa (austerities) laid down by Manu are not alternative prescriptions with freedom of selection, but one penance of which all three parts are to be performed together.[2] "For one who

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1. Tr. Colebrooke, I.i.16.

2. Jhā, The Manubhāṣya of Medhātithi, (Calcutta, 1939), 432; number of the verse in Jha is XI.192. tena ye 'rjayanti dhanaṃ karmaṇā tasyotsarga-japa-tapāṃsi triṇi samuccitāni prayaścittāni /

earns wealth by such means, the expiation consists of 'giving up', 'repetition of texts', and 'austerities', all three combined".[1]

The cogency of Vijñāneśvara's argument may be tested by a technical point. Suppose a Brāhmaṇa, immediately after acquiring property by reprehensible means, expires without having any opportunity of relinquishing it, would his sons inherit his property? Vijñāneśvara's answer to this question is in the affirmative, but considering the purport of Manu,[2] VIII.340, which Vijñāneśvara does not actually quote, the answer could conceivably be in the negative.

Medhātithi does not put forward any specific answer to this problem, but it is implied in his comment that the sons should abandon the property after inheriting it, in other words, they inherit it subject to the obligation to abandon it and it is difficult to see how they could call for any remedy against interference of their apparent property in it, or possession of it.

If Vijñāneśvara had accepted overtly Manu's prescription of abandonment, it would have posed yet another problem for him. According to the Mitākṣarā view, a son's right is co-extensive with his father's even in the father's self-

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1. Tr. Jhā, Manu-Smṛti, (Calcutta, 1926), 500-1. For Medhātithi utsarga means tyāgo mamatā-nivṛttir dānena vā, text Jhā, ibid., 432: 'Relinquishing; renouncing all sense of ownership with regard to it, or actually giving it away', tr. Jhā, ibid., 500. Bhāruci also says that these verses are meant to be connected 'with relinquishment of the property', on Manu, XI.193, Derrett, Bhāruchi, II, 399.

2. Manu, VIII. 340. 'If a Brahmin seeks, even by sacrificing for another or teaching him, to obtain property from the hand of one who took what was not given to him, he is like a thief', tr. Derrett, Bhāruci, II, 194.

acquisitions and as soon as a father acquires property, especially immovable property, even by reprehensible means, it would be owned by sons as well, as co-owners with their father, and the father would lose the right of relinquishing the whole except to the extent of his own unspecified share. Abandonment by the minor sons seems out of the question.

The question can be put whether wealth, tainted because of being acquired by the father through blameable means, would vitiate the title of the sons when they acquire it as daya or riktha. Vijñāneśvara said that they could acquire because of Manu's text (X.115, XI.193), but did not go into details of the controversy.[1] To conform with the view of Prabhākara, he accepts the

1. The author of the Madana-ratna-pradīpa was not happy with Vijñāneśvara's utilitarian approach towards Manu, XI.193 and X.115, but his reasoning also was not very dissimilar to that of his forerunner. In fact, he elaborates Vijñāneśvara's reasoning by bringing about the function of dāya as a purifying process. According to him, it is better to hold that property acquired by means reprobated in the śāstra is property reprobated by usage as well. But when such property passes to the sons through means approved by the śāstra, the sons get a good title. The śāstric mode works as a purifying 'strainer' and the taint is taken out of the property when inherited by the sons as dāya. Madana-ratna-pradīpa, ed., Kāṇe, (Bikaner, 1948), 325. It is a remarkable example of manipulation of the śāstra for a laukika end and despite the clarification at Madana-ratna, Vijñāneśvara deserves the whole credit. The laukika aspect of property has been discussed by Nīlakaṇṭha in his Vyavahāra Mayūkha, but excepting a general indebtedness to the Madana-ratna, the author does not show much ingenuity on this particular topic. He boldly shows the lack of logic in holding that the śāstra is the origin of property, Vy.Ma., ed., Māndlik, (Bombay, 1880), 31-6. Extensive discussion at the Vīra-mitradoya, ed., Golāp Śāstrī, (Calcutta, 1879), sec.12-43, but sec.38 should be approached with caution which is a misunderstanding of Prabhākara. More original approach could be found in the Sarasvatī-vilāsa which holds that the relationship between heir and the estate of a deceased person is not based upon texts, ed. Foulkes, (London, 1881), sec.399-477. Also see Kāṇe, HD, III, 552, whose statement on Madana-ratna is blurred by brevity. Elaborate discussion by Derrett, JESHO, I/1, (1957), fn.2 at 85-7.

spiritual therapy of penance for purifying the acquirer but 'dissociates the spiritual condition of the acquirer from the legal title to the object acquired'.[1] It by no means follows that this was the prevailing, still less the traditional view in Brahmin circles in the Deccan at or before his time.

There were other problems which needed Vijñāneśvara's attention. The Veda ordains that 'a man, whose hair is yet dark and who has had a son, should consecrate the sacred Vedic fires'.[2] The Veda also insists that sacrifices must be performed with one's own wealth over which one has exclusive ownership.[3] The opponents of the son's right by birth put forward the view that if the son's co-ownership with the father is accepted, then, as soon as a son is born , the father lacking an undisputed ownership of property cannot obey the Vedic injunction of consecrating Vedic fires.[4] So, a son's right by birth is grossly inconsistent with the Vedic command. Viśvarūpa and Aparāditya, who accepted son's right by birth, suggested, as we have seen before,[5] that the father should acquire wealth for performing the Agnihotra. But Vijñāneśvara was reluctant to put forward the same argument because according to him, even in the father's self-acquisition, a son had a co-extensive right. Vijñāneśvara

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1. Derrett, RLSI, 146.

2. Kāṇe, HD, III, 552. The Vīramitrodaya, I.6, ed., Golāp Śāstrī, (Calcutta, 1879), 4.

3. Taittirīya Saṃhitā, VI,i.6,3; etat kalu vāva tapa ityāhuḥ yaḥ svaṃ dadati iti /

4. Colebrooke, I.i.8.

5. Supra, 473; 480-1.

had to fall back on the Vedic injunction itself. He says that 'by cogency of the text itself which enjoins their performance and which is in the nature of a command',[1] the father is invested with the authority to utilise property for purposes prescribed by the Vedas.

Here, on the one hand, Vijñāneśvara is nullifying the argument that son's birthright is inconsistent with the Vedic injunction of performing the Agni-hotra by the father, and indeed, on the other hand, by relying on the Vedic command, is accepting that the purpose of property is not exclusively temporal: but it was never argued by anyone that property, when acquired, did not enable spiritual objects to be attained.

The champions of the exclusive śāstric concept of the acquisition of property also argue that common ownership between father and son goes against the smṛti texts, which empower a father to make gifts of affection of moveables to his wife, daughters, sisters and sons. Vijñāneśvara answers that, by special provision of the relevant smṛtis, despite son's right by birth in all his father's and grandfather's property, moveable property, whether ancestral or paternal, is under special control of the father.[2]

In K.L. Sarkar's opinion, it was not necessary for Vijñāneśvara to take the trouble to establish that property is temporal. According to him, even if

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1. Mitā on Yājñ.II.115114: yad-apy-artha sādhyeṣu vaidikeṣu karma svanadhikāra iti, tatra tad-vidhāna-balād-evādhikaro gamyate / Colebrooke, I.i.26.

2. Colebrooke, I.i.24, 27.

the concept is accepted that property is acquired for sacrifices, Vijñāneśvara's theory of son's co-ownership with the father would have remained unaltered,

> for, in Adhikarana I, Ch.ii, Bk.vi, Jaimini lays down the principle that every member of a family who joins in the family worship, has the full benefit of that worship. In other words, according to Jaimini, of the two, the father and the son, each gets the full benefit of the properties offered as sacrifices. By analogy from this, it might well be said that each member of a joint Hindu family consisting of a father and sons, was jointly with the rest, owner of the whole of the family property. 1

Though far-fetched, this argument consists with mīmāṃsā technique of which, of course, Sarkar was a master.

But it was not Vijñāneśvara's intention, as Sarkar himself realised,[2] to accept the śāstric concept of acquisition of property.[3] By trying to find a a way through the śāstra for Vijñāneśvara's theory, Sarkar is exposing his misunderstanding of the Mitākṣarā doctrine. Vijñāneśvara's purpose is to prove that acquisition of property is not within the exclusive category of subserving spiritual or symbolic purposes, it is purely a worldly phenomenon producing human 'happiness'. Thus, the invisible (adṛṣṭa) result achieved by each satrī in a

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1. K.L. Sarkar, Mīmāṃsā Rules of Interpretation, (Calcutta, 1909), 388.

2. Ibid., 388.

3. However, Vijñāneśvara did not hesitate to use Gautama's text: utpattaivārthaṃ svāmitvaṃ labhate, Colebrooke, I.i.23.

sattra[1] sacrifice would have been irrelevant to Vijñāneśvara's worldly concept of property. Moreover, the analogy between joint ownership and sattra sacrifices may explain joint exertion and joint enjoyment, but it does not help much regarding the son's innate right in property of the father and the grandfather. The analogy of sattra is more appropriate to partnership and joint acquisition by father and son than to the co-extensive right to property of a son with his father, acquired by the fact of birth.[2]

e. Property (svatva) and partition (vibhāga)

We have seen that Vijñāneśvara did not accept the śastric concept of acquisition of ownership. Nevertheless, curious as it may seem, he put forward a śastric text, on son's right by birth, which he might have found in a less authoritative edition of Gautama which he possessed, or taken from some digest now lost.[3]

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1. sattra is a sacrificial session, performed by a plurality of priests (sattrī) whose number is not less then seventeen and not more than twenty-four, The Mīmāṃsā Sūtras of Jaimini, (Allahabad, 1923), 314. Also Jhā, Shabara-Bhāṣya, (Baroda, 1934), II, 1013.

2. Jaimini, VI.ii.1 and 2; The Mīmāṃsā Sūtras of Jaimini, (Allahabad, 1923), 314-5. Jhā, ibid., 1014-5. Also Aparārka on Yājñ. II.121, 729: yathā loke sambhūya-samuthāyinām vede ca sattriṇām svāmyutthāne /

3. Similar text of Viṣṇu, ata eva Viṣṇuḥ janmanā svatvamāpadyate iti / Sarasvatī-vilāsa, § 461, ed. Foulkes, (London, 1881), 90. Also Dh.K.1125b. But Bhārucī accepts right by birth only for sons, not for daughters; putrasyaiva na tu putrikāyā iti Bhārucī, Sarasvatī-vilāsa, ibid., § 462. Jīmūtavāhana mentions the knowledge of a similar text in a passing remark. Dā.bhā.I .20, but some commentators on the Dāyabhāga attributed it to Gautama, see Kāṇe, HD, III, 558. Śrīkṛṣṇa Tarkālaṅkāra rejected the text as amūla (unauthorised), Śrīkṛṣṇa on Dāyabhāga, 1.19, ed. Stokes, (Madras, 1865), 187, n.19. Does not occur in Viśvarūpa or Aparārka, but occurs in the Bhāṣya of Medhātithi in a slightly different form: 'utpanno varthasvāmyam ity ācāryā' iti Medhātithi on Manu, IX.156 and on IX.212. Kāṇe, HD, III, 557. Derrett, JESHO I/1, (1957), 82, n.1.

The text runs as follows": [1] " Let ownership of wealth be taken by birth". [2]

Vijñāneśvara cites this text in order to refute the arguments of those who propound that partition is one of the modes of acquisition of ownership and to establish the view that property pre-exists partition. [3] To Vijñāneśvara, partition is not a phenomenon which creates proprietary right but merely adjusts diverse rights in property held jointly by applying those rights in particular portions of the joint stock. [4] "Partition (vibhāga) is the adjustment of divers rights regarding the whole, by distributing them on particular portions of the aggregate". [5]

Vijñāneśvara could not be satisfied by merely defining partition in a way which was opposed to its traditional śāstric notion. He indulged in a catechism to substantiate his definition which (as we are now ready to understand) was based on the temporal notion of property and acquisition of property by birth. [6]

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1. On Yājñ. II.114, Dh.K.1124a. utpattyaivārthaṃ svāmitvāl labhate /

2. Tr. Colebrooke, I.i.23.

3. The view was already expressed by Viśvarūpa, on Yājñ.II.121, 245, Dh.K. 1175b. Also Aparārka on Yājñ.II.121, 729.

4. On Yājñ.II.114. vibhāgo nāma dravya-samudāya-viṣayāṇām aneka-svāmyānāṃ tad ekadeśeṣu vyavasthāpanam /

5. Tr. Colebrooke, I.i.4.

6. On Yājñ.II.114. kiṃ vibhāgāt svatvam uta svasya sato vibhāga iti / ... kim śāstraika-samadhigamyam svatvam uta pramāṇāntara-samadhigamyam iti/

> Does property arise from partition? Or does partition of pre-existent property take place? ... whether property be deduced from the sacred institutes alone, or from other (and temporal) proof. 1

As so he proceeds, as we have seen.

f. Birthright and different categories of property

For the purpose of the Mitākṣarā doctrine, questions such as whether ownership pre-exists partition, or whether property be deduced exclusively from the śāstra or from temporal proof, presupposed the most vital question, namely, whether property could be acquired at birth. Probably Vijñāneśvara knew that the text of Gautama (above) on janmasvatvavāda, which he cited, would not be accepted by the śāstrins, especially in the North, as one of unimpeachable authenticity.[2] That is why, before its citation, Vijñāneśvara built up an atmosphere, with the aid of mīmāṃsā, favouring its unquestionable acceptance as an ordination of the śāstra, the effect of which was nothing but an anticlimax and aroused doubts about its genuineness.[3]

Be that as it may, this sets the stage for his famous utterance:[4]

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1. Tr. Colebrooke, I.i.7.

2. Derrett, RLSI, 135.

3. Madana-ratna-pradīpa maintains son's birthright both by reason of the text and by reason of the temporality of property, ed. Kāṇe, (Bikaner, 1948), 323.

4. On Yājñ.II.114. tasmāt paitṛke paitāmahe ca dravye janmanaiva svatvam /

"Therefore (it is settled that) ownership in the father's or grandfather's estate is by birth".[1]

This general statement of Vijñāneśvara seems to convey the meaning that a son's right by birth extends to all categories of property of his father and grandfather. But the all-pervading range of this utterance has been curtailed by Vijñāneśvara in his subsequent explanations. Here, he was faced with the problem of reconciling the day-to-day functioning of a family headed by a father, and a son's inherent right in the paternal and grandpaternal property. Vijñāneśvara had to make a synthesis between the Northern notion of morally-limited patriarchal power and the Southern customary law of common ownership between father and son, a compromise between individual and communal ownership of property.

A detailed study of Vijñāneśvara's text reveals the extent of son's co-ownership, from birth, of the property belonging to his father and grandfather.

With regard to ancestral immovables and self-acquired movables of the father, Vijñāneśvara's view can be ascertained without difficulty. In ancestral immovable property, a son's birthright can be described as 'complete'.[2] A father has no power of alienation of such property without the consent of his

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1. Tr. Ghārpure, II (4), 991. Colebrooke renders paitāmahe as 'ancestral', I.1.27. But paitāmahe literally means 'belonging to the father's father'. J.C. Ghose renders as 'grandparental', The Principles of Hindu Law, (Calcutta, 1917), Vol.II, 91 and n. thereof. Ghose and Gharpure's rendering is better, and Colebrooke's 'ancestral' is liable to raise confusion and widens the ambit of son's birthright in property more than Vijñāneśvara envisaged. Mayne prefers, 'grandfather's'; he considers Colebrooke's 'ancestral' is a mistake, Hindu Law and Usage, 10th ed., 331, n.g.

2. Golāp Śāstrī, Hindu Law, 4th ed., 211-2.

son,[1] and a son can force a division of ancestral immovables even against the will of his father.[2]

In his self-acquired movables, the father has full independence. He can alienate such property at his pleasure,[3] and unlike ancestral immovable property, a son cannot enforce a division against the wishes of his father. But the full independence of a father in his self-acquired movables is not a complete denial of son's birthright. Until a partition both father and son live on all the property as if there is no difference between ancestral and self-acquired assets, and a separating son takes a share at his father's discretion even in the self-acquired movables of his father. Moreover, at his father's death, a son who was united with his father takes 'all the property of the father, of whatever sort, which could be identified at the father's death'.[4]

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1. Mitā. on Yājñ. II.121; Colebrooke, I.v.9.

2. Stated unambiguously on Yājñ.II.121, Colebrooke, I.v.3-5; I.v.8; also on II.114, Colebrooke, I.i.24-5. But qualified when he states the time for partition. Only when the father is incapable diseased or vicious, and the mother also is then past the age of child-bearing, a son can enforce a division against his father's will, I.ii.7; an unhappy synthesis of the Northern and Southern views, N.C. Sengupta though, seems to be unhappy at p.206, yet admits at p.205 that the texts have given the son a right to demand a partition of ancestral immovables against the wishes of the father, Evolution of Ancient Indian Law, (Calcutta, 1953), 205-6. Nārāyaṇa, the author of Vyavahāra-śiromaṇi and a disciple of Vijñāneśvara, does not impose the conditions as at I.ii.7, but confers on the son the right to demand partition of ancestral property at his will, Derrett, JIH, Vol.30 (1952), 49.

3. On Yājñ.II.121; Colebrooke, I.v.9.

4. Derrett, SCJ. 19 (1950), 107. P.N. Sen, General Principles of Hindu Jurisprudence, 146.

According to Vijñāneśvara, where self-acquired immovables are concerned, father's independence has been curtailed by the son's birthright. Vijñāneśvara cites Vyāsa's text,[1] in order to give a śāstric justification of his view about a son's inherent right in the immovable property acquired by the father.[2] "But he is subject to the control of his sons and the rest, in regard to the immovable estate, whether acquired by himself or inherited from his father or other predecessors".[3]

This passage gives us an unambiguous impression that in immovables acquired by a father, the ownership of father and son is co-extensive. Between ancestral immovables and self-acquired immovables, the difference is this, that with regard to the former, a son can compel his father to come to a partition, but in the latter a son has no such right.

If Vijñāneśvara had stopped here, there would have been no scope for confusion. But he had yet to explain the relative rights of father and son in a father's self-acquired immovables. While discussing the power of disposition by an unseparated father, it might be wrongly interpreted, that Vijñāneśvara seems to have conferred on him general power of disposition at his pleasure over

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1. sthāvaram dvipadam ... supra, 340, n.3.

2. On Yājñ.II.114. sthāvare tu svārjite pitrādi-prāpte ca putrādi-pāratantryam eva /

3. Tr. Ghārpure, II (4), 991-2. Colebrooke, I.i.27. Jolly rightly thought that the father did not have absolute power to alienate self-acquired immovables, Outlines of an History of the Hindu Law of Partition, Inheritance, and Adoption, TLL, 1883, (Calcutta, 1885), 111-13.

all categories of his self-acquired property. In the following passages, Vijñāneśvara explains a son's power of interdiction in his father's alienation of self-acquisitions.[1]

> So likewise, if the unseparated father is making a donation, or sale, of effects inherited from the grandfather, the grandson has even the right of prohibition. But if the effects were acquired by the father, he has no right of prohibition, as he is dependent on him. On the contrary, he must give his consent.
>
> Consequently, the difference is this: although he has a right by birth in his father's and in his grandfather's property, still, since in regard to the father's property, he is dependent on his father and since the father has a predominant interest as it was acquired by himself, the son must give his consent to the father's disposal of his own acquired property. 2

The faulty rendering of juridical sanskrit in these two passages[3] conveys the idea that Vijñāneśvara is contradicting his earlier statement of I.i.27, where he declared son's birthright in all immovable properties, whether acquired by father or grandfather. A careful study of Vijñāneśvara's language in these

1. On Yājñ.II.121. tathā avibhaktena pitrā paitāmahe dravye dīyamāne vikrīyamāṇe vā pautrasya niṣedhe 'pyadhikāraḥ pitrarjite na tu niṣedhādhikāraḥ, tat para-tantratvāt / anumatis tu kartavyā / tathā hi - paitṛke paitāmahe pitṛ-paratantratvāt pitus carjakatvena pradhānyāt pitrā viniyujyamāne svārjite dravye putreṇānumatiḥ kartavyā /

2. Tr. Ghārpure, 1020. Colebrooke, I.v.9-10.

3. Colebrooke, I.v.9-10.

passages reveals that he left son's birthright in father's self-acquired immovables intact and never intended to modify what he had said before in I.i.27.[1] Vijñāneśvara's emphasis in I.v.9 and I.v.10, is on father's self-acquired movables and this is apparent from his use of the word 'dravya'. The word dravya which Vijñāneśvara himself categorically mentioned to signify 'movables' had been wrongly translated as 'effects' or 'property'. On this point, the pioneering statement of Rām Charan Mitra is very illuminating. He points out the misunderstanding of the word dravya and says, "But the word which has been translated into 'property' really means article or 'movable property'. If the commentary had been correctly translated, there would not have been any contradiction".[2] Thus, the word dravya which Vijñāneśvara himself categorically intended to signify movables has been wrongly translated and this misunderstanding[3] led to a conclusion which Vijñāneśvara never meant to be reached. Even the acute mind of P.N. Sen missed the significance of the word dravya and he arrived at the correct conclusion, not by textual interpretation of the Mitākṣarā, but by relying on Mitra Miśra's elaboration that 'the sons must give their assent to the disposal by the father of his self-acquired property excepting land ....'[4]

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1. Paṇḍit V.L. Joshi of the Deccan College, Poona (sometime at S.O.A.S.) agreed with our view on this point.

2. R.C. Mitra, The Law of Joint Property and Partition in British India, TLL, 1895-6, (Calcutta, 1897), 105.

3. At Mitā. tr. Colebrooke, I. v. 9-10, supra, 521.

4. P.N. Sen, General Principles of Hindu Jurisprudence, op.cit., 132-3.

Golāp Chandra Sarkār Śāstrī considers son's right in father's self-acquired immovable property as an' imperfect right',[1] because in such property a son has no right to oppose an alienation or to enforce a partition against the wishes of his father. Despite his knowledge of the śāstra, Śāstrī was led astray[2] by the wrong translation of the word dravya, and did not apply his scholarly mind to render it correctly. Though he calls son's right in father's self-acquired immovables an 'imperfect right', yet he admits the inherent right of a son in such property and quite correctly blames the decisions of the courts[3] for incorrect exposition of the śāstra. He remarks,

> It should, however, be borne in mind that such property, if undisposed of by the father, is taken by sons and the like, by survivorship and not by descent ... the right of a son to his father's self-acquired property may be called an imperfect one, but it has been made more so by our courts ... [4]

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1. Hindu Law, 4th ed., 213-4.

2. So also J.C. Ghose, Hindu Law, (Calcutta, 1917), II, 111.

3. The cases cited by Golāp Chandra Sarkār Śāstrī are: Muddun v. Ram (1863) 6 W.R. 71: a father is competent to sell his self-acquired immovables without the concurrence of his sons; also Sital v. Madho (1877) 1 All 394; Bawa v. Rajah (1868) 10 W.R. 287. To this could be added Rao Balwant v. Rani Kishori (1898) 25 IA 54, for a criticism, see infra, 744-46.

4. Hindu Law, 4th ed., 214. See Mayne's uncritical following of case law on this point, Hindu Law, 10th ed., (Madras, 1938), 352. So also J.C. Ghose, The Principles of Hindu Law, 2nd ed., (Calcutta, 1906), 422-3. Also N.R. Raghavachariar, Hindu Law, Principles and Precedents, 6th ed. (Madras, 1970), 262. But see Mayne, 464, where he admits that a father has not absolute power to dispose of self-acquired immovables. Śiromaṇi's view that father has absolute power over his self-acquired property, whether movable or immovable, is not correct, Commentary on the Hindu Law, (Calcutta, 1885), 171, also 157, para.4, where he misunderstood Vijñāneśvara.

But authors, like Śāstrī and Sen, overlooked R.C. Mitra's correct rendering of the word dravya in I.v.9-10, and did not give due importance to the crucial passage in the Mitākṣarā (I.i.27). When we read these passages together the total impression is this: that,

> these texts establish that all joint property is 'owned' equally by father and sons, but the father has special power of alienation with reference to some properties. It is clear by custom, however, partition at the demand of sons against the father's will were unusual unless the father was utterly incapable; and similarly, sons were sparing in their control over their father's dispositions. [1]

So it should be borne in mind that though Vijñāneśvara did not confer on the son, in his father's self-acquired immovables, the right to enforce a partition, yet he did not deny the son's birthright in such property and did not give the father unfettered power of disposition without asking for the consent of the son. The son's consent was necessary even for gifts of self-acquired immovables through affection to wife.[2] This is a situation where Vijñāneśvara had to make a compromise between the patriarchal notion of father's power and son's inherent right in his father's property. Vijñāneśvara never says that son's consent is not

1. Derrett, ZVR, 64 (1962), n.168 at 56. See also Henry Maine, Ancient Law, 261, where he says that the Indian tendency is the reverse of the idea of Western Europe, 'Nemo in communione potest invitus detineri', ("No one can be kept in co-proprietorship against his will"), - a partition rarely takes place in India. This may have been the case over a century ago, it will not do as a statement of fact today.

2. Mitā, Colebrooke, I.i.25. Derrett, 'Hindu Law: the Rights of the Separated Son', S.C.J. 19 (1956), 107.

required while a father alienates his self-acquired property; he only emphasises that by reason of a son's dependence on his father and because of a father's predominant interest in self-acquired property any reasonable son would morally be bound (and perhaps would conclusively be presumed) to acquiesce in such an alienation.

A son's dependence on his father or a father's predominant interest in his self-acquired property [1] is not a denial of the son's birthright in such property; but as in Indian society an individual member sacrifices some of his individual rights for the greater interest of the family, in this case also a son condescends to modify his birthright for a reasonable transaction entered into by his father.[2] A son retains his right to withhold consent in cases where a father dissipates his self-acquired immovables,[3] and Vyāsa's text quoted by Vijñāneśvara with approval, categorically confers that right on a son.[4]

To Vijñāneśvara, the interest of the family was of paramount importance and individual rights, though duly recognised, were subservient to the welfare of the family. He was not in favour of propounding a juristic principle which

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1. Mitā, Colebrooke, I.v.10.

2. See the discussion on son's dependence (pāratantrya) at Derrett, ZVR, 64 (1962), 15-130 at 96-7.

3. P.N. Sen, General Principles of Hindu Jurisprudence, op.cit., 136.

4. Vyāsa cited at I.i.27. For the correct meaning of I. i.27, see Madana-ratna-pradīpa, ed., P.V. Kāṇe, (Bikaner, 1948), 210: svārjitam-api sthāvaram dāsādikaṃ ca putreṣu prāptavyavahāreṣu tad-anumatyaiva dātavyam / Also Derrett, ZVR, 64 (1962), n.168 at 56; RLSI, 417.

would provide no rule authorising expenses in cases of family necessity, unforeseen emergencies, and for the pursuit of dharma within the family. He did not turn the requirement of consent of co-owners for an alienation into a rigid rule of substance (which it was open to him to do and now appears in judicial decisions as to the effect of death after 1956), but made full use of Bṛhaspati's text [1] for upholding transactions even of immovables by a single co-owner for legal or dharmya necessities when the other co-owners lacked legal capacity for giving consent. But this also supports Vijñāneśvara's earlier statement that the consent of a son with legal capacity was necessary for alienating all categories of immovables even when the transaction was for special purposes as enumerated in his comment on Bṛhaspati:[2]

> The meaning of that text is this: while the sons and grandsons are minors and incapable of giving their consent or doing similar acts, or while the brothers are so and continue unseparated, even one person, who is capable, may conclude a gift, hypothecation, or sale, of immovable property, if a calamity affecting the whole property require it, or for supporting the family, or for performing indispensable duties, such as obsequies of the ancestors (manes). 3

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1. Bṛhaspati cited at Mitā, I.i.28. The text quoted supra, 345, n.1.

2. On Yājñ.II.114. asyārtha aprāpta-vyavahāreṣu putreṣu pautreṣu vā nujñānād asamarthesu bhrātṛṣu vā tathā-vidhesv avibhaktesv api sakala-kuṭumba-vyāpinyām āpadi tat-poṣane vā 'vaśyaṃ kartavyeṣu ca pitṛ-śrāddhādiṣu sthāvarasya dānā-dhamana-vikrayam-eko'pi samarthaḥ kuryād-iti /

3. Tr. Ghārpure, 992-3, Colebrooke at I.i.29 renders pitṛ-śrāddhādiṣu as 'obsequies of the father or the like'.

However to impute to the word 'sthāvare' (in respect of immovables) Mitā, [I.i.27] two meanings - one in case of ancestral immovables and another in case of self-acquired immovables - (in the light of I.v.10) would amount to the violation of the nyāya principle that a word, once pronounced, could convey only one meaning,[1] and the contradiction of imputing to it a double meaning was hardly to be expected from the pen of a commentator like Vijñāneśvara.

When we turn to Vijñāneśvara's pronouncement on the father's power over ancestral movables, we realise that he believed himself bound to modify the son's birthright in such property even though Yājñavalkya ordained co-extensive right of father and son in all categories of property of the grandfather.[2]

Even in ancestral property, Vijñāneśvara treats movables as a special category, distinct from immovables. In families which live on agriculture or partly on agriculture and partly on commerce, the immovables form the nucleus of common family property and are the main sources of maintenance for the

1. sakṛd-uccāritaḥ śabdaḥ sakṛd-artham gamayati / cited by P.N. Sen, G.P.H.J., 137. Also J.N. Bhattacharya, Commentaries on Hindu Law, (Calcutta, 1909), I, 128. Dattaka Mīmāṃsā, II.35. Cp. Dāyabhāga, III.ii.30, where the word 'mother' cannot be ordinarily taken to include 'stepmother'. Contrast Jaimini, I.iv.18, where the situation is not the same; Mitākṣarā, I.i.27, does not need any subsequent elaboration on the point of self-acquired immovables of the father. At I.v.10, Vijñ. was simply clarifying the incidents of self-acquired movables of the father, see Śabara on Jaimini, I.iv.18, Jhā, Shabara-bhāṣya, (Baroda, 1933), I, 164-5.

2. Yājñ. II. 121, supra, 331, n. 1.

family. Therefore, restrictions are imposed against alienation of immovables by the father without the consent of the son. But if the same restrictions against alienation are attached to movables, a deadlock in the family might result. Vijñāneśvara here manipulated the texts, and in order to keep the situation fluid in a family he resorted to a compromise between the texts of Yājñavalkya and Nārada,[1] and did not adhere fully to the purport of either. He did not confer on the father unrestricted absolute power to deal with ancestral movables.[2] A father could deal independently with ancestral movables only in a special situation and for specified purposes.[3]

> Still, it (also) stands (as good law) that the father has independent power in the disposal of effects other than immovables for indispensable acts of duty, and for purposes prescribed by the text of law, as gifts through affection, support of the family, relief from distress and so forth.[4]

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1. Yājñ.II.121; Nārada, Maṇi muktā ... cited at Mitā, I.i.21, quoted supra, 331, n.1; 340, n.1.

2. Jogendra Smārta Śiromaṇi, Commentary on the Hindu Law, (Calcutta, 1885), 171. R.C. Mitra, TLL, 1895-6, The Law of Joint Property and Partition in British India, (Calcutta, 1897), 103. P.N. Sen, GPHJ, 138-9.

3. On Yājñ.II.114. tathāpi pitur-āvaśyakeṣu dharma-kṛtyeṣu vācanikeṣu prasāda-dāna-kuṭumba-bharaṇāpadvimokṣādiṣu sthāvaravyatirikta-dravya-viniyoge svātantryam iti sthitam /

4. Tr. Ghārpure, 991; Colebrooke, I.i.27.

g. Summing up

We can sum up by saying that according to Vijñāneśvara, the son's right by birth is not merely limited to property of the grandfather, but it extends to the self-acquisitions of the father as well,[1] although the extent of the right has been modified by factors such as religious and family necessities, and a father's predominant position and responsibility as the senior-most male member of the family.

V. Jīmūtavāhana's Treatment of the Son's Right by Birth in the Dāyabhāga

a. Introduction

In the Mitākṣarā Vijñāneśvara established the theory of the son's right by birth (janma-svatvavāda)[2] on a solid, objective foundation. But Jīmutavāhana's[3] Dāyabhāga constituted a triumph for uparama-svatvavāda (acquisition of right on the demise of the previous owner).[4] Not infrequently authors[5] have

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1. P.N. Sen, General Principles of Hindu Jurisprudence, op.cit., 131.

2. Kāṇe, HD, III, 547.

3. He flourished between 1090-1130 A.D., Kāṇe, HD, I, 326. Derrett, M.L.J. (1952) 1; also Dharmaśāstra and Juridical Literature, (Wiesbaden, 1973), 51.

4. B.N. Sampath, BLJ, (1965), I, 1, 37.

5. Herbert Cowell, The Hindu Law, TLL, 1870 (Calcutta, 1870), 102. Also Stokes, Hindu Law Books, (Madras, 1865), 187, n.19.

thought that Jīmūtavāhana wrote his long and elaborate thesis to dispute the arguments of Vijñāneśvara put forward in the Mitākṣarā, but there is no conclusive evidence for this, and it was highly improbable that Jīmūtavāhana had a personal knowledge of the celebrated work of Vijñāneśvara.[1]

To a student of comparative jurisprudence, the two works are of immense significance from the points of view of their genre as well as their theme. The contents of both works are comments and interpretations of virtually one and the same body of smṛti rules, but their jurisprudential interest lies in the fact that they differ both in their arguments and in thèr conclusions. They both looked for and emphasised those arguments which proved their respective points to fit in the framework of their ideas on ownership in joint family property.

The concept of co-extensive right in property between a father and son which is accepted in the Mitākṣarā is absent from the Dāyabhāga where a father, so long as he is alive, is considered as the absolute owner[2] of both ancestral[3] and self-acquired property.

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1. Jolly, Outlines of an History of the Hindu Law of Partition, Inheritance and Adoption, TLL, 1883, (Calcutta, 1885), 26. Kane, HD, I, 242. Thoroughly examined by Derrett, 'The Relative Antiquity of the Mitākṣarā and the Dāyabhāga', M.L.J., 1952, 1-9 at 8.

2. Sampath, BLJ, (1965), I, 1, 43, n.2.

3. R.C. Mitra, The Law of Joint Property and Partition in British India, TLL, 1895-96, (Calcutta, 1897), 178. K.L. Sarkar does not agree with Mitra, MRI, 396. A recent opinion, though superficial and uncritical, agrees with Mitra's: S.P. Khetarpal, 'Codification of Hindu Law'; Family Law and Customary Law in Asia: A Contemporary Legal Perspective, ed., D.C. Buxbaum, (The Hague, 1968), 215.

b. dāya

At the beginning of the treatise, Jīmūtavāhana's definition of dāya rules out the possibility of co-extensive right between father and son.[1]

> The word dāya is used in a specified sense in respect of property in which Property arises upon the cessation of the previous Owner's Ownership, Property itself dependent upon a relationship with that Owner.[2]

Despite deriving the term dāya from the root dā (to give), Jīmūtavāhana does not attach much importance to its literal meaning. He points out that the use of the verb is metaphorical,[3] since there is no actual abdication (tyāga) on the part of the previous owner.[4] Here the act of giving is not voluntary but takes place by operation of law at the death, relinquishment or retirement of the owner.[5]

It has already been pointed out [6] that the correct derivation of the

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1. Dā.bhā.1.5. The texts followed as edited by Jīvānanda Vidyāsāgara, 2nd ed., (Calcutta, 1893). tataś ca pūrva-svāmī-sambandhādhīnaṃ tat-svāmy uparame yatra dravye svatvaṃ tatra nirūḍho dāya-śabdaḥ /

2. Tr. Derrett, ZVR, 64 (1962), 54.

3. Dā.bhā.1.4.

4. See Derrett, MLJ (1952), 6. Macnaghten thought that an inchoate right arose at birth to the son which became perfected at the death of the owner, Hindu Law, 1,2; but Bengali authors were reluctant to accept it, see Shamachurn Sarkar, Vyavahāra Darpaṇa, 2-3, who does not agree with Macnaghten.

5. Cowell, The Hindu Law, TLL, 1870 (Calcutta, 1870), 94. Also K.L. Sarkar, Mīmānsa Rules of Interpretation, TLL, 1905, (Calcutta, 1909), 394.

6. Supra, 492, n.2.

root dā is 'to cut', 'to divide', which leads to a different connotation of the term dāya from Jīmūtavāhana's derivation. The term dāya in Jīmūtavāhana's sense coalesces with the term riktha [1] (the property of a deceased person) which suits his scheme of work.

c. Denial of the birthright

It seems that Jīmūtavāhana did not envisage any concept of joint ownership of property between father and son. A son's right arises only after the extinction of his father's ownership. So according to the Dāyabhāga doctrine, dāya is always (after a manner of speaking) sapratibandha.[2] The survival of an unblemished father remains (it appears) as a pratibandha towards the accrual of ownership in the son. This view of dāya has been further clarified by Jīmūtavāhana.[3]

(i) Texts of Manu and Devala

'Hence the text of Manu and the rest [4] must be taken as showing, that

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1. On riktha, supra, 492, n.2.

2. Kāṇe, HD, III, 547. Also supra, 493-6.

3. Dā.bhā. 1.30, 1.31. ato jīvatoḥ pitror-dhane putrāṇāṃ svāmyaṃ nāstī kiṃ tūparatayor-iti jñāpanārthaṃ manvādi-vacanam ekaḥ śabdo 'paraś cārthaḥ/ na coparama-mātram-eva vivakṣitaṃ kiṃ tu patita-pravrajitatvādy upalakṣayati svatva-vināśa-hetutā -sāmyāt /

4. Dā.bhā.1.18: Jīmūtavāhana refers to the text of Devala: 'When the father is dead, let the sons divide the father's wealth: for sons have not ownership while the father is alive and free from defect'. The text is quoted supra, 366, n.4. Vijñāneśvara forgot about this text !

sons have not a right of ownership in the wealth of the living parents, but in the estate of both when deceased. One position is conveyed by the terms of the text; the other by its import.

> Mere demise is not exclusively meant; for that intends also the estate of a person degraded, gone into retirement, or the like; by reason of the analogy, as occasioning an extinction of property. [1]

(ii) Texts on the Identity of Father and Son

Later, towards the end of his treatise, Jīmūtavāhana has discussed the dāyādaship of sons and has dealt with the texts which we have earlier seen [2] to be establishing the identity of personality and the common ownership of property as between father and son but, to Jīmūtavāhana, these texts [3] only indicate the central position of the son in continuation and preservation of the family, but do not signify any co-extensive right in property during the lifetime of the father.

(iii) Birth: not a mode of acquisition of property

Though Jīmūtavāhana rejected the idea of acquisition of ownership by birth, yet he had knowledge of the concept and applied his mind to refute the arguments of its advocates.

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1. Tr. Colebrooke, Dā.bhā.I.30-1. Also see Dā.bhā.I.12, where this point is again clarified.

2. Supra, 419-27.

3. Dā.bhā.XI.i.31-6.

He opens the discussion with the view of the objector.[1]

> Acquisition is the act of the acquirer; and one, who has the state of ownership dependent on acquisition, is the acquirer. Is not birth therefore, as the act of the son, rightly deemed his mode of acquisition? and have not sons, consequently, a proprietary right,; during their father's life, (even without his being degraded or otherwise disqualified); and not by reason of his demise? and therefore, is it declared: 'In some cases birth alone (is a mode of acquisition) as in the instance of a paternal estate'. [2]

In the preceding passage, the objector says that in order to become the owner of an object, there has to be acquisition (arjana), and arjana is an activity (vyāpāra) on the part of the acquirer (arjayitṛ). For this reason, the acquirer acquires the status of an owner contingent upon his activity of acquisition. For example, birth is an activity of the son (putra-vyāpāra) and, therefore, it constitutes acquisition of a proprietary right. Consequently, the son, at his birth, acquires this right during the lifetime of his father, not after the demise of the father.[3]

Jīmūtavāhana refutes this objection. He says that acquisition may not be an activity on the part of the acquirer: 'The right of one may consistently

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1. Dā.bhā.I.13. nanv arjayitṛ-vyāpāro 'rjanam arjanādhīnasvāmi-bhāvaś cārjayitā, tena putra-vyāpāro janmaivārjanaṃ yuktam. ato jīvaty eva pitari putrāṇāṃ tatra svatvaṃ na tu tan nidhanāt. ata evoktaṃ kvacij janmaiva pitre dhane /

2. Tr. Colebrooke, Dā.bhā.I.13. See the text of Gautama, supra, 516, n.1.

3. L. Rocher, 'In Defense of Jīmutavāhana', JAOS 96 (1976)1: 107-9 at 107.

arise from the act of another ...'[1] Therefore, the death of the father (i.e. the father's act of dying) can create his son's proprietary rights without any activity on the part of the son.[2]

Jīmūtavāhana refutes son's right by birth in the paternal estate with reference to Manu's text:[3]

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1. Dā.bhā.I.21.

2. This coalesces with Jīmūtavāhana's definition of dāya, Dā.bhā.I.5. The parallel situation which Jīmūtavāhana refers to in support of his argument is that of gift (dāna) and says that 'in the case of donation, the donee's right to the thing arises from the act of the giver ...', (Dā.bhā.I.21). The passage implies that a gift is completed by the donor's act alone and the acceptance of the donee is not necessary, see Raman Nadar Viswanathan Nadar v. Snehappoo Rasalamma, AIR, 1970 SC 1759 (in the context of a bequest to an unborn person), Jīmutavāhana's view is severely criticised by Derrett, MLJ Jan-June, (1971), 42: The Dayabhaga position to the effect that gift is the work of the donor is shortly 'nonsense'. Rocher attempts to rehabilitate Jīmūtavāhana with the aid of Pāṇini, the grammarian. Pāṇini (I.4.49) says: kartur īpsitataman karma ('the karman of an act is that which the agent (kartṛ) wants to achieve more than anything else'), Rocher, ibid, 107. From this Rocher says: 'The agent (kartṛ), in this case the dātṛ, is the one and only element that, in the action of dā "giving", acts independently and autonomously', ibid., 108. In Pāṇinian terms, Rocher's argument is correct, but the grammar of language and the grammar of law are two different things. Jurisprudentially, Jīmūtavāhana's thesis is speculative and not strictly conclusive. As Rocher himself observes, Jīmūtavāhana qualified his statement that 'the acceptance of the donee is not necessary to complete a gift, by the stipulation of a donee who is cetana (Dā.bhā.I.21), i.e. someone who is mentally capable of realising that the object is his and that he can use it at will, Rocher, ibid., 108. This is indeed significant. For a criticism of Jīmūtavāhana's view on gift and acceptance, see Mitramiśra, Vyavahāraprakāśa, Chowkhamba ed., 426-7. Also Derrett, ibid., 43-4.

3. Manu, IX.104, Dā.bhā.I.14. Dh.K.1149b. naitat manvādi-virodhāt. yathā manuḥ ūrdhvam pitus ca mātuś ca sametya bhrātaraḥ samam / bhajeran paitṛkaṃ riktham anīśās te hi jīvatoḥ /

> That is not correct; for it contradicts Manu and the rest 'After the (death of the) father and the mother, the brethren, being assembled, must divide equally the paternal estate: for they have no power over it, while their parents live. [1]

(iv) Ownership (svatva) does not pre-exist partition

Jīmūtavāhana consistently sticks to his argument that sons have no property (svatva) before partition.[2] This view on Nārada is again reiterated in the light of the foregoing text [3] of Manu.[4] "This text is an answer to the question, why partition among sons is not authorised, while their parents are living: namely 'because they have not ownership at that time'." [5]

To clarify this statement, Jīmūtavāhana adds an explanatory note regarding the status of a son. He says, "it should not be argued, that the text intends (mere) want of independence".[6]

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1. Tr. Colebrooke, Dā.bhā.I.14.

2. Dā.bhā.I.11 on Nārada, XIII.2.

3. Manu, IX, 104.

4. Dā.bhā.I.15. jvator api pitroḥ putrāṇām kuto na vibhāga ity aśaṇkāyām idam uttaraṃ tadānīm asvāmitvād iti /

5. Tr. Colebrooke, Dā.bhā.I.15.

6. '(mere)' added. nāsvātantryābhiprāyam iti, Dā.bhā.I.16. Cp. Aparārka on Devala, asvāmyam asvātantryam: 'no power means want of independence', J.C. Ghose, The Principles of Hindu Law, (Calcutta, 1917), II, 274, 239.

He also substantiates this view by citing the text of Devala.[1] Devala ordains that there should be partition after the decease of the father, and while the faultless father lives sons have no svāmya.[2] "Devala, too, expressly denies the right of sons in their father's wealth".[3]

Jīmūtavāhana fully utilises these two texts,[4] and puts forward another argument against the cogency of the concept of ownership by birth. He argues that if ownership by birth is accepted, then the son will have to be allowed the right to demand partition against the will of the father; and the acceptance of such right will go against the precepts of Manu and Devala.[5]

> Besides, if sons had property in their father's wealth partition would be demandable even against his consent: and there is no proof, that property is vested by birth alone; nor is birth stated in the law as a means of acquisition.

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1. pitary uparate putrā ... , Dā.bhā.I.18, Dh.K.1156a; quoted supra, 366, n.4.

2. Dā.bhā.I.18. devalaś ca pitṛdhana asvāmyam spaṣṭayati.

3. Tr. Colebrooke, Dā.bhā.I.18. For 'right' read 'ownership'.

4. Manu, IX.104, and Devala, Dā.bhā.I.18, Dh.K.

5. Dā.bhā.I.19-20. kiñca jīvaty api pitari pitṛ-dhane putrāṇāṃ svāmitve pitur anicchayāpi vibhāgaḥ syāt janmanaiva svatvam ity atra pramāṇābhāvāc cārjanarūpatayā janmanaḥ smṛtāv anadhigamāt / kvacij janmaiveti ca janma-nibandhanatvāt pitā-putra-sambandhasya pitṛ-maraṇasya ca svatva kāraṇatvāt paramparayā varṇanam //

> In some places[1] it is alleged: that there, by the mention of birth, the relation of father and son, and the demise of the father are mediately indicated as causes of property.[2]

(v) Property: not a matter of popular recognition

It is clear that Jīmūtavāhana is refuting janma-svatvavāda with the aid of the śāstra but except at the end of the paragraph, 1.19, he does not directly enter into the discussion on origin of property. But the statement reveals that Jīmūtavāhana was an advocate of the śāstric origin of property and opponent of the concept that property was a matter of popular recognition,[3] since he categorically rejects[4] the idea of the proprietary right of son so long as the father survives.[5]

> Hence the texts of Manu and the rest must be taken as showing, that sons have not a right of ownership in the wealth of the living parents, but in the estate of both when deceased.[6]

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1. Stokes thinks that Jīmūtavāhana is betraying his knowledge of the passage of Gautama on birthright cited in the Mitākṣarā, I.i.23, Hindu Law Books, (Madras, 1865), 187-8, n.19 and n.20 at 188. However, there is no conclusive evidence that he found it in the Mitākṣarā and nowhere else, see Derrett, MLJ (1952), 1-9.

2. Tr. Colebrooke, Dā.bhā.I.29.

3. K.L. Sarkar, Mīmānsā Rules of Interpretation, op.cit., 393. Derrett, MLJ, (1952), 3.

4. Dā.bhā.I.29.

5. Dā.bhā.I.30. ato jīvatoḥ pitror-dhane putrāṇāṃ svāmyaṃ nāsti kintūparatayor iti jñāpanārthaṃ manvādi-vacanam /

6. Tr. Colebrooke, Da.bha.I.30.

(vi) Interpretation of Yājñ. II.121.

Jīmūtavāhana based his doctrine mainly on the strength of the texts of Manu [1] and Devala.[2] He relies on the literal meaning of these texts. But, why did he refrain from accepting the literal meaning of the famous text of Yājñavalkya (II. 121), the bed-rock of the Mitākṣarā doctrine on son's right by birth, unless he was trying to uphold the doctrine of uparama-svatva-vāda? He evaded the purport of Yājñavalkya (II. 121) [3] and found his favourable comment in the statement of Udyota,[4] one of those commentators whose work could not be restored.[5] Despite the appreciation by some authors [6] of Jīmūtavāhana's 'forensic acumen' in explaining this text (Yājñ. II. 121), the presentation by Jīmūtavāhana of Udyota's view is indeed a laboured piece of juridical work.

Jīmūtavāhana explains away the text of Yājñavalkya by adopting Udyota's illustration of a situation:

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1. Manu, IX.104.

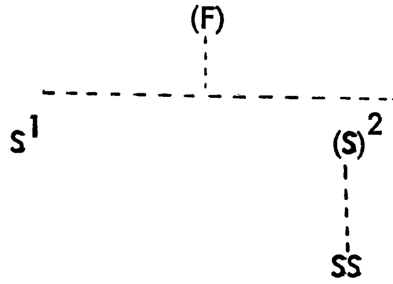
2. Devala, Dh.K., 1156, Supra, 366, n.4.

3. Jogendra Smārta Śiromaṇi thought that Jīmūtavāhana wanted to get rid of the plain meaning of the text, Commentary on the Hindu Law, (Calcutta, 1885), 313.

4. Udyota, learned predecessor of Jīmūtavāhana, who has been described by Jīmūtavāhana as a scholar of 'unblemished learning', (niravadyavidya), Dā.bhā.II.9. Kāṇe, HD, III, 556; HD, I, 323-4.

5. Jolly, TLL, 1883 (Calcutta, 1885), 25.

6. Sampath, BLJ, (1965), 1, 5.



F has two sons, S^1 and S^2. S^2 dies leaving a son, SS. Then F dies. Udyota says that by the authority of the text of Yājñ.II.121, both S^1 and SS will equally inherit the property of F at his decease, and S^1 will not exclude SS from inheritance though S^1 is nearer to F than SS. The rationale behind this distribution is this: both S^1 and SS offer pindas of the same efficacy to F in the pārvaṇa-śrāddha and because both of them can perform this supersensory benefit for F, they are entitled to inherit. This equality of offering of piṇḍa, in Udyota's opinion, is signified by the words 'sadṛśam svāmyam' (which literally means 'like or similar ownership'), and not the co-extensive right of father and son in the property of the grandfather.[1]

> When one of two brothers whose father is living, and who have not received allotments, dies leaving a son; and the other survives; and the father afterwards deceases; the text, declaratory of similar ownership, is intended to obviate the conclusion, that the surviving son alone

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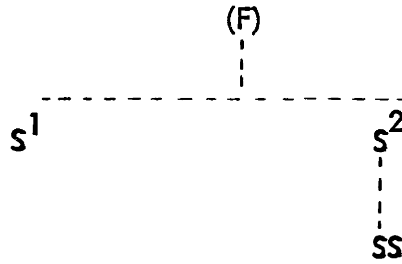
1. Dā.bhā.II.9. yatra dvayor bhrātror jīvat-pitṛkayor aprāpta-bhāgayor ekaḥ putram utpādya vinaṣṭo 'nyo jīvati, anantaraṃ pitā mṛtaḥ tatra putra eva tad-dhanaṃ prāpnoty atisannikarṣāt: tadartham sadṛśam svāmyam iti vacanam. yathā paitāmaha-dhane pituḥ svāmyam tathaiva tasmin mṛte tat-putrāṇām api na tatra sannikarṣa-viprakarṣābhyaṃ ko 'pi viśeṣaḥ pārvaṇa-vidhina piṇḍa-dānena dvayor api tad-upakārakatvāviśeṣād ity abhiprāyaḥ.

> obtains his estate, because he is next of kin. As the father has ownership in the grandfather's estate so have his sons, if he be dead. There is not, in that case, any distinction founded on greater or less propinquity, for both equally confer a benefit by offering a funeral oblation of food, as enjoined at solemn obsequies.[1]

Such is the author's meaning.

Jīmūtavāhana carries it further, and to disprove the ownership of a son in the grandparental estate during the lifetime of his father, he gives another illustration.



He points out that if sons had ownership in their grandparental estate during the lifetime of their father then, should a division be made between S^1 and S^2 after the decease of F, SS will also participate in the division. However, custom obviously did not contemplate this in circles for which the jurist was writing. Here Jīmūtavāhana's brilliance is dimmed and his apprehension is misconceived because the advocates of janma-svatvavāda have also taken heed of such situations; under the Mitākṣarā interpretation also SS will not automatically get any share while there is a partition between S^1 and

1. Tr. Colebrooke, Da.bha.II.9.

S^2.[1]

To such a famous and crucial text as Yājñ.II.121, Jīmūtavāhana has not given any interpretation of his own excepting that it does not establish son's right to demand a partition.[2]

As a second explanation, he has resorted to the comment of Dhāreśvara,[3] which by no means accepts the uparama-svatvavāda[4] as a whole.[5]

> Or the meaning of the text may be, as set forth by Dhāresvara, "A father, occupied in giving allotments at his pleasure, has equal ownership with his sons in the paternal grandfather's estate. He is not privileged to make an unequal distribution of it, at his choice, as he is in regard to his own acquired wealth." 6

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1. aneka-pitṛkāṇāṃ tu pitṛto bhāga-kalpanā/Yājñ.II.120. 'Among grandsons by different fathers, the allotment of shares is according to the fathers', Colebrooke, I.v.1-2. Derrett, MLJ (1952), 4.

2. Dā.bhā.II.18.

3. Bhojadeva, King of Dhāra. Kāṇe thinks that he reigned between 1000 and 1055 A.D., HD, I (1930), 279. According to Derrett, Dhāreśvara flourished between 1150 and 1200 A.D., Dharmaśāstra and Juridical Literature, op.cit., 54. Dhāreśvara's work perished.

4. That svatva was śāstraikasamadhigamya was the view of Dhāreśvara (= Bhoja), Kāṇe, ed., Vyavahāra Mayūkha, 478.

5. Dā.bhā.II.15. ayaṃ vā dhāreśvara-puraskṛto vacanārthaḥ. icchayā vibhāga-dānā-pravṛttasya pituḥ paitāmaha-dhane sadṛśam svāmyam putraiḥ saha na tatra svoparjita-dhana iva nyūnādhika-vibhāgam icchātaḥ kartum arhatīti.

6. Tr. Colebrooke, Dā.bhā.II.15.

The reason why Jīmūtavāhana adopted the comments of Udyota and Dhāreśvara, and, despite his knowledge of the Bālakrīḍā, [1] did not mention or refute the interpretation of Viśvarūpa on this text (Yājñ. II.121 = II.124 in the Bālakrīḍā) remains unexplained; the only plausible explanation of this can be that he was not willing to jeopardise his own theory of uparama-svatvavāda by accepting the explanation of the commentators who interpreted the text as authorising a co-extensive right on the part of the father and son in the property of the grandfather.

d. Partition

Dhāreśvara leaves the impression that to some extent ancestral property and self-acquired property of the father are two distinct categories as far as the mutual rights of father and son are concerned in the case of a partition initiated by the father. [2] Considering Jīmūtavāhana's views on son's right by birth, [3] the alleged obligation of a father to divide the ancestral property equally among his sons, [4] unlike his self-acquisitions, does not directly indicate the acceptance by Jīmūtavāhana of any co-equal ownership between father and son. According to Jīmūtavāhana, a father has his double share in the property inherited from the grandfather [5] and partition takes place only at the will of a

1. Jīmūtavāhana had knowledge of the Bālakrīḍā of Viśvarūpācarya, Kāṇe, HD, I, 322-33.

2. Dā.bhā.II.15.

3. Dā.bhā.I.14, 15, 18, 19, 20, 29, 30.

4. As stated by Dhāreśvara, Da.bha.II.15.

5. Da.bha.II.20.

father.[1] Jīmūtavāhana's denial of a son's right to demand partition and his right of ownership in the grandparental property[2] leaves a son with hardly any substantive right except (as Sontheimer opines) a moral injunction[3] directed against a father to distribute the ancestral property equally among his sons after having his double share, if and when he decides to divide the assets.

Jīmūtavāhana says:[4]

> It is consequently true, (since the texts above cited do not imply co-ordinate ownership) that the father has his double share of wealth inherited from the grandfather or other ancestor; and that a distribution takes place at the will of the father only, and not by the choice of his sons. 5

He adds:

> But, according to our interpretation, the phrase, 'let him separate his sons according to his pleasure', relates to his own acquired wealth; while the allotment of the best share, and an equal distribution, both regard an estate inherited from the grandfather.[6]

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1. Ibid.

2. See his view on Yājñ.II.121, Dā.bhā.II.15.

3. Sontheimer, EHJF, 241.

4. Dā.bhā.II.20. ataḥ paitāmahādi-dhane pitur-bhāgadvayaṃ pitur-icchāta eva vibhāgo na putrecchayeti siddham /

5. Tr. Colebrooke, Dā.bhā.II.20.

6. Colebrooke, Dā.bhā.II.79. Here Jīmūtavāhana is following Dhāreśvara, Dā.bhā.II.15. However, a father's obligation to distribute the residue of the grandparental property equally among his sons leaves the question open whether it is a mere 'moral injunction' or an indirect acceptance by Jīmutavahana of sons' birthright in grandparental property at the hands of their father.

e. Father's power of alienation

The next test of the existence of son's birthright seems to be attached to the question of how far, according to Jīmūtavāhana, a father was allowed to alienate the ancestral and his self-acquired property without the consent of his sons. In Jīmūtavāhana's opinion, a father is undoubtedly the absolute master of his self-acquired properties.[1] Let us examine how Jīmūtavāhana has dealt with the smṛti texts which prohibit a father from alienating certain family properties without the consent of his son. The text of Yājñavalkya (maṇī-muktā)[2] allows a father absolute ownership over all movables but he has no power to alienate the whole of the immovables (sthāvarasya tu sarvasya).[3]

Jīmūtavāhana accepts the general proposition that the prohibition on alienation of immovable property is due to the fact that it forms the basis of family maintenance.[4] Before giving his final verdict on the father's power of alienation, Jīmūtavāhana builds up his thesis step by step. First, he quotes Manu's text to show that maintenance of the family is specifically enjoined in the śāstra, and a scrupulous following of the injunction is spiritually rewarded, while a breach is punished.[5]

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1. Dā.bhā.II.22.

2. Cited in the Dā.bhā.II.22; also attributed to Nārada, Dh.K.1219b.

3. Dh.K.1219b.

4. Dā.bhā.II.23. See Vyāsa: vṛtti-lopaḥ vigarhitaḥ, 'deprivation of maintenance is morally wrong', N.C. Sengupta, Evolution of Ancient Indian Law, op.cit., 209, n.78. For Vyāsa's text, Dh.K.1587; Jha, HLS, I, 276. For a discussion, supra, 340-1.

5. Manu cited at Dā.bhā.II.23. bharaṇam poṣya-vargasya praśastaṃ svarga-sādhanam / narakaṃ pīḍane cāsya tasmād yatnena taṃ bharet //

> The support of persons who should be maintained is the approved means of attaining heaven. But hell is the man's portion if they suffer, therefore let a master of a family carefully maintain them. 1

Then he draws the logical conclusion from the text of Yājñavalkya [2] that a father can make a gift or sale of a small part of the immovables if this will not jeopardise the support of the family.[3]

> The prohibition is not against a donation or other transfer of a small part not incompatible with the support of the family. For the insertion of the word 'whole' would be unmeaning (if the gift of even a small part were forbidden'). 4

And the prohibition against disposing the "whole" does not stand if the family is in distress.[5] Even the whole of the immovable property, Jīmūtavāhana understandably says, can be sold for the preservation of the family.[6] Here on the one hand, Jīmūtavāhana is conferring unfettered

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1. Tr. Colebrooke, Dā.bhā.II.23. The text is not found in the Institutes of Manu. It is a matter of interest that the obligation to maintain is often stated by the <u>smṛtikāras</u> in moral, not legal terms.

2. maṇi-muktā ..., Yājñ. cited at Dā.bhā.II.22; Dh.K.1219b; see above, p.340, n.1, cited as Nārada's.

3. Dā.bhā.24. alpasya tu kuṭumba-vartanāvirodhino na dānādi-niṣedhaḥ sarvasyetyānarthakyāpatteḥ //

4. Tr. Colebrooke, Dā.bhā.II.24.

5. <u>āpat</u> = distress. On <u>āpat-dharma</u> and its applicability to prohibition, see Derrett, RLSI, 95-6.

6. Dā.bhā.II.26.

power on the head of the family, giving the father, in most cases, unrestricted freedom of disposition of family property both movable and immovable, while, on the other hand, he is unconsciously recognising the rights of family members to be maintained, because when an alienation would secure their maintenance no prohibition fetters the father's power. In other words, whatever the nature of the right to be maintained, the general rights of family members over certain categories of property are accepted by Jīmūtavāhana. But there is no reason to suppose that a right of maintenance is synonymous with a son's right by birth.[1] In these passages, Jīmūtavāhana was dealing with the texts on resumption of gift (dattāpradānikam), but he was manipulating them so as to strengthen his theory of the absolute power of a father.

To be consistent with his denial of the son's right by birth, Jīmūtavāhana faced difficulties in interpreting two texts of Vyāsa which enjoined the inalienability of immovables by a single parcener without the consent of other common owners.[2] He approached the prohibitory purport of these texts from two angles and neutralised it. First, he puts forward the logical tests of ownership, namely, that the essential nature of ownership is the power of absolute disposition or, in other words, he who has the power of valid and free disposition has proprietary right (svatva) in the thing.[3]

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1. K.L. Sarkar goes too far in supposing that a right of maintenance is equivalent to the right of having a share in a partition, Mīmānsā Rules of Interpretation, op.cit., 410.

2. Vyāsa: sthāvarasya samastasya ... , and vibhaktā avibhaktā ..., Dh.K. 1586-7; quoted and discussed as of Bṛhaspati, supra, 341, n.1.

3. P.N. Sen, G.P.HJ, 156. Kāṇe, HD, III, 555.

On the two texts of Vyāsa, Jīmūtavāhana says:[1]

> It should not be alleged, that by the texts of Vyāsa (...) one person has not power to make a sale or other transfer of such property. For here also as in the case of other goods, there equally exists a property consisting in the power of disposal at pleasure. 2

But if this incident of yatheṣṭa-viniyogārhatva of property is applied to his definition of partition, namely, that each owner's right is attached to a particular portion of joint property which is determined in a partition,[3] then a single owner will have no power to alienate beyond his own portion. Jīmūtavāhana knew that to dissipate this incongruity,m he needed to explain further, and accordingly stated that the offence of alienating beyond one's own share would be only a moral offence (adharma-bhāgitā-jñāpanārtham).[4]

The two texts of Vyāsa dealt with above could be explained as not applicable to father and son, since Jīmūtavāhana rejected the son's birthright in the property of his father or grandfather. But he could not avoid the other text[5] which specifically mentioned father and son, and probably he could not

1. Dā.bhā.II.27. etad vyāsa-vacana-dvayena ekasya vikrayādy anadhikāra iti vācyam yatheṣṭa-viniyogārhatva-lakṣaṇasya svatvasya dravyāntara ivātrāpy aviśeṣat //

2. Tr. Colebrooke, Dā.bhā.II.27. On yatheṣṭa-viniyogārhatva ('the fact that a thing is morally and legally fit for employment at pleasure'), see Derrett, 'An Indian Contribution to the Study of Property', BSOAS, 1956, XVIII/3,475-98.

3. Dā.bhā.I.8. For Raghunandana's criticism of illogicality of Jīmūtavāhana's definition of partition, see Stokes, Hindu Law Books, (Madras, 1965), 184, n.8. Also P.N. Sen, GPJH, 148-9, 157.

4. Dā.bhā.II.28. See Cowell, The Hindu Law, TLL, 1870(Calcutta, 1870), 95.

5. Vyāsa, quoted in Da.bha.II.29; Dh.K.1587. sthavaraṃ dvipadam caiva yadyapi

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find an interpretation to suit his own view among any of his predecessors, like Udyota or Dhāreśvara as he had in the case of Yājñavalkya, II.121.[1] He gives his own interpretation, but cannot altogether ignore the express prohibition against alienation of immovables even though they are self-acquisitions of the father. He first says that this text [2] also should be interpreted in the same way as the other two.[3] "So likewise other texts ... must be interpreted in the same manner. For here the words 'should be made' must necessarily be understood".[4]

He accepts the śāstric prohibition in substance, but adds that when the transaction is made in fact, the factual situation overrides the substantive precept. This is his second angle of approach. Thus, Jīmūtavāhana says:[5]

Note 5 - p.548 - Continued:

svayam arjitam / asambhūya sutān sarvān na dānaṃ na ca vikrayaḥ //

1. He avoided quoting another text (pitṛ-prasādāt bhujyante ... , Dh.K.1219b). Since we cannot impute ignorance, Jīmūtavāhana probably avoided its specific mention because of his disadvantage and tackles it indirectly at Dā.bhā.II.29. See Derrett, MLJ (1952), 4.

2. Vyāsa sthāvaram ... , Dh.K. 1587, Dā.bhā.II.29.

3. Dā.bhā.II.29. evañca ... ity evamādikam tad-apy evam-eva varṇanīyam. tathāpi kartavya-padam-avaśyam atrādhyāhāryam.

4. Tr. Colebrooke, Dā.bhā.II.29. To show that the prohibition is not a legal but only a mere impropriety, Jīmūtavāhana in the place of 'should not be made' in the original text, supplied the word 'should' (kartavya). This is an instance of adhyāhāra (interpolation of a word in a text for bringing out its meaning), see J.N. Bhattacharya, Commentaries on Hindu Law, (Calcutta, 1909), I, 114-5.

5. Dā.II.30. tena dāna-vikraya-kartavyatā-niṣedhāt tat-karaṇāt vidhy atikramo bhavati, na tu dānādy aniṣpattiḥ, vacana-śatenāpi vastuno 'nyathā-karaṇāśakteḥ.

> Therefore, since it is denied, that a gift or sale should be made, the precept is infringed by making one. But the gift or transfer is not null: for a fact cannot be altered by a hundred texts. 1

He supports this so-called doctrine of factum valet [2] by an apparently irrelevant text from Nārada:[3]

> Accordingly (since there is not in such case a nullity of gift or alienation) Nārada says: 'when there are many persons sprung from one man, who have duties apart and transactions apart, and are separate in business, and character, if they be not accordant in affairs, should they give or sell their ownshares, they do all that as they please, for they are masters of their own wealth. 4

This text, as has been suggested by many interpreters,[5] should be understood to declare the separate and independent right of co-heirs after partition (!), but as a text justifying the transaction of a co-owner it remains unconvincing. But if we start from Jīmūtavāhana's views on a father's absolute

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1. Tr. Colebrooke, Dā.bhā.II.30.

2. Quod fieri non debuit, factum valet. For a discussion of this maxim of Roman law and its application in Hindu law, see Derrett, 'Factum Valet: the adventures of a maxim', 7 I.C.L.Q. (1958), 280-94.

3. Nārada, XIII, 42-3; cited at Dā.bhā.II.31. ata eva Nāradaḥ: yady eka-jāta bahavaḥ pṛthag-dharmāḥ pṛthak-kriyāḥ / pṛthak-karma-guṇopetā na cet kāryeṣu sammatāḥ // svabhāgān yadi dadyus te vikrīṇīyur athāpi vā / kuryur yatheṣṭam tat-sarvam īśāste svadhanasya vai // Variant reading: samyak for pṛthak and kṛtyeṣu for kāryeṣu.

4. Tr. Colebrooke, Dā.bhā.II.31.

5. Smṛti Candrikā, ed., Ghārpure, (Bombay, 1918), 309. Stokes, Hindu Law Books, op.cit., 207.

power and his denial of a son's birthright, the text can, somewhat bizarrely, be taken as a precept to validate a transaction by a father.

These prohibitions or limitations on a father's power to alientate family property have engrossed the minds of almost all the commentators and their interpretations of prohibitory texts have swung like a pendulum between the father's power over properties of the unseparated sons and recognition of son's birthright in property of the father and the grandfather, and the range of the prohibition has varied from very wide to very narrow limits.

As a general rule, the dharmaśāstras themselves have discouraged alienation of property by a father in presence of male issue [1] or by a co-owner without the consent of other co-owners. But the interpretations of the commentators hardly agree with one another. In this respect, the interpreters cannot be blamed for a particular bias because the ambiguities are actually contained in the śāstric precepts.

Out of these interpretations on the exact implications of the prohibitions, three main streams of thought have emerged. Jīmūtavāhana belongs to the school which holds that the transaction is valid but the transgressor sins.[2]

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1. Texts cited on dattāpradānikam, supra, 347 ff.

2. It is interesting to note from the point of view of Anglo-Hindu law that this view of Jīmūtavāhana on 'Alienation of Immovable Property' was communicated by Prosonno Coomar Tagore on 20th June, 1859, to the Secretary to the Board of Revenue in reply to his communication No.120, dated 29th May, 1859, calling for Tagore's opinion on the subjects adverted to by the Right Hon'ble, the Secretary of State for India in his Despatch No.4 of the 25th January, 1859, P.C. Tagore, Loose Papers, (Calcutta, 1868), 5; SOAS Library, A345.4/316496. Horace Wilson criticised Jīmutavahana's view as the wrong exposition of Hindu law, R. Rost, ed., Works by the Late Horace Hayman Wilson, (London, 1865), III, 71-3. The two other schools: (i) the second school holds that the trans-

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He attaches the immorality of such a transaction to the alienor alone. His sin is purely personal; penance will exonerate him from the sin, but the property will pass despite the infringement of the injunction because the nature of a transaction cannot be altered by a prohibitory text.[1] Jīmūtavāhana apparently considers that :

> a precept which belongs to the domain of ecclesiastical i.e. spiritual law, had not in the domain of vyavahāra i.e. litigation , the same force as a positive and clear rule of the vyavahāra itself has. 2

As regards validity, all commands to be found in the śāstra were equally binding,[3] and in Sanskrit there is nothing synonymous to strictissimi juris, yet interpreters[4]

Note 2 - p.551 - Continued:

action is voidable and the transgressor does not sin. (ii) According to the third school, the transaction is voidable but the transgressor does sin. Discussed in Śaṅkarabhaṭṭa's topic of dattāpradānikam (concerning non-delivery of gifts), (Dharma)-dvaita-nirṇaya, ed. Ghārpure, (Bombay, 1943), 123-4. Also for the relevant passages in translation and critical review, see Derrett, 'Prohibition and Nullity: Indian Struggles with a Jurisprudential Lacuna', BSOAS, 20 (1957), 203-15. For a discussion on this topic, supra, 356-63.

1. J.N. Bhattacharya, Commentaries on Hindu Law, (Calcutta, 1909), I, 114-5, 149-50. Explanations added.

2. K.L. Sarkar, Mīmānsā Rules of Interpretation, op.cit., 395.

3. Derrett, RLSI, 77.

4. Cp. Vijñāneśvara on the Lipsā Adhikaraṇa, The Mitākṣarā, I.i.10. See K.L. Sarkar, Mīmānsā Rules of Interpretation, loc.cit., 395.

like Jīmūtavāhana turned a new leaf and exploited the subtle and complex co-existence of religious and positive law in the śāstra.[1] However unconvincing it may be from the point of view of acceptance of the literal meaning of the dharmaśāstras, yet it became an accepted method that the commentators were at liberty to apply laukika nyaya[2] (principles of secular reason) to bring out the meaning of a sacred text. The utterance of Jīmūtavāhana at Dāyabhāga, II.30, can be taken as an example of laukika nyaya. He wants to emphasise that 'a rule which reasonably follows from the substance (property) itself, must have precedence over a rule relating to accidents no matter how authoritative'.[3] Jīmūtavāhana wants to uphold the father's power and deny the son's right of interdiction by saying that:

> although smṛti texts tend to prevent a father's alienating self-acquired immovable property without his son's consent, the alienation without such prior consent would be an offence merely in conscience, and the transaction (per se) 4 is valid. 5

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1. Derrett, RLSI, 96.

2. N.C. Sengupta considers secular reason or laukika nyaya as an accessory source of law, Sources of Law and Society in Ancient India, (Calcutta, 1914), 82-3.

3. N.C. Sengupta, Sources of Law and Society in Ancient India, op.cit., 83.

4. My addition.

5. Derrett, RLSI, 91. Similar approach of Vijñāneśvara, though in a different context, Mitā. I.i.16. Jīmutavāhana by emphasising the transaction as such is unconsciously dissociating property from the śāstra, a triumph of expediencey over authority, an instance of accommodating written texts to the practical needs of the time, RLSI, 96. Also Jolly, Outlines of an History of the Hindu Law of Partition, Inheritance, and Adoption, As Contained in the Original Sanskrit Treaties, TLL, 1883, (Calcutta, 1885), 113.

Jīmūtavāhana's dealing with the smṛti text with the aid of the doctrine of factum valet or laukika nyaya leaves the impression that for practical purposes, the prohibition would be waived only in the case of alienation of self-acquired immovable property by a father and, as K.L. Sarkar [1] rightly thought, that the doctrine would not apply to alienation of grand-parental property by a father without the consent of his sons. It is apparent that Jīmūtavāhana did not treat ancestral and self-acquired property on the same footing, though he considered the whole as the father's property. His treatment of the topic of mode or time for partition makes it clear that a father's power was not considered to be as absolute over ancestral property as over his self-acquisitions. In ancestral property, apart from having a double share for himself, Jīmūtavāhana does not confer on the father any arbitrary power of distribution among his sons. Secondly, so long as the mother is not past the age of child-bearing, a father cannot (perhaps, should not) make a partition even though he may wish to do so.

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1. K.L. Sarkar thought that without the breach of dvayo-pranayantī nyaya, the doctrine of factum valet could not be applied to ancestral immovables. Mīmānsā Rules of Interpretation, op.cit., 396. Sampath also accepts the view of Sarkar, Benaras Law Journal, 1 (1965) 1: 43.

In procedural law, Jīmūtavāhana has stated that if a son finds his father is dissipating the entire property, a son could bring it to the cognizance of an officer of justice and thus a suit would lie between father and son.[1] It was, after all, universally acknowledged that it was part of the King's duty to uphold dharma which includes morality as well as scriptural law.[2]

f. Summing up

The restriction on a father's power regarding mode and time for partition and the sons right to sue the father for improper alienation might lead us to assume that Jīmūtavāhana accepted a son's innate right in property of the grandfather. But we should not lose sight of the fact that Jīmūtavāhana had categorically denied son's right by birth[3] and explained away the literal meaning of the texts of Yājñavalkya, II.121[4] and Viṣṇu,[5] which ordained co-extensive right of a son with his father in property of the grandfather.

The denial of son's right by birth in the Dāyabhāga remains a puzzling question. Many scholarly attempts have been made to explain the motivation which led Jīmūtavāhana to his interpretations but none of them are satisfactory or convincing; and quite a few have left it without any opinion.[6] One of the

1. Vyavahāra-mātṛkā, ed., A. Mookerjee, (Calcutta, 1912), 285; discussed in detail, supra, 440-55.

2. See Lingat, CLI, 222-3.

3. Dā.bhā.I.14, 15, 18, 19, 20, 29, 30.

4. Dā.bhā.II.9.

5. Dā.bhā.II.16, 17.

6. Kaṇe, HD, III, 560. Sampath, BLJ 1 (1965) 1: 37, n.3, 40.

earliest views was put forward by Jolly,[1] which to a great extent remains valid even to-day. He says, 'whether these various doctrines were shaped into a system by Jīmūtavāhana himself or by earlier writers, whom he may have followed, it is impossible to decide".[2] He goes on, "thus much is certain that his doctrine is not only in accordance with those opinions of earlier teachers which are refuted in the Mitākṣarā, but is readily deducible from the old texts themselves".[3] Jolly was right in saying that "the views of Jīmūtavāhana were neither peculiar to himself nor to the Bengal school of lawyers", but there is no denying the fact that it was not possible to recover the works of predecessors of Jīmūtavāhana in which he could have found the origination of his doctrine in an embryonic form.

J.D. Mayne's conjecture that the influence of Brāhmiṇism completely remodelled the law of inheritance in Bengal did not find favour with later jurists. Justice Sarada Charan Mitra, P.N. Sen, Golāp Chandra Śāstrī and S.S. Setlur, took issue with Mayne and stated that Brāhmiṇical influence could not be a factor in moulding Jīmūtavāhana's doctrine since Benares, being a greater centre of Brāhminism, followed the Mitākṣarā. It could be true in a limited sense that the Bengali brāhmins, in order to suit their own self-interest in having gifts, might have applied their minds to evolve a śāstric formula for easing alienation

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1. Jolly, TLL, 1883, 25.

2. Ibid., 114. Also K.P. Jayaswal thought that Jīmūtavāhana had textual authority behind him, especially of Manu and the Arthaśāstra, Manu and Yājñavalkya, a Basic History of Hindu Law, (Calcutta, 1930), 255, 263. The speculative character of Jayaswal's work is well-known (so Kāṇe, passim). Kāṇe also thought that the doctrine was older than Jīmūtavāhana, HD, III, 257. Also Sampath, BLJ 1 (1965) 1: 37.

3. Jolly, ibid., 114.

of property, especially land, by a father. Inscriptional and epigraphic materials prove that buying and selling of land were in great vogue in ancient and mediaeval Bengal and in many cases the transfer of land was done in order to make a gift to a brāhmin.[1] But this suspicion finds no special anchorage in Bengal.[2]

According to Justice Mitra, the main causes for the growth of a different system of law of property in Bengal were the influence of the Buddhist tantras and the commercial and maritime activities of the people of Bengal.[3] None of these contentions hold water and they are of no special peculiarities of Bengal.[4] In other parts of India where the influence of Buddhism was greater than in Bengal, the Mitākṣarā principles were followed.[5]

It is true that Bengal was a leading centre of trade, and a trading community would find any restriction on freedom of alienation of property inconvenient . But Bengal was not the only trading province of India and coastal

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1. N.R. Roy, Bāngālir Itihās, 1st ed., (Calcutta), 209-55, especially at 251.

2. We should not forget that in other partsof India too, gift of land was not unknown, Kāṇe, HD, II, 858. C.R. Lanman, 'Hindu Law and Custom as to Gifts', rpt. from Anniversary Papers Collected by Colleagues and Pupils of George Lyman Kittredge, (Boston, 1913), 1-14. J. Gonda, 'Gifts', in his Change and Continuity in Indian Religion, (Mouton, The Hague, 1965), 198-228. For a discussion, supra, 547-64.

3. In Justice Mitra's opinion, Buddhist tantras attributed to the freedom of women with which we are not directly concerned, but the ownership in severalty of the Dāyabhāga grew out of the commercial and maritime activities, Law Quarterly Review, 21 (1905), 380-92; 22 (1906), 50-63. Mayne also considered commercial activity as a contributory factor for the peculiarity of the Hindu law in Bengal, Hindu Law, 320. Also P.N. Sen, GPHJ, 165. For a criticism, Kāṇe, HD, III, 559-60.

4. Kāṇe, HD, III, 559.

5. S.S. Setlur, 'The Origin and Development of the Bengal School of Hindu Law', Bom.L.R.J. 9 (1907) 7: 135, 137.

and seafaring people in other parts of India like Andhra and Maharastra, remained scrupulous followers of the Mitākṣarā.[1]

Golāp Chandra Sarkār Śāstrī's opinion,[2] that the doctrine of spiritual benefit was used as a pretext by Jīmūtavāhana for assigning in the order of succession a higher position to some near and dear cognates in preference to remoter agnates, is not directly concerned with the son's right by birth. This affection theory of Śāstrī, like all guesswork, suffers from unreliability and there is no reason to suspect that the people in other parts of India were less affectionate to their near cognates, or that the dharmaśāstrīs in those parts were less capable of comprehending natural human relations and evolving a doctrine similar to Jīmūtavāhana's.

In a recent article, Ludo Rocher[3] took a completely different view from his predecessors, and in fact, supported the excuse put forward by Jīmūtavāhana for composing his work. According to Rocher, "the authors of the commentaries and nibandhas never intended to codify differing local laws and customs".[4] He does not think that the commentaries were connecting them

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1. Kāṇe, HD, III, 559.

2. P.N. Sen uncritically supported this view of Śāstrī, GPHJ, 166. Also see Derrett, 'Religion and Law in Hindu Jurisprudence', (1954), AIR Jr. S.C. 79 at 84.

3. L. Rocher, 'Schools of Hindu Law', J. Gonda Congratulatory Volume, (Leiden, 1972), 167-76.

4. Ibid., 172. This argument is not supported by facts, see the Mitākṣarā, I.i. 10, where Vijñāneśvara is accepting principles which are loka-siddha. Rajah Rammohun Roy also points out that the Dāyabhaga doctrine reflects the ancient usages of Bengal, Essays on the Right of Hindoos over Ancestral Property According to the Law of Bengal, 2nd ed., (London, 1832), 5-6, 12.

in any way with different geographical areas. Rocher elaborates his view that Jīmūtavāhana in the Dāyabhāga was not codifying Bengali customs, and he even refuses to accept the Dāyabhāga as a purely legal treatise. He says,

> the Dāyabhāga was studied in the ṭols - as it is to-day, not by students who had to be taught the local law of inheritance to prepare them for practice in the courts, but by traditional disciples who studied dharma as one of the branches of Hindu learning. 1

He falls back on Jīmūtavāhana's own justification for the work which is set out at the outset of the Dāyabhāga.[2]

> That means: the wise have not so far given enough thought to the numerous and seemingly conflicting rules on inheritance proclaimed by Manu and others; as a result they have differed in their overall interpretations of these rules. The Dāyabhāga will try to provide a more accurate interpretation by assigning each individual rule its proper place within the whole. 3

Rocher accepts this plea of Jīmūtavāhana and concludes, "We have no right, however, to accuse the author of dishonesty, and say that he used the ancient smṛtis as a pretext to lay down or codify the law of Bengal".[4]

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1. Rocher, ibid., 174; also 'In Defense of Jīmūtavāhana,' JAOS, 96 (1976) 1: 107-9 at 108.

2. Manvādi-vākyāny avimṛśya yeṣām yasmin vivādo bahudhā budhānām / teṣāṃ prabodhāya sa dāyabhāgo nirupaṇīyaḥ; sudhiyaḥ śṛṇudhvam //

3. Rocher, ibid., 176. Not a translation: a tendentious paraphrase.

4. Ibid.

From the study of a work, such as the _Dāyabhāga_, where a Sanskritist concludes, a lawyer begins. Jīmūtavāhana in essence polished and developed the North Indian view of the father's power and in effect, refuted the views of the Southern commentators. Was it, as Rocher thinks, merely an intellectual exercise on the _dharmaśāstra_? It is difficult to accept that the motivation behind the composition of the treatise was as simple as that. From an analysis of the _Dāyabhāga_ it appears that Jīmūtavāhana was conscious that he was dealing with a substantive part of the _vyavahāra_ which determined respective rights amongst the various members of the family in a mediaeval society. The religious aspirations, popular practices, conflicts and interactions among members of a particular society contribute to the formulation of a social syndrome, which influences legal writings. On this point, Kāṇe's remarks on the authors of _dharmaśāstra_ are worth noting. He says:

> The number of authors and works on _dharmaśāstra_ is legion. All these numberless authors and works were actuated by the most laudable motives of regulating the Aryan society in all matters, civil, religious and moral, and of securing for the members of that society, happiness in this world and the next. 1

The commentators on _dharmaśāstra_ have freely quoted the texts. But this practice should not mislead us into the belief that their works were exclusively for the teaching of _dharma_ in traditional institutions like _ṭol_.

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1. Kāṇe, HD, I, (1930), 466.

The society and structure of family from the time of the Āryan settlement was passing through a process of social and economic transformation. The society of the time of Jīmūtavāhana needed the precepts of the vyavahāra to be interpreted, and Jīmūtavāhana in turn, had to incorporate the practices of the people in his work as best he could. Every commentator was faced with the problem of 'inerrancy of scripture'. To say something new, they still had to speak in terms of the śāstra. Jīmūtavāhana had to set out with a belligerent thesis and like all revolutionaries, he was confronted with the conservativeness of an old civilisation. Though much of his thesis is original, knowing the incredulity and suspicion of the mediaeval society he had to create a śāstric illusion, by quoting from the smṛtis, to make a work of civil law acceptable to the minds of the members of the religious and juridical community of the then Bengal.

So far as his interpretations were concerned, Jīmūtavāhana made a transmutation of the śāstra and thus tended to influence the social norms of his time.[1] On this point P.N. Sen's remarks is interesting-

> The altered direction of the popular feeling, therefore, demanded that there should be a corresponding alteration in the law; and when Jīmūtavāhana took the matter up, he found that there was only one way of doing it; he could not legislate, but had only to interpret the existing law ...[2]

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1. Sampath, BLJ 1 (1965) 1:43.

2. P.N. Sen, GPHJ, 167; Of course there is no evidence of 'direction' of feeling, 'popular' or otherwise: Sen is guessing. Also S.S. Setlur, Bom. LRJ 9 (1907) 7:136.

But a sociological factor alone cannot bring out a jurisprudential transformation. The reasons behind the views on the son's birthright in Jīmūtavāhana's work may well have been multiple, ranging from religious tradition to social customs, but the most important factor will have been the positive attitude of the author towards his religion, the *śāstra* and the customs of the people of the region in which he flourished.

THE MITĀKṢARĀ BIRTHRIGHT: A COMPARATIVE STUDY IN THE LIGHT OF ANTICIPATED LEGISLATION IN INDIA

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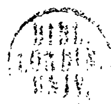

CHAPTER 14.

THE LATE MEDIAVEL COMMENTATORS

1. The Son's Birthright in Varadarāja's Vyavahāra-nirṇaya

After Jīmūtavāhana's Dāyabhāga and Vijñāneśvara's Mitākṣarā, the commentatorial literature stood at a crossroads and the subsequent interpretations followed or developed the approach of one master or the other. Varadarāja's Vyavahāra-nirṇaya,[1] a compact treatise on dharmaśāstra by a mīmāṃsaka,[2] represents the South Indian view on the son's right by birth. There is no authentic proof as to whether Varadarāja knew of Jīmūtavāhana's works or not, but he was at least familiar with the school of thought which the Bengali master developed and enlivened.[3] Since the author does not mention any writer or juridical writing later than the Mitākṣarā,[4] it may be presumed to be the only major work on smṛti after Vijñāneśvara and before Devaṇṇa-bhaṭṭa's Smṛti-candrikā.

Varadarāja did not indulge in much theorising regarding ownership or the modes of its acquisition. He put forward the smṛti texts and interpreted

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1. 1220 A.D. Ignored by Kāṇe in HD, I, 736. See K.V.R. Aiyangar, ed. Vyavahāra-nirṇaya, (Adyar, 1942), introd., I.iii, II-IV. Derrett, Dharmaśāstra and Juridical Literature, op.cit., 53.

2. Aiyangar, ibid., IXX.

3. Ibid., xxix-xxx.

4. Ibid., xxix; also Vy.Ni.409.

them with direct utterances.

Like Vijñāneśvara, he adheres to the view that a son becomes owner through his relationship with his father and mother. He indicates that ownership is acquired at birth and does not originate at a partition because partition is the distribution of property which is already one's own.[1]

Varadarāja is consistent with the view that ownership arises before partition. This is apparent from his comment on the text of Hārīta[2] that the word vibhajet (let him divide) which is found in smṛtis, implies the existence of ownership of the sons prior to partition. Otherwise, if partition created ownership, the smṛtikāras would have used the terms putrebhyo dadyāt (let him give to his sons), which would have implied no property in the son prior to partition. Moreover, the fallacy in the theory, that ownership originates at a partition, is exposed when we consider the devolution of parents' property to an only son. Despite the fact that there cannot be any partition when the parents are deceased leaving an only son, property devolves (so to speak) on the son automatically without a partition. This proves that property exists before partition and also implies that a son acquires ownership in property as soon as he is born. Varadarāja emphasises that merely by entering the kula, i.e. merely by birth, a son acquires ownership in the property of the father and grandfather.[3]

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1. Text as ed. Aiyangar, 413. evaṃ pitṛ-mātṛ-saṃbandha-prabhṛti tad-dhaneṣu teṣām tathā svāmitvam astīti / svasya sato vibhāgaḥ / na vibhāgat svatvam iti /

2. Vy.Nī.412, Dh.K.1146a. jīvati pitari putrāṇām arthādāna-visargākṣepeṣu na svātantryam iti /

3. Vy.Nī.412. kiṃ ca pūrvam eva svatvam utpannam ity asmin pakṣe sarva-smṛtiṣu vibhajed iti yujyate / anyathā vibhāgāt pūrvaṃ svatvābhāve putrebhyo dadyād iti vaktavyam / tathā vibhāgāt svatva-pakṣe eka-putrasya mātā-pitror-ūrdham vibhāgābhāvāt svatvam na syāt / tena kula-praveśād eva pitṛ-paitāmaha-dravye 'pi putrasya svāmyam asty eva //

But with regard to a son's right to demand partition, Varadarāja makes a distinction between ancestral and self-acquired property of the father. In respect of self-acquired property of his father, a son has no right to demand a partition. In such property, partition takes place only at the will of the father because of his revered [1] position in the family. This statement on self-acquired property allows us to surmise that according to Varadarāja, a son could demand partition of the ancestral property unilaterally. But Varadarāja's language on this point is not very clear. The meaning can be that both father and son had independence to demand a partition of ancestral property, which means that either the father could divide the ancestral property among his sons during his lifetime, or a son could demand a partition of ancestral property in the hand of the father. Alternately, (as the word ca, rather than vā, 'or' suggests) the meaning could be that a father and son could come to an agreement regarding the time for division of ancestral property.[2]

Varadarāja's statement probably betrays the Northern influence of patriarchal authority, but his interpretations never deny the innate right of a son either in grandparental property,[3] or in the self-acquisitions of a father.[4]

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1. prādhānyāt (superiority, implying independence).

2. Vy.Nī.413. tena svayamārjite pitur-icchayā vibhāgaḥ, ārjakasya prādhānyāt / kramāgate tu pitur icchayā putrecchayā ca vibhāgaḥ //

3. evamādibhir vacanaiḥ paitāmahe putra-pautrayoḥ svāmyaṃ samam /, Vy.Nī.411; on Vyāsa (maṇī-muktā ...) and on Yājñ.II.121.

4. pituḥ svayamārjite svātantryam iti gamyate , but he explains the sons asvātantrya while commenting on Devala's text: (pitar uparate ...) iti evamādiny asvātantrya paraṇi / na svatvābhāvaparānīti ... /, Vy.Nī.412.

II. The Son's Birthright in Devanna-bhatta's Smṛticandrikā

Devaṇṇa-[1] bhaṭṭa's *Smṛticandrikā*,[2] despite its following of the *Mitākṣarā* doctrine, bears the stamp of originality and mature research. Devaṇṇa-bhaṭṭa could look back about a hundred years since the *Mitākṣarā* was written, and could see how the work of Vijñāneśvara was accepted among the societies of the Deccan and, perhaps, coastal Andhra. Devaṇṇa-bhaṭṭa had before him all the major works of his predecessors and between the *Mitākṣarā* and the *Smṛticandrikā*, excepting Varadarāja's *Vyavahāra-nirṇaya*, there was probably no important contribution on *vyavahāra* from the South.

When Devaṇṇa-bhaṭṭa wrote, the *Mitākṣarā* concept of the son's right by birth was popular, he simple re-stated the doctrine with some variations. On the theme of the origin of property, like the author of the *Mitākṣarā*, Devaṇṇa-bhaṭṭa took up the argument of the objector that ownership as well as property were deducible only from the *śāstra*.[3]

He answered that ownership and property were temporal,[4] and the sacred institutes were merely compilations and demonstrative of the rules that have been established and recognised by the world.[5]

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1. Or Devanna, see Derrett, DJL , 54.

2. Composed, A.D. 1225, Kāṇe, HD, I,345.

3. Smṛticandrikā, ed. Ghārpure, 257; tr. Ghārpure, *Vyavahāra Kāṇḍa*, Part III, (Bombay, 1952), 542.

4. Devanna accepted the statement of Bhavanātha, the author of *Naya-viveka*; ata evānīdaṃ-prathama-loka-viṣaya ity avasthita nibandhanārthā smṛtiḥ / vyākaraṇadi smṛtivad iti / S.C., 257.

5. S.C. 257-8.

Devaṇṇa-bhaṭṭa showed originality in interpreting the text of Gautama[1] on acquisition of ownership.[2]

> Rikthaṃ 'inheritance', i.e. acquisition by inheritance; in short, the inducing cause of (the right of) ownership in the property of the father and the like is the birth of a son, etc. 3

Then he supports the view by the aid of the text of Gautama on birthright, quoted by Vijñāneśvara.[4]

> Moreover, (this) has been stated by Gautama as the cause of the acquisition of the paternal estate viz., "by the birth itself, he may acquire (right of) ownership, so (says) the venerable teacher" ... 'By the birth itself', i.e. the meaning is by the very commencement (of the formation) of their body in the womb of the mother ... 5

Devaṇṇa-bhaṭṭa accepted Gautama's text on birthright without casting any doubts on its authenticity. He more or less used the same arguments as Vijñāneśvara, but explored new sources to reinforce the laukika aspect of property.

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1. Gautama, X.39-42.

2. S.C. 254, rikthaṃ rikthārjanam, pitrādi-dhane svāmitvāpādakam putrādijanmeti yāvat /

3. Tr. Ghārpure, S.C.544.

4. Mitā.I.i.23. S.C. 258. tathā ca paitṛka-dhana-lābha-hetutvenoktaṃ Gautamena - "utpattyaivārtham svāmitvaṃ labhata ity ācārya" iti / utpattyaiva mātṛ-garbha-śarīrotpattyaivety arthaḥ /

5. Tr. Ghārpure, S.C.544. This is the first instance where (live) birth (janma) is explained (rightly) as conception, the moment of which is still imputed by law.

He gives a new interpretation to riktha. He takes it as property of a living person. He says that riktha is ownership which originated in respect of father's wealth on account of birth. He emphasises that the dharmaśāstra is the record of popular practices. Birth is also recognised there as a mode of acquisition. So the origination of riktha is by birth, and there is no conflict between the śāstra and popular practice since they both accept birth as a mode of acquisition. Devaṇṇa-bhaṭṭa elaborated the rules of popular practices and put birth as one of the modes of acquisition along with partition, purchase, seizure and finding. He made use of the Nayaviveka of Bhavanātha who had a specific statement [1] on the laukika modes of acquisition.[2]

> These modes of acquisition, e.g. 'by birth etc. are recognised by popular practice'. The meaning of this is that, birth, purchase, partition, seizure and finding etc. are the only primary (rather 'immemorial') modes of acquisition of ownership established in popular usage. 3

Devaṇṇa-bhaṭṭa valuably interprets the text of Devala,[4] which literally denies a son's right by birth in a father's estate, in the light of recognised practices among the people. He explains asvāmya of a son during the

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1. Vijñāneśvara said something similar but did not indicate the source, Mitā, I.i.23. For Bhavanātha's contribution to the study of property, see Derrett, RLSI, 136.

2. S.C.257. laukikam idaṃ cārjanam janmādīti /janma-kraya-saṃvibhāga-parigrahādhigamādy eva anidaṃ-prathama-loka-siddham arjanam eva svatvāpādakaṃ ... ity arthaḥ /

3. Tr. Ghārpure, S.C. 543.

4. Supra, 366, n. 4.

lifetime of a father as asvātantrya[1] (want of independent power).[2]

> Here 'want of ownership' referred to in this text should be construed as demonstrating want of independent power; for it is a fact well established in the world that (even) when the father is free from (any) defect the sons have the (right of) ownership by birth in the paternal estate.[3]

Devaṇṇa-bhaṭṭa emphasises the point that the texts should not be construed literally.[4] The texts are nothing but congealed commonsense and compilations of popular practices, and that is why they should be interpreted in the light of existing social norms and practices of the age in which the interpretation is put forward.

For the sake of practical necessity, the Mitākṣarā doctrine is a challenge to the immutability and infallability of the śāstra, and this challenge is eloquently developed in the Smṛticandrikā. But the inroad made by the dharmaśāstra into the customs of the South was discernible at the time when it was written. Devaṇṇa-bhaṭṭa, however, accepts the origination of ownership

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1. This is also his interpretation of Manu, IX, 104: anīśā asvātantrā ity arthaḥ / The same interpretation to the text of Śaṅkha, (na jīvati pitari putrāḥ riktham bhajeran), see S.C. 256: illustrated as, arthāsvātantryaṃ arthādāna-pradānayor asvātantryam / S.C.256. Also see Ghārpure, S.C. tr., 539, n.8.

2. S.C. 256. atrāsvāmya-vacanam asvātantrya-pratipādanārtham iti mantavyam / nirdoṣe pitari sthite pitṛ-dhane putrāṇāṃ janmanā svāmyasya loka-siddhatvāt /

3. Tr. Ghārpure, S.C.539.

4. S.C. 258.

of the sons at birth in their father's property, yet denies them the right to demand a partition against the will of the father.[1]

> The meaning of this:- Although, by these sons immediately after their own birth has been acquired the right of ownership in the paternal wealth, still while the father is living, they shall not divide the paternal estate. Since on account of want of independent power in regard to wealth over religious matters [rather 'in regard to secular matters and righteousness'], in the matter of capacity for making a partition the sons are incompetent. 2

This view has been made clearer, and the incidents of ancestral and self-acquired properties have been distinguished with regard to mutual rights of father and son. While explaining the famous text of Yājñavalkya[3] on co-extensive rights of father and son in ancestral property, Devaṇṇa-bhaṭṭa supports those who accept the literal meaning, and upholds the birthright of a son in such property.[4]

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1. S.C.256. yady api taiḥ putraiḥ svakīya-janmanaḥ paścād anantaram eva pitṛ-dhane svāmyam adhigataṃ prāptaṃ tathāpi jīvati pitari pitṛ-dhanaṃ na vibhajaren / yato 'rtha-dharmayor asvātantryād vibhāga-kartṛtāyām anarhāḥ putrā ity arthaḥ /

2. Tr. Ghārpure, S.C.538. My modification.

3. Yājñ.II.121.

4. S.C.279. Mysore edn.III/2,649. kecit tu yathāśrutārthatām evāsya vacanasyāṅgī-kurvate / tathā ca pautra-mātrecchayā 'pi pitāmaha-dhana-vibhāgo 'pi bhavati, pitur icchā-mātreṇa ca kramāyāta-dhanādikam na bhavati / tatra pautrasyāpi svāmy abhidhānād ity āhuḥ / tad atrāpi grāhyaṃ samañjasatvāt / Ghārpure's text is innacurate. The Mysore edn. variant reading āñjasatvāt (S.C. 279, n.7), for samañjasatvāt: the former means 'directness, relevance'.

> Some, however, accept a literal significance of this text and say that even at the desire of the grandson alone, a partition of the grandfather's property may take place, and that at the mere wish of the father, a partition of the hereditarily descended property cannot take place– since an equal right of ownership of the grandson in such property has been stated – that may be accepted here also, as being reasonable [rather 'suitable '] ...[1]

Devaṇṇa-bhaṭṭa explains that in ancestral property, the son acquired both svāmya and svātantrya, but in self-acquired property he acquires merely svāmya but not svātantrya.[2] This becomes apparent when Devaṇṇa-bhaṭṭa explains the respective rights of father and son in ancestral and self-acquired property.[3]

> In the case of the grandfather's property even, the ownership (svāmyam) and also independent power (svatantryam) both are equal in the father and the son; whereas in regard to the father's property, while he is alive and free from defect, his alone is the power of independence.[4]

However, a father's 'power of independence' over his self-acquired property does not indicate the absence of birthright of a son in such property.

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1. Tr. Ghārpure, S.C. 602. Also see tr. of Setlur, Vol.I, 255, para.20.

2. We have already pointed out that lack asvātantrya does not necessarily mean lack of svatva (ownership), supra, 432–33.

3. S.C. 279–80. paitāmahe dhane 'pi pitā-putrayoḥ svāmyam svātantryam eva tulyatā / paitṛke tu jīvati pitari nirdoṣe tasyaiva svātantryam ity /

4. Tr. Ghārpure, S.C. 603.

And certainly according to the correct interpretation of the Mitākṣarā[1], a father could not alienate any categories of immovables without the consent of his sons. Devanna-bhatta does not deviate from the Mitākṣarā position on this point, but his comment on Bṛhaspati's text[2] is very significant.

He supports the general smṛti rule that when a father recovers ancestral property which was lost, he may deal with it in any way he pleases. He considers such property as almost a father's self-acquisition.[3] He also suggests that a son had no power to demand partition or interdict an alienation of self-acquired property of a father. He comments on Bṛhaspati:[4]

> The purport of the above passage is that it is admissible that the father, even without his son's oonsent and on the strength of his ownpowerof independence, is competent to make a gift or the like of his property particularly mentioned in the topic ofpartition during (the father's) lifetime, or to make an unequal partition. 5

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1. Mitā, I.i.27; I.v.9-10.

2. Bṛ. XXV. 12-13.

3. S.C. 280 svārjitaprāyaṃ yat-kramāyātam.

4. S.C. 280. On Br. XXV.12-13. sutānanumatim-antareṇāpi pituḥ svātantrya-balād-dānādikaṃ jīvad-vibhāgokta-viṣaya-viśeṣe viṣama-vibhāga-kalpanaṃ ca yujyata iti tātparyārthaḥ /

5. Tr. Ghārpure, S.C. 604.

If we take the comment literally and isolate it from Devaṇṇa-bhaṭṭa's general attitude to birthright, it seems that the power of a father in self-acquired property is greater in the Smṛticandrikā than in the Mitākṣarā. Indeed, this 'independence' of a father over self-acquired property narrows down the effectiveness of the birthright of a son, but Northern influence and perhaps the day-to-day necessity of running a family and family trade, demanded more flexibility in the father's favour.

III. Caṇḍeśvara's Vivāda-ratnākara

Caṇḍeśvara's [1] Vivāda-ratnākara which was composed between 1290 and 1370 A.D., does not have anything directly on the son's right by birth, but his interpretations of texts indicate that he accepted the co-equal right of father and son in the property of the grandfather.

He explains that co-equal ownership (sadṛśam svāmyam) of father and son recognised by Yājñavalkya [2] in property of the grandfather has two implications on partition and alienation by a father. First, in a partition a father cannot have a greater share than the son. Secondly, a father had no power to

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1. A nibandhakāra of great influence over Mithilā and Bengal. He wrote at the command of King Bhaveśa of Mithilā. He was a Chief Judge and a Minister for Peace and War, Kāṇe, HD, I, 336, 368 , 370, 372. Derrett, DJL, 54.

2. Yājñ.II.121. Vivāda-ratnākara, ed., Paṇḍit Dīnanātha Vidyālaṅkāra, (Calcutta, 1887), 461.

make a gift of ancestral property without the consent of his son. This comment on Yājñavalkya shows that Caṇḍeśvara accepted the son's right by birth in property of the grandfather.[1] "'Ownership being the same' means that there shall be no greater share allowed to the father and no gift (of the property) at the father's choice".[2]

Being a Northern commentator, Caṇḍeśvara could not completely follow Vijñāneśvara on son's right to demand partition against the will of a father even in property of the grandfather. But he says that when the father is not afflicted with any disease, there can be a partition during his lifetime with his consent. While commenting on Viṣṇu,[3] he reiterates his view that a father's absolute power to divide property is applicable only to his self-acquisitions which are acquired (by him) without the help of ancestral wealth.[4] "This applies to property acquired without the aid of the father's wealth".[5]

He brings out the contrast between the incidents of self-acquired

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1. V.R. 464. J.C. Ghose, Hindu Law, II, 592. sadṛśaṃ svāmyaṃ nātrām-śādhikyaṃ na vā pitur icchayā dānam /

2. Tr. S.S. Setlur, A Complete Collection of Hindu Law Books on Inheritance, (Madras, 1911), II, 162. J.C. Ghose translates more clearly: 'Equal ownership means that the father has not a larger share and that there cannot be a gift at the father's pleasure', The Principles of Hindu Law, (Calcutta, 1917), II,556.

3. Viṣṇu, XVII, 1, J.C. Ghose, Hindu Law, II, 593.

4. V.R. 464. J.C. Ghose, ibid., II, 593, pitṛ-dravyānupaśleṣārjita-dhana-viṣayam etat /

5. Tr. Setlur, II, 164, J.C. Ghose, II, 558.

and ancestral property clearly in his comment on Yājñavalkya, II.114.[1] "This text also refers to self-acquired property of the father; for in property acquired by ancestors, the father and the son are said to be entitled to share equally".[2]

Caṇḍeśvara implies by his silence that a son might interdict an alienation of ancestral property by his father. It seems that Caṇḍeśvara could not favour the idea that a son could demand partition against the wishes of his father. The patriarchal power of a father was still respected in Northern India and precepts of the smṛtis like Gautama[3] had already shown that a partition against a father's wishes was condemned by society.

Caṇḍeśvara's treatment of Baudhāyana's general statement that partition takes place with the consent of the father is very significant:[4] "Partition (shall take place) with the father's consent".[5]

He accepts this precept as a general rule but relates the practices among the people in general which is also enjoined by the smṛti, namely, that a father normally would partition the wealth amongst his sons before entering into the order suitable for an aged man, or may remain in the householder's order after dividing a small portion of the wealth.[6]

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1. V.R. 464. J.C. Ghose, Hindu Law, II, 593, 'A father when making partition can divide it among his sons as he pleases, either giving to the eldest the best share or in such wise that all share equally', J.C. Ghose, II, 558. etad api svārjita-dhana-viṣayam, pūrva-puruṣārjite pitā-putrayoḥ samāṃśitvābhidhānāt /

2. Tr. Setlur, II, 164. J.C. Ghose, II, 558.

3. Gautama, XV. 16-19; Manu, III. 159, supra, 368, ns. 1, 3.

4. Baudhāyana, V.R. 463. J.C. Ghose, II, 593, pitur anumatyā dāya-vibhāga /

5. Tr. Setlur, II, 164.

6. Caṇḍeśvara on Hārīta, V.R.463. J.C. Ghose, II, 593, tr.557.

In essence, Caṇḍeśvara accepts the son's birthright in the property of the grandfather, but unlike Vijñāneśvara cannot confer on the son the right to demand a partition against the will of the father. After a consideration of his comments, the extent of son's right by birth in ancestral property cannot be gauged definitely; but his right of interdiction in a case of alienation of any of it by his father is accepted. This right of interdiction may not be exactly synonymous with the right by birth; yet in effect, the one presupposes the other.

IV. The Parāśara-mādhavīya of Mādhavācārya

Mādhavācārya alias Vidyāraṇya, the statesman and the scholar, composed the parāśra-mādhavīya between 1330 and 1360 A.D.[1] Being the work of a minister of the founders of Vijayanagara kingdom, and composed in response to the needs of the infant empire,[2] this famous commentary on the Parāśara-smṛti attained a semblance of positive law though it was not actually codified at the command of a sovereign.[3]

There is nothing original in the work on the definition of dāya or on the theory of property as a matter of popular recognition, or on birth as a mode

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1. Kāṇe, HD, I, 380.

2. Derrett, DJL, 54-55.

3. For an ancient inscriptional reference to it, see Derrett, JAOS 94 (1974) 1: 65 ff, 70.

of acquisition. On these points, and also on the point of partition, Mādhavācārya has followed Vijñāneśvara without adding anything of his own to the work of his great predecessor.[1] This does not mean a slavish imitation of the Mitākṣarā; on the contrary, many misunderstandings of the Mitākṣarā[2] have been cleared up in the Mādhavīya.

Mādhavācārya's discussion on time and mode of partition is elaborate and exhaustive, and throws light on the birthright of a son in the property of his father and grandfather. His comment on Bṛhaspati[3] and Yājñavalkya[4] reveals that a son's co-equal right with the father in the property of his grandfather was well established in practice among the people.[5]

> In what was acquired by the grandfather by acceptance of gift, purchase, etc., the equal right of father and son is well known in the world. Hence there is partition, since ownership is equal, the partition is not by the father's choice alone, nor is there a double share. 6

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1. Parāśara-mādhavīya, (Calcutta, 1899), definition of dāya, 326; ownership by birth, 329, 331.

2. Mitā. I.i.27; I.v.9-10.

3. Bṛ. XXV.8: dravye pitāmahopātte ...

4. Yājñ.II.121.

5. P.M. 338. yat pitāmahena pratigraha-vijayādi-labdham, tatra pituḥ putrasya ca svāmyaṃ loka-prasiddham iti vibhāgo 'sti / hi, yasmāt, sadṛśaṃ samānam svāmyam, tasmāt na pitur icchayaiva vibhāgo nāpi pitur bhāga-dvayam /

6. Tr. Setlur, 324.

According to Mādhavācārya, the son's right by birth in all categories of grandparental property is complete.[1] "In respect of grandparental property there can never be unequal partition. Also in grandparental property, when it is being wasted or sold by the father, the grandson (i.e., son of the father) has the right to forbid such acts".[2]

Mādhavācārya dissipates any doubt by saying that even in self-acquired immovable property, a father was not independent of his sons.[3] "In regard to immovables, etc., though self-acquired, the father is not certainly independent of [rather 'is certainly dependent upon'] the sons etc."[4]

A father can deal independently with self-acquired immovables in a time of distress, but under normal circumstances a son's birthright remains fully effective, and this is one of the proofs of the son's right by birth in his self-acquisitions also.[5] "Hence, it has been well said that ownership is by mere birth".[6]

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1. Text: J.C. Ghose, Principles of Hindu Law (Calcutta, 1917), II, 651. paitāmaha-dhana-viṣaye tu na kvāpi viṣama-vibhāgaḥ - iti / tathā avibhaktena pitrā paitāmahe dravye dīyamāne vikrīyamāṇe vā pautrasya niṣedhe 'pyadhikāro 'stīti gamyate /

2. Tr. J.C. Ghose, II, 622.

3. P.M. 322. sthāvarādau tu svārjite 'pi putrādi-pāratantryam eva /

4. Tr. Setlur, 320. My modification introduced.

5. P.M. 332. tasmāt suṣṭhūktaṃ janmanaiva svatvam iti / This explains Devaṇṇa-bhaṭṭa, S.C.280 see above p.572.

6. Tr. Setlur, 320.

We have seen that Mādhavācārya accepts son's right by birth in father's property, but because of son's dependence during the lifetime of a father, he is reluctant to allow a son to demand partition against the wishes of his father.[1]

> On birth, sons become possessed of the cause of getting paternal wealth still as long as the father is living, they should not divide that wealth because they are not deserving of or 'incompetent to claim' partition on account of their want of independence in regard to wealth and religious works (better 'in regard to righteousness and secular matters'). 2

From the above comment, it is clear that the son's dependence, as declared in the texts of Śaṅkha, Hārīta and Devala, is applicable only in the case of the father's self-acquired property. From a subsequent comment of Mādhavācārya on incidents of ancestral property lost and recovered by a father, the chance of any confusion has been removed.[3] "In property acquired by the

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1. Mādhavācārya on Śaṅkha (na jīvati pitari ...), text, J.C. Ghose, II, 645. yady api janmānantaram eva putrāḥ pitṛ-dhana-nimittaṃ pratipannāḥ tathāpi pitari jīvati tad-dhanaṃ na vibhajeran / yato dharmārthayor asvātantryād vibhāga-karaṇe 'narhāḥ / Also see his comment on Hārīta (jīvati pitari putrāṇām), where he explains, arthādāna as upabhoga (enjoyment of property); visarga as vyaya (expenditure), ākṣepa as bhṛtyādeḥ śikṣārtham adhikṣepādiḥ (spending for the instruction of servants and the like), ibid., 645, 615. Also he explains asvāmya of son in Devala's text (pitayur uparate tatra ...) as asvātantrya and adds pitṛ-dhane putrāṇām janmanā svāmyasya loka-siddhatvad / ibid., 645.

2. Tr. J.C. Ghose, II, 615. My modification.

3. Text, J.C. Ghose, II. 651. paitāmahopātte 'pi kvacit pitur icchayaiva svārjitavad-vibhāgobhavati /

grandfather, in some cases, there may be division according to the father's desire, as in regard to his self-acquired property."[1]

The word kvacit shows that as a general rule with regard to the partition of ancestral property, the father's desire was not the determining factor.

From the above discussion, we may conclude that Mādhavācārya accepted the son's right by birth in the property of a father and grandfather, but a father had full independence in his self-acquired movables. In a father's self-acquired immovables, his son's birthright was complete, excepting that he could not demand partition against the will of the father, but in grandparental property the rights of father and son were completely co-equal.

V. Sāyaṇa

The joint and co-extensive ownership and enjoyment of property between father and son was a notorious feature in South India during the 14th century. The comments of Sāyaṇa[2] on Āraṇyaka literature, though elaborating a concept during the Vedic period, are, in fact, depicting a contemporary legal concept.

At the starting point of the Āryan law, the son's acquisitions were prima facie regarded as his father's, but that situation was gradually amended

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1. J.C. Ghose, ibid., 622.

2. Younger brother of Mādhavācārya, Kaṇe, HD, I, 376.

towards the recognition of son's exclusive ownership of his self-acquisitions.[1] Sāyaṇa's comment on the passage of the Taittirīya-saṃhitā [2] beings out this idea clearly, but at the same time, upholds a son's co-extensive right in all categories of property acquired by the father.[3]

> Indeed in practice a boy will earn property and, keeping it with the object of preventing it from being common property and so having some means of livelihood for himself in future, will go and hide it instead of giving it to his father or brothers. But whatever is acquired by a father becomes the common property of the boy, his sons, and his brothers. All of them in fact live upon such property. 4

In the comment on the passage of the Aitareya-āraṇyaka,[5] the common ownership and mutual enjoyment of the respective property of father and son is undoubtedly accepted and any scope for individual acquisition is minimal.[6]

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1. Derrett, 'The Development of the Concept of Property'in India C. A.D. 800-1800', ZVR, 64, (1962), 15-130, at 99, n.333.

2. Tai.saṃ.2.6.1.6, Dh.K.1160b; pitā vai prayājāḥ prajā'nūyājā yat prayājānīṣṭvā havīṃṣyabhidhārayati pitaiva tat putreṇa sādhāraṇaṃ kurute /

3. Sāyaṇa on Tai.saṃ.2.6.1.6, Dh.K.1161a. loke hi bālena yad upārjitaṃ tad dravyaṃ sa putra uttarakāle svajīvanārtham asādhāraṇatvena saṃghṛya guptaṃ karoti na tu pitre prayacchati na tu bhrātṛbhyaḥ / pitrā tu yad upārjyate tat-piturbāla-putrasya tad-bhrātṛṇāṃ ca sādhāraṇaṃ bhavati / tena dravyeṇa sarve'pi jīvanti /

4. Tr. Derrett, (1956), 19 S.C.J., 107.

5. A.t.Ā. II.1.8. yatra ha kva ca putrasya tat-pitur yatra vā pitus tad vā putrasyet-yetat tad uktaṃ bhavati / Dh.K.1163a. Aitareya-āraṇyaka, ed., A.B. Keith, (Oxford, 1909), 107, tr.210.

6. Sāyaṇa on Ai.Ā.II.18, Dh.K.1163a. loke putrasya vastu yatra ha kva ca yasmin kasminn api grāmāntare vidyamānaṃ tat sarvaṃ pituḥ svaṃ bhavati / Cont'd. on next page:

> In practice an object belonging to a son becomes in its entirety the property of his father wherever it may be, that is to say, in whatever different village it may be located; and the father will send for it and enjoy it. Moreover should any object connected with the father come to light in another village, it becomes his son's property also, and even the son will send for it and enjoy it. For equity demands such reciprocal rights of enjoyment (or "union consists in the mutual enjoyment of one another's goods").[1]

This right of common enjoyment of property by father and son presupposes son's ownership in property from birth and the accrual of ownership does not depend on a partition, because until a partition they all live on all the property, both ancestral and self-acquired, "as if there had been no difference between the two classes".[2]

Though Sāyaṇa's comments had universal acceptance in India, yet from the juridical point of view, his utterances regarding the two texts should be taken as depicting the practice only in South India (specifically the Deccan, from where Sāyaṇa and Mādhavācārya came) because the patriarchal family structure in North India was not commensurate with the son's ownership in all

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<u>Note 6 - p.581 - Continued:</u>

pitā hi tad ānīyānubhavati / athavā pituḥ sambandhiyad vastu grāmāntare vidyate tadvā tadapi putrasya svaṃ bhavatyeva / putro'pi tadānīyānubhavati / paraspara-dravyānubhavena yadaikyam asti /

1. Tr. Derrett, (1956), 19 S.C.J., 107. Note: <u>sambandha</u> = claim; <u>sambandhi</u> = to which X has a claim.

2. Derrett, (1956), 19 S.C.J. 107.

categories of property acquired by the father.

VI. Madana-pārijāta

One of the North Indian digests is Viśveśvara-bhaṭṭa's[1] *Madana-pārijāta*[2] which was patronised by King Madanapāla of Kāṣṭhā.[3]

The commentator does not say anything new on the son's right by birth, but as a juridical guide of a North Indian territory the work throws light on the relative proprietary rights of father and son in family property towards the second half of the fourteenth century.

Viśveśvara-bhaṭṭa recognises a son's co-equal rights with his father in ancestral property. He conveys this idea in unambiguous terms in his comment on Yājñavalkya II. 121.[4]

> In the property of the grandfather consisting of all these, the ownership of both father and son is equal. Therefore, the meaning is that the restrictions such as "while the father is alive partition should take place only with his consent", "the

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1. Born in South India but migrated to Northern India in search of patronage, Kāṇe, HD, I, 385.

2. 1360-1390 A.D., Kāṇe, ibid., 389. Derrett, DJL, 55.

3. Modern Kath on the Jumna to the north of Delhi, Kāṇe, ibid., 386.

4. Madana-pārijāta, (Calcutta, 1893), 660. J.C. Ghose, II, 534. etādṛśi samaste paitāmaha-dhane pituḥ putrasya svāmyaṃ samam eva / ato jīvati pitari pitur icchayaiva vibhāgaḥ / pituś ca dvāy aṃśau pitṛto bhāga-kalpanetyādi niyamā na santīty arthaḥ /

> father shall take two shares", and "the allotment of shares shall be according to the fathers", etc., do not apply.[1]

The author has considered the four periods of partition,[2] and those periods include the partition of grandparental property as well.[3] The opinion of the commentator on these four periods of partition implies that a son had not the right to demand a partition against the will of a surviving unblemished father. But the comment[4] on Yājñavalkya II.121, shows that in ancestral property, a son could demand a partition against the will of his father, which strengthens the idea of son's right by birth in such property.

This apparent contradiction should not distract us from the fact that this author has accepted the principle of the son's birthright in ancestral property.

VII. Madanaratna-pradīpa (Vyavahāravivekoddyota)

Madanaratna-pradīpa[5] is one of the most scholarly and extensive

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1. Tr. Setlur, II, 524. J.C. Ghose, II, 520.

2. J.C. Ghose, II, 531-2, tr., 515.

3. The word 'paternal' here is symbolical of grandparental and the like, J.C. Ghose, II, 515.

4. M.P. 660 on Yājñ. II. 121. jīvati pitari pitur icchayaiva vibhāga .../

5. Work compiled by four brāhmins under the patronage of Madanasiṃha Deva, King of Gorakhpur, Kāṇe, HD, I, (1930), 391-2. Kāṇe thought that the work was

/Continued on next page:

digests on the dharmaśāstra. Being a North Indian compilation, the learned authors freely differed from the Mitākṣarā on some points, but at the same time, held Vijñāneśvara in high esteem.

The North Indian compilers could not ignore the impact of the views of Vijñāneśvara, but they realised that since their loka 'public' was different, the loka-siddha doctrine of acquisition of property needed a recasting. They attempted to see the laukika aspect of property and the concept of son's right by birth (janma-svatvavāda) through the haze of the śāstra then available to them, and the result was a synthesis of the Northern orthodox śāstric school and the views put forward in the Mitākṣarā.

In considering a son's alleged asvāmya during the survival of an unblemished father,[1] the compilers of Madanaratna-pradīpa have maintained the explanation of most of the authors who were inspired by the Mitākṣarā, and endorsed their view that asvāmya is nothing but pāratantrya[2] (dependence).

Vijñāneśvara's definition of dāya and its categorisation into apratibandha and sapratibandha, has been retained by the Madanaratna. But the

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Note 5 - p.584 - Continued:

composed between 1425-1450 A.D., ibid., 393. Also Derrett, DJL, 55. Kāṇe revised his opinion and placed it between 1350 and 1500 A.D., Madanaratna-pradīpa, ed., Kāṇe, (Bikaner, 1948), introd., xii.

1. MRP, 322-23.

2. anīśā asvātantrā, Madanaratna on Manu, IX, 104, MRP, 322. eteṣv asvātantryaṃ pitranujñāṃ vinā svecchayā na pravartitavyam tair ity arthaḥ, on Hārīta, MRP, 322. tatrāsvāmyam asvātantryam ity artha, on Devala, MRP, 323.

significance of these two categories of dāya has been illustrated in a slightly different sense from the Mitākṣarā's. The implication of a dormant right of sapratibandha-dāyādas in the Mitākṣarā [1] is absent in the Madanaratna because the cause of property is birth in the case of apratibandha dāya, whereas in the case of sapratibandha dāya it is essentially (birth apart) the disappearance of the obstruction.[2]

The Madanaratna's is broadly the Mitākṣarā doctrine of the son's right by birth, but it tries to establish that the birthrigh, though allegedly a creature of popular recognition, is also approved by the śāstra. Though he quotes Gautama's [3] text on birthright, yet he emphasises that popular recognition is the reason for the acquisition of rights from birth in the property of a father and grandfather.[4]

Then he puts forward the antique view of the Saṃgrahakāra [5] who opines that ownership of property is deduced only from the sacred institutes

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1. Mitā.I.i.3. Derrett, ZVR 64 (1962), 55.

2. MRP, 323-4. atrāpratibandho dāyo janmanaiva svatva-hetuḥ sapratibandha-dāyas tu pratibandhāpagame satīti jñatvyam /

3. utpattyaivārtha svamitval labhate ..., Mitā, I.i.23.

4. MRP, 323. satyapi nirdoṣe pitari putra-pautrāṇāṃ janmana ārambhaiva pitṛ-pitāmaha-dhane svāmitvasya loka-siddhatvāt / This view is reiterated while commenting on Bhavanātha: loka-siddhaṃ varjanaṃ janmādi; Madanaratna explains, janmādi putra-janma pitṛ-pitāmaha-dhane svatva-hetuḥ, MRP, 324.

5. MRP, 323.

(*śāstraīka-samadhīgamya*).[1] The compīlers want to resolve the conflīct between *loka-prasīddhī* and *śāstra* by sayīng that īn the case of *apratībandha dāya*, the cause of property īs bīrth and, *rīktha* beīng *apratībandha dāya*,[2] bīrth īs automatīcally approved by the *śāstra* as a means of acquīsītīon and comes wīthīn the text of Gautama[3] on acquīsītīon of property.

Consīderīng the authors' dīscussīon on tīme and mode of partītīon, īt īs apparent that partītīon wīll take place accordīng to the *śāstrīc* precedents and a son cannot normally demand a partītīon agaīnst the wīll of the father unless the faults prescrībed by the *śāstra* are present.[4]

Thīs can safely be taken to apply to father's self-acquīred property, but wīth regard to the grandfather's property *Madanaratna* drops the hīnt that sometīmes there can be a partītīon agaīnst the wīll of the father.[5]

But the Madanaratna's opīnīon on partītīon does not help us īn assessīng the extent of the son's bīrthrīght īn the property of the grandfather.

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1. MRP, 323.

2. rīktham apratībandhaḥ dāyaḥ, MRP, 323.

3. Gautama, X. 39-42; rīktha-kraya ... The dīfference of thīs treatment upon the *Mītākṣarā* īs evīdent.

4. See MRP, 326-33. It īs explaīned at MRP. 326: nīrdoṣe pītarī sthīte-ītī vacanāt-sadoṣe pītarī jīvaty apī putrāṇāṃ na tat-pāratantryam ītī bhavatī teṣām secchayā vībhāga-kartṛtvam /

5. *Madanaratna* on Vyāsa, kramāgate gṛha-kṣetre ... MRP.333. pītary anīcchaty apī paītāmaha-dhana-vībhāgo bhavatīty āha vyāsaḥ /

The authors throw light on the mutual rights and powers of father and son in their topic of dattāpradānikam and the scope of such powers is well-defined. The rights of the sapiṇḍas to be consulted in a case of alienation of immovable property have been enjoined by the smṛti in vague terms.[1] The compilers bring out the purport of the text and relative rights of the divided and undivided co-parceners. In the light of their subsequent statement, the opinion of the authors on this text should be taken as referring to ancestral immovables.[2]

> Divided coparceners even are equal, how much more undivided coparceners? The employment of the word 'divided' is for the sake of the rule "how much more"? but does not purport to confer ownership to the divided. The uselessness of partition would be the result. 3

So the authors point out that only the undivided sapiṇḍas, e.g. the undivided sons, had the power to interdict an alienation of ancestral immovables by a father. They go further and clear the supposed Mitākṣarā[4] ambiguity by stating that even self-acquired immovables and slaves of the father can only be alienated with consent of the adult sons.[5]

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1. vibhaktā avibhaktā vā sapiṇḍā ... , MRP, 210, Dh.k., 803 b, supra, 341, n.3.

2. MRP, 210. vibhaktā api sthāvare samāḥ kimutāvibhaktā iti kaimutika-nyāya-pradarśanārthaṃ vibhakta-grahaṇam na tu vibhaktānām tatra svāmitvam astīti pratipādanārtham / vibhāgasya vaiyarthyāpatteḥ.

3. Sontheimer, EHJF, 312.

4. Mitā, I.i.27.

5. MRP, 210. svārjitam api sthāvaraṃ dāsādikaṃ ca putreṣu prāpta-vyavahāreṣu tad anumatyaiva dātavyam /

The above analysis establishes that according to the Madanaratna, the birthright of a son was well-established in all categories of immovable property. This was a big step towards curtailing the patriarchal power of a father in Northern India. In fact, it is a triumph for the Mitākṣarā, but at the same time, it should not be considered as a blind following of their Southern predecessors by the compilers because in essence, it is a restoration of the smṛti texts,[1] which enjoined co-extensive rights to the father and son in ancestral and self-acquired immovables. The authors also kept an escape route from any rigidity that might be done to the son's birthrigh, in order to keep the functioning of the family smooth and in case of distress or necessity, a father could alienate even ancestral immovables.[2]

In theorising on the origin of property and birth as a mode of acquisition, and also on textual comment, the opinions put forward in the Madanaratna-pradīpa show the stamp of mature and original minds by way of a restatement of the Mitākṣarā birthright in their North Indian setting.

VIII. Sarasvatī-vilāsa of Pratāparudradeva

The Sarasvatī-vilāsa (Recreations of the Goddess of Learning) of Pratāparudra-deva stands out as a mature work on the dharmaśāstra during the

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1. e.g. Yājñ. II.121. Nārada.

2. MRP.210. See Mitā.I.i.27-9. āpat-kāle kuṭumba-poṣaṇārtham āvaśyaka-pitṛ-śrāddhādhārya-kanyā-vivāhādi-dharma-kāryārthaṃ putra-bhrātrady anumati-rahito 'pi kramāga-sthavaradānādikaṃ kuryat /

first quarter of the 16th century.[1] In order to produce a work of practical utility, the author attempted to compile a uniform compendious digest from the divergent texts and commentaries in relatively popular, though self-consciously scholarly style.[2]

In the Sarasvatī-vilāsa, the concept of son's birthright was revitalised and the secular character of the ownership of property was made more conspicuous than in the Mitākṣarā.[3] Pratāparudra-deva argued that ownership itself was the offspring of secular causes, and he thus completely removed ownership from all nexus with spiritual things both in regard to its origin and as to its secular results, so rendering it completely secular in its nature.[4] "A scriptural character does not exist in the connection between property and its proprietor".[5]

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1. Kāṇe, HD, I, 413. Foulkes thinks it was compiled in 1515 A.D., S.V., (London, 1881), Preface, XVIII. Derrett places it between 1500 and 1525 A.D., DJL, 56.

2. Foulkes, ibid., xviii. It is misleading to call it (as Kāṇe has done, HD, I, 412) a work of positive law in the Austinian sense. The work was compiled by a committee supervised by Lolla Lakṣmīdhara. See DJL, 56 and ns. 355, 356.

3. Foulkes, ibid., Preface, xxi.

4. S.V. Foulkes, ed., §§ 400-01. sva-svāmī-saṃbandhasya vācanikatvābhāvat / ... tathā hi svatvam laukikaṃ, laukika-kriyā-janyatvāt vrīhyādivat /

5. Tr. Foulkes, 81. It will be recollected that the word sambandha has in Sanskrit the overtones and often the meaning 'claim': hence, it would be admissible to render this sentence, 'Since an owner's claim on his asset is based on no text ...'

"That is to say, ownership is secular; because of its origin in secular acts, like rice and other things".[1]

Before dealing with the sources of ownership, the author has spent, appropriately, a few sections[2] on the discussion of the nature of ownership.[3] In these sections, he explored the mīmāmsā and even improved on Vijñāneśvara's[4] use of it. First, he establishes the secularity of ownership and interprets the text of Gautama[5] as 'visible' (i.e. 'secular') means of acquiring property (dṛṣṭārthā dhanārjanopāyāḥ)[6] and as sources of ownership prevalent in the world.[7] He takes the term riktha as meaning the acquisition of proprietorship by sons in the property of their father.[8] "The term 'inheritance' means the acquisition of inheritance; (i.e.) that proprietorship which sons and others obtain by birth in the property of their father and others".[9]

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1. Tr. Foulkes, 81.

2. S.V. §§ 400-56.

3. S.V. §§ 457-77.

4. S.V. §§ 404, 413, 455, 456. Cp. Mitā.I.i.10.

5. Gautama, X.39-42.

6. S.V. § 457.

7. S.V.§471. He has taken Manu, X.115, as demonstrative of righteous and worldly sources of property and that is why even property acquired improperly by a Brāhmin is divisible amongst his sons. Cp. the approach of the Madanaratna who took Manu, X.115, as listing the modes of śāstric acquisition.

8. S.V. § 459. rikthaṃ nāma rikthārjanaṃ / pitrādi-dhane svāmitvāpādakaṃ putrādi-janmeti yāvat /

9. Tr. Foulkes, 93. riktha is also considered as unobstructed heritage, S.V. § 464.

He reinforces the birthright of a son by quoting unhesitatingly the text of Gautama as cited in the Mitākṣarā,[1] and adds also a text of Visnu to that effect.[2] "Hence also Viṣṇu: 'Ownership accrues by birth'".[3]

He refutes the argument of the Saṅgrahakāra that property (ownedness) svatva is secular (laukika) but proprietorship (svāmya)[4] is non-secular (aulaukika)[5] and proprietorship can only be obtained by means as ordained in the sacred institutes. To this argument, Pratāparudra-deva answers that proprietorship and ownership are interconnected like yoga[6] and kṣema.[7] "The establishment of the secularity of either of them is, in reality, an establishment of both".[8] The author is not ready to accept proprietary right as the creature

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1. Mita.I.i.23.

2. S.V. § 461. ata eva viṣṇuḥ / janmanā svatvam āpadyata iti / Not found in the Institute of Viṣṇu. Bharuci on this text, accepts the birthright of a son but not of a daughter: putrasyaiva na tu putrikāyā iti Bhārucih, S.V. § 462. Unfortunately, this is not verifiable from the surviving text of Bhāruci: See Derrett, Bhāruci's Commentary on the Manusmṛti, (Wiesbaden, 1974), I, 7, n.30. It was probably in his commentary on Viṣṇu.

3. Tr. Foulkes, 93.

4. On Hindu concept of property (svatva) etc., see Derrett, BSOAS 18/3 (1956), 475-98; . ZVR 64 (1962), 15-130, rpt. Essays, II, 8-130.

5. S.V. § 474.

6. The obtaining of that which has not been obtained; a sacrifice, S.V. § 189, Mita, I.iv.23.

7. The preservation of that which has been obtained; a deed of charity, S.V. §§ 189-91. Mita.I.iv.23. The phrase yoga-kṣema, though originally a compound of two distinguishable terms had long since become a single term indicating 'means of support' and in modern times has declined still further to mean 'welfare'.

8. S.V. § 475.

of *śāstra* and according to him, *śāstra* is merely a handmaiden of worldly practices and not a source of acquisition of ownership. Once the secularity of property is established, it can safely be assumed that birth is one of the modes of acquisition. So according to him, it seems that *śāstra* has not much importance in establishing birth as a mode of acquisition though (characteristically) he has not refrained from citing the texts of Gautama [1] and Viṣṇu [2] on son's right by birth. But apart from these doubtful texts, texts (as we have already seen) of the *dharmaśāstra* on the son's co-equal rights were there in abundance; any commentator composing a treatise had to apply his doctrine of property to assess the extent of the mutual rights of father and son in family property, as ordained by the texts.

Pratāparudra-deva's comments on the *smṛti* texts are precise, direct and free from ambiguity. In the grandfather's property, a son could demand a partition against the will of his father, [3] and had the power to interdict an alienation of such property by the father. [4]

In the *Sarasvatī-vilāsa*, the distinction between the incidents of ancestral and self-acquired property is well brought out. The dependence of a son during the lifetime of a father is applicable only with regard to father's self-acquisitions. [5] In such property, a father could not be compelled to a forced

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1. S.V. § 460.
2. S.V. § 461.
3. S.V. § 220.
4. S.V. § 221.
5. S.V. § 218.

division by his son.[1] This does not mean that Pratāparudra-deva does not recognise a son's birthright in father's self-acquisitions. On the contrary, son's birthright is accepted both in ancestral and self-acquired property but in self-acquired property, because of the dependence of the son during the survival of a father, the son must not interfere with his father's power of dealing with his self-acquisitions.[2]

> It is to be understood, that, although proprietorship in the property of a father and grandfather is by birth alone, nevertheless, since the son is dependent on his father in the instance of the paternal property, and his father has supreme power of acquisition [rather, 'has superiority due to the mere fact that he was the acquirer'] , consent must be made by the son in the case of a disposition by the father of his self-acquired wealth.[3]

Here we meet again the Mitākṣarā idea, based upon the alleged merit of the father in making the acquisition, i.e. an acquirer (provided he acquires without detriment to his father's estate) has a 'superiority' in respect of the article acquired which the other persons, who de facto enjoy, are morally bound to recognise.

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1. S.V.§224.

2. S.V. § 222. anumatis tu kartavyā // paitṛke paitāmahe ca svāmyaṃ yady api janmanaiva, tathāpi paitṛke pitṛ-paratantratvāt pituścārjakatvena pradhānyāt pitrā viniyujyamānesvārjita-dravye putreṇānumatiḥ kartavyā //

3. Tr. Foulkes, 47. My modification.

Unlike Vijñāneśvara, Pratāparudra-deva has broadly divided property into ancestral and paternal, but it remains a question whether he sub-divided each into movable and immovable. The word dravya (which implies 'movables') seems to indicate that the Sarasvatī-vilāsī retains the Mitākṣarā distinction.

In his very definition of dāya, Pratāparudra-deva has reiterated the existence of common ownership between father and son. He defines dāya as 'wealth common to father and son'[1] (pitā putra-samudāya-dravya).[2] He quotes a text of Bṛhaspati[3] which gives the impression that the term dāya is derived from the root dā = 'to give'. But this objective derivation of the root leads to the general definition of the term as wealth common to father and son.

IX. Mitra Miśra's Vīramitrodaya, Vyavahāraprakāśa

Mitra Miśra's Vīramitrodaya[4] is a scholarly and elaborate digest on vyavahāra. His time and genius were both advantageous to him in making a re-appraisal of the conflicting views[5] of the interpreters of dharmaśāstra. The great works of the commentators like Lakṣmīdhara, Vijñāneśvara, Jīmūtavāhana and

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1. S.V.§§ 5, 6.

2. S.V.§§ 5, 6.

3. dadāti dīyate pitrā putrebhyas svasya yad dhanam, SV. § 6.

4. Composed between 1610 and 1640 A.D., Kāṇe, HD, I, 446. Also Derrett, DJL, 57.

5. V.M. I.1.

Devaṇṇa-bhaṭṭa, and many other predecessors were in front of him. With great scholarly acumen he also looked at the śāstra through the prism of mīmāṃsā.[1] This plethora of material did not blur his vision rendering his work superfluous or imitative; on the contrary, it helped him to re-examine and reach a summation on the points of disagreements among the champions of the different schools of thought.

The conflict between the protagonists of janma-svatvavāda and uparama-svatvavāda is as old as the śāstra, and even today we cannot say that the conflict has been resolved. It was natural for Mitra Miśra to take up this topic and make his own contribution.

The concept of the son's right by birth, though mainly a South Indian phenomenon, was not foreign to the śruti[2] or smṛti[3] literature, which were supposed to be followed meticulously in the Aryan society of Northern India. But Vijñāneśvara's recognition of popular practices under the veneer of śāstra could not be ignored by the North Indian masters. On the other hand, though the cogent arguments of Jīmūtavāhana in his Dāyabhāga were running through the same stream of śāstric interpretation as the Mitākṣarā, the water of the two never mingled. This confusing situation needed a bold North Indian utterance and the the Vīramitrodaya, as a complete treatise on vyavahāra, served this purpose.

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1. Bhavanātha, V.M. 1.35; Prabhākara, V.M.1.38; Kumārila, V.M.1.39.
2. Tai.saṃ. 3.1.9.4. supra, 374-75.
3. Yājñ. II.121, etc., supra, 331-33.

First, he took up the basic difference between Vijñāneśvara and Jīmūtavāhana on the definition of dāya. He endorsed the definition of Vijñāneśvara and rejected the definition put forward by Jīmūtavāhana [1] by saying that

> to assert that the meaning of a term is derivative as well as technical, after assuming a figurative meaning of its root, is useless, involves the fallacy of mutual dependence, is against the order in which meanings are naturally suggested by words, and is a reductio ad absurdum. [2]

He accepts Vijñāneśvara's classification of dāya into apratibandha and sapratibandha [3] and rejects Jīmūtavāhana's contention that in every case dāya is sapratibandha.[4] By endorsing Vijñāneśvara's view, Mitra Miśra upheld the son's right by birth in the father's and grandfather's property as apratibandha dāyada.

Initially, Mitra Miśra does not disturb the concept of the śāstric origin of property. Taking it for granted that ownership is to be deduced from the sacred institutes, he tries to prove that the birthright of a son was enjoined in the śruti is presumed to be endorsed by the smṛti. The śruti enjoins that 'one who is black-haired and to whom a son has been born shall establish the sacred fire'.[5] Those

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1. Dhā.bhā.1.4-5.

2. Golāpchandra Sarkār Śāstrī,ed., The Vīramitrodaya, (Calcutta, 1879), I.3. The definition of dāya is extended with reference to the dictum of the Nighaṇṭu: vibhaktavyaṃ pitṛ-dravyaṃ dāyam āhur-manīṣiṇa ityāha / 'The property of the father which is to be divided, the sages call heritage'. The term 'father' stands for any relation. He takes vibhaktavyam (to be divided) as vibhāgārham (capable of partition) which indicates that father's property is not compulsorily to be divided as in the devolution in the case of an only son.

3. V.M.I.5. Mitā.I.i.3, supra, 493-4.

4. V.M.I.6. supra, 532.

5. V.M.I.6; I.23: kṛṣṇa-keśo'gnin ādadhī itetī /

who oppose the existence of the concept of birthright of sons interpret this _śruti_ text to their advantage by pointing out that if a son had common ownership with his father, it would not be possible for a father to follow the injunction of establishing the sacred fire with his own wealth because during minority or legal incapacity of a son, the necessary permission would not be forthcoming. Vijñāneśvara refuted this argument by stating that the injunction itself presupposed (or rather, obviated need for) a permission.[1] He wanted to show that the injunction had no apparent conflict with the existence of a son's right by birth. But Mitra Miśra views the injunction from the opposite angle and answers Jīmūtavāhana and his followers who hold that son's right arises after the extinction of the right of the father. Mitra Miśra contends:[2]

> If it be only on the extinction of the right of the father and others, that the right of the sons etc. accrues to their [i.e. the antecedents'] property in that case it would follow that while the father and others are alive and free from defect, the sons would be incompetent to perform the ceremonies enjoined by the Vedas. 3

Mitra Miśra's approach to the _śruti_ text is ingenious, logically sound and an improvement on Vijñāneśvara's interpretation. He accepts that a son requires his father's permission to perform sacrifice but this is required only because

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1. Mitā.I.i.26.

2. V.M. I.23. yadi pitrādi-svatvāpagama eva putrādīnāṃ tad dhane svatvaṃ tarhi nirdoṣe pitrādau jīvati teṣām dhana-sādhya-vaidika-karmasv anadhikāra . . . /

3. Tr. Golāp Śāstrī, 13.

of the dependence of a son during the survival of his father. A father, on the other hand, being independent, does not require the permission of the son,[1] whereas of course, as Vijñāneśvara saw, the Vedic text itself overrides any legal objection. Mitra Miśra also points out that permission to sacrifice does not generate property; the competence arises out of the fact that both father and son have common ownership in the property.[2]

> And the supposition, if made for the above reasons, that right is generated by permission of the father and the like, is [pre-] supposed by neither sacred nor profane [i.e. secular] authority. 3

This is a subtle answer to those who hold that property is deducible only from the śāstra, and also a pointer towards the fact that son's right by birth "rests on the authority of the śruti, the smṛti, the purāṇas and the custom observed by the learned".[4] It is important to note that a Northern Indian writer, like Mitra Misra, can also appeal to 'good custom' as a support (if a suitably inferior one) for the practice.

But Mitra Miśra knew that the notion of śāstric origin of property accepted by Dhāreśvara[5] could not stand the test of reason.[6] He had to fall

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1. V.M.I.24.

2. V.M.I.23. pitrādy anumateḥ svatvotpādakatvañ caitad anurodhāt kalpyamānam alaukikam aśāstrīyañca /

3. Tr. Golāp Śāstrī, 14. My modification.

4. V.M.I.23. śruti-smṛti-purāṇa-śiṣṭacāra-siddhasya / Mitra Miśra thinks that birth is included in the text of Gautama, X.39-42 in the word adhigama (finding), ibid., reiterated again at I.31.

5. On Dhāreśvara's view, supra, 542, n. 4.

6. V.M.I.32: vastutas tu na svatvasya śāstraika-samadhigamyatvaṃ yukti-yuktam /

back on the argument of Vijñāneśvara that property was laukika. He elaborated and improved on the Mitākṣarā and brought forward more views of the mīmāṃsakas and the naiyāyikas to strengthen the theory of the laukika origin of property,[1] and to refute the opinions of Dhāreśvara and the author of the Saṅgraha, namely that origin of property stemmed only from the śāstra.

Both from the materialistic and metaphysical idea of property, Mitra Miśra's focal point of discussion remained hinged on son's right by birth, and; Jīmūtavāhana's[2] contention that birth was not the immediate cause but the mediate cause of property was rejected.

The objectors to the idea of son's right by birth put forward another means of argument, namely the texts on impartibility of pre-partition gift by father to a son. The objectors argue that the prohibition against partibility signifies the father's unilateral power to deal with property and the absence of the son's common ownership with the father.[3] The objection is refuted by Mitra Miśra's saying that one can assume son's permission in case of a pre-partition gift by a father, and the texts only ordain the invalidity of an

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1. Mitra Miśra quotes Bhavanātha: loka-siddhiñ cārjanam janmādi /, V.M.I.35. Prabhākara: arjanaṃ svatvam nāpādayatīti vipratiṣiddham, V.M.I.38. Kumārilasvāmin is also of the opinion that the notion of property is derived from profane authority, V.M.I.39. Pārthasārathi: rāga-prāptes tāvad arjanaṃ na śāstrīyam, V.M.I.40. See V.M.I.41 for the difference in approach between Prabhākara and Kumārila, though their conclusions were the same, namely that property was derived from profane authority. For a critical discussion, see Derrett, RLSI, Ch.5.

2. V.M.I. 49-50.

3. V.M.I.7. The same objections put forward with reference to husband's affectionate gift to wife, I.8.

affectionate gift of immovables.[1] Alternatively, the texts declare that movables can be given by the father unilaterally by reason of his independence.[2]

> For they may be reconciled as having reference to (the sons') permission, and as having the object of establishing [or, 'reinforcing'] the invalidity of the affectionate gift of immovable property: or, what is declared (in those texts) is the impartibility, by reason of the father's independence, of what, other than immovable property, has been given by him, even without the permission of the sons. 3

By this Mitra Miśra does not mean that a son's birthright was operative only in the immovable property. It was all-pervading, but from the practical point of a view, a father had independence to deal with movable property for specific purposes, e.g. the necessities of the family. Birthright could not be a stumbling block to the Hindu joint family as a viable institution; it had to make room for family necessity.[4]

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1. Here Mitra Miśra is closely followeing the Mitākṣarā, I.i.19-20; I.i.25.

2. V.M.I.28. anumaty abhiprāyeṇa sthāvara-prīti-dānābhāva-sthirīkaraṇārthatayopapatteḥ / svātantryād vā pitur-anumatim antareṇāpi tena datte sthāvaravyatirikte putrāṇām avibhājyatvam ucyate / also see I.9. Mitra Miśra also interprets son's asvāmya in the texts of Manu, Nārada and Devala as lack of independence, V.M. .I.27.

3. Tr. Golāp Śāstrī, 16.

4. V.M.I.30. tasmāt paitṛke paitāmahe ca dravye putrādīnām yady api janmanaiva svatvam, tathāpi pitur-āvaśyakeṣu dharma-kṛtyeṣu vācanikeṣu ca prasāda-dāna-kuṭumba-bharaṇāpad-vimokṣādiṣu ca sthāvaravyatirikta-dravya-viniyoge svātantryam iti dhyeyam / sthāvarādau tu svārjite pitrādi-paramparā-prāpte ca putrādi-pāratantryaṃ tulyam eva /

> Hence it is to be observed, that although the right of the sons etc. to the property of the father and the grandfather accrues by birth alone, still for the performance of the necessary religious ceremonies and for the purpose of affectionate gifts, maintenance of the family, deliverance from danger and the like that are prescribed by the sacred texts, the father possesses independence in dealing with the (joint) property, other than immovable: but with respect to immovable property, whether self-acquired or inherited from the father or other ancestor, the dependence on the sons etc. is alike ... 1

In this paragraph, Mitra Miśra is re-emphasising in clearer language the Mitākṣarā [2] position on the relative extent of the son's birthright and father's power over joint family property. He also makes it clear that the son's lack of independence during the lifetime of his father does not in any way hinder, in law, the bringing of an action for partition against the father even though it would be abhorred as a breach of the rules of morality and religion.[3] This is perhaps the clearest statement of this dichotomy.

This problem was taken up again by Mitra Miśra while refuting Jīmūtavāhana's doctrine of factum valet and the special importance of immovable property has been restated in the following words:[4]

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1. Tr. Golāp Śāstrī, 16-17.

2. Mitā. I.i.27; I.v.9-10.

3. V.M.i.19; tathā sati dṛṣṭādṛṣṭa-virodha-mātram bhaved vyavahāros tu siddhyed eva /

4. V.M. II.i.22. tatrāvibhaktānāṃ madyaka-dravye sāmyasāmyād-anīśatvam anyānumatiṃ vinā siddham api sthāvare viśeṣatas tadādarārtham ucyate /

> Although the incompetency without the consent of the others is settled by reason of the co-equality of ownership, in joint property, of undivided coparceners, still the same is here particularly mentioned in respect of immovable property for the purpose of extolling its worth. 1

He specifically refutes Jīmūtavāhana's [2] approach to the two texts of Vyāsa which forbid alienation of immovable property by a coparcener or a father without the consent of the dāyadas. As we have stated before,[3] according to Jīmūtavāhana, such an alienation is only a moral offence [4] and when the transaction is made in fact, it cannot be altered despite its śāstric prohibition. Mitra Miśra attacks this seemingly convenient doctrine of factum valet of Jīmūtavāhana by saying that it is a mistake to assume an 'ultra-mundane' object in a rule of positive law if the rule is directed to seen (dṛṣṭa) and not to unseen (adṛṣṭa) objects. He points out the fallacy in Jīmūtavāhana's argument by saying that if the rule only amounts to the moral offence of injuring the family, then even in an alienation with consent of all the dāyadas, the objection of distressing the family in the form of committing a moral offence would still arise. His point is that the 'unseen' offence relates to scriptural law, and no 'seen' consideration, such as consent, could prevent its

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1. Tr. Golāp Śāstrī, 87.
2. Dā.bhā.II.27.
3. Supra, 551-2.
4. Dā·bhā. II.28.

operating'.[1]

> And since it is unreasonable to assume an ultra-mundane object in a rule of positive law, when there may be a visible object, such as facility of proof in case of dispute: otherwise, even in case of the consent of cosharers, the objection of injuring the family may arise; hence the texts would have to be interpreted as referring solely to sin in consequence of injuring the family, as is laid down in other texts. 2

Mitra Miśra-s rejection of the factum valet concept as a means of validation of an otherwise invalid transaction, in effect, confirms his acceptance of son's birthright in all categories of immovable property. Thus, the Mitākṣarā view on this point was reinforced and Jīmūtavāhana's denial of son's birthright, though probably in the meantime gaining in popularity, was held technically unacceptable.

Even among the commentators who apparently belong to the Mitākṣarā school, there is no unanimity on certain texts. Regional practices might have influenced their interpretations, and confusion had increased owing to the bulk of the literature. Mitra Miśra did not leave these problems untackled. He pointed out the difference of opinion between Devaṇṇa-bhaṭṭa and Lakṣmīdhara

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1. V.M.II.i.23. vyāvahāra-śāstrasya vyavahāra-saukaryyādi-dṛṣṭa-prayojana sambhave-'dṛṣṭa-kalpanānupapatteḥ / anyathā 'numatāv api tadāpatteḥ kuṭumba-virodha-janya-vacanāntara-pratipādita dharma-prayojakatā-param astu /

2. Tr. Golāp Śāstrī, 89. The rule not to posit an 'unseen' object when a 'seen' object is possible is a notorious mīmāṃsā principle.

on the text of Śaṅkha-Likhita. The text ordains:

> The sons shall not divide the heritage while the father is alive; although ownership is subsequently acquired by them, the sons are certainly incompetent by reason of the absence of independence in respect of wealth and religious duties. 1

The explanation of Devaṇṇa-bhaṭṭa runs as follows:[2]

> 'Although ownership' in the property of the father 'is by them', i.e. by the sons 'acquired', i.e. gained 'subsequently',[3] i.e. immediately after their birth and not afterwards, still 'while the father is alive' they shall not divide his wealth except at his desire, the sons being incompetent to make partition 'by reason of the absence of independence' i.e. by reason of their being dependent on the father 'in respect of property and religious duties'. 4

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1. V.M.I.11. na jīvati pitari putrā riktham bhagjeran / yady api svāmyam paścād-adhigataṃ tair anarhā eva putrā artha-dharmayor-asvātantryād iti /

2. V.M.I.11. Smṛticandrikā, Ghārpure, ed., 256, supra, 570, n.1. yady api taiḥ putraiḥ svakīya-janmanaḥ paścād-anantaram eva pitṛ-dhane svāmyam-adhigataṃ prāptaṃ tathāpi jīvati pitari tad dhanaṃ tad-icchām vinā na vibhajerann artha-dharmayor asvātantryāt pitṛ-pāratantryād vibhāga-karaṇe 'narhāḥ putrā iti /

3. The word causes difficulty into connotation.

4. Tr. Golāp Śāstrī, 7. Smṛticandrikā, tr. Ghārpure, 538, cited supra, 570.

Mitra Miśra points out the different interpration of the same text by Lakṣmīdhara, the author of the Kṛtyakalpataru.[1]

> Although ownership is subsequently acquired in the wealth gained by the sons through learning etc., without making use of the paternal property; still by reason of the absence, during the life-time of the father, of their independence in respect of property and religious duties, there is not (absolute) ownership even in the property so acquired -- then what ownership can there be in the father's estate? 2

According to Mitra Miśra, the explanation in the Smṛti-candrikā is preferable. Mitra Miśra thinks that an interpretation of śāstra must be kept close to the text as far as possible, otherwise a cumbersome explanation might destroy the force of an argument. Lakṣmīdhara's interpretation of Śaṅkha-Likhita's text suffers from the defect of inference of many terms (bhūyaḥ-padādhyāhāra),[3] like 'acquired by learning etc.'[4], whereas Devaṇṇa-bhaṭṭa's [5]

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1. See Kṛtyakalpataru, Vyavahāra-kāṇḍa, (Baroda, 1953), 649, with K.V. Rangaswamī Aiyangar's valuable notes. Mitra Miśra has neatly paraphrased Lakṣmīdhara's text. V.M.I.11. Emphasis alludes to the text commented upon. yady api paścad-adhigatam pitṛ-dhana-vyapāra-nirapekṣaiḥ putrair vidyādibhir upātte dhane svāmyam, tathāpi tatrāpy asvāmyam jīvati pitari, kimuta pitṛ-dhane, artha-dharmayos teṣam pitari jīvaty asvatantryād iti /

2. Tr. Golāp Śāstrī, 7.

3. V.M.I.26.

4. V.M.I.11.

5. V.M.I.11.

interpretation is better in the sense that less inference of terms (alpādhyāhara) is necessary.

> The interpretation, however, of the term 'birth' (in the interpretation given in the Smṛticandrikā) is not unreasonable, because it presents itself through the suggestion of the terms sons etc., and because of the importation is of fewer terms. 1

Mitra Miśra concludes [2] that the texts [3] of Manu, Nārada and Devala, which also seemingly deny the right of the son during the survival of a faultless father, are to be construed as referring only to the lack of independence of such a son, but not to absence of his ownership.[4]

Any commentator in Mitra Miśra's position would be under cross-fire from the two opposing camps, of the Mitākṣarā and the Dāyabhāga. The Dāyabhāga principles were bound to gain ground in the minds of some people of North India who were used to the patrilineal and patriarchal structure of the family. The doubts created by the Kalpataru's interpretation of Śaṅkha-Likhita's text demanded a statement lest it be taken as support for Jīmūtavāhana at least in the matter of self-acquired property of the father.

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1. V.M.I. 26: janma padādhyāharastu putratvādyākṣepepasthiteralpādyāhāracca nāyuktaḥ / tr. Śāstrī.

2. V.M.I.27.

3. V.M.I.10.

4. Kaṇe's observation that Mitra Miśra disapproves the son's right by birth in his father's self-acquired property is wrong and a misunderstanding of the Vīramitrodaya, Notes, Vyavahara Mayūkha, ed., Kaṇe, (Poona, 1926), 123.

As regards the son's right in property, Mitra Miśra goes one step further than Vijñāneśvara. The concept of the Mitākṣarā birthright is combined with the notion of putratva (sonship) which implies the prime and unique position of a son who inherits as well as being charged with the duties and obligations of the father after his death.[1] Mitra Miśra says that ownership in the father's and grandfather's property is caused by putratva rather than by birth.[2] He thought that putratva or sonship as a concept was stronger than the birthright. A son could be disqualified because of degradation or physical or psychopathic causes, but his ownership of the property of the father and other ancestors was so inherent that it would not be affected even by a partition or reunion.[3]

Mitra Miśra's importing of the ancient notion of putratva made it easier for the juridical society of North India to swallow the laukika aspect of the son's birthright as envisaged by Vijñāneśvara. But we should not overstate the incidents of putratva. Putratva itself emerges at birth and from birth, a son is endowed with his rights and obligations.

In effect, Mitra Miśra defended the concept of common ownership between father and son, and rejected the concept of father's absolute power in family property as popularised by Jīmūtavāhana.

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1. See the texts, in this respect, Dā.bhā.XI.i.31-3.

2. pitrādi-dravya-svāmye putratvād, V.M.IV.12.

3. See Mitra Miśra on Hārīta: hārītena ca vibhāgottaram api pitā-putrayoḥ paraspara-dhanādhikāra pratipādanāc ca / V.M. IV.12.

X. Vyavahāra-mayūkha

In Nīlakantha Bhatta's Vyavahāra-mayūkha,[1] the Mitākṣarā doctrine of the son's acquisition of ownership by birth has been thoroughly restated.

Nīlakantha goes straight into the problem of origination of ownership. He defines ownership as a kind of capacity (śakti) which arises from purchase or acceptance, or other means of acquisition.[2] To endorse the laukika origin of property, Nīlakaṇṭha adopts the arguments of Vijñāneśvara. He points out that the means of acquisition, like purchase etc., are recognised only by wordly usage because even among the people who are ignorant[3] of the śāstra, the concept of ownership is well known. Then following the authors of Smṛticandrikā and Madanaratna, he puts forward the opinion of Bhavanātha, namely, that the concept of ownership is loka-siddha. The means of acquisition which are enumerated in the text of Gautama,[4] are merely compilation and repetition of the sources which were notorious in ordinary worldly life.[5]

Against the traditional orthodox views of Dhāreśvara and the author of the Saṅgraha that sons have no ownership during the survival of the father, Nīlakaṇṭha puts forward the text of Gautama[6] on ownership by birth and the

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1. Composed between 1610-1640 A.D., Kāṇe, HD, I, 440. Also his ed. Vyavahāra-mayūkha, (Poona, 1926), introd., xxvi. Derrett, DJL, 57.

2. Vy.Ma. Kāṇe, 89.

3. anabhijñānām api, cp. Vijñāneśvara's pāmarā. loka-siddhaiva krayādīnām kāraṇatā / Vy. Ma., 92.

4. Gautama, X.39-42.

5. Loka-siddha-kāraṇānuvādakam / Vy.Ma., 89.

6. Mitā. I.i.23. Vy.Ma., 89.

text of Yājñavalkya (II.121) which enjoins co-extensive right of father and son in the property of the grandfather. Nīlakaṇṭha points out that the correct interpretation of Yājñ.II.121, indicates that the cause of accrual of ownership is not the death of the grandfather but the birth of the son. Here he brings out the fallacy in the interpretation of commentators like Jīmūtavāhana who hold the view that ownership arises at the extinction of ownership of the previous owner.[1] Nīlakantha says that if a view like that of Jīmūtavāhana is accepted, then a grandson not born at the time of the death of the grandfather would not have any ownership in the property of the latter but, in fact, such grandson has ownership in the property of his deceased grandfather.[2]

> It cannot be said that this (text) conveys that the cause of the production of ownership is the death of the grandfather and not the birth of the son, since (if that view were accepted) there would arise the unacceptable result that a grandson not born at the death (of the grandfather) would have no ownership (in what was his grandfather's property). 3

Nīlakaṇṭha shows novelty in his approach to the text of Devala,[4] which seems to deny a son any right in property during the survival of his father.

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1. Dā.bhā.I.5.

2. Vy.Ma., 90. na cedaṃ pitāmaha-maraṇasyaiva svatvotpatti-hetutvaṃ gamayati na putrotpatteḥ / maraṇa-kālenutpanne pautre tad abhāvaprasaṅgāt /

3. Tr. Kāṇe and Patwardhan, Vyavahāra-mayūkha, (Bombay, 1933), 79.

4. pitayur-uparate putra ... See above, 366, n.4; Dh.K. 1156a.

He relies more on mīmāṃsā to bring out the meaning of the text and says that the first half of the text, the terminal suffix,[1] vibhajeyuḥ ('should divide') is in its nature an injunction or a command. It enjoins a rule (vidhi) to the period of partition. It does not involve the birthright of a son which is assumed to be existing irrespective of a division. The latter half of the text is commendatory of the time of partition. It gives the reason and so is a mere arthavāda.[2] This portion is not to be taken literally. With the support of this mīmāṃsā interpretation, Nīlakaṇṭha takes the same view as other commentators of the Mitākṣarā school, that asvāmya of a son during a faultless father's survival is mere dependence and not indicative of his want of ownership.[3]

> The first half (of this verse) only enjoins the time of partition, as the potential termination is found (in the word vibhajeyuḥ), while the latter half only commends the time (of partition laid down) and indicates that the sons are dependent, but is not to be construed as laying down absence of ownership (in them during the father's lifetime). 4

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1. vidhi-pratyaya: vidhi means injunction. pratyaya means a termination or terminal suffix.

2. arthavāda only recommends a vidhi; see Jaimini, I.2.26-30: hetuvannigadādhikaraṇa / Lingat, CLI, 153-4.

3. Vy.Ma., 90. tatra pūrvārdham tāvad-vibhāga-kāla-vidhāyakaṃ vidhi-pratyaya-śravaṇāt uttarārdhaṃ tu tasyaiva stutyarthatayāsvātantryaparaṃ na tu svatvābhāvaparam /

4. Tr. Kaṇe and Patwardhan, 79.

In the Vyavahāra-Mayūkha the birthright of a son has been extended to a greater degree than in the Mitākṣarā, in the sense that Vijñāneśvara allows the father to make gifts of affection of ancestral movables,[1] but Nīlakaṇṭha denies this power to the father in his comment on Yājñavalkya [2] and interprets the text as allowing the father only the independence of regulating their use.[3]

> That text signifies only this that the father is independent only in the matter of wearing ear-rings, rings, etc., but it does not signify that the father is independent as regards the gift of these nor is it meant to exclude the birth of a son giving rise to ownership. 4

Nīlakaṇṭha does not accept the view that ownership is not pre-existent to partition. He takes the view that ownership is created at birth and partition merely manifests the ownership in a particular thing which was already in an unrecognised portion.[5]

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1. Mitā. I.i.27.

2. maṇi muktā ..., Nīlakantha takes the words maṇi muktā pravālānām (gems, pearls and corals) as illustrative of only those movables which do not deteriorate by use, Vy. Ma., ed. V.M. Mandalika, 34, n.1. The same interpretation to the text, sthāvaraṃ dvipadaṃ caiva .../ For the texts of Yājñ., see above, 340, n.1, cited as Nārada's.

3. Vy.Ma., 91. tat-kuṇḍalāṅgulīyaka-dhāraṇādāv eva pituḥ svātantrya-mātrārtham, na tu danādau na vā putrotpatteḥ svatva-kāraṇatva nivṛtty artham /

4. Tr. Kāṇe and Patwardhan, 81.

5. Vy. Ma., 91. pūrvam-eka-deśa-sthitam evotpannaṃ vibhāgena padārtha-viśeṣa-niṣṭhataya jñāpyate /

> (Ownership) which previously (to partition) existed in an indeterminate portion (of the things jointly owned) is made known by partition as subsisting in definite things. 1

According to Nīlakaṇṭha, a son could demand a partition of grandparental property against the will of his father. It is clear from his comment on Bṛhaspati's text,[2] that in grandparental property the son's birthright was fully operative.[3]

> The meaning is that it follows as a matter of course that they (sons) can claim partition even against his (father's) will of what was acquired by their grandfather and the like. 4

Nīlakaṇṭha accepted in broad terms the son's birthright over the father's self-acquisitions, but could not allow a son the unilateral power to demand a partition of self-acquired property and constructive self-acquired property[5] against the will of his father because, unlike Vijñāneśvara, the incident of community of acquisition and common ownership between father and son had to recede into the background to make way for practical purposes

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1. Tr. Kāṇe and Patwardhan, 81.

2. kramāgate gṛha-kṣetre ... , Vy. Ma., 95; Bṛ. quoted above, 332, n. 4; Dh.K. 1180b.

3. Vy. Ma., 95. arthāt pitāmahādy arjite tad anicchayāpi vibhāgārhā ity arthaḥ.

4. Tr. Kāṇe and Patwardhan, 88. Ancestral lands recovered by the father's own power, see next note, also Bṛhaspati cited by Nīlakaṇṭha immediately after Manu/Viṣṇu.

5. See Nīlakaṇṭha on Manu, IX. 209; Viṣṇu, XVIII, 43; Vy. Ma., 95.

in the patriarchal and patrilineal family of Northern India. Nīlakaṇṭha's modesty in withholding this power of demanding partition of self-acquired property is noteworthy. He would, however, allow such partition if the father becomes disqualified to manage the estate by disease, etc.

Nīlakaṇṭha defines dāya as partible wealth which is not reunited (asaṃsṛṣṭa) and which is not brought together into common stock for the sake of gain and the like.[1] The definition is different from Vijñāneśvara's, but his classification of dāya into apratibandha and sapratibandha has been retained by Nīlakaṇṭha and his explanation of apratibandha dāya indicates in unambiguous terms the existence of the son's birthright in paternal property.[2]

> But where ownership accrues to sons and the like solely by relationship to the owner independently of any other means (source) of acquiring wealth, that is apratibandha dāya, for example, the father's wealth. 3

XI. The Birthright in Śūlapāṇi's Dīpālikā / Dīpakalikā

In course of time, the denial of the son's birthright by Jīmūtavāhana in his Dāyabhāga became as highly regarded as if it was the representative view

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1. asaṃsṛṣṭaṃ vibhajanīyaṃ dhanaṃ dāyaḥ / lābhādy artha-saṃsṛṣṭa-dhana-vyāvṛttayesaṃsṛṣṭam iti / Vy. Ma., 93.

2. Vy. Ma., 93. yattu svāmī-sambandhād eva putrāder dhanārjanopāyāntara nirapekṣatvāt svatvaṃ bhavati so'pratibandhaḥ / yathā pitṛ-dhanam /

3. Tr. Kāṇe and Patwardhan, 86.

of the śāstrīns of Bengal, laying down the law of the region; but it has been more or less overlooked that three centuries later Śūlapāṇī, [1] the most authoritative writer next to Jīmūtavāhana on dharmaśāstra,[2] did not speak with the same voice. His work, Dīpālikā, a commentary on the Yājñavalkya-smṛtī has been conspicuously ignored by subsequent Bengali jurists, like Raghunandana and Śrī Kṛṣṇa.[3] The importance of this short commentary lies in the fact that the author's Bengali origin and the pervading shadow of the Dāyabhāga doctrine in no way dim his originality of mind.[4]

On this point of a son's common ownership with his father in grandparental property, Śūlapāṇī significantly arrived at conclusions which were more akin to Viśvarūpa's than those of his illustrious Bengali forerunner, Śūlapāṇī did not view the texts through the rules of mīmāṃsā, nor did he resort to accepted techniques of interpretation, like adhyāhāra,[5] but he relied on the plain meaning of the text and, where relevant, reinforced Yājñavalkya's utterances with those of the other smṛtīkāras.

With this closeness of approach to the śāstra, Śūlapāṇī accepted the son's right by birth in grandparental property as ordained by Yājñavalkya. [6]

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1. A.D. 1375-1460: Kāṇe, HD, I, 396.

2. Kāṇe, ibid., 393. Significantly, Śūlapāṇī does not make any reference to Jīmūtavāhana in his Dīpālikā.

3. On Raghunandana and Śrī Kṛṣṇa, infra, 618-24.

4. He has made copious references to the Mitākṣarā, but has not blindly followed it, J.R. Ghārpure, The Yajñavalkyasmṛtī and the Mitākṣara, The Collection of Hindu Law Texts, (Bombay, 1944), xxix, introd., 63.

5. As used by Jīmūtavāhana, Dā.bhā., II.29.

6. Yājñ.II.121.

He does not seem to have said anything on the restriction of a father's power of alienation, nor has he commented on the text of Gautama [1] on acquisition of property by birth, but his opinion is quite clear that in grandparental property, a son's ownership is co-extensive with his father. On his comment on Yājñavalkya, [2] he says: [3] "In these, i.e. land, etc., the ownership of the father and the son is equal. In such property, there can be no partition at the will of the father and the shares of the father and the son are equal". [4]

Since in grandparental property, father's and son's ownership is co-equal, there cannot be a partition of such property merely at the father's volition, but according to the commentator, a partition will take place probably on mutual agreement by the father and son. But when such partition of grandparental property takes place, a son's birthright is guarded in the sense that the father's share will be equal to that of the son, and a father cannot play an arbitrary role with regard to partition. [5] "(In regard to grandparental property)

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1. Mita.I.i.23.

2. Yājñ.II.121, Dīpālikā, II.122, J.C. Ghose, Hindu Law, II, 551; in Ghārpure's edn. (1939), V.121 (55).

3. J.C. Ghose, Hindu Law, II, 551. eṣu bhūmyādiṣu pituḥ putrasya ca tulyaṃ svāmyam / atra pitṛicchaya na vibhāgo'ṃśo 'pi sama eva /

4. Tr. J.C. Ghose, Hindu Law, II, 554. Ghārpure reads ataḥ putrecchayā vibhāgo 'ṃśo 'pi sama eva ('Consequently, at the will [option] of the son a partition, that is to say, the share [of each] is invariably equal'). Ghārpure had the earlier edition before him and three manuscripts including one very superior one. His reading is preferable - but the meaning, from our point of view is the same: a son can demand partition and an equal share in ancestral assets.

5. Śūlapāṇi on Yājñ.II.114, Dīpālikā, II, 115, J.C. Ghose, Hindu Law, II, 550; Ghārpure, edn., V. 114 (54). Śūlapāṇi also quotes Viṣṇu, XVII.2: "paitāmahe tu pitāputrayos tulyaṃ svāmitvaṃ, svecchayā na vibhagaḥ", iti atrāsvāmyam hetuḥ/

there cannot be partition in any way the father likes, because of his want of complete ownership."[1]

The point is this, that sons have ownership in the ancestral assets, not in self-acquired property, but Śūlapāṇī goes on to quote Nārada that sons can initiate (and perhaps enforce?) a partition of the father's self-acquired property when the mother is past child-bearing, the sisters married off, and the father will beget no more issue. According to Śūlapāṇī, the father's dominance is (this last apart) complete in his self-acquisitions.[2] His view stands midway between the views expressed in the Dāyabhāga and in the Mitākṣarā. Jīmūtavāhana considered both grandparental property and self-acquired property of the father as the father's property, but according to Vijñāneśvara, with the exception of slight concessions to the father in the form of expenses for family necessity,[3] basically the son's birthright was all-pervading.[4] But Śūlapāṇī's position in the Dīpālikā is equidistant from these two extremes and casts doubt on the popular belief that Jīmūtavāhana was stating the right law with regard to the son's birthright in grandparental property prevalent in Bengal.[5]

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1. Tr. J.C. Ghose, Hindu Law, II, 542. The reading asvāmyam (above) is not adopted by Ghārpure, but because of the text of Devala that follows, it is difficult to say that Ghose's reading was not correct.

2. Śūlapāṇī, on Yājñ.II.114.

3. Mitā.I.i.29.

4. Mitā.I.i.27.

5. Ghārpure, op.cit., introd., 63. Significantly and boldly, Sures Chandra Banerjee says: 'Śūlapāṇī has very clearly and ably given us an exposition of the then current legal system with a thorough grasp of the subject matter', 'Sulapani', New Indian Antiquary, May, (1942), Vol.5, No.2, 31-5 at 32.

XII. Raghunandana's Dāyatattva

Jīmūtavāhana's rejection of a son's right by birth found support in the writings of later commentators in Bengal. The foremost among these jurists was Raghunandana.[1] From his acceptance of Jīmūtavāhana's definition of dāya, it is apparent that Raghunandana upholds the theory that son's right arises after the extinction of the right of the father at his demise.[2]

Gautama's [3] text on a son's right by birth has been approached by Raghunandana from an angle opposite to that set forth in the Mitākṣarā. He accepts birth as a major criterion which endows the son with sonship, but it does not cretate ownership in the son as soon as he is born. Birth creates in the son the most important relationship with his father in the sense that at the demise of a father, his son excludes all other relatives from the inheritance.[4]

> As regards the text of Gautama cited in the Mitākṣarā: 'the teachers say that ownership accrues by birth', the meaning of it is that on the cessation of the father's right, on account of

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1. Literary activity between 1520 and 1570 A.D., Kāṇe, HD, I, 419. Derrett, DJL, 56, n.358.

2. D.T.I.5; J.C. Ghose, Hindu Law, III, 259, Setlur, II, 469.

3. Mitā.I.i.23.

4. Text, J.C. Ghose, III, 259. yat tu mitākṣarāyām 'utpatty aivārthaṃ svāmitvāl labheta ity ācāryāḥ' iti gautama-vacanam, tad api pitṛ-svatvoparame 'ṅgajatva-hetutvenotpatti-mātra-sambandhenānanyasaṃbandhādhikena janaka-dhane putrāṇāṃ svāmitvād dhanaṃ putro labheta nānya-sambandhītyācāryā manyante / na ca pitṛ-svatve vidyamāne 'pi janmanā tad-dhane putra-svatvam iti vācyam, devala-vacana-virodhāt /

> the cause of being born of the body, by virtue of the sole reason of birth, the relationship being superior to that of others, there being the ownership of the sons in the wealth of the father, the son succeeds and no other relation: this is the intention of the teachers.
>
> It should not be said that even during the continuance of the father's right, the sons have ownership in his wealth by birth as that is inconsistent with the text of Devala. 1

Raghunandana has based his interpretation mainly on the literal meaning of texts of Baudhāyana,[2] Devala [3] and Nārada.[4] By his avoidance of the text of Yājñavalkya (II.121), on the point of son's right by birth, his arguments suffer from the weakness of onesidedness. Raghunandana does not question the authenticity of the text of Gautama which is cited in the Mitākṣarā,[5] which proves that he might have had knowledge of the text alleged to be Gautama's. If he had no pre-conceived notion about the son's birthright, why did he take three [6] texts literally and set out to explore the intentions of the sages in the

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1. TR . J.C. Ghose, III, 233.
2. satsaṅgajeṣu tadgāmī hyartho bhavatī: Baudhāyana, I.5.11.11. D.T.I.6.
3. pitayur-uparate putrāḥ ... , D.T. I.8; Dh.K.1156.
4. Nārada, XIII.3; D.T. I.9; Dh.K.1152.
5. Mitā.I.i.23.
6. Baudhāyana, Devala and Nārada, see ns. 2,3,4 above.

text of Gautama? Raghunandana knew that birth was a potent factor in the ownership of property, but Jīmūtavāhana's regional popularity and popular practice in Bengal influenced the manipulation of the śāstra by the jurist. The wavering of Raghunandana is discernible while he brings out the importance of birth as the origin of the son's right, which becomes operational only at the demise of the father. Here Raghunandana, though not giving categorical acceptance, yet, in effect, is talking about the dormant right of a son in the property of his father - the cause of this right being his birth.[1]

> Thus in the text of Devala, it being declared that the sons have no ownership in the lifetime of the father, the text of Gautama: 'The teachers say that ownership accrues by birth' means that after the cessation of the father's right the son's right accrues by reason of birth and he obtains the property by ownership, and not after birth during the continuance of the father's right.[2]

Jīmūtavāhana in his Dāyabhāga probably overstated his case. He took both ancestral property and paternal property as father's property. Raghunandana accepted the distinction between grandfather's property and father's self-acquired property. According to Raghunandana, a father's power was not absolute even when he was separating his sons at his own will. He

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1. Text, J.C. Ghose, III, 259-60. tasmāt devala-vacane pitari vidyamāne tad-dhane putrānām asvāmya-śruter utpattyevārthaṃ svāmitvāl labheta ityācāryāḥ iti gautama-vacanaṃ pitṛ-svatvoparamāntaram eva janmanā putra-svatva-sampādanāt svāmitvena tad-dhane putro labhetety etatparam, na tu pitṛ-svatva-kāle janmānantaram /

2. Tr. J.C. Ghose, III, 233.

could take the decision unilaterally to make a partition among his sons, but the manner of distribution did not depend on his personal will. Raghunandana follows the text of Viṣṇu,[1] which forbids a father to make an unequal distribution of grandparental property among his sons. This was also the case for a father's self-acquired property, unless there were special grounds[2] to discriminate between his sons.

Raghubandana also envisaged[3] a situation where all the sons unanimously could request the father to divide the property. On this problem, he has cited a text of Manu which ordains: "If the undivided brothers do, with one accord, desire partition, then the father shall, on no account, make an unequal distribution".[4]

The citation and the comment[5] show that Raghunandana accepted the rule that even in the distribution of self-acquired property of the father, his will was not the determining factor. A son's right was manifested in the form of an entitlement to an equal share even in his father's self-acquisitions. This may not be considered equivalent to a birthright, but such a substantive right of an equal share definitely stems from birth though Jīmūtavāhana or

1. Viṣṇu, XVII.1; D.T. II.3, Dh.K.1175.

2. Existence or absence of filial piety of a large family, of 'inability' and the like (of any son): bhaktatva-bahu-poṣyatvā kṣamatvādi: Raghunandana on Kātyāyana, D.T.II.4. Ghose, III, 262.

3. It might have been in practice in Bengal.

4. Not found in the Institute of Manu; D.T. II.6; Setlur, tr., II. 474.

5. D.T. II.6.

Raghunandana would not, at least theoretically, admit it.[1]

Despite his bias towards uparama-svatvavāda, the jurist was conscious that he was incapable of laying down a uniform code of devolution or ownership of property for the whole of Hindu society in India. He was aware that the law regarding the partition of dāya could vary according to diversity of class, trade, custom or religion, and thus, indirectly, the validity of other interpretations of the śāstra, such as Vijñāneśvara's, was upheld.[2]

> Kātyāyana cited in the Kalpataru and the Ratnākara thus lays down that there may be different rules of partition in different countries: 'The rules of succession should be according to the customs of a country, of a caste, of an assembly of artisans or of a village', Bhṛgu says, 'is understood. 3

XIII. Śrīkṛṣṇa Tarkālaṅkāra's Dāya-krama-saṅgraha

Śrīkṛṣṇa Tarkālaṅkāra's Dāya-krama-saṅgraha[4] is mainly an elaboration of the Dāyabhāga of Jīmūtavāhana. The author kept his concept of birth-

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1. Raghunandana follows Jīmūtavāhana on Yājñ.II.121, and Viṣṇu, XVII.2, and does not take the texts literally, D.T. II.20-1. Dā.bhā. II.9. Yājñ.II.121 and Viṣṇu, XVII.2 quoted above, 331, n.1; 332, n.2.

2. Text, J.C. Ghose, III, 261. deśādibhedenāpi vibhāgam āha kalpataru-ratnākarayo kātyāyanaḥ, deśasya jāteḥ saṅghasya dharmo grāmasya yo bhṛguḥ / uditaḥ syāt sa tenaiva dāya-bhāgam prakalpayet // bhṛgur āheti śeṣaḥ /

3. Tr. J.C. Ghose, III, 236.

4. A work of the middle of the 18th century.

right untouched in this work, but elsewhere he commented on the text of Gautama on birthright as amūla (not original).[1]

He takes Yājñavalkya's text (II.121) on common ownership in ancestral property between father and son as merely intended to restrain the father's will against an unequal distribution of immovable property among his sons. But at the same time, Śrīkṛṣṇa expresses his opinion that during the lifetime of the father a son's ownership cannot exist.[2]

> For (although contrary to the received opinion of equal ownership between father and son) it is impossible that, as long as the father, the owner of the ancestral property, continues to survive, his sons should have ownership therein.[3]

The restriction on father's will regarding distribution of property was not applicable in cases of ancestral movables.[4]

Śrīkṛṣṇa is also of the opinion (following Jīmūtavāhana on the point) that sons should have no right to demand partition during the survival of the mother, although ownership is vested in the son after the demise of the father.[5]

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1. Śrīkṛṣṇa on Dā.bhā.I.19; Stokes, Hindu Law Texts, (Madras, 1865), 187, n.19.

2. D.K.S., VI. 18; J.C. Ghose, III, 459. satī pitāmaha-dhana-svāminī pitarī tat-putrāṇām pitāmaha-dhana-svāmitvāprasakter yathāśrutārthabādhāt /

3. Tr. J.C. Ghose, III, 418. Setlur, II, 145.

4. D.K.S., VI. 19.

5. Śrīkṛṣṇa on Manu, IX, 104, D.K.S., VII.1.

With regard to ancestral immovables, when the father decided to divide the property among his sons, he was obliged to make an equal distribution among them, but this injunction by itself does not prove the existence of son's right by birth. The Dāya-kra[ma]-saṅgraha clearly shows that Śrīkṛṣṇa, like Jīmūtavāhana, did not recognise the birthright of sons.

XIV. The navya-nyāya school and the concept of son's right by birth

A major intellectual event during the 17th century was the flourishing of the Bengali logicians (navya-nyāya, or the New School of Logic),[1] who were extremely well-versed in the sources of law and for our purpose, applied their minds to the tangled webs of the popular conflict between the advocates of janma-svatvavāda and uparama-svatvavāda. The literature is mostly in manuscript, much of it still unexplored,[2] but two works of importance in our present context have been brought to light by Derrett.[3]

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1. The movement started as early as the 13th century with Gangeśa in Mithilā, and was given a new fillip in Bengal by Raghunātha Śiromaṇi (1475-1550 A.D.). See D.H.H. Ingalls, Materials for the Study of Navya-nyāya Logic, (H.U.P., 1951), 1, 4, 9.

2. Derrett, 'An Indian Contribution to the Study of Property', BSOAS 18/3 (1956), 475-98 at 477, n.3.

3. 'An Indian Contribution to the Study of Property', BSOAS, 1956 XVIII/3, 475-98 and 'Svatva-Rahasyam: a 17th Century Contribution to Logic and Law', Annals of Oriental Research, Centenary Volume, Madras, 42-8.

One of these works is Svatva-vicāra[1] (a discussion of Property), which deals with the theory of Property and throws light on the concept of the son's right by birth. Whether father's death or son's birth be the cause of property was a question as controversial and puzzling to the logicians as to the jurists. If a faultless father is the absolute owner of property then joint ownership with his son is inconceivable and the existence of the son's birthright is illogical. On the other hand, if a son acquires a right in his father's property as soon as he is born (or rather conceived), then the father's death cannot be the cause of property. This interesting and debatable point naturally attracted the talents of the navya-naiyāyikas and expressions to that effect are found in the Svatva-vicāra.

The logician starts with the enumeration of the traditional causes of property:[2] (i) purchase, (ii) acceptance, (iii) the predecessor's death, his embracing the order of ascetics, or his fall, and (iv) finding an abandoned object.

According to the category of property, the opinions of the commentators have differed with regard to a son's right by birth. Broadly, there are two main views. One view[3] is that a son acquires a right by birth in the ancestral,

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1. Text published: Derrett, 'The Anonymous Svatva-vicāra: A Legal Study by a Seventeenth Century Logician', Charu Deva Shastri Felicitation Volume, (Benaras, 1974), 605-11; rpt. Essays, I, 358-64. The author was probably a Bengali, but there are possibilities that he could have been a Maithila. The date of the work could most likely be the first-quarter of the seventeenth century; Derrett, BSOAS, 18/3 (1956), 478.

2. Sva.vi.II. It is significant that causes of property, such as partition and seizure in Gautama's dictum (Gautama, X.39-42) are absent here.

3. As Vijñāneśvara's in the Mitākṣara, I.i.27.

as well as in the self-acquired property of the father. The other view is that so long as the faultless father lives, his sons have no ownership either in ancestral or in paternal estate.[1] There existed a third view midway between the Dāyabhāga and the Mitākṣarā doctrine, namely, that the death of the father produces property in the son only insofar as the father's self-acquisitions are concerned; but in grandparental property, by authority of the scriptural text (Yājn.II.121),[2] a son acquires property (svatva) from the moment of his birth.[3]

In the Svatva-vicāra[4] the doctrines of janma-svatvavāda and uparama-svatvavāda have been put to the test of logic under the guise of arguments between an imaginary objector and an imaginary opponent representing and advocating each doctrine. The supporters of janma-svatva opine that in grandparental property, ownership is created in the son during his father's lifetime because this has been ordained by Yājñavalkya.[5] This then explains the rule that a son may compel his father to divide the assets of his grandfather.[6]

Moreover, the necessity for the consent of a son to the alienation of the grandparental estate[7] by a father also proves the son's property in that

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1. Dā.bhā.I.19.

2. See above, 331, n.1.

3. Sva.vi.IV.2.

4. Sva.vi.IV.2.

5. Yājñ.II.121.

6. Mitā.I.v.5., but denied in Dā.bhā.II.7-8.

7. Bṛ.XIV.5-6 , Dh.K.803.

estate during the survival of the father. Then the author deals with the notion that property arising in the successor excludes or obstructs the property of the predecessor. The advocates of janma-svatva suggests that being joint owners of grandparental estate, a father and son do not stand towards each other as obstructed and obstructor, which is possible in the case of a vendor and vendee or donor and donee. There is a difference between property passing by descent and property passing by voluntary transfer. The situation of obstructed and obstructor between father and son has been falsified by positing an analogy with the existence of common property between husband and wife. A text supposed to be in the Veda (but certainly accepted as genuine by Bengali and other jurists) ordains that 'wealth is common between spouses' (dampatyor madhyagaṃ dhanam).[1] If joint owners, as in the case of husband and wife, would stand mutually as obstructed and obstructor with regard to property, then the text would be meaningless and the wife's joint acquisition of husband's property would not have been sanctioned in the śruti. From this, by analogy, a conclusion could be drawn that a son also can acquire a right by birth as a co-owner with his father in the estate of the grandfather; and the son's joint ownership will not obstruct the ownership of the father.[2] Moreover, a son may take his father's (self-acquired) property

1. The Vedic origin of the text has been doubted by Derrett, BSOAS, 18/3 (1956), 490, n.4. But Śabara-svāmī, Śūlapāṇi, Raghunandana knew it; also Kullūka notes dampatyor aikyam on Manu, IX.45. That the dhana of spouses is sādhāraṇa is stated by Medhātithi on Manu, VIII.163 (cf. III.202) Devaṇṇa-bhaṭṭa, S.C. (Mysore edn.), 654. Also see Derrett, ZVR, 64 (1962), 62-4.

2. Sva.vi., IV.2.

by gift or sale,[1] and it is not supposed to be the rule that a son takes his father's property only by succession. So the death of the father or grandfather cannot be the real cause of property in the son.

Then the author affects to show the logical incongruity of the above arguments through the imaginary objector. He says, "not so, for the property of one person obstructs the property of another".[2] The objector does not accept the concept of joint ownership of father and son. His own definition of property is not wide enough to include a co-existence of rights amounting to property within a group whose titles arose independently. He holdsthe view that at the grandfather's death, his property passes to the father and at the father's death, the property devolves on the son.[3] That means father's and son's ownership cannot co-exist: "so to put it shortly, the cause (of the son's succession) operates through the non-existence of anything characterized by his father's property".[4]

Next, he points out the illogicality of the idea that a wife is co-owner with the husband. If we accept the view that wife's property is created during the existence of her husband, then son's property also can be created during the survival of the father. But the naiyāyika points out the fallacy in the premise. He says that in fact, wife's property in the husband's estate is never created at

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1. Without prejudice to the general rule that only divided relations may take transfers inter se (of the śāstra's provisions as to indicia of partition).

2. Sva.vi., IV.4. See Jagannātha, Vivādabhaṅgārṇava, Colebrooke, (London, 1801), II, 520.

3. View of Jīmūtavāhana, Dā.bhā. III.i.19.

4. Sva. vi., IV.4; i.e. the son succeeds because there exists, on the father's death, nothing in which the father's property inheres.

all.[1] If a wife is a co-owner with her husband in a real sense, then after the death of the husband, as long as the mother survives, the son's property would not come into existence. But in fact, the son excludes the widow as an inheritor, and a homologation of texts places a son before the widow in order of succession. He does not deny that females have property in strīdhana, but, with an extreme view, concludes that even the strīdhana belongs to the husband because he "has property in the females themselves".[2] So the analogical

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1. Sva.vi., IV.5.

2. Sva.vi., IV.5. Seems to be literal acceptance of Manu, VIII. 416, text quoted above, 427, n.2 . Even Jīmūtavāhana did not go to this extreme, Dā.bhā. I.16. On the implication of Manu, VIII, 416, Kāṇe, HD, III, 771. Literal meaning exploded by Jaimini, VI, i.10-16. Also see Derrett, ZVR, 64 (1962) 30, 98-9. Also our discussion, supra, 427-35. Śrīkṛṣṇa on Śūlapāṇi's Śrāddha-viveka, (Calcutta, 1939), 124 points out that in the text dampatyor madhyagaṃ dhanam, the word dhanam refers to the husband's and not the wife's estate, for the husband is not the owner of her saudāyika assets, Derrett, BSOAS, 1956, XVIII/3, 479, n.2. The author of the Svatva-rahasya takes this text as merely giving authority to the wife to make certain uses of her husband's property, Derrett, A.O.R. Centenary Number, 42-8 at 45. However, sale of a wife, though deprecated, was not inconceivable. Jīmūtavāhana, Vyavahāra-mātṛkā, ed., A. Mookerjee, 285. Derrett, Dharmaśāstra ... , (1973), 20, reveals that sale of a wife was a sin (not necessarily void) in spite of Manu's deprecation at IX.46 (and see XI.62!) to this effect. A vyavasthā also throws light on this: One Śaṅkaradāsa sold his wife Raghuvaṃśī to Rāmacaraṇa for forty rupees, cash or an undertaking of debt (tamasuka) by Rāmacaraṇa for fifty rupees. The paṇḍits opined that sale of a wife was śāstra-viruddha but in fact, it happened. However, if a person does anything which is śāstra-viruddha, the King can punish, Strī-vandhaker vyavasthā, 1st of May, 1827, Sadar Nizamat Adalat (from the Court of Ajimabad, West India), S. Jhā, ed., Dharmaśāstrīya Vyavasthā Saṅgraha, (Allahabad, 1957), 114.

establishment of joint ownership between father and son on the basis of the idea of joint ownership of husband and wife does not stand the test of logic.

Then the author enumerates the causes of extinction of property, namely:- (i) death; (ii) embracing the order of ascetics; (iii) 'fall'; (iv) destruction of the object in which property inhered; (v) relinquishment; (vi) sale; and (vii) lapse of a specific period. Death of the predecessor being the cause of extinction implies the cause of creation of property in the successor. So in the ultimate analysis, birth is not accepted as a cause of property.

The other work Svatva-rahasyam [1] (' The Secret of Property') also deals with the cause of property. The author devotes Chapter III to the investigation of life as a general cause of property. The interpretation of Gautama's dictum,[2] "wealth is taken by birth alone", shows his rejection of son's right by birth. According to him, the text "refers to the birth of children to slaves and cattle and not to property being produced by the birth of sons, etc. in themselves".[3]

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1. The work is anonymous. No internal evidence available for dating the work, but the author was later than Vijñāneśvara, Vācaspati Miśra, Jīmūtavāhana, Kamalākara and almost certainly, later than Mitra Miśra. The work has been tentatively dated 1600-1610 A.D., but most probably the author was Gadādhara, 1650-1690 A.D., Derrett, 'Svatva-rahasyam: a Seventeenth Century Contribution to Logic and Law', A.O.R., Centenary Number, 42-48 at 45. It is open to doubt that the author could be Mathurānātha, Derrett, BSOAS, 18/3 (1956), 479, n.4. On Mathurānātha, (1600-1675), see Ingalls, op. cit., 20-5.

2. Mita. I.i.23.

3. Sva.ra.III.

In Chapter IV, the author's view becomes more eloquent and he categorically states that "sons have no right in their father's property during his lifetime".[1]

From a purely juristic angle, the navya-nyāya view on birthright may be considered by some as the hyper-realism of logicians, but as a rational analysis of different interpretations of the śāstra, by linking logic with practical legal problems, it is as equally important as the doctrine of the mīmāṃsā. These seventeenth century logicians in their own ways gave intellectual support to the Dāyabhāga doctrine of Jīmūtavāhana and gave it a new stimulus among the śāstrins of Bengal.

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1. Derrett, A.O.R. Centenary Number, loc.cit., 45. Cp. the view of Anantarama, author (?) of a Svatva-vicāra. Anantarāma (later than Śrī Kṛṣṇa Tarkālaṅkāra, c.1750) believed that property in a father's estate was obtained by birth (f.10b) , MS, I.O. 1278b=Egg. 1530, cited by Derrett, 'An Indian Contribution to the Study of Property', BSOAS, 18/3 (1956), 475-98 at 478, n.9.

CHAPTER 15.

JURIDICAL COMPILATION UNDER THE PATRONAGE OF THE BRITISH

1. Treatment of Son's Right by Birth in the Vivādārṇava-setu (The Code of Gentoo Laws)

From the point of view of individual effort or inspirations from the Hindu kings to compile digests, the eighteenth century was a period of decadence in śāstric learning. But towards the end of the century, a new chapter opened in Hindu legal history.

The East India Company acquired the *divānī* (civil administration) of Bengal, Bihar, and Orissa in 1765 and in 1772 decided to administer justice relating to the suits between 'Gentoos' on inheritance etc., according to the laws of the 'Shaster'.[1] From the existence of the provinces of Bihar and Orissa in the Company's *divānī* and also because of the inclusion in the Plan of the 'suits regarding inheritance',[2] it was obvious that cases involving the concept of son's right by birth would also come before the British judges. At the initial stage,

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1. Warren Hasting's Plan for the Administration of Justice Extracted from the Proceedings of the Committee of Circuit (Cossimbazar) 15 August 1772, being pp.13-25 of Extract of a Letter from the Governor and Council at Fort William to the Court of Directors, 3 November 1772, Regulation II of 1772, s.27. See Derrett, 'The Administration of Hindu Law by the British', *Comp.Studies in Society and History*, 4 (1961), 11-52 at 24ff. Also RLSI, 229-33.

2. 'Inheritance, marriage, caste and other religious usages of institutions', s.27, Regn.II of 1772.

the judges themselves were ignorant of the śāstra and they had to rely on the vyavasthās [1] of the paṇḍits. But this system proved to be unsatisfactory, and sometimes issues were decided differently from case to case,[2] and even the integirty of the pandits in issuing vyavasthās was doubtful.[3]

The search for certainty and search for justice led to the search for the śāstra, and in May 1773, eleven paṇḍits were appointed to compile a digest of Hindu law.[4] They finished the work, Vivādārṇava-setu [5] ('bridge across

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1. Opinions of paṇḍits on the śāstra: Cp. responsa prudentium. Cp. in Rome the priest consulted on a question of law issued responsum. Such a responsum was considered binding, even on Roman Magistrates, J.P. Dawson, The Oracles of Law, (Ann Arbor, The University of Michigan Law School, 1968), 107. Also cp. the role of the Roman jurisconsults, who advised the praetor and the judge, but had no legislative or judicial responsibility, J.H. Merryman, The Civil Law Tradition, (Stanford, 1969), 60. Also the Rabbinical opinions in Jewish law, the responsa ('replies', or juridical 'opinions'), Z.W. Falk, 'Jewish Law', op.cit., 32.

2. Halhed, The Code of Gentoo Laws, (London, 1776), 5.

3. Sir William Jones, although an admirer of Hindu law, could not 'with an easy conscience concur in a decision merely on the written opinion of native lawyers, in causes in which they could have the remotest interest in misleading the Court', Lord Teignmouth (Sir John Shore), Memoirs of the Life, Writings and Correspondence of Sir William Jones, (London, 1835), II, 43. W.H. Macnaghten, registrar of the Sadr Diwani Adalat in Bengal from 1822-30, saw paṇḍits as 'venal', W.H. Macnaghten, Principles and Precedents of Hindu Law Being a Compilation of Primary Rules Relative to the Doctrine of Inheritance, Contracts and Miscellaneous Subjects, (Calcutta, 1829), iv. RLSI, 239. The French experiment of settling disputes within the framework of the śāstra, was a success to a certain extent, Leon Sorg, Avis du Comité Consultatif de Jurisprudence Indienne, (Pondicherry, 1827). Also mentioned by Joseph Minattur, Justice in Pondicherry, 1701 to 1968, ILI, New Delhi, (Bombay, 1973), 15-16.

4. Halhed, The Code of Gentoo Laws, or Ordinations of the Pandits, (London, 1776), Preface, x. RLSI, 239-40.

5. Soon afterwards acquired the title, Vivādārṇava-bhañjana ('breakwater to the ocean of litigation').

the ocean of litigation'), by the end of February 1775.[1] The views expressed in the Code mainly conform to those in the Dāyabhāga but the Mithilā views are also superimposed[2] where applicable.

Halhed writes in the translators' preface to the Code,

> these laws also strongly elucidate the Story of the Prodigal Son in the Scriptures; since it appears from hence to have been an immemorial custom in the East, for sons to demand their Portion of Inheritance during their father's lifetime, and that the Parent, however aware of the dissipated Inclinations of his child, could not legally refuse to comply with the Application. 3

If the word 'East' in this passage includes Bengal, then definitely Halhed is pointing to a custom in that province which is nothing but son's right by birth in the property of the father. But the Code itself, on the one hand has given, but on the other hand, has taken away a son's right by birth. The Code prohibits

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1. Kāṇe's date (1773 A.D.) at HD, I, 465, is wrong, Halhed, ibid., 5. Derrett, 'Sanskrit Legal Treaties Compiled at the Instance of the British', ZVR, 63 (1961), 72-117, at 85ff; also RLSI, 239.

2. The Bengal and Mithilā views are put forward in the fashion: '... iti Śrīkṛṣṇatarkālaṅkāra-Smārtabhaṭṭācārya-Jīmūtavāhana-prabhṛtayaḥ; ... iti tu Miśrāḥ, Vivādārṇavasetu, (Bombay, 1888), 42; again ' ... iti Śrīkṛṣṇatarkālaṅkāra-Smārtabhaṭṭācārya-Jīmūtavāhanādayaḥ prāhuḥ; Maithilās tu ...', ibid., 79; also, 'Smārta-Jīmūtavāhanādayaḥ prāhuḥ Maithilās tu ... ity āhuḥ', ibid., 80, or when the two schools agree '... iti Smārta-Dāyabhāgakārādayaḥ', ibid., 83. See Rocher, 'Schools of Hindu Law', India Maior, J. Gonda Congratulatory Volume, (Leiden, 1972), 168-9. The texts are also compared with the Vivādārṇava-setu, Adyar Library, (microfilm), very kindly lent by Derrett.

3. Halhed, The Code of Gentoo Laws, op.cit., preface, lvi. This analysis of this parable is without foundation, see Derrett, Law in the New Testament, (London, 1970). Also our discussion, supra, 214-17.

a father from giving away or selling ancestral property without the consent of the sons, but at the same time, modifies this position by stating that a father can alienate the surplus, over and above what is needed for the maintenance of his immediate dependants.[1]

On the partition point, the Code is very explicit and does not give any power to the son to demand partition against the wishes of the father:

> If it be not the Father's choice, the sons have no authority to take from him by Force their respective Shares of their Ancestors' Property; even if there is no Expectation that their Father shall ever have another Son, still they have not Authority to take it. 2

It can be said that in the Code, the Dāyabhāga views became predominant and the compilers did not give its due weight to the concept of the son's right by birth.

II. Jagannātha Tarkapañcānana's Treatment of Sons' Right by Birth in the Vivāda-bhaṅgārṇava

The Vivādārṇava-setu did not solve all the problems for the solution of which it was compiled. To the court paṇḍits, in relation to other śāstric sources, it was a sibling rather than a sequel.[3] The inadequacy of the Code

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1. Halhed, Ch.II. XI, 83. This is pure Dāyabhāga law.
2. Halhed, Ch.II, XI, 82.
3. RLSI, 241-2.

as well as the anomaly of the vyavasthās led to the compilation [1] of Vivāda-bhaṅgārṇava [2] under the guidance of Jagannātha Tarkapañcānana, [3] the most celebrated of the paṇḍits of his time. Despite the predominance of Bengali paṇḍits among the compilers, resulting in a 'Bengali bias', [4] to different jural concepts, the work was a success. Jagannātha's method of surveying the two doctrines of Mithilā and Bengal by stating both and sometimes without leaving any conclusion, made his work more an emergent than a resultant. [5] But being 'a living encyclopaedia of law', [6] he referred to all available śāstric learning, and to present an analytical exposition of the controversial problem of the son's right by birth, he repeatedly assembled the smṛti texts and the opinions of the commentators in his work.

He opens the discussion with the question: 'what is the cause of

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1. For the detailed reasons of the compilation and the role of Sir William Jones, see RLSI, 241-5.

2. Compiled between 1788-1794, translated by Colebrooke, under the title, A Digest of Hindu Law. Another work preceded this: Vivāda-sārārṇava, 'Ocean of All Disputes', a code on the Mithilā school, by Sarvoru Śarmā Trivedi in 1789 (RLSI, 245).

3. Born in or about 1695-7; Kāṇe, HD, I, 466.

4. Derrett, BSOAS, 1957, XX, 204; RLSI, 246. Rocher disagrees, 'Schools of Hindu Law', J. Gonda Congratulatory Volume, (Leiden, 1972), 172. Rocher is technically right but on a total assessment of Vivāda-bhaṅgārṇava, it appears that his observations are doubtful. Also Derrett, DJL, 62.

5. RLSI, 247, Lingat, CLI, 121.

6. RLSI, 245.

property?'[1] He puts forward the view of Vācaspati Bhaṭṭācārya [2] who holds the opinion that 'acquisition is the sole cause of property',[3] and 'birth of sons and the rest constitutes acquisition'.[4] Jagannātha explains Vācaspati's view by stating that 'in case of inheritance, birth alone is the cause of property ...'[5] But Jagannātha immediately reverts to the text of Devala,[6] the corner-stone of the Dāyabhāga view and puts forward the crucial problem in the form of a question:- 'may not a son have property in the wealth of a living parent?'[7] To this, he comes out with the peculiar answer:- 'let it not be answered, this is admissible; for it would contradict the law. Devala declares, that, while the father lives, his sons have no ownership of his estates'.[8]

Jagannātha opines that, in effect, Devala assigns the death of the father as a mediate cause of property vesting in the son. But it does not mean that death or degradation of the father produces divesture of property and, being indirect causes, they may produce other effects. The immediate cause ofproperty

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1. A Digest of Hindu Law, tr. H.T. Colebrooke, (London, 1801), II, 507.
2. I do not know if anything is known of him.
3. II, 507.
4. II, 508. Here Vācaspati cites the text of Gautama as in Mitā, I, 1, 23, and also another anonymous text of the same purport, 'in some instances acquisition is by birth'.
5. II, 508.
6. Dh.K.1156a.
7. II, 508.
8. II, 508.

vesting in the son is the divesture of the father's property.[1] Then Jagannātha poses the problem by saying that if divesture is the immediate cause and death of the father is the mediate cause of vesting property in the son, then, after a father's death, property could divest continually because of the continuous subsistence of the relationship of father and son. If continuous divesture is correct, then father's property will divest at the moment of his son's birth. But 'property is established to be an impediment to concurrent property'[2] (i.e. the property of A obstructs the property [in the same asset] of B [a questionable proposition]) and 'no property vests in the son while the father's property subsists',[3] which leads to the conclusion that 'a son has no ownership while the father is living'.[4] In effect, Jagannātha is supporting the concept of uparama-svatva and points out that there is (normally) no divesture of property until after the death of the father. At the same time, Jagannātha does not fail to mention the opinion of the commentators who hold that the sons 'have title in the estate while the father lives, but cannot appropriate it at pleasure without his command'.[5]

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1. II, 509.

2. II, 509.

3. II, 510. Here Jagannātha is following the Dāyabhāga school and especially Śrī Kṛṣṇa who says: 'for those two concurrent rights of the same nature are incompatible', II, 520. That 'ownership vests after his (father's) death' - on this point, besides Jīmūtavāhana, Raghunandana and Kullūka, Jagannātha had the support of Caṇḍeśvara and Vācaspati Miśra, II, 521; III, 4.

4. II, 510.

5. II, 522.

While discussing the topic of partition by a father, Jagannātha again takes up the text of Gautama [1] on son's right by birth, and examines it in view of the father's power of unequal distribution among his sons. If a father wants to deprive or exclude a son from his share on the ground of lack of filial love or animosity of the son, a father's decision is not final unless he proves the grounds for such exclusion in the presence of the King or a public assembly.[2] Jagannātha had (so far as we know) no smṛti or commentatorial authority for this last idea. Even in the case of self-acquired property, in the light of Baudhāyana and Kātyāyana's text, a father can be punished by the King for his unjustified exclusion of a son from his share (again the authority is wanting) but Jagannātha explains that since the texts do not ordain a fine for the offence, such a father commits only a moral offence.[3] Jagannātha reminds us that the advocates of son's right by birth do not accept a father's power of depriving his son of his share,[4] but at the same time, he is not ready (notwithstanding their efforts to prove a concurrent property) to accept the existence of the son's ownership during the lifetime of the father on the ground that there is not authority for establishing 'property within property'.[5] But under extraordinary circumstances,

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1. Mitā.I.i.23.

2. III, 2. This probably contemplates a testament similar to the testamentum calatis comitiis in early Roman Law, Institutes of Roman Law by Gaius, tr., Edward Poste, (Oxford, 1904), ii, 101; 176. Maine, Ancient Law, (London, 1905), 174.

3. III, 2-3.

4. III, 3.

5. III, 4; also II, 521.

such as oppression by stepmother 'or the like' a son may appeal to the King for protection of his right only in ancestral property and obtain a partition from his father.[1] The source once again of this idea is not to be found. Though a categorical admission is missing, what else is Jagannātha hinting at in this passage but birthright?

According to Jagannātha, a right to be maintained or a right to have equal share is not a vested right in the strict sense of the term and does not coalesce with such vested right as right by birth. For his contention he finds support in Vācaspati who also does not admit 'the son's vested title in the paternal estate during his father's life'.[2]

Jagannātha states that a partition of property inherited from the grandfather is granted by the sole will of the father, and categorically expressed the view that the father is the owner of the grandparental estate.[3] With this view, he reconciles the textual attribution[4] of son's co-ownership in grandparental property by saying that a father's ownership remains unhindered by such texts, because in these texts 'ownership is <u>figuratively</u> attributed to the son'.[5]

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1. III, 47.
2. III, 5.
3. III, 42. The same point is emphasised at II, 524-6.
4. Yājñ. II.121.
5. III, 43. My emphasis.

Jagannātha does not seem to accept the co-extensive right of father and son even in immovables of the grandfather. He repeatedly rejects the birthright of a son in paternal and grandparental estate on the strength of the text of Devala.[1] Those who say that 'a title in the estate of the father and grandfather is vested by birth alone'[2] are wrong, 'for it would contradict the text of Devala: 'they have no ownership (or full dominion), while a faultless father lives'.[3]

But it is too risky to identify the view of a particular commentator as having the approval of Jagannātha. The famous text of Yājñavalkya[4] which ordains common ownership of father and son in grandparental property, has been left with the comment of Śūlapāṇi:- 'over these, namely over land and the rest, the father and son have equal dominion. Partition is made even by the choice of the son; and the shares are equal ...'[5] But for the explanation of the phrase, _sadṛśam svāmyam_[6] in the text, Jagannātha has resorted to the _Vivāda-ratnākara_ which probably partially suited his purpose: '"equal dominion"; in this case no greater share is allotted to one than to another; nor can the father

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1. Dh.K.1156a.
2. III, 6.
3. III, 6.
4. Yājñ.II.121.
5. III, 34. See above for versions of Śūlapāṇi.
6. Yājñ.II.121.

give away such property at his pleasure'.[1] Jagannātha's acceptance of the correctness of the view of the author of the Dīpālikā [2] shows that he seems to have accepted the birthright of a son in the property of the grandfather, but his reliance on the Ratnākara's explanation of the words sadṛśam svāmyam on the partition point is nothing but an endorsement of Jīmūtavāhana's view on that text (Yājñ.II.121).[3] Here Jagannātha has obfuscated rather than illuminated the correct purpose of the text of Yājñavalkya.

Jagannātha has sided with Jīmūtavāhana on the interpretation of texts which prohibit a father to make a gift or sale of immovable property. He asserts that a gift of immovable property to one son without having the prior consent of the others, though immoral, is valid.[4] Again, unequal distribution of grand-parental property by a father is also merely a moral offence.[5]

Jagannātha's emphasis on the comcept of moral offence in jural problems is not his own innovation. It is a sign of the influence of Jīmūtavāhana's inter-

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1. III, 35, also III, 36. See Caṇḍeśvara, Vivāda-ratnākara, (Calcutta, 1887), 461.

2. III, 35.

3. See Jīmūtavāhana's treatment of Yājñ.II.121, supra, 539-44.

4. III, 35-7. For a discussion, Derrett, BSOAS, 1957, XX, 204-15.

5. III, 38-9.

pretation of the texts of Vyāsa [1] which prohibit alienation of property by one coparcener without the consent of other co-owners. Jagannātha applied and extended Jīmūtavāhana's solution to the law of partition,[2] and stated that an unequal distribution of grandparental property by a father among his sons was nothing more than a moral offence. But a moral offence being only an infringement of rules in conscience, having no penalty in the worldly sense, makes the administration of justice difficult and leaves uncertain the law on those rights, infringement of which constitutes moral offence alone.

The raison d'être of Vivāda-bhaṅgārṇava was an exploration of śāstric law from the smṛtis, commentaries and the nibandhas. On the topic of assessing a son's right by birth, it seems that Jagannātha has overstressed the Dāyabhāga view and has underplayed the Mitākṣarā doctrine. Despite Jagannātha's profound and wide śāstric erudition, the weight of the works of the Bengali commentators and the influence of his own surroundings probably moulded the pattern of his work. But from the evidence of authentic zetesis in the work, it can be said that he never wanted to create juridical mirage out of the śāstra, yet never made any pretence of not seeing the looking-glass hidden in the pages of the texts with which he was dealing.

His difficulty was that the texts themselves were never comprehensively

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1. Dā.bhā.II.28-30.

2. The difference of the application of this solution between gift and partition has been explained by Jagannātha at III, 47.

reconciled [1] and explained, and actual practice was ambiguous and divergent. From the textual standpoint, it could as easily be claimed that the father was owner of all the types of assets in question, subject to reservations in his issue's favour, as that the sons were co-owners with their father subject to certain privileges on his part, some by way of encouragement to activity and enterprise, and some by virtue of his inevitable function as the family's leader, manager.

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1. For a discussion on this point, see R. Rost, ed., Works by the Late Horace Hayman Wilson, Vol.III: Essays on Sanskrit Literature: 'Review of Sir F.W. Macnaghten's Considerations of the Hindu Law, as it is current in Bengal, (London, 1865), 2-3.

CHAPTER 16.

THE BIRTHRIGHT IN THE VYAVASTHĀ SUB-LITERATURE

1. Introduction

Warren Hastings' Plan [1] to settle disputes on inheritance etc.,[2] between Hindus according to their śāstra was not without difficulties in its implementation. The śāstras were written in Sanskrit, a language which, in most cases, was unknown to the judges,[3] and even though a scanty minority of śāstric materials were translated,[4] their purports remained inscrutable,[5] due to unfamiliarity with the religious tradition, ancient usages and contemporary practices of the Hindus. Nevertheless, administration of justice had to be done according to the

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1. Discussed, supra, 632, n.1.
2. G.W. Forrest, Selections from the State Papers of the Governor Generals of India, II, Warren Hastings Documents, (Oxford, 1910), 295-6, RLSI, 289.
3. See the honest confessions of their Lordships at the pinnacle of the judicial system as to their disadvantage in not knowing Sanskrit, Balusu v. Balusu, (1899), 26 IA 113 at 146 (PC).
4. Th. Goldstücker, 'On the Deficiencies in the Present Administration of Hindu Law',: a paper read at the meeting of the East India Association on the 8th June, 1870, (London, 1871), 6-7. RLSI, 298.
5. The point emphasised in Rungamma v. Atchamma, (1846) 4 MIA 1, 97-8 (P.C).

Plan,[1] and neither the Government nor the litigants could wait for the day when a judiciary with all the relevant learning[2] would be available.

It has already been pointed out[3] that to overcome the crisis on śāstric learnings, a group of people were attached to the Company's Courts for interpreting the śāstra to the judges. These were the paṇḍits or the śāstrins who were supposed to be conversant with śāstric lore.

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1. The Plan was anticipated by the Charter of 1726 which laid down that custom and institutions of the Indians should be left undisturbed, T.K. Mukherjee, 'Mayor's Court and the Indian Residents of Calcutta', Bengal Past and Present, 80 (1951) 133: 42-5 at 44.

2. On the lack of confidence of the public on the Hindu lawyers, see Rajah Rammohan Roy, Exposition of the Practical Operation of the Judicial and Revenue Systems of India, (London, 1832), 11; on lack of judicial ability and outlook of the judges, ibid., 2; and Rammohan's recommendation that European judges sent to India should not be under 24 years of age and should have a certificate of proficiency in English law, ibid., 47. Discussed also by Derrett, 'Justice, Equity and Good Conscience' in J.N.D. Anderson, ed., Changing Law in Developing Countries, (London, 1963), 140-1; also RLSI, 231-2. On the deficiency of qualifications of vakeels (pleaders) and their improvement by Lord Cornwallis, see Kalikinkar Datta, 'Some Records Relating to the Method of Appointment of the Vakeels in the Administration of the East India Company', Bengal Past and Present, 71 (1952) 134: 44-52. Apart from ignorance of the śāstra, the allegation of a legacy of corruption in the judiciary was not wholly unfounded, T.K. Mukherjee, 'A Note on the Administration of Justice by the Calcutta Mayor's Court (1726-1774)', Bengal Past and Present, 71(1952) 134: 85-92 at 91. RLSI, 275.

3. Supra, 632-33.

The remittance by the Courts of a particular point of Hindu Law to the paṇḍits for their opinion was not entirely a British innovation. Even during the Muslim rule in India, the same role often used to be played by the paṇḍits when the parties to the disputes were Hindus.[1] The continuation of this system by the British was founded on political and juristic compulsion,[2] and the paṇḍits were appointed to the Supreme Court itself from 3rd February, 1777.[3] Eventually, paṇḍits were attached to all types of Courts, such as District Courts, Provincial Courts and the Sadr Divānī Adālat.[4]

The issues on son's right by birth, having been coupled with the topic of 'inheritance', not infrequently came before the paṇḍits for their opinion. The cases involved with the topic of a son's birthright broadly cover two areas. In some, the father's capacity to alien and incumber the family estate was

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1. G.C. Rankin, Background to Indian Law, (Cambridge, 1946), 3ff. T.E. Colebrooke, Miscellaneous Essays of H.T. Colebrooke with a Life of the Author, (London, 1873), I, 96. RLSI, 229. Even at the remote epoch of Hindu legal history this was not unknown, Manu, VIII.1 and the comment of Medhātithi, Jhā, Manu-smṛti, (Calcutta, 1924), 4. Gautama, XIII.26, SBE, II, 245. Yājñ.II.1, 3. Vasiṣṭha, XVI.2, SBE, XIV, 78 and n.2 thereto. Viṣṇu, III.72, SBE, VII, 20.

2. On this point, see the observation of Sir William Jones in his letter to the Supreme Council of Bengal, 19 March, 1788, G.H. Cannon, ed., The Letters of Sir William Jones, (Oxford, 1970), 794.

3. RLSI, 236.

4. 'Cornwallis Code', Regulations of 1793, W.H. Morley, An Analytical Digest of All the Reported Cases, (London, 1850), I, introd., xlvi. B.K.Acharyya, Codification in British India, TLL, 1912, (Calcutta, 1914), 57-9.

challenged by the son, and in others a son's right to demand a partition of family property against the wishes of the father, or a father's arbitrary power of unequal distribution among his sons had to be determined. The vyavasthās do not always portray a specific pattern of opinion restricted to a particular geographical area, and sometimes within the same geographical region, 'the decisions arrived at have in some respects, been almost as various as the Courts that pronounced them'.[1]

II. Father's Power of Alienation and Partition of Property

The majority of the vyavasthās, regarding disputes between Bengali Hindus in different courts of Bengal, indicate that a father had absolute power of disposing of the family property without the consent of his sons. But one cannot say that this is the whole truth, because there are opinions of paṇḍits which reveal considerable restrictions on a father's power of unilateral alienation and arbitrary partition of certain categories of family property in Bengal. The divergence of opinion among the paṇḍits of different courts, or within the same court, show that there was no undisputed or universal acceptance of Jīmūtavāhana's Dāyabhāga as the only authority in Bengal.

The vyavasthā in the case of Juggulkisson Addic [2] was a forerunner

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1. West and Bühler, A Digest of Hindu Law, (Bombay, 1884), I, preface, v.
2. (1781), Supreme Court, Calcutta, Strange, Hindu Law, II, 324.

in upholding the Dāyabhāga doctrine in Bengal. Juggulkisson had property, both ancestral and self-acquired. He disposed of the whole estate in equal shares between his wife and son by a will. On a dispute over his will, the matter was referred to the paṇḍits for their opinion. The paṇḍits certified in favour of the will. After the death of Juggulkisson, the son would have inherited the whole estate, but by the will half of that estate went to the widow. The case is significant in the sense that the paṇḍits upheld a father's absolute power to dispose of property of every description and thus denied the son his birthright even in the ancestral property at the hands of the father.[1]

But in 1810, the vyavasthā at a District Court[2] in Bengal was that without the consent of his son, a father could give only a small portion of ancestral immovables to his daughter's son. The significance of the opinion was that alienation beyond a small portion of ancestral immovables was not within the power of the father without the concurrence of the son.

In another district,[3] following Raghunandana's Dāyatattva, the paṇḍits declared that in Bengal a father could give away all his self-acquired immovables to one of his sons, depriving the others.

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1. Sutherland remarked that a father did not have absolute power over 'real ancestral estate', Strange, II, 324-5.

2. (1810), Zillah 24 Pergunnahs, Case No.36, W.H. Macnaghten, Principles and Precedents of Hindu Law, (Calcutta, 1828), II, 244.

3. (1821), Zillah Jungle Mehals, Case No.28, Macnaghten, II, 236-7.

In Gangagobinda Sen v. Ramlochan Saha,[1] Ramjit Saha made a gift of his whole property to his daughter-in-law in the presence of his sons and grandsons. Three questions[2] were put to the paṇḍit by the court:

(i) Whether according to the śāstra, a gift of a father's self-acquired property to a daughter-in-law would be valid in presence of sons and grandsons?

(ii) Would the said gift be valid if the property in question is ancestral?

(iii) If some of the property gifted is self-acquired and some ancestral, is the whole gift valid?

Since the paṇḍit of the District Court, Śrī Śrīrāma Tarkālaṅkāra was not available, the questions were referred to the paṇḍits of the Sadr Dīvānī Adālat for their opinion. Paṇḍit Vaidyanātha Miśra of the SDA followed the Dāyabhāga Law and did not make any distinction between ancestral and self-acquired property in respect of son's right by birth. He opined that without being deceitful or influenced by wrath, normally a father could make a gift of all properties in his hands, provided he left sufficient property for the maintenance

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1. (1826), a case from Jessore, Bengal, Dharmaśāstrīya Vyavasthā Saṅgraha: A Collection of the opinions of the pundits on Hindu Law, ed., S. Jha, Sarasvatī Bhavana Granthamālā, No.85, (Allahabad, 1957), 240. The work is a compilation from the manuscripts of the copies of the vyavasthās of the Sadr Dīvānī Adālat, between 1824 and 1836, which Paṇḍit Vaidyanātha Miśra of the SDA kept in his possession. The juridical value of the work lies in the fact that it contains many vyavasthās which are not reported in the extant Law Reports, ibid., preface, 1. The questions put to the paṇḍits are in Bengali language in devanāgarī script and the vyavasthās are in Sanskrit.

2. Ibid., 242-3.

of his sons and grandsons.[1] He declared the gift under discussion as invalid on the ground that in any gift made without sufficient provisions for maintenance (annācchādanopayuktaṃ dhanam) of sons and grandsons, deceit (chalādi) and wrath would be presumed, and this presumption would make the gift invalid.[2]

A father's absolute power of disposition, however, was upheld in the District Court of Beerbhum,[3] where the paṇḍits declared that the gift of part

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1. Ibid., at 244-5. The paṇḍit relied on Dā.bhā.; Vi.bhaṅg.; Vi.setu; His answer to the second question was: yadi ca tad eva sarvaṃ vastu rāmjī sāhā sajñakasya paitṛkaṃ bhavati tadā sva-putra-vadhum uddiśayaiva tādṛśa dānaṃ prathama praśnottara likhita prakāreṇa chala-kṛtatvāt krodha-kṛtatvāt paitāmahe sthāvarādau putra-pautrādy anumatiṃ vinā pitur etādṛsa-dāne prabhutvābhāvāc ca siddhaṃ bhavituṃ na śaknoti / ibid., 245. He relied on Dā.bhā. II.23.

2. Ibid., 244. On this point, the following texts are relevant. Manu, VIII. 163, Dh.K.I, 1, 552. mattonmattārtādhyadhīnair bālena sthavireṇa vā / asaṃbandha-kṛtaś caiva vyavahāro na sidhyati // 'A transaction is not valid when done by an intoxicated person, a lunatic, one distressed, a dependent, a child, one senile, or one who has no connection with the business', tr. Derrett, Bhāruci, II, 145. Manu, VIII, 165, Dh.K.I, 1, 554. yogādhamana-vikrītaṃ yoga-dāna-pratigraham / yatra cāpy upadiṃ paśyet tat sarvaṃ vinivartayet // 'Fraudulent mortgage and sale, fraudulent gift and acceptance, and wherever he detects deceit - all these he shall nullify', tr. Derrett, Bhāruci, II, 146. Manu, VIII, 168, Dh.K. I, 1, 556. balād dattaṃ balād bhuktaṃ balād yac cāpi lekhitam / sarvān bala-kṛtān arthān akṛtān Manur abravīt // 'What has been given by force, enjoyed by force, caused to be written be [by] force - all things done by force Manu declared to be void', tr. Derrett, Bhāruci, II, 147. Also Yājñ.II. 31-2, Dh.K.I, 1, 557. However, the paṇḍits failed more or less uniformly to give due weight to these texts.

3. Zillah Beerbhum, Case No. 14 on Gift, Macnaghten, II, 221. The paṇḍit followed the Dāyabhāga. He thought that property purchased with the produce of patrimonial estate did not constitute patrimony, ibid., 221.

or the whole of the immovables purchased with the produce of ancestral property was good and valid even though the donor had sons and grandsons surviving.

Pandit Hīrānanda Miśra in Chitra Dasī's Case,[1] apparently admitted that because of co-ownership between father and son, a father's alienation of ancestral property, especially of ancestral immovables, is invalid both according to the śāstra and loka-vyavahāra. Moreover, even in a gift of self-acquired property, the right of maintenance of the dependents cannot be ignored.[2] Vaidyanātha Miśra[3] takes note of the śāstric precept that a father cannot alienate ancestral property and self-acquired immovables without the consent of his sons, but in the light of the Bengali authorities,[4] he explains the implications of such texts by saying that an alienation by the father in contravention of the śāstra is valid as a transaction, but because of the contravention he incurs sin.[5]

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1. (1830), Mussummaut Citra Dasī, a case from Jessore, Vyavasthā No. 100, DVS, 284; Ramkoomar v. Kishenkunker, (1812), IDOS, VI, 398 distinguished.

2. paitāmahe sthāvarāsthāvara dhane pituḥ putrasya ca tulya svāmitvena bahu svāmikaika padārthasya parasparānumati vyatirikenaika-kartṛka dāna vikrayādau svāṃśa dānādi siddhi vyatirikeṇa parāṃśa dānādy asiddeḥ, śāstra loka-vyavahārobhaya-siddhatvāt, paitāmahe sthāvara dhane pitur viśeṣataḥ svacchanda vṛttitāyā api niṣedhācca, śāstre putrādy anumati vyatirikeṇa svopārjita sarva sthāvarāsthāvara dhana dānasyāpi niṣedho'sti, poṣya vargasyāvaśyam bharaṇīyatvāt, tathānvaya svatva prayukta sarvasva dānasya vṛtti-lopasya ca niṣedhāt /, ibid., 288-9.

3. Vyavasthā, No.101, DVS, 292.

4. Ibid., 294-5.

5. tādṛśa vacanānāṃ tātparyyārthaḥ -- yadi ca pitā tad eva śāstroktājñājātam ullaṅghya svopārjita sthāvara samudāyasya paitṛka samudāyasya vā putrānumatiṃ vinā dānaṃ vikrayaṃ vā karoti, tadā tad dānaṃ vikrayo vā siddhyaty eva, kintu pituḥ śāstrollaṅghana janyaḥ pratyavayo bhavati / at 292; relied on Dā.bhā.II.30, DVS, 294.

In Rajivalochan Satpati v. Becharam Roy,[1] Pandit Kamalākanta Vidyālankāra distinguished the Dāyabhāga and the Mitākṣarā views in respect of a father's power of alienating ancestral land in the presence of a minor son. The pandit affirmed that according to the Mitākṣarā, a father having a minor son [2] could not sell ancestral land unilaterally, but according to the Dāyabhāga he could,[3] even though he would incur sin by such alienation. The Pandit also pointed out that for the Utkal (from Orissa) brahmins, the vyavasthā should be according to the Mitākṣarā and for the rāḍīya and dakṣiṇa rāḍīya brahmins [4] it should be according to the Dāyabhāga. This vyavasthā was reviewed in the SDA by Vaidyanātha Miśra, who opined that according to the śāstra followed in both Bengal and Orissa, the alienation under discussion was valid.[5]

The vyavasthās discussed, indicate that in Bengal a father could alienate every category of property in his hands without the consent of his sons.[6]

But there were vyavasthās of pandits which differed from the opinions referred to above. Going back to 1817, we come across a case in the District of

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1. (1835), a case from Midnapore; Vyavasthā, No.203, DVS, 622.
2. Ibid., at 623.
3. Ibid., at 624.
4. Both rāḍīya and dakṣiṇa rāḍīya brahmins are Bengalis.
5. DVS, 625-6.
6. Also discussed in context of testamentary power of a father; Rushiklal Dutta v. Choytun Churn Dutta, (1789), Strange, I, 263; Eshanchand Rai v. Eshorchand Rai, IDOS, VI, 2; Ramtanu Mallik v. Ram Gopal Mallik, (1807), Strange, I, 266; Ramkoomar v. Kishenkunker, (1812), IDOS, VI, 398, infra, 731-34.

Nuddea [1] (Nadiya) in which the paṇḍit accepted a son's right by birth in ancestral immovables, and denied a father, even according to the Dāyabhāga, any right of alienation of such property per se. The vyavasthā emphasised that a father was entitled to alienate ancestral immovables under two conditions: either he must have the consent of the son prior to such alienation, or the alienation should be necessary for the support of the family. If neither condition exists, the sale is void.

Another case [2] seems to merit discussion in some detail. In this, the paṇḍits differed on the validity of a deed of partition by which Ramkaunt, a Bengali Hindu made an unequal allotment of shares of his estate, consisting of movables and immovables, ancestral and acquired, among his sons. The case was fought at all judicial levels. The Zillah Judge was of the opinion that the father had no power to make an unequal distribution of his ancestral property without the consent of all his sons. The Provincial Court of Calcutta reversed the opinion of the District Judge. On appeal to the Sadr Dīvānī Adālat, the case was referred to the Hindu Law Officers to ascertain the merits of the case. The paṇḍits opined that a father had no power to make an unequal distribution of his ancestral estate, but in respect of self-acquired property, a father was permitted by the śāstra to make an unequal distribution unless such distribution was influenced by perturbation of mind or wrath.

But the final decision of the case was left to another judge. In order

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1. (1817), Zillah Nuddea, Sale Case No.22, Macnaghten, II, 312. Shamachurn Sircar, Vyavastha Darpana, (Calcutta, 1867), 620.

2. Bhawanychurn Bunhoojea v. The Heirs of Ramkaunt Bunhoojea, (1816), IDOS, VI, 556 = 2 Sel. Rep. 260. Discussed in context of will, infra, 733 ff.

to clear up the Hindu Law point, the senior judge put the following question to the paṇḍits:

> If Ramkaunt in his lieftime had put all the parties, excepting the plaintiff, into possession of the shares allotted to them in the deed respectively, and have divested himself of all the proprietory right, would such distribution of property, movable and immovable, whether acquired or ancestral, be valid (notwithstanding the declared illegality of an unequal distribution of ancestral immovable property), arguing from its analogy to the case of a gift, against which there exists a legal prohibition; but the validity of the donation is nevertheless maintained by the author of the Dāyabhāga? [1]

The paṇḍits of the SDA, Chaturbhooj and Sobha Śāstrī differed with each other. Chaturbhooj made the point that the Dāyabhāga did not allow unlimited discretion to a father in dividing his ancestral immovables beyond a twentieth part in favour of the eldest son.[2] Where in the Dāyabhāga, Jīmūtavāhana upholds the validity of a prohibited gift,[3] that should always be considered as a proviso. A proviso presupposes a power to do an act. Since the father has no power to distribute ancestral immovables arbitrarily, the proviso regarding validation of prohibited gifts would not be applicable in a case of partition. That means Chaturbhooj refused to extend the maxim of factum valet beyond the boundaries of gift and stressed the point that the maxim had no application to the division of ancestral immov-

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1. (1816), IDOS, VI, 560.

2. Dā.bhā. II.37, 43. Chaturbhooj's answer to the second question, IDOS, VI, at 562-3.

3. Da.bha.II. 30.

ables.[1]

Paṇḍit Chaturbhooj was also not in favour of conferring on the father a general power of unequal distribution of his self-acquisitions. His opinion was that if a father made an unequal distribution of his own acquisitions among his sons, his motive must be examined. He adds that the law looks upon a father making an unequal distribution as having been influenced by considerations as permitted by law.[2] The motives permitted by law, by which a father could be actuated by the desire to give more to one son than others, are: (a) a token of esteem on account of his good qualities, or (ii) for his support on account of having a large family, or (iii) through compassion by reason of his incapacity, or (iv) through favour by reason of his piety.[3] In the absence of any apparent legal motive under the impulse of which he might lawfully give, the law would consider his acts as invalid.[4]

The other paṇḍit, Sobha Śāstrī, concurred with Chaturbhooj on the point of ancestral immovables,[5] but regarding unequal and arbitrary distribution

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1. Chaturbhooj relied on Dhāreśvara on Yājñ.II.121; Dā.bhā.,II.15; Viṣṇu, 17.2; Dā.Ka.Saṅ.VI. 18; IDOS, VI, 563.

2. Here Chaturbhooj was interpreting Jīmūtavāhana, Dā.bhā.II.74, to be read with Dā.bhā.II.83.

3. The motives which generally render the act as invalid are: (i) perturbation of mind occasioned by disease or the like, or (ii) irritation against any one of his sons, or (iii) through partiality for the child of a favourite wife, IDOS, VI, at 563, Dā.bhā.II.83.

4. Cf. the same view of Vaidyanātha Miśra on chala (deceit) and krodha (wrath), Chitra Dasi's Case, DVS, at 262.

5. See the remark, IDOS, VI, at 568, note thereto.

of self-acquisitions by a father, his opinion was that by such distribution a father would incur sin occasioned by infringement of the law;[1] nevertheless, the distribution must be upheld as valid.[2]

In fact, he extended the maxim factum valet to the law of partition; such extension according to Chaturbhooj would have been ultra vires.

In two previous cases,[3] the SDA had already upheld a father's power to make a gift of his entire property to one son, depriving the others, nevertheless condemning such an action as immoral. In Ramkoomar v. Kishenkunker,[4] the point for decision was the validity of a gift by a Brahmin of his entire estate, comprised of movables and immovables, ancestral and self-acquired, to his younger son, excluding the elder. Chaturbhooj and Sobha Śāstrī declared the gift valid even though such an act is held to be sinful by the śāstra. Considering his opinion on arbitrary partition by a father in Bhawannychurn's Case, Chaturbhooj's approval of the gift of ancestral property in Ramkoomar's Case is understandable. He declared valid the gift in the latter case because it was a gift.[5] When the

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1. IDOS, VI at 565.

2. On the point of immovable property, Sobha Śāstrī relied on Viṣṇu, XVII.2, and on self-acquired property, relied on the Dāyabhāga, IDOS, VI, 565-6.

3. Eshanchand Rai v. Eshorchand Rai, (1792), IDOS, VI, 2; the opinions of pandits from different parts of the country were taken in this case, and the majority view was that the will of Raja Kishenchund was 'just and proper'. Because of the difference of opinion, the SDA ultimately relied on the views of 'Jagganauth Turkapunchanun, Kirparam Turkabhoosun and Hurrynarayan Sarbobhom [Sarvabhauma]' who concurred with the majority opinion, IDOS, I, 399. The other case was Ramkoomar v. Kishenkunker, (1812), IDOS, VI, 398. The authority of both these cases were doubted, although not formally overruled, in Bhawannychurn's Case, see IDOS, I, 401.

4. (1812), IDOS, VI, 398.

5. Following Dā.bhā.II.30.

problem came before the SDA in Bhawannychurn's Case, Chaturbhooj's place was taken by Pandit Ramtunoo who was called upon to put forward an opinion on the point. Ramtunoo opined that a father could make a gift of all ancestral movables and of all his self-acquisitions, but a gift of the whole of the ancestral immovables by a father was not valid.[1]

The authorities cited in the vyavasthā in the case of Ramkoomar v. Kishenkunker[2] did not seem to support the opinion put forward in it.[3] To explain this contradiction, the surviving paṇḍit Sobha Śāstrī, was called upon by SDA for any explanation he could offer. He relied on Manu[4] and Devala,[5] and put forward the Dāyabhāga view which was as follows:

> "the father is master of the gems, pearls, etc.", this text, according to the Dāyabhāga, extends to the property of the grandfather, according to which authority also the father has ownership in all the property inherited from the grandfather. This appears to be the case, because having propounded the texts "for they have not power over it while their parents live" (and) "for sons have not ownership while their father is alive and free from defect" the author concludes by observing, that these texts, declaratory of a want of power and requiring the father's consent, must relate also to property ancestral.[6]

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1. IDOS, VI, at 570. The vyavasthā was according to Dāyabhāga and other authorities current in Bengal.

2. IDOS, VI, 398.

3. IDOS, VI, 569.

4. Manu, IX.104, Dh.K.1149b.

5. Devala, Dh.K.1156a.

6. IDOS, VI, 569.

The irreconcilable differences of opinion turned the situation into a baroque muddle which was symptomatic of the formative stage of Anglo-Hindu Law. Finding its own _paṇḍits'_ views discordant, the SDA placed the issues before a board of four _paṇḍits_,[1] who unanimously opined that

> if a father, whose elder son is alive, make a gift to his younger, of all his acquired property, movable and immovable, and of all the ancestral movable property; the gift is valid, but the donor acts sinfully. If during the lifetime of an elder son, he make a gift of to his younger, of all the ancestral immovable property, such gift is not valid. Hence, if it have been made, it must be set aside. The learned have agreed that it must be set aside, because such a gift is _a fortiori_ invalid; inasmuch as he (a father) cannot even make an unequal distribution among his sons of ancestral immovable property, as he is not master of all; as he is required by law, _even against his own will_,[2] to make distribution among his sons of ancestral property not acquired by himself (i.e. not recovered) as he is incompetent to distribute such property among his sons until the mother's courses have ceased, lest a son subsequently born, should be deprived of his share; and as, while he has children living, he has no authority over the ancestral property. 3

Indeed, very few _vyavasthās_ can have had so much ink spent on them by the

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1. 'Tarapershad and Mrityoonjyee of the Supreme Court; Nurahuree of the Calcutta Provincial Court; Ramajya, a pundit attached to the College of Fort William', IDOS, VI, 571.

2. The emphasis is mine.

3. IDOS, VI, 571.

pandits as had this. The vyavasthā echoes the smṛti texts,[1] which enjoin co-ownership of father and son in ancestral immovables, but nothing could be more significantly interesting than to observe that though the pandits based their opinion on Bengali authorities, yet they reached a conclusion which could not be found in the Dāyabhāga of Jīmūtavāhana.[2]

The rationale with regard to ancestral immovables in Bhawannychurn's Case was not an isolated opinion in the SDA. In another vyavasthā,[3] Pandit Vaidyanātha Miśra of the SDA opined as a general rule that even in Bengal,[4] a father could alienate ancestral immovables without the consent of his son only for family necessity. When there is no such necessity and the consent of the son is not forthcoming, the alienation will not be valid.[5]

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1. Yājñ.II.121; Br., Dh.K.1179a; Vyāsa, Dh.K.1180b; Viṣṇu, Dh.K.1175a.

2. The authorities cited by the pandits were mainly the Dāyabhāga and once Dvaita Nirṇaya. The carelessness of the pandits also could be marked when they cited as 'text of Vijnāneshwara cited in the Medhatithi:- "Let the judge declare void a sale without ownership, and a gift or pledge unauthorised by the owner"', at IDOS, VI, 571, Medhātithi on Manu, VIII. 199, an analogous text to that one which is cited above does not say anything about Vijñāneśvara, Jhā, Manu-smṛti, IV, 1.247. Vijñāneśvara cited an analogous text of Kātyāyana, 612. Ghārpure, Yājñavalkya Smṛti, (Bombay, 1939), II (4), 1183. Even if the textual citation of the pandits would have been correct, chronologically it would have been an anachronism.

3. Vyavasthā, No.89, undated, but between 1824-36, DVS, 251.

4. iti vaṅga-deśa-calita ... DVS, 253.

5. yady upari-likhita-kuṭumba-bharaṇādy āvaśyaka-karma-karaṇārthaṃ pitrā na vikrītaṃ kintu svecchayā svābhiprāyeṇa vā vikrītam tadā putrāṇām anumatiś cet siddhyati, no cen na siddhyati / DVS, 252; answer to question 1.

A father's power, however, in respect of alienation of ancestral immovables came in 1831 for determination before the SDA in Juggomohan Roy v. Sreemutty Neemoo Dossee,[1] which had been referred by the Supreme Court to the judges of the Sadr Dīvānī Adālat for their opinion on the point of Hindu Law. The judges of the SDA opined that a Hindu could alienate all his property, including ancestral immovables without the consent of his son.[2]

Shakespear J. of the SDA, drew up a minute explaining his view on the point. The weight of opinion in the Nuddea Case,[3] and in the case of Bhawannychurn v. Ramkaunt,[4] was not overlooked by Shakespear J. He made an attempt at great length to neutralise the rationale of the Nuddea Case paṇḍit's opinion by means other than śāstric precepts. On the point that a father could alienate ancestral immovables only for the support of the family, his remark was, 'this doctrine however clearly admits of great latitude of construction; for after all, who ought to be so good a judge of the necessity of selling as the father himself'.[5] The observation shows a clear inclination to endow the father with absolute power of alienation through his absolute discretion.

Secondly, he points out from everyday experience in a bench that the non-consent of the son is pleaded against father's alienation in very few instances,

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1. (1831) IDOS, I, 358.
2. (1831) IDOS, I, 367.
3. (1817), Zillah Nuddea, Sale Case No.22, Macnaghten, II, 312, above p. 654.
4. (1816), IDOS, VI, 556.
5. IDOS, I, 359.

which 'afford(s) a strong presumption, that in the estimation of the people, the consent of the son is not necessary to the legality of the transfer'.[1] It need hardly be said that such an inference is at best questionable.

Thirdly, Shakespear J. observed that upholding son's birthright in ancestral immovables would go far to conflict with the pure law of contract, and two-thirds of the Putnee Taluks[2] created under Bengal Regulation VIII of 1819 would be in jeopardy, which would lead to a series of litigations. He said, 'it is only when sales involve question of inheritance, that they need be decided by the rules of Hindu Law. All simple contracts are determinable by the regulations'.[3]

But it is very difficult to maintain this differentiation between sales involving a question of inheritance and sales as pure contract. Any unilateral sale by a father which is not for support of the family could be interpreted as a simple contract between the vendor (father) and the vendee but, in essence, this sort of sale is involved (once the concept of entails is firmly excluded from our view of the Hindu law) with the question of inheritance, as it would reduce a son's expectancy in the mass of ancestral property. This shows a tendency to

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1. IDOS, I, 360.

2. Putnee Tenures were inheritable by their conditions and were capable of being transferred by sale, gift, or otherwise, at the discretion of the holder, as well as answerable to his personal debts, s.III, Bengal Regulation VIII of 1819, D. Sutherland, <u>The Regulations of the Bengal Code in Force in September, 1862,</u> (Calcutta), 919-931 at 921.

3. IDOS, I, 360.

circumvent the precepts of the *śāstra* by giving priority to the statutes.

Shakespear J. also tried to reject the decision in *Bhawannychurn's Case* on the ground that 'the pundits consulted in 1818, who are considered to have pronounced the true doctrine, were none of them officers of the Court'.[1] On this point, it could be said that among all the *paṇḍits* whose opinion was sought in *Bhawannychurn's Case,* there was no disagreement on one point, namely, that a father had no power to make an unequal distribution of his ancestral immovables (which at least infers the sons' equal rights insofar as they are genuine expectancies), and this precept was the basis of the opinion of the four *paṇḍits* who finally opined that a father could not make a gift of his ancestral immovables. The views of the three *paṇḍits* of the SDA, Chaturbhooj,[2] Sobha Śāstrī,[3] and Ramtunnoo[4] were not dissimilar on this point. Shakespear's J. remark was technically right in respect of the opinions of the four *paṇḍits* on the ground that none of them were Hindu Law Officers of the SDA. But even if we give importance only to official assignment and ignore scholarship, it is apparent that their *vyavasthā* was not very different from Ramtunoo's who was the Hindu Law Officer of the SDA at the time.[5] Moreover, the *vyavasthās* of all the Hindu

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1. IDOS, I, n. at 362.

2. IDOS, VI, at 562.

3. IDOS, VI, at 565, and n. at 568. He contradicted himself in reassessing his view in *Ramkoomar* v. *Kishenkunker,* IDOS, VI, 569.

4. IDOS, VI, at 570.

5. One of the cases Shakespear J. relied on was *Esanchand Rai* v. *Eshorchand Rai,* IDOS, VI, 2, where despite their acknowledged scholarship, technically none of them were Hindu Law Officers of the SDA, see IDOS, VI, 569, para.3.

Law Officers of the SDA in this case at different stages, denied a father the power to distribute arbitrarily his ancestral immovables.

Shakespear's J. minute was not unlikely to be well received by the judges of the Supreme Court, because they were also eager not to unsettle the decisions which upheld a father's absolute power over the properties in his hands.

Grey, C.J., in delivering the actual judgment in Juggomohun Roy's Case,[1] observed that Mr. W.M. Macnaghten thought that Bhawannychurn's Case disturbed the decision in three former cases.[2] His Lordship took the opinion of the judges of the SDA as based on usage of Bengal.[3] He remarked that Macnaghten might have erred, but at the same time, observed that Macnaghten's view was the general law of the Hindus, 'but in Bengal a different usage prevails'.[4]

From Ryan's J. remark ibidem, it becomes clear that the Supreme Court was not in favour of unsettling titles which were acquired from transfers (i.e. alienations by fathers beyond the powers laid down by the majority of the pandits) conformable to the judgments even though such judgments did not themselves conform to the precepts of Hindu Law. His Lordship asserted,

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1. Franks J., and Ryan J., concurring, (1831), IDOS, I, 358.

2. He alluded to Russick Lall Dutt v. Choytu Churn Dutt, (1789), Strange, I, 263; Eschand Rai v. Eshorchand Rai, (1792), IDOS, VI, 2, and Ramkoomar v. Kishenkunker, (1812), IDOS, VI, 398.

3. IDOS, VI, at 365.

4. ibid., at 366.

> It is notorious that titles of property, of immense value and great extent, in this town, are founded on this construction of law,[1] which has been confirmed by a series of decisions. Now, I would not disturb these titles, nor moot a question settled by so many decisions.[2]

On Macnaghten's pointer to the decision in Bhawannychurn's Case, he remarked,

> surely, the law on this subject ought now to be considered as finally set at rest; the decisions of this court were uniform, from the times of its establishment until the publication of Mr. W.M. Macnaghten's book; and it can be a matter of no wonder, that we were for a short time misled by his authority. 3

It is apparent from the arguments put forward by the judges that their conclusion was predetermined, and they were motivated by the urgency of settling the law considering the wide practice of alienations, including ancestral immovables, by the father. In many cases, despite their discomfiture, the sons were probably shy to come forward to dispute the actions of their fathers. So in Bengal to a great extent, the judiciary, for the sake of expediency, led (so it seems) the Anglo-Hindu Law away from the śāstra for the Supreme Court approved and relied on the opinion of the judges of the Sadr Divānī Adālat, which was as follows:-

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1. He alluded to Russick Lall Dutt's Case, (1789), Strange, I, 263.
2. IDOS, VI, at 367.
3. IDOS, VI, 367.

> On mature consideration of the points referred to us, we are unanimously of opinion, that the only doctrine that can be held by the Sudder Dewanny Adawlut, consistently with the decisions of the Court, and with the customs and usages of the people, is that a Hindu, who has sons, can sell, give, or pledge, without their consent, immovable ancestral property situate in the province of Bengal ... [1]

The decision was (understandably) followed ten years later by a full bench of the SDA in Kali Doss Neogee v. Chunder Nath Rai Chowdry,[2] where it was held that "it has been established by precedents of the Court that a Hindu father in Bengal can dispose of his property without the consent of his sons".[3]

When a case came before the SDA from Bihar, the paṇḍits had less difficulty in putting forward their opinions than in one from Bengal. The Hindus in Bihar were governed by the Mithilā doctrine which recognised the son's right by birth.

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1. IDOS, I, at 367. But see the opinion of Wilson: 'that a man make what disposition he pleases of his property both ancestral and self-acquired and personal or real: a doctrine which is wholly at variance with the letter and spirit of the whole Hindu law, whether as laid down by Manu, and ancient legislators, or as expounded by modern scholiasts'. H.H. Wilson, Works, ed., R. Rost, (London, 1865), III, 71. Earlier, in the context of ancestral immovable property, he said that this is certainly contrary to the conclusions even of the Bengal lawyers, ibid., 70. A father's power to make an unequal distribution of ancestral immovables was denied in Iktear Raee v. Rughonath Purshad, (1848), 4 SDAR 767 = IDOS, X, 544; this was a Mithilā case but the authorities and precedents cited were from Bengal. The case was recommended for trial according to Mithilā law.

2. (1841) IDOS, VIII, 112 = 7 Sel.Rep. 148.

3. (1841) , IDOS, VIII, 113.

In Sham Singh v. Mussummaut Umaraotee,[1] a Hindu father, a short time before his death, made a gift of all his ancestral estate to the eldest son with the stipulation of a pecuniary provision for the younger son. The paṇḍits of the District Court declared the gift illegal, but the paṇḍits of the Provincial Court at Moorshedabad upheld the gift. The paṇḍits of the SDA agreed with the District Court and declared the gift illegal. The deed of gift did not contain the word 'dān' (gift). But the SDA paṇḍits declared in clear terms that even as a gift ('dān') the donation of the father could not be valid because 'a father and a son possess an equal right in ancestral immovable property'.[2]

In another instance,[3] from the same district, a father made a gift of his entire ancestral property. The paṇḍits opined that a gift of ancestral immovables by a father to the second son without consent of the predeceased eldest son's son was 'null and void'. But they affirmed that a father was entitled to give away ancestral movables without the consent of his sons.[4]

Regarding self-acquired immovables of the father, the son's right by birth was upeheld in the case of Gobardhanlal v. Mohanlal and Gangaprasad.[5]

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1. A case from the district of Bhagulpore, Bihar; (1813) IDOS, VI, 429 = 2 Sel. Rep. 92.
2. Ibid., at 95. The authorities followed by the paṇḍits were Yājñ.II.121; Vi.Ra; Smṛti-samucaya; Vi.Ca; Vi.Ci.
3. (1819), Zillah Bhagulpore, Macnaghten, II, 210.
4. Relying on Yājñ. II.121; Vi.Ra; Mitā.
5. (1826), Vyavasthā, No.73, DVS, 202.

Macnaghten, J. of the Supreme Court put the question to the paṇḍit that, if a Hindu made a gift of his whole self-acquired immovables to one of his sons and gave possession to him, would such a gift be valid in the presence of other sons and, after the death of the father, would the other sons get their shares in that property or not.[1] Paṇḍit Vaidyanātha Miśra opined that without the consent of all the sons, the gift in question could not be valid.[2]

On this point, Vaidyanātha Miśra was consistent with his views. He declared in Shyam Sundar Mahendra v. Krishna Chandra Bhramarabara Roy Papada[3] that in the presence of his son it was not lawful for a father to give away immovable property whether ancestral or self-acquired without the consent of the sons.[4] The same view was expressed by the paṇḍits in respect of the father's power of alienation of self-acquired immovables where the case[5] had to be decided according to the Benares School.

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1. Ibid., question No.1, at 204.

2. yadā ca pitrā tad dānaṃ sarva-putrānumatyā na kṛtaṃ tadā tad-dāna-grahītur bṛhātrantareṣu satsu tad-arthaṃ tad-dānaṃ siddhaṃ bhavituṃ na śaknoti .../ relying on Mita; Vi.Mi.; Vy. mādhava; Vy. kaustubha. The key text on which the paṇḍit relied was: sthāvare tu svārjite pitrādi prāpte ca putrādi paratantryam eva, Mita. I.i.27, DVS, 205.

3. (1825), Vyavasthā, No.10, DVS, 32.

4. (1825), Vyavasthā, No.10, DVS, at 35: sati putrādy anvaye dhanādhikāriṇi vidyamāne sarvasva dānaṃ tad ananumatyā kramāgata svārjita sthāvara dānaṃ cāsiddham / Relying on Mita.I.i.27, DVS, 36. Same view on immovables, Bhikshanaryan Singha and Others, (1835), Vyavasthā, No.223, DVS, 677 at 679, relying on Mita, I.i.29. Also Vyavasthā, No.226, DVS, 684, relying on Mita. I.i.29. But cp. P.C. on Rao Balwant Singh v. Rani Kishori, (1898) 25 IA 54 (PC), discussed and criticised infra, 744-46.

5. Case No.26, Macnaghten, II, 233.

The Mitākṣarā view on the incidents of ancestral immovable property was re-stated by Vaidyanātha Misra in a case from the district of Sahabad.[1] In this case, a Hindu made a gift of his ancestral immovables to a Brahmin. The donee was put into possession and after his death, the property passed to his successors. During the lifetime of the donor, one of his sons challenged the validity of the gift. The question before the pandit was whether such a gift was valid or not.

The pandit declared that because of co-ownership of ancestral immovables by father and son, a father had no power to make a gift of such property without the consent of his sons. But for religious purposes, a father could make a gift of a small portion of ancestral immovables unilaterally.[2]

A father's power of alienation of ancestral immovables without the consent of his sons or grandsons was denied in Matilal Kalyan Singha v. Brajalal and others [3] according to the śāstra followed in Bihar.

Vijñāneśvara and Jīmūtavāhana differ in their definition and notion of partition.[4] This difference of approach of the two commentators has been reflected

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1. (1830) Gopalchandra v. Babu Kunwar Singh, Vyavasthā No.92, DVS, 257 = 5 Sel.Rep.29.

2. dharmārthaṃ kiñciddāne putrāṇām anumatiṃ vināpi paitṛka-sthāvare'pi pitur adhikāraḥ, ibid., DVS, 260; relied on Nārada, maṇi-muktā ..., Dh.K.1219; Yājñ.II.121; Vyāsa, sthāvaram ... , Dh.K.1587; Bṛ., ekopi sthāvare ..., Dh.K.1588b; Mitā.I, 1, 27; at DVS, 260-1.

3. (1835) Vyavasthā No.204, DVS, 626: vehāra-deśa calita śāstrānusāreṇa putrasya pautrasya vā anumatiṃ vinā paitṛka sthāvarasya hastāntara karaṇe pituḥ pitāmahasya vā svecchayā kṣamatā nāsti, DVS, at 628.

4. Mitā.I. 1, 4; Dā.bhā., I.8.

in the vyavasthās of the paṇḍits.

In Bengal a sale by one coparcener of his own undivided share was declared valid.[1] But according to the Mithilā school, a sale or gift of one's undivided share was held to be invalid.[2] This shows that according to the Mithilā and the Mitākṣarā view the presence of an unseparated son will invalidate the alienation of joint property by the father.

The vyavasthās compiled by Sir Thomas Strange are mainly from South India. Indirectly a son's birthright wasrecognised in a case from Vizagapatam,[3] in which the paṇḍit opined that a kṣatriya having no son, grandson or nephew, could dispose of his estate as he thought proper.

Birthright also presupposes a son's right to demand a partition of the family property from his father. In Turcapah v. Mullashiah,[4] a father turned one of his sons out of doors. The son demanded partition of the family property, and the paṇḍit declared [5] that the father was bound to allow the son the share he

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1. Byjnath Bunhoojea v. Sambhuochand Bunhoojea, (1815), Sale Case No. 24, Macnaghten, II, . Also same view in a case from Zillah Jungle Mehals, (1826), Macnaghten, II, 212.

2. (1823), Case No.17, Macnaghten, II, 224. Dulli Pande v. Kashi Pande, (1824), Vyavasthā No.2, DVS, 4, answer to question no.2 at 6. Mussummut Roopna v. Ray Reotee Rumeen, (1853), IDOS, XIII, 260. The same view on a case from Cuttack, (1817), Macnaghten, II, 295-6 amd in a case from Midnapore where Orissa law was followed, (1813), Macnaghten, II, 306.

3. Strange, II, 428; opinion of Paṇḍit Dusky Narrain, Sastraloo.

4. (1807), Strange, II, 320.

5. Paṇḍit Rangacharee. Colebrooke remarked on the vyavasthā that the paṇḍit's opinion was contrary to the law on the point, but he admitted that under particular circumstances, a son could demand partition, Mita, I, ii, 7. Mr. Ellis

/Continued on next page:

demanded.

But in Penauka-Paty v. Appauyangar,[1] a case from the district of Vendachellum, a son's claim for a partition of ancestral movables was denied. The paṇḍit[2] opined that a son could claim a division of ancestral lands only from his father.

Significant was Sarabiah v. Mulliah,[3] where a son's right to demand partition during the lifetime of the father in any category of property was completely denied. But the paṇḍit's reliance on a single text of Hārīta,[4] asserting

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Note 5 - p.670 - continued:

[for F.W. Ellis, see RLSI, 258-9] thought that a father's dominion over the family property was absolute. If he divides his estate at his own volition, he is bound to give the son a share, otherwise not. Sutherland's view was similar to that of Mr. Ellis, ibid., 321. But it is submitted that in his exposition of the Mitākṣarā law the paṇḍit was right, see Kāṇe, HD, III, 570-1. The paṇḍit relied on Yājñ. II.116a, Dh.K.1169a, (which he cited as Nārada's).

1. (1807), Strange, II, 319.

2. Paṇḍit Sreenevasa Charloo. Strangely enough, he cited as his authority, 'Daya Bhagum of Jimuta Vahana and Agree Vateva Bhagum ("signifying division in the lifetime of the father" [read ājīvad eva bhāgam, an untraced minor treatise unless it is the Jīvatpitṛka-vibhāga-vyavasthā-sāra-saṅgraha (see RLSI, 272, n5)] in Jagannatha turkapanchananam'. Colebrooke thought that the answer of the paṇḍit was expressed too broadly, and he cited Mitā.I.ii.7, according to which a division may be exacted by sons under particular circumstances. Mr. Ellis on the question of a son's demanding partition from his father remarked: '"They cannot" - certainly not; the property, barring waste, is absolute in the father during his lifetime'. Both the paṇḍit and Mr. Ellis were influenced by Jīmūtavāhana and Jagannātha even as early as 1807.

3. (1808), Zilla Bellari, Strange, II, 322.

4. Paṇḍit Rungachary relied on Hārīta: jīvati pitari putrāṇām arthādāna-visargākṣepesv asvātantryam, Dh.K.1146a. Colebrooke disagreed and expressed the same view as at n. 2 above.

a son's lack of independence (asvātantrya) during the lifetime of the father, arouses suspicion as to the authoritative value of this opinion.

In a case from the district of Ganjam,[1] on the issue of a son's right, among the Wodday Brahmins, to enforce a division of the family property, the paṇḍit made a distinction between ancestral and self-acquired property of the father. The son could demand and enforce a division only of the ancestral property in the hands of the father.[2] The principle behind such right of a son in ancestral property was given by a paṇḍit in a case from the district of Chittore.[3] He did not rely on the son's co-ownership with the father in ancestral property, but proffered the view that as a man offered piṇḍa to ancestors as far back as four degrees, he had therefore to that extent, a right to demand a share of his ancestral property.

The vyavasthās, (all except one),[4] from South India discussed above, agree on one point, namely, that in ancestral immovable property, the son's right by birth is unquestionable and the majority of the opinions uphold such a right in all categories of ancestral property in the hands of the father. There

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1. Zilla Ganjam, Strange, II, 323.

2. Sutherland did not accept son's right to enforce a division of ancestral property as a general rule. He overlooked Mitā.I, v, 11, and relied on Mitā. I.ii, 7, and thought that only in particular circumstances could a son demand such a partition, Strange, II, 323.

3. (1810), Strange, II, 327.

4. Sarabiah v. Mulliah, (1808), Strange, II, 322, cited at supra, 671.

are opinions, as in Sarabiah v. Mulliah [1] where the son's birthright has been completely denied, but such views only expose the limited learning of the paṇḍit on the point.

The paṇḍits attached to the Sadr Dīvānī Adālat of the North Western Provinces recognised a son's co-ownership with the father in a house constructed by the great-grandfather of the objector in the case.[2] But in a previous case,[3] a son had to share equally with his mother, the real property left by his father. The paṇḍits declared that according to 'Yagyabulk, Byas and Bishnoo', the son and the widow had a right to inherit equally the property left by the deceased. In another case,[4] a son's special position in the family was upheld partly and indirectly by the paṇḍits, who expressed the view that to give anything from a father's self-acquisitions over and above maintenance to a wife having no children was not valid without the consent of the sons, but a husband was free to make a gift of his self-acquired property to a wife by whom he had children. In N.W.P., the Mitākṣarā view of jointness before partition was recognised [5] by the paṇḍits, when they declared invalid the alienation by co-sharer of his own share in the joint ancestral property without the consent of other co-sharers.

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1. Sarabiah v. Mulliah (1808), Strange, II, 322.

2. (1860), Bywustha, No.13, Bywusthas, from July to December, 1860; revised and published by the authority of the SDA, N.W.P., (Agra, 1861), I,1,7.

3. (1860), Bywystha, No.5, ibid., 3.

4. Bywustha, No.40, ibid., 28.

5. (1860), Bywustha, No.39, ibid., 26-7.

Raymond West and Johann Georg Bühler's compilation[1] of the replies of the paṇḍits in the several courts, throws some light on a son's right by birth among the Hindus of Bombay Presidency.

The paṇḍits in the court of Dharwur,[2] upheld the claim for the share of a predeceased son's son in the ancestral property during the lifetime of the grandfather. But in the self-acquisitions of the grandfather, the paṇḍits explained that such a claim by the grandson was inadmissible. The view that sons cannot demand a partition of the father's self-acquisitions was reiterated in another case from Dharwur.[3]

But the opinions were not everywhere uniform. The right of sons to divide an ancestral house against the will of the father was denied in a case from Khandesh,[4] where out of four sons of a yogī, two had a quarrel with the father and divided the ancestral house against his will and during his absence. The paṇḍit opined that the division under discussion must be cancelled. Though the paṇḍit referred to 'brothers shall divide the estate after their father's death (which is observed by West and Bühler, was not precisely apposite) his judgment was almost certainly based on the 'force or fraud' principle to which we have adverted above (p.651).

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1. Digest of Hindu Law Cases, (Bombay, 1869), Vol.II.
2. (1846), Bühler, ibid., 7; similar view in Surat, 1846.
3. (1850), Bühler, ibid., 11.
4. (1852), West and Bühler, A Digest of the Hindu Law, (Bombay, 1884), II, 798.

In Tanna [1] the _paṇḍits_ took the opposite view and upheld a son's right to divide ancestral property against the will of his father. The _paṇḍits_ added that if such property passed from the family and was subsequently regained by the father, it should be considered as self-acquired and could not be divided by the sons without the consent of their father.

A similar view in respect of ancestral property was expressed by the _paṇḍits_ in Surat in 1847 and in 1860,[2] but the views of the _paṇḍit_ of the same court were different in 1859,[3] for they qualified a son's general right to demand partition against the wishes of the father. The _paṇḍits_ added that a son had no right to demand a share of the ancestral and undivided property from his father against his wish, unless there were good reasons for the demand, such as (i) the father has relinquished his claim to his property, or (ii) he was dissipating his property, or (iii) he was in a state of unsound mind, or (iv) he was very old, or (v) he was afflicted with an incurable disease.[4] This is a rather archaic reconciliation of texts we have already studied.

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1. (1854), West & Bühler, (Bombay, 1884), II, 796.

2. Bühler, _A Digest of Hindu Law Cases_, (Bombay, 1869), II, 3; also at Ahmednuggur, 1850; Poona, 1854; Dharwar, 1858; West & Bühler, (Bombay, 1884), 797.

3. West & Bühler, (Bombay, 1884), II, 795.

4. The _paṇḍit_ cited as his authority: Yājñ. II.121 at Mitā.I.v.3; they relied on and explained Mitā.I.ii.7 and the text of Śaṅkha: akāme pitari riktha-vibhāgo vṛddhe viparīta-cetasi rogini ca, which is cited as Hārīta's in Vy. Mayūkha, IV, iv.6, Dh.K.1148a.

In Sholapoor,[1] the paṇḍit approved the equal share of father and son in the property left by the grandfather, but opined that in self-acquired property of the father, the father as the acquirer was entitled to a double share in a partition with his son.

In Ahmadnagar,[2] the paṇḍit affirmed the inherent right of a son in family property when a partition was initiated by a father. In this case, a Hindu having two sons divided his property equally between them. The younger son being abroad, his share was given to the grandson. When the younger son contested the action of the father, the śāstrī opined that the father could not give his son's share to his grandson unless the son was incompetent to receive it.

1. (1855) Bühler, ibid., 803.

2. (1855), ibid., 801.

With regard to a father's power of alienation of his self-acquisitions, the pandits from Ahmednagar [1] affirmed that the original acquirer was at liberty to dispose of his property in any way he liked.

But in 1857,[2] the pandits of the same court opined that a father had no right to dispose of immovable property, though acquired by himself, without the consent of his sons.

In the majority of the opinions from different districts, it appears that the śāstra as understood and followed during the period under discussion, in the Presidency of Bombay, gave a son a right by birth in ancestral property in the hands of the father. Regarding the father's self-acquisitions, the pandits leaned towards a father's superiority as the acquirer, but did not give him the liberty to dispose of self-acquired immovables without the consent of his sons.

III. śāstric vyavasthās versus the caste customs

There are some evidences of empirical study [3] in the Presidency of Bombay, the findings of which to some extent run counter to the opinions reflected in the vyavasthās regarding a son's right by birth in property in the hands of the father. The study arouses doubt as to the universal acceptance of the śāstric law among the different castes and sub-castes of the Hindu community, and one can find some

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1. (1847(), Bühler, Digest (Bombay, 1869), 19.
2. (1857), Ahmednagar, ibid., 19.
3. Such a study was generally neglected by the Government, RLSI, 307-8.

value in Maine's hasty remark on the *śāstric* works: 'it does not, as a whole, represent a set of rules ever actually administered in Hindostan. It is, in great part, an ideal picture of that which, in the view of the Brahmins, *ought* to be the law'.[1]

Arthur Steele made a study of 101 castes and sub-castes in Poona.[2] On the question of community of property, it was found that out of those 101 castes, in 24 the manager could sell or mortgage family property, whether immovables or movables, without the consent of other members.[3] But among 24 castes, at the time of alienation of family property, the consent of the rest of the family was necessary.[4] In another 41 castes, in one form or other, the manager had to take the consent of the other members of the family before alienating family property. Among the 101 castes, the practices of 12 castes are not known from that fieldwork.[5]

The enquiry into the caste customs on partition between father and son

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1. Maine, *Ancient Law*, (London, 1905), 15. Sir Gaṅgānātha Jhā does not agree with the first sentence of Maine. Jhā says that we cannot conclude one way or the other. But he agrees with the second sentence, *Hindu Law in its Sources*, (Allahabad, 1930), I, introd., 14-15. Professor Derrett has repeatedly found Maine's words inadequate and misleading, see *Juridical Review*, (1959), 1, 40ff.

2. A. Steele, *The Law and Customs of Hindoo Castes*, (London, 1868), preface, XV. But he warns about the limitations of such study due to the backwardness of the people, and lack of intelligence, ibid., xvi.

3. ibid., 398.

4. ibid., 398.

5. ibid., 398-9.

revealed that amongst 82 of the 101 castes in Poona, a son could not enforce a partition against his father unless the father conducted himself improperly as the manager.[1] Among 17 out of those 101, a father, even when dividing family property at his own volition, could divide arbitrarily among his sons. But this finding in no way denies the son any say in the family property. In fact, a 'separation might take place'[2] if the father acted extravagantly, or, even during the lifetime of the father, among 72 castes, a son could act as the manager in his father's name when the father was incapable of managing the property for any reason.[3] In Steele's study, the majority of the castes were non-Brahmins and mainly respectable śūdras.

In Borradaile's collection of the caste customs of Gujarat, it is found that among 42 castes of the non-Brahmins of Surat and Broach, (including 1 from Ahmedabad and 1 from Gour), there was, in no instance, an admission of an unqualified right of a son to enforce a partition against the will of the father.[4] Borradaile's study also reveals that among some Brahmins[5] of Surat and Broach, a son could not demand a partition against the will of the father.

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1. ibid., 216; 405-8 .

2. ibid., 216.

3. ibid., 216.

4. cited by Bühler, A Digest of Hindu Law, (Bombay, 1884), II, 662.

5. The Bhargova Visa Brahmans, the Srimali Brahmans, the Chowraisi Brahmans and the Waira Oonewal Brahmans of Surat; the Tulubda Brahmans and the Sachoura Brahmans of Surat; the Motola, Desaee Turn Brahamans of OOlpur, ibid., 660.

The investigations into caste customs do not weaken the authority of the *śāstric* precepts as such, but they reveal 'the great chasm between custom and law'[1] and show that a good many members of the Hindu community were following a system which did not coincide with the rules as expressed in the treatises which were supposed to be the correct interpretation of *śāstra* regarding that particular region.

IV. Juridical vyavasthā literature

We have discussed[2] the *vyavasthās* of the court *paṇḍits* of Bengal, and have also noted that, so far as Bengal was concerned, a father's absolute right over family property was judicially settled in 1831.[3] Perhaps it is not uninteresting that, parallel to this growth of judicial opinion, a *vyavasthā* literature of juridical value was flourishing in Bengal, which has so far been buried under neglect. Despite their unnoticed existence, the *raison d'être* of these works, and the recognised scholarships of the *paṇḍits* who put forward their opinions through them, do not allow any excuse for ignoring this literature when studying the Bengal view of the *śāstrins* on son's right by birth.

The earliest available of this literature is the *Vyavasthā-saṅgraha*[4]

1. RLSI, 305.
2. Supra, 648 ff.
3. *Juggomohan Roy* v. *Sreemutty Neemoo Dossee*, (1831), IDCS, I, 358.
4. Rāmajaya Tarkālaṅkāra Bhaṭṭācārya, *Vyavasthā-saṅgraha*, (Calcutta, 1827), Bengali script.

of Rāmajaya Tarkālaṅkāra,[1] who clearly states that a father can deal with his self-acquired property in whatever way he wishes, but any distribution of such property made in anger is wholly invalid.[2] As far as ancestral property is concerned, except for sthāvara (immovables), nibandha (corrodies, pensions), dvipada (slaves), the father has complete independence of action. An unequal division or gift etc., of ancestral immovables by the father is declared to be 'never valid'.[3]

Then Tarkālaṅkāra explains[4] the circumstances under which a father could alienate family property:

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1. On whom see RLSI, 254, 270.

2. Vyavasthā-saṅgraha, 307. On invalid transfers, see above, 356-64.

3. ibid., 308.

4. kintu kuṭumba vartanā virodhi kiñcit dāna karile siddha haya / evaṃ poṣya-vargātmapoṣaṇa āvaśyaka-śrāddhādi ṛṇa śodhanārthe ai tinera pitṛ-kṛta dāna vikrayādi siddha haya / kramāgata athavā svopārjita dhanete pitā yadi bhaktatva vahu-poṣyatvādi kāraṇa nyunādhika vibhāga dāna karena, tave tāhā siddha haya / paitṛka svopārjita dhane krodhādi nimittaka pitṛ kṛta vibhāgādi sakala-i asiddha haya / evaṃ yadi paitṛka asthāvaramātra dhana thāke, tāhāte paitṛka sthāvarera nyāya vyavasthā jāniva / putra pautra prapautra sambhāvanā-rahita vyakti-kṛta paitṛka sthāvarāsthāvara vikraya siddha haya / iti pitṛ pitāmaha dhana viṣayaka vyavasthā saṅkṣepa / Vyavasthā-saṅgraha, 308.

> But the gift of a small portion, without jeopardising the support of the family, is valid. And an alienation (gift or sale) by the father, for maintenance of the dependents, for performance of the *śrāddha* etc., and for the payment of debts, is valid. An unequal distribution of ancestral or self-acquired property, based on considerations such as filial love or a son's responsibility to support too many dependents, is valid. A division of self-acquired property in anger is void. And if there are (i.e. if the estate consists of) only ancestral movables, then the *vyavasthā* should be as in the case of ancestral immovables. An alienation of ancestral immovables and movables, by a person who has no possibility of procreating a son, son's son or son's son's son, is valid. This is the end of the *vyavasthā* regarding paternal and ancestral property. 1

In the *Vyavasthā-sāra-saṅgraha*,[2] the opinion leaned towards Jīmūtavāhana in the definition of *dāya*,[3] and it re-stated that a son's *svatva* arose after the extinction of the *svatva* of his father.[4] The compiler continues by saying that a father can divide self-acquired property unequally according to his discretion, 'but in ancestral property, as because there is equal ownership between

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1. Tr. mine.

2. Compiled by Gokula Candra Gosvāmī, (Calcutta, 1870), Bengali script.

3. Dā.bhā.I.5.

4. *Vyavasthā-sāra-saṅgraha*, 237.

father and son, the father cannot do likewise'.[1] He adds, 'but in movable property, the father has ownership'.[2] This will probably include ancestral movables as well. But the incidence of ancestral property in general becomes clear when the compiler says that ancestral property lost and recovered should be treated as self-acquired. By these statements one should not be deceived into thinking that the compiler was accepting co-ownership of son with the father in the ancestral immovables. He came back to the Dāyabhāga view and pointed out that the limitations on father's power regarding ancestral immovables should be taken as applicable only in the case of a disqualified (or faulty) father.[3]

It is evident in the compilation that a son can divide the property of the grandfather during the lifetime of his father, but for such a division he must seek the permission of his father.[4] As, on this rule, the paṇḍits relied on Bṛhaspati,[5] it should be understood as referring to a partition during the survival

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1. pitāra svopārjita dhane yathecchā pūrvaka vibhāga karīyā putradigake dāna karivāra adhikāra āche kintu paitṛka sampattite putravarger pitāra sahita tulya svāmitwa thākāya airūpa karite pārena nā / ibid., 238; relying on Viṣṇu, XVII.2, and Kātyāyana, jīvad vibhāge tu pitā ... , Dh.K.1173b.

2. ibid., 239.

3. pūrve ye pitāmahāgata sthāvara sampattite pitāra ajathācāritva likhita haiyāche tāhā pātityādi doṣayukta pitṛ-para yānite haive / ibid., 239; relying on Devala, asvāmyam hi ... , Dh.K.1156a.

4. Vyavasthā-sāra-saṅgraha, 240.

5. Bṛ. XXVI.9: pitror abhāve ... , Dh.K.1155a. ibid., 240.

of the father after the mother's childbearing capacity has ceased.

On alienation of joint immovable property, the Dāyabhāga view has been followed. It has been admitted that one co-parcener has no power to give or sell without the permission of other coparceners, but if any unilateral alienation of such property is done, it is only a moral offence.[1]

In the preface to the Vyavasthā-kalpadruma,[2] the compiler justifies the need for the compilation of the opinions of the śāstrins by saying that the Hindus were getting interested in foreign learning and paṇḍits were becoming rare; indeed, in rural areas they were not available at all. That is why he had to compile the opinions of the famous paṇḍits[3] on topics which were important to the daily life of the Hindus.

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1. Vyavasthā-sārasaṅgraha, 240, relying on Dā.bhā. II.27 and II.28, although discussed the implication of Vyāsa, Dh.K.1587 and Bṛ. eko'pi sthāvare ... , Dh.K.1588b.

2. Vyavasthā-kalpadruma, compiled by Candra Kumāra Bhaṭṭācārya, 1st ed., (Calcutta, 1873); 4th ed., 1885. The 4th ed. is followed here, preface, 1. Bengali script.

3. The paṇḍits whose opinions were compiled in the work were all Bengalis and came from different famous centres of Sanskrit learning, signed by: Śrī Durgādāsa Śarman and Ambikācaraṇa Śarmaṇ of Triveṇī, Śrī Ramadeva Śarmaṇ of Vāsvārḍia, Śrī Śrīnātha Śarmaṇ, Śrī Haramohana Śarmaṇ, Śrī Vrajanātha Vidyāratna and Śrī Mathurānātha Śarmaṇ of Navadvīpa, Śrī Śyāmācaraṇa Śarmaṇ of Vardiśā, Śrī Bharata Candra Śromaṇi and Śrī Ṭiturāma Śarmaṇ of Calcutta, Śrī Durgāprasanna Śarmaṇ of Villapuṣkariṇī, Śrī Kālikānta Śiromaṇi and Śrī Sāradācaraṇ Tarkapañcānana of Vikramapura, Śrī Rāmadhana Sarmaṇ of Krokadi and Śrī Umācaraṇa Śarmaṇ of Koṭālipārā.

On respective proprietary rights of father and son in family property, the vyavasthā, compiled and approved by 15 paṇḍits [1] in this work, was that in self-acquired property the father had power to make an unequal distribution among his sons.[2] But in grandparental property, the ownership of father and son being equal, a father could not make an unequal distribution of such property among his sons.[3]

On the definition of dāya, the compiler has followed the Dāyabhāga [4] view and has supported this definition with a (spurious?) text.[5] The compiler has again reaffirmed the Dāyabhāga [6] view on the alienation of immovable property by the father.

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1. Supra, 682., n.3.

2. svopārjita dhane pitā svecchayā nyūnādhikaṃ vibhāgaṃ kartuṃ śakyate iti vidāṃ mataṃ / relied on Hārīta, jīvanneva vā ... Dh.K.1163a; the text has been interpreted in the vyavasthā as applicable to the self-acquired property of the father, ibid., 5.

3. The vyavasthā signed by the 15 paṇḍits is as follows: svopārjita-dhane pitā svecchaya nyunādhikaṃ vibhāgaṃ kartuṃ śakyate, na tu pitāmaha dhane / pitāmaha dhane pitā putrayos tulyaṃ svāmitvam iti / idam matam / The paṇḍits relied on the literal purport of the text of Viṣnu 17.1 and 2 and on Kātyāyana, jīvad vibhāge tu pitā ..., Dh.K.1173b. Viṣṇu 17.2 is explained in Bengali: kintu pitāmaha-dhane pitā evam putrera tulya svāmitva, arthāt sekhāne pitā putre samāṃśa haive /, 'but in grandparental property the svāmitva of father and son is equal, that means there (in that property) the share of father and son will be equal', (tr. mine), ibid., 3.

4. Dā.bhā., 1.5.

5. pitrādīnām svatvanāśe yad dhanaṃ syāt sutādikam / sva svatvādika sambandhāt tad dāyaḥ parikīrtitaḥ // cited as from the smṛti but anonymous, ibid., 1.

6. kintu dāna o vikraya siddha haive, pitā pāpī haive / relied on Dā.bhā.II.28. The view on father's alienation was not in the vyavasthā but was added by the compiler, ibid., 13.

Nanda Kumāra Kavīratna Bhaṭṭācarya's justification for the compilation of his Vyavasthā-sarvasva was more or less the same as that put forward by Candra Kumāra Bhaṭṭācarya for his Vyavasthā-kalpadruma.[1] Nanda Kumāra points out in his preface,[2] that the old paṇḍits out of greed for money were educating their ownsons and grandsons in foreign learning. In the traditional Sanskrit schools (catuspāṭhī) the smṛti is neglected. This crisis in the knowledge of the dharmaśāstras induced him to compile the compendium on smṛti for the benefit of the householders and especially for those who live in the villages. The repeated publications of the work[3] rule out any possible suspicion of commercial undertone in the compiler's plea and show its acceptability and popularity among the Hindus in Bengal.

On the definition of dāya this work has also followed the definition of Jīmūtavāhana.[4] The vyavasthā put forward in Vyavasthā-sarvasva on the incidents of self-acquired and ancestral property is very similar to that expressed in the Vyavasthā-kalpadruma.[5] The paṇḍits who gave their opinions in the present work

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1. Supra, 682.
2. Vyavasthā-sarvasva, compiled by Nanda Kumāra Kavīratna Bhaṭṭācarya, (Calcutta, 1916), preface, 5. Bengali script.
3. 1st ed., 1859; 2nd ed., 1867; 3rd ed., 1878; 4th ed., 1916. Also repeated publication of Vyavaharā-kalpadruma, op.cit., 682 n.2.
4. Dā.bhā.1.5.
5. Supra, 683.

also relied on Hārīta,[1] Viṣṇu[2] and Kātyāyana,[3] and affirmed that 'a father could make an unequal division of his self-acquired property but not of grand-parental property. This is the view of the learned'.[4] On the incidents of immovable property, especially of land, NandaKumāra's compilation has followed the literal purport of Nārada's[5] dictum, which enjoins that for the movables the father is the prabhu, but for all immovables, neither the father nor the grandfather alone is the owner. But at the same time, on the rules of alienation, the vyavasthā reaffirms the Dāyabhāga doctrine by stating that the alienation of immovables by a father without the consent of his son is valid, even though the father incurs sin by such act.[6]

The works which we have just discussed above,[7] are neither projected

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1. Dh.K.1163a.
2. Viṣṇu, XVII. 1-2.
3. Dh.K.1173b.
4. svopārjita dhanaṃ pitā nyūnādhikam vibhāgaṃ kartum śakyate na tu pitāmaha dhane iti vidāṃ mataṃ / ibid., 126. The view on ancestral property has become clear in the vyavasthā on ancestral property lost and recovered, yadā pitāmaha dhanam anyair hṛtam paścāt pitroddhṛtam tadā pitur akāmato vibhāgaṃ kartum na śakyate iti vidāṃ mataṃ, relied on Manu, IX.209, ibid., 127. The same view in Dāyabhaga-vyavasthā, author unknown, Bengali script, (Calcutta, 1871), published by Indranārāyaṇa Ghoṣa.
5. maṇi muktā ... , Dh.K.1219b, ibid., 121.
6. tathāca dāna vikraya siddha haya, kintu pitā pratyavāyī haya, ibid., 128-9.
7. Supra, 678-85.

with the masterly skill of the commentators or digest writers nor have they any judicial authority as have the vyavasthās of the Hindu Law Officers attached to the courts in different parts of the country. Despite these limitations, their significance lies in the fact that even being opinions of eminent śāstrins from Bengal they admitted, at least theoretically, the co-ownership of father and son,[1] in the ancestral property. For their opinions, the paṇḍits did not explore so much the commentaries but relied more on the texts of the śāstra. It seems that Viṣṇu, Kātyāyana and Hārīta were more popular with them than Yājñavalkya. Despite their omission of many relevant texts - the purport of Viṣṇu, XVII.2 was overwhelming - the paṇḍits superimposed on Viṣṇu the maxim of factum valet which was Jīmūtavāhana's innovation. Notwithstanding their correct understanding of the smṛti, the paṇḍits were fettered by Jīmūtavāhana's maxim and in effect, the compilers, as their pious duty,[2] took the task of popularising the Dāyabhāga doctrine among the Bengali Hindus in their own tongue.

V. Conclusion

Coming back to the judicial vyavasthās, we are to note that the posts of the Hindu Law Officers of the High Courts of Bombay, Calcutta and Madras

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1. Rejected by Jīmūtavāhana, Dā.bhā.II.18.

2. See preface to Vyavasthā-sarvasva and Vyavasthā-kalpadruma, op.cit.

were abolished in 1864,[1] but the paṇḍits from all corners of the country left a sub-literature which was as varied as it was enormous. But the quality of the opinions was not as great as their variety and there was a lack of coherence among the opinions of paṇḍits even on the same juridical problem. The scholarship of paṇḍits ranged from ill-digested śāstric learning of a village priest to the encyclopaedic expertise like that of Jagannātha. But for the disharmony among the opinions on identical issues,[2] the paṇḍits' deficiencies cannot be entirely blamed.[3] 'The sub-literature of Court paṇḍits' vyavasthās ... was coloured strongly by the Anglo-Indian Courts' predetermined fancies as to which texts should be relied upon and in which way'.[4]

But the genre of this sub-literature as an exploration of the śāstra has its interest to students of Hindu legal history; the vyavasthās, as experts' opinions on the śāstra, might not have reached the standard of perfection expected by jurists, but at the formative period of Anglo-Hindu Law, these opinions gave an administrative satisfaction to the judiciary, and a subjective satisfaction to the litigants, being regarded as the responsa prudentum available in their days,[5] and set the pattern of many legal rules which are governing the Hindus even today.

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1. Derrett, DJL, 8.
2. Acharyya, TLL, 1912, op.cit., 79. RLSI, 234.
3. RLSI, 243.
4. Derrett, DJL, 62.
5. Cp. the rabbinical opinions in Jewish law, the responsa ('replies', or juridical 'opinions'), Z.W. Falk, 'Jewish Law', in Derrett, ed., An Introduction to Legal Systems, (London, 1968), 32. Also on responsum in Roman law, see supra, 633 n.1.

CHAPTER 17.

FATHER'S POWER OF DISPOSITION AND THE BIRTHRIGHT OF SON

1. A son's Right by birth and the concept of Pre-emption

a. Introduction

A study of the śāstra reveals that in the same property there may well be a coincidence of different rights on the part of people who are reciprocally related to each other.[1] It is an instance of the Hindu concept of svatva that numerous people can have different facets of right in dhanam concurrently. For example, where several sons own property jointly after the demise of their father, their concurrent rights happen to be identical; but, in the case of property ownership between father and son, their respective rights, even though 'equal', may be non-identical. As the senior male member, a father has the superior right to manage the property including that of his unseparated son, but he lacks the right of alienation of certain types of property without the consent of his son.[2] Therefore, as a corollary of the birthright, one of the rights said to be possessed by the son is to impugn or prevent an alienation by the father.

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1. Yājñ.II.121, Dh.K.1175b. Viṣṇu, XVII.2, Dh.K.1175a. Bṛ. XXVI.10, Dh.K. 1180b. Bṛ. XXVI.14, Dh.K. 1179b. Kāty. 839, Dh.K.1173b.

2. Vyāsa, Dh.K.1587ab, sthāvaram dvipadam ... Bṛ. XV.7, Dh.K.803b.

Our present enquiry is confined to whether there are any other instances in Hindu Law by which persons, including sons or others than sons, are entitled to interfere with the independent action of an owner. If such a right exists, the question arises as to whether it is a substantive right over that dhanam under discussion, or whether it is merely a right pertaining to the procedural formalities of the transaction.[1]

b. Nature of the right of pre-emption

The idea of pre-emption [2] has been explained in general terms by Tyabji as, 'where a person has the right to have any property transferred to himself on his paying the consideration for which the owner of the said property has agreed (or purported) to sell or barter it to another, such right is called the "right of pre-emption".[3] Thus, pre-emption is a right in the nature of property in the land of another which may be activated provided the pre-emptor is ready to pay the sale price agreed upon between the vendor and the vendee.[4] In

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1. As emphasised by Vijñāneśvara at Mitā.I.i.31. The dichotomy is analogous to that between the mīmāṃsā categories of kratvartha and puruṣārtha upon which we cannot now dwell.

2. Partly retained in the Hindu Succession Act, 1956, S.22(1), the so-called pre-emption section. On this section, Ganesh Chandra Pradhan v. Rukmani Mohanty, AIR 1971 Or.65. Also M.S. Vaidya, 'Section 22 of the Hindu Succession Act: A Plea for its Amendment', 73 Bom.L.R. Journal, (1971), 41-9.

3. F.B. Tyabji, Principles of Muhammadan Law, (Calcutta, 1919), 648. The right of pre-emption has fallen foul of the Constitution, Jagdish Saran v. Brij Raj, AIR 1972 All 313.

4. Derrett, (1962), K.L.T.J., 59.

essence, it is a right to influence an alienation, substituting the pre-emptor for the vendee in order to become the actual purchaser on the ground, e.g. of vicinage or blood tie. The right of a pre-emptor remains dormant and does not arise until a sale is in process. Pre-emption is not a restriction on the general right of alienation as such. It is more a restriction on the freedom of the seller to sell to the vendee of his choice and also on the buyer's freedom to buy in the market. In a sense, it is a right of preference to buy certain property by the pre-emptor. The completion of a sale to the original vendee depends on the consent of the possible pre-emptors.

So pre-emption as a concept runs counter to natural right [1] of voluntary transfer of property by the owner and from its nature, it betrays an ancient origin because it is believed that at the dawn of human civilization, ownership was 'corporate not sole'.[2] Many ancient legal systems reveal that the validity of a transfer depended on the consent of the members of the family or the tribe [3] or the ruler, and the modern concept of individual right of free alienation of property has grown through a gradual and chequered process.[4]

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1. On natural right and legal right of transfer, see N. Micklem, Law and the Laws, (London, 1952), 84.

2. Maine, Ancient Law, (London, 1930), 258, 289. Markby, Elements of Law, (Oxford, 1885), 247. Mayne, A Treatise on Hindu Law and Usage, (Madras/London, 1892), ¶210.

3. Similar custom found regarding transfer of land among the Mundas and Oraons, the two aboriginal tribes of Chota Nagpur, E.S. Hartland, Primitive Law, (London, 1924), 95.

4. Markby, loc.cit., 247-8. R. Pound, An Introduction to the Philosophy of Law, (New Haven/London, 1954), 115.

c. The right of pre-emption in different legal systems

In early Roman Law, excepting the requirement of five witnesses for the validity of the mancipatio [1] form of transfer, we do not exactly come across the idea of pre-emption, and there is nothing to suggest that, apart from contributing to the notoriety of the transaction,[2] these witnesses had any right analogous to that of a pre-emptor. But Holloway, J. suggested that the institution of pre-emption was known to Roman Law: 'it sanctioned an obligatory relation between the vendor and a person determined, binding the vendor to sell to that person if he offered as good conditions as the intended vendee. It arose from contract and also from provisions of positive law'.[3]

In the Germany system, the individual ownership of land is an evolution from the ownership of the community. The consent of the blood relatives was a prerequisite to the transfer of landed property by the owner (Beispruchsrecht). If land was sold without such consent, the relatives had the right to claim the property within a year and a day by the fiction that inheritance had followed the death of the propositus - 'retractus gentilicius sive ex jure consanguinitatis'. Besides this analogous right to pre-emption, they had a distinct

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1. Gai.I.119, 'a sort of symbolic sale', (imaginaria venditio), Institute of Roman Law by Gaius, ed., E.A. Whittuck, tr. Poste, (Oxford, 1904), 74-5. W.W. Buckland, A Manual of Roman Private Law, (London, 1925), 121. W. Markby, Elements of Law, (Oxford, 1905), 249.

2. H.F. Jolowicz, Historical Introduction to the Study of Roman Law, (London, 1932), 145.

3. Ibrahim Saib v. Muni Mir, (1870) 6 Mad.H.C. 26 at 30.

right of pre-emption, of Retraktrecht (Naherrecht), i.e. 'the power to require the relinquishment from the transferee or any subsequent grantee of land transferred upon payment of the original purchase price'.[1]

The right of pre-emption or some sort of device to keep away the stranger from the vicinity of family or village lands was a feature of the old agrarian communities. In the old Dutch law, like the old German system, the right of pre-emption was prevalent.[2]

Since olden times this right has been recognised in almost all the legal systems of the Middle East. In Assyrian Law,[3] the members of the family or neighbours had the 'right of pre-emption or redemption'.[4] A stranger as a purchaser was unwelcome among the Hebrews,[5] and pre-emption as a practice was well-established in the Mosaic law.[6] The rabbinical law on the subject is eloquent.[7] In that system, joint owners, like undivided brothers, and

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1. K. Gareis, Introduction to the Science of Law, tr. A. Kocourek, (Boston, 1911), 145. The modern judicial transfer of land (gerichtliche Auflassung) in which the consent of the state is required may be a development from the ancient requirement of the consent of the family and the tribe, Markby, Elements, of Law, op.cit., 250, 256.

2. Derrett, (1962), K.L.T.J., 59-60.

3. c.1450 to 1250 B.C., Driver and Miles, Ancient Codes and Laws of the Near East, The Assyrian Laws, (Oxford, 1935), 4.

4. Driver and Miles, ibid., 315.

5. Abraham's purchase of land for the burial of his wife, Genesis, XXIII.3-8.

6. Leviticus, XXV. 24-34.

7. Maimonides, Code, XII (Acquisition), tr. I. Klein, (New Haven, Yale Judaica Ser. 5, 1951), 198.

adjacent neighbours are pre-emptors.

Ruth illustrates the right of the pre-emptor in the story of the purchase of land by Boaz.[1] Naomi, the widow of Elimelech, after the death of her two sons, came back from the land of the Maobites with her daughter-in-law, Ruth. Naomi offered to sell a parcel of her husband's land to Boaz, who was one of his kinsmen. Elimelech had a nearer kinsman than Boaz. When the offer of sale was made to Boaz, he asked the nearer kinsman to buy the land or to renounce his right of pre-emption in the presence of other kinsmen. Boaz could buy the land only after the nearer kinsman renounced his right. This practice among the Jews is again attested in the purchase of his uncle's field by Jeremiah.[2]

Among the Arabs, the right of pre-emption was well-established [3] and in Islamic Law, besides kinsmen, the right extends to the co-sharers, and neighbours.[4]

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1. Ruth, IV. 1-9. Horowitz, The Spirit of Jewish Law, (New York, 1953), 339-40.

2. Jeremiah, XXXII. 6-15. Driver and Miles, The Assyrian Laws, op.cit., 315-6.

3. Amir Ali, Mahommedan Law, TLL, 1884 (Calcutta, 1904), I, 596.

4. Tyabji, Muslim Law, (Bombay, 1968), 608-10.

d. Pre-emption in Hindu jurisprudence

In Hindu jurisprudence, the right of the individual was subordinated to the interest of the group or the family to a great extent. The Hindus attached great importance to land and the sages went so far as to declare that land was inalienable.[1] Though transfer of land was eventually allowed,[2] yet joint ownership of land by father and son,[3] and the discouragement of unilateral alienation[4] have been repeatedly emphasised. Under such a system, a separated kinsman, especially, a separated son, considering the sentimental value attached to ancestral land or family land, would definitely prefer to redeem the land when sold by a father. Any positive evidence of the existence of the separated son's right of pre-emption would reinforce the right of the unseparated son to impugn an alienation by the father which is a coefficient of a son's right by birth.

For our enquiry into the presence of the institution of pre-emption among the Hindus, the major commentators and nibandhakāras do not proffer anything but silence.[5] Apart from the smṛti texts cited by Varadarāja and Pratāparudra-deva,

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1. sthāvare vikrayo nāsti ..., Mitā.I.i.32. On the juridical implication of the text, see above, 345, n.3.

2. Bṛ., Mitā.I.i.28 , Dh.K.1588b.

3. Yājñ.II.121. Nārada, maṇi-muktā ... , Dh.K.1219b.

4. Bṛ. XV.7, Dh.K.803b; avibhaktā vibhaktā ...

5. No recognisable trace in the Mitākṣarā, Smṛti-candrikā, Vyavahāra-mayūkha, Madanaratna-pradīpa, Vīramitrodaya, Vivāda-ratnākara, Vivāda-cintāmaṇi, Vivāda-bhaṅgārṇava. But at the late mediaeval period, texts were discovered RLSI, 161.

the only ancient work which illustrated the practice of pre-emption was the Arthaśāstra[1] of Kauṭilya. Though there could be hesitation in accepting Arthaśāstra as a source of Hindu law,[2] yet the rules laid down in the work are of unquestioned value as evidences of actual usage amongst the Hindus at that remote epoch.[3] The passage in the Arthaśāstra runs as follows:[4]

> 1. Kinsmen, neighbours and creditors, in this order, shall have the right to purchase landed property (on sale).
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> 2. After that, others who are outsiders (may bid for purchase).

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1. c. 300 B.C. to 100 A.D., Kāṇe, HD, I, 99.

2. Kāṇe, HD , I, 86. Lingat, CLI, 146, n.3.

3. Derrett, 'Preemption in Tesawalamai: a Problem in Choice of Residual Law', University of Ceylon Review, Vol.19, No.2 (1961), 105-16 at 111.

4. Arthaśāstra, 3.9.1-9. The Kauṭilya Arthaśāstra, ed., Kāṅgle, (Bombay, 1960), I, 109. jñāti-sāmanta-dhanikāḥ krameṇa bhumi-parigrahān kretum abhyābhaveyuḥ / 1 / tato'nye bāhyāḥ /2/ sāmanta -catvāriṃśat-kulyeṣu gṛha-pratimukhe veśma śrāvayeyuḥ, sāmanta-grāma-vṛddheṣu kṣetram ārāmaṃ setu-bandhaṃ taṭākam ādhāram vā maryādāsu yathā setubhogam 'anenārddhena kaḥ kretā' iti /3/ tri-rādhuṣitam avyāhatam kretā kretuṃ labheta /4/ spardhayā vā mūlya-vardhane mūlya-vṛddhiḥ saśulkā kośam gacchet /5/ vikraya pratikoṣṭā śulkam dadyāt /6/ asvāmi prati-krośe catur viṃśati paṇo daṇḍaḥ /7/ sapta-rātrād ūrddhvam anabhisa-rataḥ pratikruṣṭo vikrīṇīta /8/ pratikruṣṭātikrame vāstuni dviśato daṇḍaḥ, anyatra catur viṃśati paṇo daṇḍaḥ /9/ iti vāstu-vikrayaḥ //

3. (Owners) shall proclaim a dwelling (as for sale) in front of the house, in the presence of members of forty neighbouring families, and a field, a park, an embankment, a tank or reservoir (as for sale) at the boundaries, in the presence of village elders who are neighbours, according to the extent of the boundary, saying, 'at this price who is willing to purchase?' 1

4. What has been thrice proclaimed and not objected to, the purchaser shall be entitled to purchase.

5. Or, in case of increase in price because of competition, the increase in price together with the tax shall go to the treasury. The (successful) bidder at the sale shall pay the tax.

6. In case of a bid by one who is not an owner, the fine shall be forty-four paṇas.

7. If the (bidder) does not come (to take possession), the owner whose property was auctioned may sell (again) after seven days.

8. In case of transgression by one whose property was auctioned, the fine is two hundred paṇas in the case of immovable property, a fine of twenty-four paṇas in other cases.

9. Thus ends (the topic of) sale of immovable property. 2

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1. Cp. in Assyrian law, the intending purchaser had to cause proclamation by the herald three times within one month, Driver and Miles, op.cit., 315.

2. Tr. Kangle, The Kauṭilya Arthaśāstra, (Bombay, 1963), II, 252. The word abhyābhu at 3.9.1 denotes a right, Kangle, II, 189, n.26. The passage 3.9.1-9 is also paraphrased by Derrett, University of Ceylon Review, 19 (1961), 115, n.28.

The passage is highly technical but in clarity rivals the provisions in many statutes drafted in modern times. It describes the procedure for sale of immovables in detail, and could be mistakenly considered to be only describing that, but in the first two sentences the pre-emptors' rights are well-pronounced,[1] and the order of preference of buyers in a proposed sale is expressed by the word kramena (in order).

Varadarāja in his Vyavahāra-nirṇaya has discussed some smṛti texts,[2] which declare the rights of some classes of people to buy in preference to others in a proposed sale. Thus, Vyāsa ordains,[3]

> Relations, neighbours, creditors are in order "possessed of causes of purchase". Amongst them the nearer are matāḥ ("to be respected") in the sale, and foremost are the sapiṇḍas ("agnates within seven inclusive degrees"). Where neighbours on four sides compete, he on the East is preferred, then he on

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1. U.C. Sarkar, Epochs in Hindu Legal History, (Hoshiarpur, 1958), 87, 206. Also Derrett, University of Ceylon Review, 19, No.2 (1961), 111.

2. Some of those referred by Kāṇe in passing, HD, III, 496.

3. Vyavahāra-nirṇaya, ed., Aiyangar, K.V.R., (Madras, 1942), 355. jñāti samanta dhanikāḥ krameṇa kraya-hetavaḥ / tatrāsannatarāḥ pūrva sapiṇḍāś ca kraye matāḥ // (Also attributed to Kātyāyana, Dh.K.898b). catus sāmanta sānnidhye prācī dig balavattarā / udīcī ca pratīcī ca sarvābhāve tu dakṣiṇā // (Analogous text of Kātyāyana, Dh.K.898b). samānā salilāḥ paścāt saṃsaktāś ca tataḥ param / tato'pi bāndhavāḥ paścāt tat saṃsaktās tataḥ param // na cet tad vayavadhīyeta nadī srotaḥ pathādibhiḥ //

> the West, the North, and in the absence of all others, the South. Those who share water come next, then those who are (merely) contiguous. Then come bāndhavāḥ (? remoter relations, or partners, connections) and after them their contiguous neighbours. And this is not broken by streams, springs, paths and the like. 1

Another text of Vyāsa which ordains the period of limitation within which a pre-emptor could redeem land has been cited by Varadarāja and runs as follows:[2]

> The period of resiling in the case of land is ten days both for purchaser and seller. It is twelve days in the case of sapiṇḍas. After that, the sale is absolute (avicālyam). Neighbours have the same period (of grace) and we learn that the creditors have the same period, are understood to be mataḥ in purchase. 3

Varadarāja has cited three texts of Bṛhaspati in the same context:[4]

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1. Tr. Derrett, Univ. Ceylon Review, 19 (1961), 114.

2. Vy.Ni., 357; Dh.K.899a. bhūmer daśāho'nuśayaḥ kretur vikretur eva ca/ dvādaśāhas sapiṇḍānāṃ avicālyam ataḥ-param // tat kālikās tu sāmantāḥ tat kālā dhanikāḥ smṛtāḥ / tat kālikāḥ sapiṇḍāś ca vedanīyāḥ kraye matāḥ //

3. Tr. Derrett, ibid., 114.

4. Bṛ. XVIII.14, Aiyangar, ed., 157; Dh.K.896. jñātyādi-pratyayenaiva sthāvara-kraya iṣyate / anyathā cet krayo na syāt daṇḍaś cāpi tayor bhavet // (Also attributed to Kātyāyana, Dh.K.898b).

(i) 'A purchase of immovables is valid only with the consent of the relations, etc., otherwise there is no purchase at all, and the parties may even be liable to a penalty.'[1]

Varadarāja comments that this rule will apply only to the relations etc., who are present in the vicinity at the time of the sale.[2]

Then Bṛhaspati declares[3] the right of those who are absent from the village at the time of the sale: (ii) 'Where relations, neighbours, and creditors are absent from the village at the time of the purchase, they have no right of protest when three fortnights have elapsed since the purchase'.[4]

Bṛhaspati continues[5] to enumerate the classes of people who generally have the right of pre-emption in a proposed sale: (iii) 'Full brothers, _sapiṇḍas_, sharers of water (i.e. _samānodakas_), members of the same _gotra_ ('agnatic lineage'), neighbours, creditors, fellow villagers: these seven are _mataḥ_ in a sale of land'.[6]

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1. Tr. Derrett, ibid., 114. Renou in his translation of the _śloka_ has rendered _pratyayenaiva_ as 'par la confiance' ('through the trust'), "Notes sur la 'Bṛhaspati-smṛti'", _Indo-Iranian Journal_, (The Hague, 1962-3), VI, I, 97.

2. Vy.Ni., 357. jñātyādīnām sannidhāne vacanam /

3. Br. XVIII.20, Aiyangar ed., 158; Vy.Ni., 358; Dh.K.896. jñāti sāmanta dhanikāḥ kraye grāmād bahir gatāḥ / nārhanti te pratikroṣṭuṃ krāntaṃ pakṣa-traye krayāt //

4. Tr. Derrett, ibid., 114.

5. Br. S.V., 323; Dh.K. 896; Vy.Ni., 356-7. sodarāś ca sapiṇḍāś ca sodakāś ca sagotriṇaḥ / sāmantā dhanikā grāmyāḥ saptaite yanayo matāḥ // variant is bhūkraye matāḥ, Vy.Ni., 357.

6. Tr. Derrett, ibid., 114.

Renou points out that 'these seven types are the "foundations" (yoni) of purchase',[1] and brings out the correct implication of the text by saying that 'the point of the question would have been the right of pre-emption that these people would have possessed, in the given order'.[2]

Bhāradvāja also declares,[3] 'Relations, neighbours, creditors in order are "takers of land". Thereafter members of the same kula ("agnatic lineage"), and in the absence of all, members of another family (i.e. "cognates", says Varadarāja).'[4]

Varadarāja cites a text from the Pañcādhyayī[5] with the same purport:[6]

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1. "Il s'agit des sept classes de gens qui sont less 'bases' (yoni) de l'achat", Renou IIJ, VI, 1, 97.

2. "Il sagirait d'un droit de preemption que possederaient ces gens, dans l'ordre indiqué", Renou, ibid. The passage was translated for me by Dr. Kanitkar.

3. Vy.Ni., 356; Dh.K.900b. jñāti sāmanta dhanikāḥ bhūmi parigrahāḥ / tataḥ sakulyāḥ sarveṣām abhāve tv-nyajātayaḥ // Varadrāja explains: anyajātayaḥ bāndhavāḥ / There is another text of Bhāradvāja to the same purport, Vy.Ni., 358.

4. Tr. Derrett, ibid., 114.

5. The work is not well known. No light has been thrown on the work either by Kāṇe or Aiyangar in his introduction to Vy.Ni.

6. Vy.Ni., 357; Dh.K.901a. jñāti sāmanta dhanikāḥ jñāte (kraye) tāt kālikāḥ smṛtāḥ / daśāhādyas tu te sarve kretur vikretur eva ca // jñātyādigāmī tat kṣetraṃ vikretur mūlya-kārpaṇāt // The third line is omitted in two manuscripts, Vy.Ni., 357. The meaning of the line is vague but it might be indicating a restriction on the freedom of the seller in the sense that a seller had to sell land at a proper market price. It is better not to conjecture because of our lack of knowledge of the method of price-fixing in ancient times, see Derrett, ibid., 114, n.27.

> Relations, neighbours, creditors are learnt to have the same period (of grace) when it (the intended sale) is known. For all of them have a ten-day period, etc., and so have the purchaser and seller themselves. That field will go to the relatives, etc., where the price accepted by the seller is inadequate.

There are two texts of Katyāyana,[1] which undoubtedly convey the idea of pre-emption in sale of land.

> (i) The law says that there is no rule enabling purchase or sale of land, unless notice has been given to relatives (of the seller) and others (entitled to pre-empt), provided they are readily available (literally situated in the neighbourhood) and of unblemished character (i.e. credit-worthy). 2
>
> (ii) In the same village a period of ten nights (for vetoing by kinsmen the sale made by one of the kinsmen) is prescribed; when (land sold is) in another village, the period is three fortnights, when in another country six months, when the language (of the kinsmen vetoing) is different, a year.[3]

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1. Kāty.702-3; Dh.K.898; Vy.Ni., 358. jñātyādin ananujñāpya samīpasthāna (tandri) ninditān / kraya vikraya dharmo'pi bhūmer nāstīti nirṇayaḥ (niścayaḥ) // sva grāme daśa rātraṃ syād anya grāme tri-pakṣakaṃ // rāṣṭrāntareṣu ṣaṇmāsaṃ bhāṣā-bhede tu vatsaram //

2. Translated for me by Derrett.

3. Tr. Kāṇe, Kātyāyanasmṛtisāroddhāra, 262.

The idea of the first verse of Kāyāyana is this: no seller of land can alienate without proof of notice to possible pre-emptors. In Kāṇe's translation of Kātyāyana (702) the meaning of the verse is somewhat blurred.[1] He is not inclined to find any element of pre-emption in this text and opines that the text 'must be interpreted in the same sense'[2] as the anonymous text cited by Vijñāneśvara at Mitā.1.1.31,[3] which, according to Vijñāneśvara, is a rule intended for mere publicity of the transaction in order to avoid future dispute. Kāṇe does not put forward any convincing reason for interpreting Kāyāyana 702 in the same sense as the anonymous text cited by Vijñāneśvara.[4] In the next text of Kātyāyana, it is apparent from Kāṇe's explanations within parenthesis in his translation of the verse, that he admits the vetoing power of kinsmen when a sale is purported to be made by another kinsman, which attests the view that Kāyāyana 702 is a text on the right of pre-emption.

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1. Derrett's 'notice has been given' for anujñāpya is better than Kāṇe's 'securing the approval', Kāṇe, ibid., 262.

2. Kāṇe, Kātyāyanasmṛti, 262, n. on 703. Jolly found in it the trace of a right of pre-emption but he thought that the text was divested of its meaning by the commentators, History of the Hindu Law, TLL, 1883, (Calcutta, 1885), 89. This view was wrongly/not accepted by Mahmood J. in Gobind Dayal v. Inayatullah, 7 All. 775 at 777. Long before Macnaghten identified the text as containing the idea of pre-emption, see his comment on the sale Case No.7, Hindu Law, (Calcutta, 1828), II, 297, note thereto.

3. sva-grama jñāti-sāmanta ... , Mitā.1.1.31.

4. Kāṇe also missed the texts attributed to Kāyāyana, which clearly state the rules of pre-emption, texts of Kātyāyana at Dh.K.898b.

All the texts cited above converge on one point, that in sale of immovables the owner's decision to sell to the buyer of his choice is not final. Certain categories of people had to be notified when there was a proposed sale of land, since they had the right to buy in order of preference.

As we have stated before,[1] none of the major commentators has dealt with these texts in the context of pre-emption, but that does not altogether negate their knowledge of the concept. There is a passage in Aparārka which suggests the right of pre-emption of kinsmen. While stating the rule of alienation of immovable property, Aparārka says that a seller must have the consent of kinsmen before a sale, and the object of requiring such consent is to indicate that where they are not unfit or indifferent, an alienation should be made in their favour and not in favour of strangers.[2]

Kalhaṇa records an incident of the fraudulent sale of a house in the Rājataraṅgiṇī,[3] which comes very near to an illustration of pre-emption.[4]

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1. Supra, 694, n. 5.

2. Aparārka on Yājñ. II. 175: Yājñavalkyasmṛti, Anandāśrama edn., 380. dānādi-yogyeṣu vibhakteṣu dāyādeṣu satsu tebhya eva sthāvaram arpaṇīyam ayogyeṣu nirapekṣeṣu vā'nyebhya iti / Yājñ. II. 175 is a text on what could be given as a gift. But Aparārka's comment could be taken as rule applicable to alienation of land in general. He was explaining the rights of the separated dāyādas on ancestral immovables.

3. A 12th century work, chronicling the reigns of the kings of Kashmir from c.2448 B.C. to 1148 A.D.

4. Rājataraṅgiṇī, VI. 14-41, (Hoshiarpur, 1963), 245-8.

According to the law of the country, the sale of land had to be concluded in the presence of the official recorder (adhikaraṇa-lekhaka). It was his duty to measure the land and draw up the deed. In this case, the seller bribed the recorder presumably to evade the rights of the pre-emptors. However, the pre-emptor lodged a complaint with the king and 'at the request of the councillors, the king granted to the claimant the house of the merchant, together with his property, and exiled the defendant(s) from the land'.[1] Kalhaṇa composed his work between c. 1148 and 1149 A.D.[2] The story of the fraudulent merchant may be a narrative but, juridically, it is the record of a usage practised among the people of Kashmir around the time when the author was composing his work.

Even among the people of Bengal, where there is supposed to be more freedom of alienation because of Jīmūtavāhana's approach to the smṛtis, the practice of asking for the consent of kinsmen etc., before a sale of land, was not completely unknown. It has been pointed out by N.R. Roy that inscriptional materials of the time of the Pal dynasty reveal that while making a gift of land, the king used to address the kinsmen (kuṭumba), neighbours (prativāsī) and the elements by saying, 'I am making a gift of this land, let it be consented to by all of you' (matam astu bhavatām).[3]

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1. R.T., VI. 41. sabhair abhyarcamānena rājñā sārthaṃ vaṇig-gṛham / vitīrṇam arthine deśāt pratyarthī ca pravāsitaḥ // tr. M.A. Stein, Rajataraṅgiṇī, (London, 1900), I, 239.

2. Stein, ibid., 15.

3. N.R. Roy, Bāngālīr Itihās, a historical work in Bengali language, (Calcutta,) 1st ed., 252-3.

The later inscriptions belonging to the Sen dynasty show that the 'matam astu bhavatām' was changed into 'viditam astu bhavatām' ('let it be known to you'). Roy does not think that there was any basic difference between the two expressions. According to him, 'matam astu' was more courteous than 'viditam astu'. He also opines that the village community was not the collective owner of land during the reign of these two dynasties, but he was not so sure of his contention and qualified it by suggesting that to some extent, it could be correct to say that these utterances were carrying the idea of a remote past when the concept of ownership was collective.[1] In our present context, one can suggest that if some sort of consent of kinsmen etc. was required while making a gift, it would not be altogether unnecessary while making a sale. In South Indian inscriptions, especially those of the tenth to the fourteenth centuries in Kannaḍa or Telegu, sales with the consent of sons, relatives, and neighbours are repeated rehearsed and there are examples where the consent turned out not to be sufficiently specific.[2]

There are a few texts in the Mahānirvāṇa-Tantra[3] which mirror the idea of pre-emption as revealed in the smṛti texts cited above.[4]

1. N.R. Roy, Bāngālir Itihās, op.cit., 252.

2. See Ep. Carn. V, Chann. 242 (A.D. 1252), ibid., VIII, Sorab 237 (A.D. 1221).

3. A sacred work composed between 1775 and 1785 A.D., RLSI, 267.

4. Ante, 697-701.

The texts in Mahānirvāṇa-Tantra run as follows:[1]

> If there be a competent buyer for immovable property, who is a near neighbour, then it is not competent for the owner of the immovable property to sell the same to another. Among buyers who are near, the agnate and one of the same caste are specifically qualified, and in their absence, friends, but the desire of the seller should prevail. 2

Macnaghten cited these texts as implying the recognition of the concept of pre-emption among the Hindus.[3] But he was sceptical about their acceptability as precepts of practical law.[4] He added a few words of caution by saying that 'the interminable and troubled ocean of Hindu Jurisprudence is sure to present something for the support of any opinion which it may be desirous to keep afloat for the purpose of temporary convenience'.[5]

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1. MNT, ed., Sir John Woodroffe, (Madras, 1929), 390-1. XII. 107-8. Also cited by Shyama Charan Sarkar, Vyavasthā Chandrikā, (Calcutta, 1880), II, 627, note thereto. XII. 109-12 are illustrations of the same rule. sthāvaraṃ dhanam anyasmai sthite sānnidhya-vartini / yogye kretari vikretuṃ na śaktaḥ sthāvarādhipaḥ //107// sānnidhya-vartināṃ jñātiḥ savarṇo vā viśiṣyate / tayor abhāve suhṛdo vikretṛicchā garīyasī //108// vikretṛicchā garīyasī means that if there are several buyers belonging to any of these classes, the person to whom the seller wishes to sell the property will have the preference to buy, Hariharānanda Bhāratī on MNT, XII. 108. Woodroffe, MNT, (Madras, 1953), 374-5.

2. Tr. Woodroffe, The Great Liberation (Mahānirvāṇa Tantra), (Madras, 1953), 374-5.

3. W.H. Macnaghten, Principles and Precedents of Moohummudan Law, (Calcutta, 1825), xviii-xix.

4. Ibid., xix.

5. Ibid., note at xix. The Supreme Court in Shri Audh Behari Singh. v. Gajadhar, AIR 1954 SC 417 at 420, treated the work as one on mythology and not on law, and did not attach any value to the texts of MNT on pre-emption.

Macnaghten did not seem to have any knowledge of similar texts in the Vyavahāra-nirṇaya or in the Sarasvatī-vilāsa and having nothing in the other commentaries available to him regarding pre-emption, his scepticism was legitimate. But having before us the texts from the two above-mentioned treaties, there is not much reason to suspect that the Mahānirvāṇa-Tantra texts were metrical versions of Islamic jurisprudence.[1] Moreover, the rules contained in the Mahānirvāṇa-Tantra texts are far from being identical with the Muslim law of pre-emption.[2]

The absence of a mention of the rules of pre-emption in the major legal treaties, and their presence in the Vyavahāra-nirṇaya and Sarasvatī-vilāsa may be due to the intrusion of customs (laukika-dharma) or (vyavahārika-vidhi) in the dharmaśāstra literature at a relatively late stage.[3] We might find some support for this observation if we attempt to explore the customary law of the Hindus available to us in the different parts of the sub-continent.

The Dutch compiled the Thesavalamai, the Code in Jaffna at the beginning of the eighteenth century. The Code was prepared, as the name 'Thesavalamai' suggests, from customary materials as presented by the Mudaliars.[4]

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1. On the supposed origin of the work, see RLSI, 267, also on its psychological background, Derrett, 'A juridical fabrication of early British India: the Mahānirvāṇa-tantra', Z. f. vergl. Rechtsw., 69, pt.2 (1968), 138-81.

2. Derrett, 'The Hindu Law Relating to Pre-emption', Adyar Library Bulletin, Vol.25, pt.1-4, 25.

3. Derrett, ibid., 25; also (1962) Ker.L.T.J. 64.

4. Tambiah, W.H., Laws and Customs of the Tamils of Jaffna, (Colombo, 1950), 43f. 'Tamil Culture', Vol.7, No.4 (1958), 9. Also his Principles of Ceylon Law, (Colombo, 1972), 200.

In the Code we can see that the right of pre-emption of heirs, partners and neighbours was recognised in the customary law of the Tamils of Jaffna, who migrated to Ceylon and carried the customs with them from their previous abode. Tambiah emphasises that the law of pre-emption known to the Thesawalamai is a survival of the original Marumakattayam law brought by early colonists.[1]

According to Hindu customary law in Goa, 'no transfer of land was valid without the consent of the gāṅkārs and other watandārs, i.e., the principal tenants of the village'.[2] The knowledge that pre-emption existed by custom among the Hindus in Bihar goes back as far as 1792.[3] A right or custom of pre-emption was recognised as prevailing among the Hindus in Gujarat.[4] Pre-emption also exists among the Khasas.[5] A full bench of the High Court[6] of North-West Provinces (now Uttar Pradesh) determined that

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1. Customs of the Tamils of Ceylon, Tamil Cultural Society, (Ceylon, 1954), 49.

2. Derrett, 'The Hindu Law Relating to Pre-emption', Adyar Library Bulletin, Vol.25, 1-4, 24, n.2.

3. Ramruttan Singh v. Chunder Naraen Rai, (1792), 1 Sel. Rep., S.D.A., (Cal.), 1, disapproved at 7 All. 775. But pre-emption as part of Hindu usage in Tirhoot was upheld in Omed Roy v. Nakched Rai, I.D., O.S., VII, 396= 5 Sel.Rep.82; at 85. There is a valuable note which ends with the remark of Colebrooke at 86, who states that a right of pre-emption 'may be found supported by local custom' among the Hindus.

4. R.K. Wilson, A Digest of Anglo-Muhammadan Law, (London, 1895), 351. The same view with regard to the Hindus in Bihar, ibid.

5. Pre-Vedic immigrants belonging to the Āryan fold who occupied a large part of the Himalayas from Kashmir to Nepal, L.D. Joshi, The Khasa Family Law, (Allahabad, 1929), 192.

6. Chowdhree Brij Lal v. Raja Goor Sahai, (1867) Agra (F.B.) (N.W.P., F.B. Rul. July-Dec.1867), 95 cited by F.B. Tyabji, Muslim Law, (Bombay, 1968), 631,n.16, also at 633, n.8; 637, n.30. Also cited by Tambiah, Tamil Culture, Vol.8,NO.2

/Continued next page:

pre-emption was a feature of the customary law of the Hindus and was not an importation from Islamic jurisprudence. Despite this judicial pronouncement, Sir John Edge in delivering the judgment of the Privy Council in Digambar Singh v. Ahmad Said Khan[1] held that pre-emption in village communities in British India had its origin in the Mohammedan law ...' The decision was somewhat careless in the sense that the Judicial Committee did not even make any mention of Brijlal's case. The only text-book on the subject, they relied on was Amir Ali's Mahommedan Law and Macnaghten's work went unnoticed. Even before Brijlal's case in Fakir Rawot v. Sheikh Emam Bukhsh,[2] Sir Barnes Peacock C.J. left some doubts as to the certainty of Islamic origin of the Hindu law of pre-emption by saying that,

> we, therefore, think the established law upon this subject is clear enough; that a right or custom of pre-emption is recognised as prevailing among the Hindoos in Behar and some other provinces of Western India; that, in districts where its existence has not been judicially noticed, the custom will be matter to be proved; that such custom, where it exists, must be presumed to be founded on and co-extensive with the Mahommedan Law upon that subject, unless the contrary be shown ... 3

Note 6 - p.708 - Continued:

(1959) 32. Derrett, Adyar Library Bulletin, vol.25, Pt.1-4, 16, n.3. I apologise that I could not see the case from the law report itself.

1. (1914) 42 IA 10 at 18.

2. (1863) W.R. (Sp.No.) 143.

3. ibid., at 145.

By these last five words he left the possibility open to show that the Hindus could have pre-emption in their customary law independent of Muslim influenceon the subject.

Despite the availability of Varadarājīyam and the Sarasvatī-vilāsa, the Supreme Court aired its ignorance in emphatic terms that pre-emption was not a feature of Hindu jurisprudence. Observing on pre-emption, the Supreme Court remarked, 'there is no indication of any such conception in the Hindu Law and the subject has not been noticed, or discussed either in the writings of the smrti writers or in those of later commentators'.[1] But in Radhakishan Laxminarayan v. Shridhar,[2] the Supreme Court observed that so far as Berar was concerned, the theory of the Islamic origin of the Hindu law of pre-emption did not seem to be well-founded.

It has also been pointed out by the Supreme Court[3] that pre-emption, being a limitation of one's freedom of enjoyment of property, is against the provisions[4] of the constitution. Be that as it may, in our present context, we refrain from indulging in constitutional quibbles regarding enjoyment of property.[5] Freedom of enjoyment of property is desirable, but one should not miss the point that pre-emption is also a notion of natural justice which upholds the preference

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1. Shri Audh Behari Singh v. Gajadhar, AIR 1954 SC 417 at 420.
2. AIR 1960 SC 1368 at 1369, para.5.
3. Bhau Ram v. Baij Nath Singh, AIR 1962 SC 1476 at 1481.
4. Art.15; Art.19(1)(f).
5. For the paradox and hollowness of decisions of the Bhau-Ram type, see Derrett, 'Supreme Court and Pre-emption', 1963, Bom.L.R.J.1-4.

of certain persons having specific relations of person or property to the vendor.[1] From the point of view of modernity, there is no doubt that pre-emption is a limitation on the owner's power of alienation and on a buyer's power to purchase: these limitations and their nature and extent are relevant to our present enquiry into the son's right by birth, which also implies a limitation on the father's power of alienation. The nature of the two concepts, namely pre-emption and birthright, may be different but they are manifestations of the same archaic tendency towards the interaction of multiple rights over the same property. But the existence of the one in any legal system does not necessarily prove the existence of the other; nevertheless, the discussion will help us in the sense that the existence of the right of a separated son as the pre-emptor in the case of a proposed alienation by his father would strongly imply a right of interdiction of a father's alienation by an unseparated son, which indirectly proves the existence of an unseparated son's co-ownership with the father.

In almost all the texts to which we have referred above jñāti (a person within the same gotra) is recognised as the pre-emptor. In Vyāsa and Bṛhaspati sapiṇḍas (agnates within seven inclusive degrees) are foremost in order of preference as pre-emptors. A son is the nearest jñāti as well as the nearest sapiṇḍa. The meaning of the word piṇḍa in the law of inheritance has important bearing on our present purpose. As used in the Veda, piṇḍa means particles of body and

1. Per Holloway, C.J., Ibrahim Saib v. Muni Mir, (1870) 6 Mad. H.C.26 at 31.

not the funeral cake.[1] Vijñāneśvara also opined that the word sapiṇḍa, either directly or indirectly denoted particles of one's body.[2] By being particles of one's body is meant blood-relationship with one's ancestor.[3] The son is the nearest blood relative of the father, and in that sense, he is the nearest sapiṇḍa and according to the texts, would have the right to pre-empt before any other pre-emptor in the case of a proposed alienation by the father. Similarly, in a proposed sale by a separated son, the father will also have the right to pre-empt before any other pre-emptor.

e. Conclusion

Thus, in a legal system where the separated son has the right to pre-empt, the unseparated son's right to impugn or prevent an alienation by the father is unquestionable. We must say that our present discussion is neither an attempt to prove the existence of son's birthright on the strength of the existence of pre-emption in the Hindu system, nor is it a wilful digression from our

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1. Yaju.XXV. 42. The White Yajurveda, ed., Webber, (Berlin, 1849), I, 769. ekas tvaṣṭur aśasyā viśastā dvā yantārā bhavatas tathartuḥ / yā te gātrāṇām ṛtuthā kṛṇomi tā tā piṇḍānāṃ prajuhomy agnau // Mahīdhara explains gātrāṇām piṇḍānām as, gātra-sambandhinām māṃsa-piṇḍānām tā tā tāni = tāny aṅgāni agnau prajuhomi / ibid., 769. Uvaṭācārya also explains piṇḍānām as māṃsa-piṇḍānām, Śuklayajurveda-Saṃhitā, ed., W.L.S. Pansikar, Nirnaya Sagar Press, (Bombay, 1912), 471a.

2. Vijñāneśvara on Yājñ.1.52, Kāṇe, HD, I, 290.

3. Kāṇe, ibid., 290. The idea is also in Baudhāyana dh.sū. 2.2.15.16 ; Dh.K. 1268b; SBE, II.2.14; aṅgād aṅgāt sambhavasi, 'From my several limbs (of my body) art thou produced', SBE, XIV, 226.

central theme. On the contrary, since the *śāstra* has precepts on son's right by birth,[1] the texts on pre-emption may be identified as complementary to those precepts intending to emphasise the co-ownership of father and son.

II. Son's birthright and testamentary power of a father

a. Introduction

The coming into existence of a son's right by birth restricts the father's power of dealing with family property and reduces him to a co-owner with his son. The existence of testamentary disposition in any legal system envisages the power of a father (testator) to interfere with the expectancy of natural heirs by regulating the devolution of property after his death.[2] A son's birthright is a limitation on his father's ownership in the form of curtailing his power of arbitrary division or unilateral alienation of family property. The idea of co-ownership between father and son would not only imply restrictions on father's power in dealing with property during his lifetime, but also would prevent the father from determining the devolution of property after his death.[3] Thus, according to the *Mitākṣarā* view of property, the recognition of a son's co-ownership with his father in the patrimony should negate a father's power of testamentary disposition.

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1. Yājñ.II.121.
2. Jolowicz, *Historical Introduction to the Study of Roman Law*, (London, 1952), 125.
3. West and Bühler, *A Digest of the Hindu Law*, (Bombay, 1884), 213.

Under the Mitākṣarā system, a father before a partition with his son should have no power to will away his son's share, the ownership of which was acquired by the son at his birth. There could be a possibility of testamentary disposition by a father of his own share in the family property, but property being joint, the shares of the co-owners remain undefined [1] until a partition takes place between the father and the son.

Even in the Dāyabhāga system where a father, for all practical purposes, is considered as the absolute owner of the family property, exclusion of a son from inheritance took place only in rare circumstances, namely when the son has proved himself an enemy of the father, or wilfully omits the performance of obsequies.[2]

In both systems, the chances of testamentary disposition are minimal ; because in both, in the absence of a son including an adopted son,[3] there is an absolute and far-reaching scheme of intestate succession after the death of the propositus.[4] But this cannot be the last word on testamentary disposition in the Hindu system unless we explore the dharmaśāstras, which were the basic inspirations behind these two schools.

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1. Appovier v. Rama Subba Aiyan, 11 MIA 75 at 89.

2. Colebrooke, Dig., (Calcutta, 1801), III, 300-1; 303-4.

3. Kāṇe, HD, III, 474, 816.

4. Cp. In Roman Law when a man died intestate, leaving no suus heres, his nearest agnate used to get his estate: si intestato moritur, cui suus heres nec escit, adgnatus proximus familiam habeto, Ulpiani Fragmenta ex libro Singulari Regularum; on the discovery and authenticity of this work, see J. Muirhead, Historical Introduction to the Private Law of Rome, (London, 1899), 310-11.

b. A comparative appraisal

Before we pass on to the dharmaśāstras, we should have a survey of other ancient legal systems which might provide a guideline to our present enquiry. A testament is an instrument to override the natural claims and rights of the kindred in blood of the propositus.[1] In primitive society where mutual dependence and ties were closer, bequest would be a rare phenomenon. The institution of the disposition of one's property after one's death, as stated by Maine, is a feature of the developed form of society.[2]

The Romans may be considered pre-eminently the inventors of the will,[3] but it took a long time for them to evolve the idea of a proper instrument by which a testator could disinherit his legal heir. In the early Roman system, there were two types of instruments which were made either in the comitia (testamentum calatis comitiis),[4] or by a soldier when the army was drawn up in battle array (testamentum in procinctu).[5] Around c.200 B.C. testamentum calatis comitiis became obsolete and the more frequent form of a sort of testament was testamentum per aes et libram, which was a

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1. There is a general absence of testation in kin-organised societies, J. Stone, Human Law and Human Justice, (Bombay, 1965), 98.

2. Maine, Ancient Law, (London, 1905), 174.

3. Maine, Ancient Law, (London, 1905), 172. But see supra, 33.

4. Institute of Roman Law by Gaius, tr. E. Poste, (Oxford, 1904), ii, 101; 176 Ancient Law, 176. On this also supra, 33-4.

5. 'In procinctu, id est cum belli causa arma sumebant': 'in martial array, that is to say, in the field before the enemy', Gaius, ibid. A. Watson, Roman Private Law around 200 B.C., (Edinburgh, 1971), 100. See supra, 34.

peculiar adaptation of mancipatio, in the sense that besides the person to whom the transfer was made (familiae emptor), it required five witnesses and the transfer was not secret.[1] For the first time, a general testamentary power was granted in the Twelve Tables,[2] but the idea was in every way discountenanced,[3] and nothing short of express disherison (exheredatio) could deprive a son (suus heres) of his 'birthright'.[4]

Even after the Twelve Tables, the potency of the right of the suus heres was such that a testator had to provide, either by institution or disherison, not only for sui heredes in life at the date of his will, but also for any that might be born subsequently. If this point was neglected, the birth of another child would invalidate the testament because even a newly-born child had an interest which could not be defeated except by his institution or disheredation.[5] To protect the natural heir from being completely disinherited, various laws were made from

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1. Watson, ibid., 101-2.

2. 'uti legassit suae rei, ita jus esto' 'as a man shall settle in reference to his estate (res = res, familiaris), so shall be law', Muirhead, Historical Introduction to the Private Law of Rome, (London, 1899), 46. On this text see supra, 35-6.

3. Discussed by Poste, Gai. Institute, II, 101-3, at 179. Also, Muirhead, ibid, 46.

4. Muirhead, ibid., 46, 162. Also Sanders, The Institutes of Justinian, (London, 1956), Introd., liv. It is submitted that by the phrase 'birthright', Muirhead and Sanders did not mean co-ownership of father and son in the Mitākṣarā sense. They emphasised the heirship of son in preference to other heirs.

5. Muirhead, ibid., 163. Cp. Vyāsa, Dh.K.1587: ye pitā ye'pyajātāś ca ...

time to time. The most important was the lex Falcidia,[1] by which no one was allowed to give in legacies more than three-fourths of his goods after making deductions for debts and funeral expenses.[2] Thus, at least a fourth part was secured[2a] which was known as the Falcidia or portio legitima.[3] If children were completely disinherited, they could prefer a complaint called querela inofficiosi testamenti, which was eventually abolished by Justinian. Under similar circumstances, the children could bring another action called de inofficioso testamento[4] on the supposition that their parents were not of sane mind. All these rules show that in Ancient Rome the protection of the rights of natural heirs was given great importance, and the testamentary power only gradually made inroads into the right of inheritance of the suus heres.

Testamentary succession in the strict sense did not exist in Babylonia. In the Code of Hammu-rabi[5] there was no such instrument as a will.[6] To

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1. Passed in c.. 40 B.C. in the reign of Augustus, Sanders, The Institutes of Justinian, (London, 1956), Introd., liv and 549-50.

2. Cp. by the authority of the sunna of the Prophet, a Mahomedan cannot make a bequest of more than one-third of his estate, Hedaya, (London, 1870), 671. Mulla, Principles of Mahomedan Law, (Bombay, 1968), 127. N.J. Coulson, Succession in the Muslim Family, (Cambridge, 1971), 213-4.

3. Gai.II, 227. G.S. Henderson, The Laws Relating to Wills in India, TLL, 1887, (Calcutta, 1889), 4. On the different phases of the Roman Law of Will, see Jolowicz, Historical Introduction to the Study of Roman Law, (London, 1952), 248-56.

4. Sanders, Inst. Justn., LIB, II, TIT. XVIII; 209.

5. c. 2270 B.C.

6. G.R. Driver and J.C. Miles, Ancient Codes and Laws of the Near East, The Babylonian Laws, (Oxford, 1952), I, 343.

2a. However, it is important to note that lex Falcidia protected not only sons, but any instituted heir so far as the legislation is concerned.

disinherit a son, a father had to go before a court and announce his intention of disherison. The judge would examine into the reasons, and if the son had no grave offence, he would not be disinherited ('thrust out').[1]

The Law Code of Gortyn [2] did not provide any freedom of testamentary disposition to the father. This may be due to the fact that the Code provides a semblance of son's birthright in the sense that when a son was condemned to pay a fine, the father had to give him his due portion from the family property. Otherwise, normally a division would take place after the death of the father, and a daughter would get half as much as a son.[3]

A testament was unknown in Sparta.[4] Originally, in Athens, 'a man could in no circumstances determine the ownership of things belonging to his patrimony after he should die'.[5] The Athenian will introduced by the Laws of Solon was an inchoate testament and could never prejudice the inheritance of a son.[6]

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1. Ibid., 348-9. Rev. A.H. Sayce, The Code of Hammurabi, tr. Evolution of Law, (Boston, 1915), I, 422; Code, § 168. For grave offence like cursing a father, a son could be put to death, Code, § 195. For our discussion on the Code, see supra, 172.

2. c. 480–460 B.C. See our discussion, supra, 87.

3. A.C. Merrian, Law Code of Gortyna in Krete, (Baltimore, 1886), 15. R.F. Willetts, The Law Code of Gortyn, (Berlin, 1967), 20. Willett's edition is better than Merrian's. On daughter's share, cp. Islamic law, a double share to the son.

4. J. Muirhead, Historical Introduction to the Private Law of Rome, (London, 1899), 46. See supra, 82.

5. A.R.W. Harrison, The Law of Athens, (4th century B.C.), (Oxford, 1968), 149-50. See supra, 81.

6. Maine, Ancient Law, 174-5. Also supra, 81.

In Jewish law, there were tzewa'ah ('a gift of one lying sick', matenat shekiv mera'), a sort of donatio mortis causa but 'shetar tzewa'ah', a written will was of later development and appears to have been a product of the influence of Roman or Hellenistic jurisprudence.[1]

In ancient German law, as in the Mitākṣarā system, a male child was a co-proprietor with the father,[2] and a will was unknown to them until they came in contact with the Romans and Roman influence could be attributed to the growth of testamentary disposition among all Teutonic nations of Europe.[3]

In all these systems, the absence of or discouragement from making a bequest proves the fact that the natural heir had a vested right in the family property, though that might materialise only in the form of inheritance after the death of the father. The ancient German system and the Mitākṣarā system in a striking resemblance manifest co-ownership of son with the father. In the Mitākṣarā system, a son's power of demanding a partition from his father makes a father's testamentary power nugatory. The Roman patria potestas resembles the powers of a father under the Dāyabhāga system. The obstructions against testamentary disherison of natural heirs in ancient Roman law explain that even among the Hindus, following the Dāyabhāga school, testamentary disposition by

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1. Maine, ibid., 174. G. Horowitz, The Spirit of Jewish Law, (New York, 1953), 402-4. Explained, supra, 218.

2. Maine, ibid., 175-6. Also R. Huebner, tr., Philbrick, A History of Germanic Private Law, (London, 1918), 666. Supra, 128-9.

3. See supra, 137-9.

a father may not be an easily accepted phenomenon.

c. Testaments in Classical Hindu Law

The above discussion explains Thomas Strange's claims [1] as to why there is no word in the Indian languages which accurately conveys the conception of a will. Strange's view was also shared by Sir Henry Maine, who stated that 'in Hindu Law there is no such thing as a true will'.[2] In this context, Montriou brought out the underlying idea behind the rules of Hindu succession. He explains,

> an inofficious Will by a Hindu, i.e. one substantially in contravention of the rules laid down for his guidance in the Sāstras, as to the obligations and uses of property, is a rare, it may be said, an almost impossible occurrence. The orthodox Hindu contemplates the claims of his children and dependants as indeafeasible ... 3

Golāp Chandra Sarkār Śāstrī emphatically denied the existence of wills among the Hindus. He said, 'wills were unknown to the Hindus, and in fact, they appear to be opposed to the spirit of Hindu Law.'[4]

Among the early authors on Hindu Law, almost all cherished the idea that wills were unknown to classical Hindu jurisprudence. But J.D. Mayne

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1. T. Strange, Hindu Law, (Madras, 1859), I, 255. There is a Tamil word, maranasadānam, analogous to will; pointed out in Vallinayagam Pillai v. Pachche, (1863) 1 Madras H.C.R. 326 at 330, n.j.

2. Maine, Ancient Law, op.cit., 171-2. Same view of Muirhead, Historical Introduction to the Private Law of Rome, op.cit., 46.

3. W.A. Montriou, Hindu Will of Bengal, (Calcutta, 1870), introd., xlix.

4. Golāp Chandra Sarkār Śāstrī, Hindu Law, (Calcutta, 1910), 569.

struck a different note and, as we shall see presently, cited texts which he claimed to have contained the germs of testamentary disposition.

Modern researches on the topic have partially supported Mayne's claim, but before going into the controversy let us analyse the śāstric position on the subject.

The earliest idea of a gift to be possessed after the death of the donor is found in the Nābhānediṣṭha legend.[1] Manu divided his property among his sons. He omitted Nābhānediṣṭha, but Manu afterwards taught him how to appease the Angiras and to procure the cows. While going to heaven the Angiras promised Nābhānediṣṭha that he should take all the property left by them. After the Angiras left for heaven, Nābhānediṣṭha proceeded to take possession of the property left by the donors, but someone (Rudra)[2] opposed the whole claim.[3] The legend shows more evidences of a son's innate right in his father's property[4] than of testamentary disposition.

The smṛtis vaguely betray some elements of wills in the form of post obit gifts. Kātyāyana[5] ordains,

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1. R.V. X.61 and 62.

2. In Ai. Br. V. 14, 'a man with "blackish dress"'; in Tai. Saṃ., III. .1.9.4. is mentioned as Rudra.

3. The story is given in each with slight variation: Tai. Saṃ., III. 1.9.4. Ai .Br. V.14, Jai.Br., III. 156. The significance of the story in the context of a will has been pointed out by Radhabinod Pal, The History of Hindu Law, TLL, 1930, (Calcutta, 1958), 329, 353-5.

4. Kāṇe, HD, III, 565. Discussed in this context, above, 371-5.

5. Kāty, 71, Dh.K.806b. svasthenārtena vā deyam bhāvitam dharmakāraṇat / adattvā tu mṛte dāpyas tat suto nātra saṃśaya // Alternate reading in place of bhavitam is śrāvitam.

> If a gift was promised by a man for a religious purpose whether when in good health or when afflicted with disease, the son should be made to pay it, if the father (the promisor) dies without (actually) giving it over; there is no doubt on this.[1]

Hārīta has a similar text where it is declared,[2] 'What has been promised in word, but not fulfilled in action, constitutes a moral debt, in this world and in the next'.[3]

P.N. Sen [4] opined that such voluntary promise made by a Hindu for the performance of some religious or pious act would be legally enforceable as a debt,[5] and a son would be obliged to pay such debt of his father. But in these texts he finds more an element of pious obligation that anything of a will.[6]

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1. Tr. Kāṇe, Kātyāyanasmṛtisāroddhāra, (Bombay, 1933), 234.

2. Hārīta, Dh.K.794b. vā cā yacca pratijñātaṃ karmaṇā nopapāditam / ṛṇaṃ tad dharma saṃyuktam iha loke paratra ca //

3. Tr. Jhā, Vivādachintāmaṇi, (Baroda, 1942), 62.

4. P.N. Sen, The General Principles of Hindu Jurisprudence, TLL, 1909 (Calcutta, 1918), 91. Sen's view goes against a text of Bṛhaspati which declares that a promise or direction to take effect after the death of the promisor was not ordinarily enforceable: Bṛ . XIV.14. Aiyangar, ed., (Baroda, 1941), 139. madūrdhvam iti yad dattaṃ na tat svattāvahaṃ bhavet / tenedānīmadattatvān mṛte rikthinamāpatet // This text is cited in the Vyavahāra-nirṇaya, 298-9, Derrett, IMHL, 443.

5. Though not exactly on the point, yet for the idea, see Derrett, 'Testamentary Contracts and an Opportunity for Indian Law', (1974), Bom.L.R.J., 76, No.1,6.

6. P.N. Sen, loc.cit., 92.

Mayne thought that these rules of pious gifts contained the germs of will,[1] and went as far as to say that these could be extended even to dispositions of undivided shares by a co-heir or ancestral property by a father without the consent of the sons.[2] Mayne's overstatement and his identification of rules of testamentary disposition in these texts were vehemently criticised by Arthur Phillips and Sir Ernest John Trevelyan. They say that the texts referred to by Mayne do 'not contemplate any testamentary disposition'.[3] They find in these texts merely an element of donatio mortis causa and according to their opinion, 'the Hindu family system, which was inconsistent with independent dominion over property, would necessarily not recognise any testamentary disposition'.[4]

Trevelyan's restricted interpretation of the texts had its own merit. But the texts of Kātyāyana and Hārīta certainly declare that the promise by a father before his death, was a debt in conscience to the donee which, at least the customary law, would oblige the son to execute.[5] Moreover, the smṛti rules have been reinforced by the rules of mīmāṃsā which envisage that 'gift promised, payments undertaken, and merit anticipated from instituting sacrifices, would all continue and operate for the benefit of the sacrificer even though he

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1. Also Kāṇe, HD, III, 817.
2. Mayne, A Treatise on Hindu Law and Usage, (Madras, 1906), 539.
3. Phillips and Trevelyan, The Law Relating to Hindu Wills, (London, 1914), 3.
4. Trevelyan, ibid., 3.
5. Derrett, IMHL, 443, (§ 700).

should die before the sacrifice could be completed.'[1]

The fact that the law of wills has emerged from the law of gifts,[2] does not entirely conflict with the mīmāṃsā doctrine. The mīmāṃsā approves the transference of details (aṅgas) prescribed for one sacrifice (yajña) into another sacrifice.[3] In a very general way, it could be said that in Hindu law,

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1. Derrett, ibid., Jaimini, X.2.58. The pūrvapakṣa view is that 'when the sacrificer has died, the "sarvasvāra" should not be completed; as every act is related to a living person', Jai.X.2.57. Jhā, Shabara-bhāṣya, karmāsthiyajñavat, 'on death the sacrifice is like asthiyajña, The Mīmāṃsā Sūtras of Jaimini, ed., B.D. Basu, (Allahabad, 1923), 648-9. The sūtra means 'in reality, there must be (completion) because both have been directly enjoined', Jhā, ibid., 1721-2.

2. Tagore v. Tagore, (1872), 1 I.A. Sup., 47. Montriou, Hindu Will of Bengal, (Calcutta, 1870), 5.

3. The principle is called atideśa (transference). The principle has been treated by Jaimini in Chapters VII and VIII. The crucial sūtra is VIII.1.2: yasya liṅgam artha-saṃyogād abhidhānavat, The Sacred Book of the Hindus, ed., B.D. Basu, (Allahabad, 1923), XVII/I, 456: 'that should be transferred of which there is some indicative*(and that which is to be transferred); as in the case of names', Jhā, Shabara-bhāṣya, (Baroda, 1934), II, 1321-2. The model and principal sacrifice in the Vedas is the Darśa-pūrṇamāsa. The rules and procedure of this standard sacrifice (prakṛti yajña) could be applied into another modified sacrifice (vikṛti yajña) which is lacking in details of ritualistic procedure, K.L. Sarkar, MRI, 411. Jhā, The Prābhākara Schools of Pūrva Mīmāṃsā, (Allahabad, 1911), 25. Natarāja Ayyar, Mīmāṃsā Jurisprudence, (Allahabad, 1952), 4. Kāṇe, History of Dharmaśāstra, (Poona, 1962), V.II, 1321-4. Cp. in Jewish law, Middot (exegetical rules of interpretation) include Gezerah Shawah ('Inference by Analogy'", literally: similar injunction or regulation. When in two pentateuchal passages words occur which are similar or have identical connotation, both laws, however different they may be in themselves, are subject to the same regulations and applications. Also Middot include Binyan'ab mikkathub'eḥad, literally, 'constructing a family', that is, extension of a rule to a number of connected provisions though it is found in relation to one only of them. Thus, the principal passage imparts to all the remaining passages, a common character which unites them in one family. Hermann L. Strack, Introduction to the Talmud and Midrash (Philadelphia, 1931) 94; for examples, 285-6, n.5; 286, n.7. Also, Z.W. Falk, 'Jewish Law', in Derrett, ed., An Introductionto Legal Systems, (London, 1968), 37, n.10. Also cp. qiyās (analogy) in Islamic juristic interpretation.

* because there is connection between that indicative

gift stands to will as the archetype or the original sacrifice (prakṛti-yāga) to the ectype or the modified sacrifice (vikṛti-yāga) in mīmāṃsā solution of Vedic sacrifices. But the mīmāṃsā has set a limit to the principle of transference, in the sense that the extension of the details of one sacrifice to another is permitted so long as there is no incongruity in such extension.[1]

The śāstras forbid making a gift of one's entire property when there is a son.[2] Moreover, the rules of smṛtis ordaining co-ownership of son with the father in certain categories of property are well-known.[3] If at all, one wants to apply the mīmāṃsā principle of transference (atideśa) to the laws of will from the laws of gift, one must do that within the limited situations permitted by the śāstra for making a gift.[4] Otherwise, the extension of the principle should be suspended as prescribed in the mīmāṃsā rule of bādha (annulment or suspension).[5]

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1. Jhā, The Prābhākara School of Pūrva Mīmāṃsā, (Allahabad, 1911), 25.
2. Bṛ.XV.3; also Yājñ. cited by Vācaspati Miśra, Vi.Ci., Jhā, § 244. For a discussion, supra, 349-51.
3. Yājñ.II.121.
4. Mitā.I.i.27. Explained supra, 347-64.
5. By the general rule of the principle of atideśa, the details of the model sacrifice should be taken over to the modified sacrifice. But in some cases, the model sacrifice cannot be extended to the modified one. In a situation where there is an express text against application of details of the model sacrifice to the modified, the principle of bādha will apply, Śabara on Jaimini, X.1.1. and X.1.2, Jhā, III. 1635-37. One can get over bādha by resorting to abhyuccaya or samuccaya (opposite of bādha), nevertheless one would require in the modified sacrifice, some rules enjoined of its own, Śabara on Jai., X.4.6., Jhā, III, 1807-8. Kāṇe, HD, V.II, 1327-8. Abhyuccaya applied by Vijñāneśvara on Yājñ.III. 243, on penance for Brāhmicide, Ghārpure, Yājñavalkya Smṛiti, The Collection of Hindu Law Texts, (Bombay, 1940), II.V., 1724-5. While applying the principle of atideśa, certain alterations and adaptations become necessary and mimamsa has taken care of these eventualities. Śabara on Jaimini, IX.1.1. Jha, III, 1417-20. The ācāra-kaṇḍas of dharmaśāstras have made use of uha (adaptation) as in Mitā, Yājñ.I.254 applied Viṣṇu dh.sū.75.7, SBE, VII, 240.

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Indeed, their Lordships [1] would find comfort in finding out an indigenous principle as justification behind making a will, but the emphasis on the singular source of emergence [2] of will from the laws of gift and the eventual identification of one with the other, were probably the result of confusing the principle of atideśa, which is only transference or an extension of details to a limit, with the principle of upamāna (analogy).[3] In the ācāra and prāyaścitta sections, commentators have used mīmāṃsā and the Vedānta as aids to śāstric interpretations, but in applying to vyavahāra these could be mazes where many a master might lose his way.

Apart from the śāstras and the mīmāṃsā interpretations, the mediaeval history of the Hindus shows the existence of the idea of testamentary disposition.

Note 5 - p.725 - continued:

Kāṇe, HD, V.II. 1326; HD, IV, 513, n.1142a. Applying these mīmāṃsā principles to vyavahāra, the question would remain as to whether a person would be able to will away property which is declared as adeya or adatta, as gift.

1. Tagore v. Tagore, (1872) 1 IA Sup., 47, Kalgavada Tavanappa v. Somappa, 1909, ILR. 33 Bombay 669 at 680, Justice Chandravarkar preferring the application of analogy in similar cases. But Sir Robert Phillimore warned against application of 'strained analogies', Bhyah Ram v. Bhyah Ugar, 13 MIA 373 at 390.

2. As stated in the Tagore case, ibid., at 68.

3. As in Tagore v. Tagore, (1872) 1 IA Sup. 47; Kalgavada Tavanappa v. Somappa, (1909) ILR 33 Bom. 669 at 680. Probably their Lordships meant transference, but used a wrong rendering for atideśa. On upamāna, see Śabara on Jai., I.v.5. Jhā, I.15-16. Nataraja, Ayyar knew the difference, but failed to point it out, Mīmāṃsā Jurisprudence, (Allahabad, 1952), 71-81.

In the first half of the 8th century we come across a political testament of King Lalitāditya of Kashmir.[1] A document which appears to be 'very much like a will' has survived from the Maratha period in the Deccan,[2] and about 1730-40 testamentary disposition was not unknown to the Hindus around Negapatam.[3] In customary law of the Vellālar Chettiyars,[4] testamentary disposition was acknowledged though complete disinherison did not exist between parents and children.[5] It is not clear how much this is owed to Dutch influence.

Though it may not be conclusively proved, yet it would not be out of place to point out that the French found some customary practices of testamentary dispositions among the Malabaris (i.e. Tamils), which were ultimately given legal force by the French.[6]

M. Gibelin, the Procureur General, at Pondichery, in 1843 stated in

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1. Rājataraṅgiṇī, IV., 341-59, ed. Vishva Bandhu, (Hoshiarpur, 1963), 151-2.
2. Derrett, IMHL, 443. One letter of Naro Babaji (dated 1775 A.D.) disposing property to be effective after his death is cited by Kāṇe, HD, III, 817, n.1603.
3. Derrett, IMHL, 443.
4. A prosperous śūdra, merchant community of the Coromandel coast.
5. Ludo Rocher, 'Jacob Mossel's Treatise on the Customary Laws of the Vellālar Chettiyars', J.A.O.S. 89 (1969), 27-50 at 45. The title of the treatise is Het Chormandelsh Heijdens Regt Van de Geslagten Wellale & Chittiji, undated. RLSI, 228, n.3 thereto.
6. Montriou, The Hindu Will of Bengal, (Calcutta, 1870), Introd., lv.

a published discourse:[1]

> Hindu law does not refer to this way of disposing of one's goods in the case of death. It has been considered as a creation of practical law; it has been thought that the right to make a will did not exist for Indians. However, this right has been recognised among the people of Bengal and they enjoy it without hindrance up to the present day. In French territory, the same right has been recognised among Malabaris, Christians or heathens, without distinction. They have possessed it since the establishment of French rule. The judicial decrees of the Chief Council of Pondichery, (of 18 November 1769, article 10; 22 April 1775, article 5; and 2 September of the same year, article 16) sanction this right and draw up the rules to be followed in the exercise of it. In this respect, then, there is an achieved right. It cannot be removed from the French natives. It is only proper to maintain it within the limits that custom and law have assigned to it; namely, no one who has a child or other descendant may be allowed to make a will; or, if living a communal life, only he who has particular goods recognised as his own by Malabari law may make a will and, in that case, it may relate only to the said goods.

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1. Montriou, ibid. "Les lois hindoues ne parlent pas de ce mode de disposer de ses biens, à cause de mort. On l'a considéré comme une création de la loi positive, et on a cru que le droit de tester n'existait pas pour les Indiens. Ce droit cependant leur a été reconnu dans le Bengale, et ils en jouissent jusqu'á ce jour sans difficulté. Sur le territoire françaís, le même droit a été reconnu aux Malabars, chrétiens ou gentils, indistinctement. Ils en sont en possession depuis l'établissement de la domination française. Les arrêts de règlement du Conseil Supérieur de Pondichéry, (des 18 Novembre 1769, article 10; 22 Avril 1775, article 5; et 2 Septembre même année, article 16) consacrent ce droit et tracent les règles à suivre pour son exercise. Il y a donc, à cet égard, droit acquis. One ne peut l'enlever aux indigènes français. Il est convenable seulement de le maintenir dans les limites que la coutume et la jurisprudence lui ont assignees, en ne permettant de tester qu'à celui qui n'a pas d'enfant ou de descendant, ou, s'il est en communauté, qui possède des biens particuliers reconnus propres par la loi malabare, et, dans ce

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> This has been the constant practice, and these hallowed usages return again to the spirit of our French laws, under which a man may freely dispose of his goods only if he has no descendants or forebears. 1

These positive evidences help to show that the idea of wills among the Hindus was not totally wanting, though it was quite far from'a full-fledged law of Testamentary succession'.[2] It is also fallacious to say that the Mitākṣarā birthright or the vested right of the son to inherit his father's property as the nearest sapiṇḍa,[3] and a system of testamentary disposition being an extension of a father's power of gift, cannot co-exist. Even under the Mitākṣarā system, there are a lot of flexibilities by which a father can make reasonable gifts for religious and other considerations.[4] Mṛtyu-patras were quite a common feature among the Hindus,[5] and in the majority of cases, there was always a direction or

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Note 1 - p.728 - continued:

> dernier cas , relativement aux dits biens. C'est ainsi qu'on l'a constamment pratiqué, et ces usages consacrés rentrent encore dans l'esprit de nos lois françaises, sous lesquelles c n'est qu'à défaut de descendants et d'ascendants qu 'on peut librement disposer de ses biens".

1. Translated for me by Dr. H. Kanitkar, Department of Anthropology, S.O.A.S.

2. Kāṇe,HD, III, 474.

3. dadyāt piṇḍam hared dhanam / Manu, IX.136. The idea may not be followed judicially but still plays a part in rural Hinduism, H. Chatterjee, The Laws of Debt in Ancient India, (Calcutta, 1971), 90.

4. Mitā.I.i.27.

5. West and Bühler, A Digest of the Hindu Law, (London, 1919), I, 216. I am informed by Professor Derrett that recently documents have been brought to light by scholars which prove that will(saṅkalpa) were known to the Hindus from the seventeenth century. These saṅkalpas highlight the testamantary power of a Hindu father. The present writer apologises that he could not examine the real nature of these documents personally.

lecture to his sons (or to the uttarādhikārī) by a dying father as regards his wishes towards the actual disposition of his property, and a son would normally never ignore the last wishes of his ancestor.[1]

We have shown that wills as post obit gifts or as donationes mortis causa might have existed among the Hindus in the pre-British period, but both in spirit and form they were different from modern wills and probably never intended to be an instrument to disinherit the son from his innate right in the property of his ancestors.

d. Anglo-Hindu Law

In Anglo-Hindu Law, one of the earliest wills that we come across was that of Umichand who died in 1758.[2] In Bengal, the legislature[3] recognised the power of a Hindu to will away, prior or subsequent to 1st July, 1794, his entire landed property to any of his sons or even to strangers. Then several statutes were passed,[4] but still the law regarding wills by a Hindu was not at rest.[5]

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1. Montriou, The Hindu Will of Bengal, op.cit., xlix.

2. For an English translation of the will, see Montriou, ibid., 9ff.

3. Bengal Regulation XI of 1793, ss.5 and 6. Bengal Regulation XXXVI of 1793.

4. Regulation XLV of 1795, s.6 applied to the province of Benares. Regulation V of 1799, s.11 applied to Bengal, Bihar, Orissa and Benares.

5. Regulation V of 1829 (Madras) stated that wills had no force except so far as they might be in conformity with general principles of Hindu Law. Regulation VIII of 1827 (Bombay) provided formal recognition of executor, but was silent as to race or creed to whose estate it would be applicable.

In Bengal, wills came before the judges of the Company's courts and to know the śāstric position, as in other branches of Hindu law, they had to depend on the vyavasthās [1] of the pandits. In 1781,[2] Juggulkisson Addic, having a wife and a son, disposed of his whole property, partly ancestral and partly self-acquired, in equal shares between them. Upon reference to the pandits of the Supreme Court, Calcutta, they certified in favour of the will.

In 1789 in Rushiklal Dutta's case,[3] a father disinherited two elder sons in favour of two younger, in a will. The pandits of the then Supreme Court at Calcutta, affirmed the validity of the will. The decision attracted sharp criticism from Sir William Macnaghten. He remarked,

> to this it can only be answered, that the motives which actuated the pandits in their exposition of the law, and the judges in their decision, are avowedly stated on conjecture only; and that if such motives are allowed to operate, there must be an end to all law, the maxim factum valet superseding every doctrine and legalising every act. 4

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1. On vyavasthās, see supra, 633, 646.

2. Strange, Hindu Law, (London, 1830), II, 3.

3. Rushiklall Dutt and another v. Choytun Churn Dutt, Strange, Hindu Law, I, 263.

4. Macnaghten, Hindu Law, I, 6-7.

Strange also complained that in this case, the maxim, factum valet, was stretched to an unlimited length. He said,

> the grounds with the pandits probably was (the Bengal maxim) that, however inconsistent the act with the ordinary rules of inheritance, and the legal pretensions of the parties, yet, being done, its validity was unquestionable. 1

But again in 1792 in the Nuddea case,[2] the SDA held that a gift in the nature of a will to the eldest son, depriving the other three, was valid. The majority of the paṇḍits, including Jagannātha Tarkapañcānana, the compiler of the Digest,[3] upheld the validity of the will mainly by relying on Jīmūtavāhana, who stated that although a father be forbidden to give away lands, yet if he nevertheless do so, he merely sins and the gift holds good.[4] The other point (6th point) which the paṇḍits made, that a principality might lawfully and and properly be given to an eldest son, was not based on the facts of the case. There was no evidence that the rāj descended according to primogeniture because, as stated in the will, the king settled the property in order to prevent quarrels among his sons after his death, which settlement would not have been necessary if the estate would have normally devolved on the eldest.

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1. Strange, Hindu Law, I, 163.

2. Eshanchand Rai v. Eshorchund Rai, IDOS, VI, 2. Strange, I, 263-4. Macnaghten, I, 7.

3. See Strange, I, 265.

4. Dā.bhā.II.29-30; II.77. For a criticism of Jimutavahana and particularly of, Jagannatha on this point, see H.H. Wilson, Works, V, ed., R. Rost, (London, 1865), 72.

The decision in the Nuddea case was too muddled to establish any general rule of Hindu law, but it was received as a precedent and without consulting the pandits, the Supreme Court followed the Nuddea case in 1807.[1]

But in Ramkoomar v. Kishenkinker,[2] a note of dissent was heard from pandits. They opined that in Bengal a father, whose eldest son was alive, could make a gift to the younger son of all his self-acquired movables and immovables, and of only ancestral movables. But with regard to ancestral immovables, such gift though valid is immoral. Even this categorisation of property regarding power of a father to make a will did not take the law very much further from the rules in the Nuddea case.

The wisdom of the pandits in the Nuddea case and in Ramkoomar's case, was questioned by the judges in Bhowannychurn Bunhoojea v. The heirs of Ramkaunt Bunhoojea.[3] According to the facts of this case, a Hindu father of the district of 24 Parganas, Bengal by a Hissanameh or deed of partition, made an unequal distribution among his sons of his estate, comprised of movables and immovables, both ancestral and self-acquired. The disposition was not carried into effect during his lifetime. Because the parties were not put into possession during the lifetime of Ramkaunt, the effect of the disposition was that of a testament. In

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1. Ramtanu Mallik and others v. Ram Gopal Mallik and Ram Ratan Mullik, Strange, I, 266.

2. Ramkoomar Neaee Bachesputtee v. Kishenkunker Turk Bhoosun (1812) IDOS, VI, 398.

3. (1816), IDOS, VI, 556.

consequence of the difference of opinion among the paṇḍits of the SDA, the question regarding a father's power of making a gift was put to the paṇḍits of the Supreme Court, Tarapershad and Mrityunjee; to Nurahuree, paṇḍit of the Calcutta Provincial Court, and Ramajya, a paṇḍit attached to the College of Fort William. This board of paṇḍits unanimously passed the opinion that if a father during the lifetime of his eldest son, made a gift to his younger son of all his self-acquired and of his ancestral movables, such gift was valid but the donour acted sinfully. Their opinion in respect of ancestral immovables is very significant with regard to the birthright of a son in such property. They unanimously declared on the point that if a father, during the lifetime of his eldest son, makes a gift to his younger son of all the ancestral immovables, the gift was not valid. 'Hence, if it had been made, it must be set aside'.[1]

The opinion of the paṇḍits in this case reveals a practice in Bengal, namely that a father lacked the power of depriving his son from his innate right in the ancestral immovables. The vyavasthā shows that the paṇḍits were not interpreting the birthright of a son according to the Mitākṣarā. The authorities cited by the paṇḍits were mainly Jīmūtavāhana's Dāyabhāga and once Dvaita Nirṇaya. So we can say that the paṇḍits' opinion was based on the Bengali authorities, though they reached a conclusion different from that supported by Jīmūtavāhana in his Dāyabhāga.

In self-acquired and movable property, a father's will has been upheld

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1. At 571.

and when there were justiciable grounds, a father's power could hardly be questioned. Thus, a will of one Darpanarayan Sharma [1] was upheld, which appeared to be more an excommunication than a testament. The wordings of the will are very interesting:

> as my eldest son Sri Radhamohan Babu and third son Sri Krishnamohan Babu have discarded their Guru (spiritual teacher) and drink spiritous liquors, and have threatened to murder me, I have discarded them and debar them from performing the ceremonies of burning my body and shraddha.

He gave the first and third son each Rs.10,000 and bequeathed to his youngest; son, who was deaf and dumb, Rs.20,000. It should be taken into consideration that the property in this case, was self-acquired by Darpanarayana.

In Bengal, the law seemed to have been settled over a father's power of making a will of all his self-acquisitions and ancestral movables. But despite the decision in Bhowaneechurn's case, the controversey went on over a father's power of disposing by will of his ancestral immovables. To resolve this controversy and to put the law on the topic 'as finally at rest', (per Shakespear J.), the then Supreme Court consulted the judges of the SDA who, after much consideration, declared in Juggomohun Roy v. Sreemutty Neemoo Dossee [2] that a Hindu,

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1. Cited by Shamachurn Sircar, Vyavasthā Darpaṇa, 559.

2. (1831) IDOS, I, 358.

having sons, may alienate his ancestral land in Bengal without their assent, and he can by will, prevent, alter, or affect their succession to such property. Ryan J. declared that 'the doubts, which they (judges) did entertain in consequence of Mr. W.H. Macnaghten's work, no longer exist'.

Thus, a father's power to make a will of his self-acquired and ancestral property, was judicially settled, but the juridical writings on the topic reveal that neither the pandits nor the judges were free from the fault of inventing a rule which was hardly the ordination of the śāstra.[1]

Colebrooke unambiguously wrote to Strange,[2] 'a Hindoo in Bengal may leave by will all his own acquisitions: but would be restricted, if he have sons, from distributing ancestral property according to his mere pleasure'. But he modified his view in subsequent correspondence,[3] not because of his re-discovery of the śāstra, but because it was too late to stem the tide of wills which were wrongly upheld by the courts. He wrote,

> upon references to adjudged cases, and upon consideration of the inferences to be drawn from them, and the principles held to have been settled by these judgments, I find occasion to correct that part of my letter on the subject of wills by Hindoos, in which I said that a Hindoo in Bengal may leave by will all his own acquisitions; but is restricted from distributing ancestral property among

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1. H.H. Wilson, Works, ed., R. Rost, (London, 1865), V, 77-85.

2. May 25, 1812; Strange, II, 435-6.

3. July 22, 1812; Strange, II, 437.

> his children, according to his mere pleasure. [1]

He concluded,

> a Hindu in Bengal may leave by will, or bestow by deed of gift, his possessions, whether inherited or acquired; and the gift or the legacy, whether to a son or to a stranger, will hold however reprehensible it may be, as a breach of an injunction and precept. [2]

Shamachurn Sircar accepted the previous opinion of Colebrooke as the correct interpretation of the śāstra. He remarked on the opinion of Colebrooke,

> these are true expositions of the law and ought to have been acted upon; but it was too late. Numbers of wills and deeds of gift relative to the transfer of entire estate, movable and immovable, acquired and ancestral, had already been admitted and affirmed; and thereby the doctrine of 'factum valet' was too deeply rooted to be shaken. [3]

Shamachurn's admission of Colebrooke's previous opinion [4] as the true exposition of the law cannot exonerate him from his own attempt to interpret wrongly the text of Nārada [5] in his Vyavasthā Darpaṇa, [6] probably to give a śāstric

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1. Strange, II, 437.

2. Ibid., 438.

3. Shamachurn Sircar, Vyavasthā-darpaṇa, (Calcutta, 1867), 564.

4. Letter of May 25, 1812, to Strange.

5. Da.bha.II.31. For the text, infra, 738.

6. Shanachurn Sircar, Vyavastha-darpaṇa, loc.cit., 564.

sanction [1] to the testamentary power of a Hindu in Bengal. Shamachurn cited part of the text, 'should they give or sell their own shares, they do all that as they please, for they are masters of their own wealth'. Shamachurn seems to think that this text contained the *śāstric* ordination for making a will, but we shall see presently that this is not the case. Firstly, Shamachurn has partially quoted the text to his own advantage. The whole text runs like this:

> When there are many persons sprung from one man, who have duties apart, and transactions apart, and are separate in business, and character, if they be not accordant in affairs, should they give or sell their own shares, they do all that as they please, for they are masters of their own wealth. 2

Though Jīmūtavāhana has cited the text as giving power to dispose of undivided property to one coparcener without the consent of other coparceners, commentators of the *Mitākṣarā* school do not agree with his interpretation, and they take the text as declaring the separate and independent right of co-heirs who have made a partition amongst themselves.[3] Śrīkṛṣṇa Tarkālaṅkāra also seems to have thought that the natural construction of Nārada's text would bear out the competency only of a divided parcener to alienate his share.[4] Śrīkṛṣṇa tried

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1. It is more clear from his view on coparcener's power on alienation, ibid., 592-3.

2. Colebrooke, Dā.bhā.II.31.

3. Stokes, *Hindu Law Books*, (Madras, 1865), 207, n.31.

4. K.K. Bhattacharyya, *The Law Relating to the Joint Hindu Family*, TLL, 1884-5, (Calcutta, 1885), 484.

to explain away the first part of the text of Nārada. He explained,[1]

> By "duties" is meant the observance of the days of impurity, such as ten days or twelve days. By "transactions" is meant the practice of austerities, or the performance of valorous deeds. By "character" is meant mildness or fiereceness. By "busines"" is meant the performance of priestly duties and so forth. By "affairs" is meant the making of gifts etc. by each apart from the others. 2

Then Śrīkṛṣṇa tries to bring out the legal precept behind the text,[3]

> if the owner makes a gift or any other alienation of undivided immovable property, it is valid, like that of the divided, since afterwards the share may beidentified by the process of drawing lots and so forth. This is the purport.[4]

Here Śrīkṛṣṇa tries to explain that the religious duty of the members of an undivided family is divided, and undivided brothers are to observe the rules separately, each one for himself. This is what is meant by 'duties apart'

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1. dharmo 'śaucaṃ dvādaśa-rātrādi / karma tapaḥ śauryyādi / guṇo mṛdutva caṇḍatvādiḥ / kriyā yājana pālanādiḥ / kāryyeṣu ekaika-kriyamāṇa-dānādiṣu / Śrīkṛṣṇa on Dā.bhā.II.31.

2. Tr. K.K. Bhattacharyya, loc.cit., 484-5.

3. vibhaktasyeva abibhakta-sthāvarasyāpi svāmi-kṛta-dānādi sidhyatyeva / akṣapātādinā paścādaṃśe paricaya-sambhavāditi bhāvaḥ // Śrīkṛṣṇa on Dā.bhā.II. 31.

4. Tr. K.K. Bhattacharyya, The Law Relating to the Joint Hindu Family, op.cit., 485.

in Nārada's text. Each of the brothers makes a gift separately from one another. From this, Śrīkṛṣṇa draws the conclusion that Nārada has permitted alienation of undivided property by an undivided coparcener to the extent of his share.[1] Even this laboured interpretation of the text of Nārada does not clear up the fact that, so long as there is co-ownership of son and father in ancestral immovables, a father lacks the power of willing away such property by his unilateral act. Secondly, the text was cited as an authority by the paṇḍits in Vyavasthā No.352,[2] which was essentially an opinion on the co-parcener's power of disposing his own interest in the joint property. The case has no relevance to the power of a father to dispose by will of ancestral immovables while having sons.

Shamachurn probably was not confident of his cogency of argument based on the text of Nārada. That is why he searched for some commentatorial support for a father's power of making a will from the writings of Jīmūtavāhana and Śrīkṛṣṇa. Jīmūtavāhana envisaged two times of partition: 'One, when the father's property ceases; the other by his choice, while his right of property endures'.[3] Śrīkṛṣṇa explains the second time of partition by saying,

> Butwhen the father, for the sake of obviating disputes among his sons, determines their respective allotments, continuing however the exercise of power

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1. This view is illustrated in his Dāya-karma-saṅgraha, XI.7-8, Setlur, II, 155.
2. Vyavasthā-darpaṇa, op.cit., 594-5. Case No.13, Macnaghten, II, 220.
3. Dā.bhā. I.38.

> over them, that is not partition: for his property still subsists, since there has been no relinquishment of it on his part. Therefore, the use of the term partition in such an instance, is lax and indeterminate. 1

Shamachurn argues that as the father has power to distribute the property during his lifetime without the consent of his sons, so he should be allowed to dispose of his property by a will which will take effect after his death. But this could be answered in Śrīkṛṣṇa's language that during his lifetime, a father's property subsists and at his death, his property would cease and the law would not envisage a continuance of a power of disposition which ceased at his death.

So Shamachurn's attempt to find a śāstric sanction behind testamentary power of a Hindu in Bengal was not a success.[2] The judges granted this power to a Bengali Hindu more for expediency than for having any definite śāstric authority for it.

It appears that as early as the first quarter of the nineteenth century, the principles of the different schools of Hindu law began to be well entrenched in the judicial system through the opinion of the paṇḍits. In Sham Sing v. Mussummaut Umraotee,[3] a Hindu (governed by the Mithilā School) from Tirhoot, a short time before his death, made a gift of the whole of the estate to his eldest son. The wordings were, 'he will become sole proprietor on my death, and my

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1. Śrīkṛṣṇa on Dā.bhā.I.38, Stokes, op.cit., 195, n.38, Vyavasthā-darpaṇa, 570.
2. Similar attempt by K.L. Sarkar who tried to find out śāstric precept for making a will in texts which ordained co-ownership of father and son and a dependant's right to be maintained, MRI, 412-3.
3. (1813), IDOS, VI, 429.

younger son will be provided by him, with a suitable maintenance'. The paṇḍits of the SDA opined that the gift could not be considered as valid because of co-equal ownership of father and son in ancestral property.

Before that, in 1812, the paṇḍits of the Recorder's Court of Bombay, emphasised on the Mitākṣarā concept of co-ownership between father and son, and opined, ' there is no mention of wills in our Shaster, therefore they ought not to be made'.[1]

In Madras it took a long time to recognise any sort of testamentary power by a Hindu. A will by a Hindu to dispose of only his self-acquired property was recognised in Madras as lately as 1859 in the case of P. Narrainsvami Chetti v. P. Arunachella Chetti.[2] But this power though settled, was somewhat restricted in Vallinayagam Pillai v. Pachche,[3] where it was held that the testamentary power of a Hindu in respect of property, whether ancestral or self-acquired, was co-extensive with his authorised power of alienation during his lifetime.

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1. Strange, II, 449; but see Strange, II, 419.

2. (1860) II Madras S.D., 115. When there was no male issue, a Hindu in Madras could make a will of his ancestral as well as acquired, estate, Nagalutchmee Ummal v. Gopoo Nadaraja Chetty, (1856) 6 M.I.A., 309.

3. (1863) I Madras H.C.R., 326.

About the same time, the right of a Hindu in the North Western Provinces to make a will of his self-acquired property was recognised by the Judicial Committee of the Privy Council.[1] The Privy Council in 1880 upheld the Mitākṣarā birthright of the son in ancestral property in Laksman Dada Naik v. Ramchandra Dada Naik,[2] and held that under the Mitākṣarā law as received in Bombay, a father could not by will make an unequal distribution of ancestral property, whether movable or immovable, between his sons.

The law was settled in Baboo Beer Pertap v. Rajender[3] that a Hindu belonging to any school could dispose by will of his separate or self-acquired property of any description.

III. Father's power of alienating self-acquired immovables

In Hindu law, the testamentary power is interrelated with a father's power of alienation, the presence or absence of which is one of the touch-stones for the existence of son's right by birth. Since in the Dāyabhāga doctrine as enunciated by Jīmūtavāhana, a son does not acquire any interest by birth, either in the ancestral property or in the self-acquisitions of the father, a father has enough independence to dispose of them by will.[4] But in the Mitākṣarā system,

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1. Rewan Persad v. Radha Beeby, 4 MIA, 137. Nana Nurain Rao v. Huree Punth Bhao, (1862) MIA 96. The power of a Hindu to make a will of his divided property was recognised by the paṇḍits of the S.D.A., N.W.P. (1860), 'Bywustha', No.16, Bywusthas (from July to December, 1860), (Agra, 1861), I, 1, 10.

2. LR 7 IA 181.

3. (1867) 12 MIA 38.

4. Debendra v. Brojendra, (1890) 17 Cal.886.

the implication of the judicial opinions,[1] as stated in the preceding section, appears to be this: that according to the Mitākṣarā law, as understood by the judiciary, son's birthright was recognised only in the ancestral property in the hands of the father. The rule that a father can alienate his self-acquired immovables is based on an erroneous interpretation of the Mitākṣarā[2] by the Judicial Committee in Rao Balwant Singh v. Rani Kishori.[3] The view of the Judicial Committee has been accepted by the Supreme Court in Arunachala v. Muruganatha[4], and despite the pointer by academic jurists the law is judicially settled on the point.

Vijñāneśvara stated that ownership in the father's or grandfather's estate is by birth.[5] He also stated that the father is subject to the control of his sons and the rest, in regard to the immovable estate, whether acquired by himself or inherited from his father or other predecessors.[6] Then he explains:

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1. Rewan Persad v. Radha Beeby, 4 MIA, 137; Nana Nurain Rao v. Huree Punth Bhao, (1862) MIA 96; Laksman Dada Naik v. Ramchandra Dada Naik, LR 7 IA 181; Baboo Beer Pertap v. Rajender, (1867) 12 MIA 38.

2. Mitā.I.i.27; I.v.9-10.

3. (1898) 25 IA 54 (P.C.).

4. AIR 1953 SC 495 at 498.

5. Mitā.I.i.27. For discussion, see above, p.518.

6. Mitā.I.i.27. See above, p.520.

> So likewise, if the unseparated father is making a donation, or sale, of effects inherited from the grandfather, the grandson has even the right of prohibition. But if the effects were acquired by the father, he has no right of prohibition, as he is dependent on him. On the contrary, he must give his consent.
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> Consequently, the difference is this: although he has a right by birth in his father's and in his grandfather's property, still, since in regard to the father's property, he is dependent on his father and since the father has a predominant interest as it was acquired by himself, the son must give his consent to the father's disposal of his own acquired property. 1

We have earlier pointed out [2] in our discussion on the Mitākṣarā that the word 'dravya' [3] should have been rendered as 'movable'.[4] In Rao Balwant Singh's case,[5] the Judicial Committee was misguided by Colebrooke's inexact rendering of the word 'dravya' as 'effect'.[6] Lord Hobhouse observed in the course of his judgment that in the textbook and commentaries on Hindu law, religious and moral considerations were often mingled with legal commands.[7]

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1. Mitā.I.v.9-10; For the text, see above, p.521, n.1.
2. Supra, pp.521-2.
3. At Mitā.I.v.9. Also see supra, p.521.
4. See R.C. Mitra, The Law of Joint Property and Partition in British India, TLL, 1895-6, (Calcutta, 1897), 105.
5. (1898) 25 IA 54 (PC).
6. On religious command and legal command, see RLSI, Ch.3.

His Lordship opined that the passage in the Mitākṣarā – I.i.27, contained only moral or religious precept, while those in I.v.9 and 10 embodied rules of positive law, but his Lordship could not put forward any basic criterion by which one passage of Vijñāneśvara should be taken as a religious command and another as a legal command.

In Arunachala's case, the Supreme Court had the opportunity to rectify the mistake of the Judicial Committee and to restore the correct implication of the three above-mentioned passages of the Mitākṣarā by going directly to the Sanskrit texts of Vijñāneśvara.[1] But the Supreme Court re-examined[2] the relevant passages in Colebrooke's rendering and arrived at the same conclusion as the Judicial Committee. One thing should be said in defence of the Supreme Court that it was too late to set the law right because many transactions of property had been made since 1898 on the basis of the rule laid down in Rao Balwant Singh's case.

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1. Jolly was right in his opinion that the father did not have absolute power to alienate self-acquired immovables without the consent of his sons, Outlines of an History of the Hindu Law of Partition, Inheritance and Adoption, TLL, 1883, (Calcutta, 1885), 111-113. Derrett, RLSI, 417, n.3. Mulla, Hindu Law, 13th ed., § 222. The Parāśara-mādhavīya clearly supports our interpretation of the Mitākṣarā texts (I.i.27, I.v.9-10) and highlights the mistake of the Judicial Committee in Rao Balwant Singh's case, P.M.322, tr. Setlur, 320; P.M. 332, tr. Setlur, 320; see supra, 578-80. For the correct view on this point, also see The Madanaratna-pradīpa, 210, cited supra, 588, n.5; also The Vīramitrodaya, II.i.23, discussed supra, 603-4. These major works of the Mitākṣarā school could certainly be available to the Counsel arguing the case before the S.C. bench.

2. AIR 1953 SC 495 at 498.

The decision of the Supreme Court in Arunachala's case has been hailed as a progressive piece of judicial opinion reflecting the radical reorientation of the society towards individualisation of ownership in property and disintegration of joint family.[1] But we are yet to see what in the incipient social revolution among the Hindus is ephemeral and what destined to endure.

IV. Son's birthright and blending or merger of self-acquired property with joint family property by the father

The effect of a judicial opinion whether right or wrong does not stop with the particular decision. The decision in Rao Balwant Singh v. Rani Kishori[2] and its approval by the Supreme Court in Arunachala's case,[3] influenced the incidents of self-acquired property in many respects.

Under the Mitākṣarā system, self-acquired property of a father when inherited by a son changes into the category of ancestral in the hands of the son vis-a-vis his own male issue. But the controversy arises as to what would be the nature of the property and what kind of interest would pass to the male issue of a son when he gets the self-acquired property of his father by a gift or will.[4] On

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1. Vyavahara Nirṇaya, a journal of the Law Faculty of Delhi University (1954), III.1, 203-6 at 206.

2. (1898) 25 IA 54 (PC).

3. AIR 1953 SC 495.

4. Kāṇe puts such property in his list of separate property, but does not fail to mention the differences of judicial opinions on the point, HD, III, 555, n.1087.

this question of law there was divergence of judicial opinions among the different High Courts.

In 1863 the Calcutta High Court held [1] such self-acquired property as ipso facto ancestral. The Madras High Court left it to the father to determine whether the self-acquired property which he had bequeathed should be enjoyed by his son as ancestral or self-acquired,[2] but in the absence of the father's declaration of any intention, it should be presumed to be enjoyed as ancestral.[3] The Bombay High Court partly agreed with the Madras decision as to the father's power of determining the nature of the property under discussion, but differed on the point of presumption that in the absence of any clear intention by the donor or testator, it should be presumed to be self-acquired.[4] The Bombay view was followed by the Allahabad High Court,[5] and a full bench of the Patna High Court leaned towards Madras.[6] The Punjab High Court in several cases consistently held that a

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1. Muddan Gopal v. Ram Baksh, 6 WR 71. Also Hazari Mal v. Abaninath, 17 CWN 280. But see Mukti Prokash v. Iswari Devi, AIR 1920 Cal.746 which leaned towards Madras.

2. cuius est dare eius est disponere

3. Tara Chand v. Reeb Ram, 3 Mad HC 50; Nagalingam Pillai v. Ramchandra, 24 Mad. 429; Velayyuddham v. Commr. of Income Tax, I.L.R. (1945) Mad. 549; Seeyali Achari v. Doraiswami, AIR 1948 Mad. 46; Kavuru Venkatappaya v. Kavuru Raghavayya, AIR 1951 Mad. 318.

4. Jugmohan Dass v. Mangaldas Nathubhoy, 10 Bom. 528.

5. Parsotam v. Janki Bai, 29 All. 354; Jai Parkash v. Bhagwan, AIR 1937 All.453. Oudh followed Allahabad, Mst. Brij Kunwar v. Sankata Prasad, AIR 1930 Oudh 39.

6. Bhagwat v. Mst. Kapomi, AIR 1944 Pat. 298.

father's separate property acquired by a son through a bequest would become self-acquired property in his hands vis-a-vis his sons.[1]

These conflicting decisions of the different High Courts were brought to the notice of the Privy Council,[2] but the Judicial Committee left the question unresolved. When the problem came before the Supreme Court, their Lordships based their decision mainly on that given by the Judicial Committee in Rao Balwant Singh's case[3] regarding a father's power over his self-acquisitions. The Supreme Court held that since it was settled law that a Mitākṣarā father had absolute power of disposition over his self-acquired property, it would not be possible to hold that property bequeathed or gifted by him to a son must necessarily, and under all circumstances, rank as ancestral property in the hands of the son. 'The interest which the son takes in such property must depend upon the will of the grantor'.[4]

The Supreme Court put forward two further arguments as to why the property in question should not be considered to be presumed as ancestral. Firstly, the property which a son gets from his father by succession or partition is ancestral in his

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1. Amar Nath v. Guran Ditta Mal, P.R. (1918) 53.2, No.14, 75. Ram Singh v. Ram Nath, AIR 1932 Lah. 533; Kishan Chand v. Punjab Sindh Bank Ltd., AIR 1934 Lah. 534; Jagtar Singh v. Raghbir Singh, AIR 1932 Lah. 85, a case on customary law where Tek Chand J. wrongly observed obiter that there was a consensus of opinion that under Hindu law the property under discussion was not ancestral.

2. Lalram v. Deputy Commissioner of Partapgarh, AIR 1923 PC 160 = 50 IA 266.

3. (1898) 25 IA 54 (PC).

4. Arunachala v. Muruganatha, AIR 1953 SC 495 at 499. Muddan Gopal v. Rambaksh 6 WR 71 overruled. CP. Valliammal Achi v. Nagappa Chettiar, AIR 1967 SC 1153, where the property bequeathed was ancestral.

hands vis-a-vis his male issue, because he gets it as a 'son'. Secondly, in the case of a gift or bequest, the son receives the property not because he is a son but because his father chose to bestow a favour on him which he could have bestowed even on a stranger. In both these arguments, the Supreme Court gave importance to the mode of transmission of the property to the son. But it is perhaps not without significance that the Supreme Court did not say that on the basis of those arguments the presumption should be that the property under discussion would be self-acquired in the hands of the son. The Supreme Court ruled out any presumption one way or the other and gave paramount importance to the intention of the donor to determine the nature of the property in the hands of the son (donee or legatee).[1] The Supreme Court's decision on this point could have further support from the judgment of the Judicial Committee in Muhammad Husain Khan v. Babu Kishva Nandan Sahai.[2] This case confined the scope of the definition of ancestral property within the narrow limit of property 'descending' from any of the three paternal ancestors. From this judicial opinion, one can draw a conclusion that no property obtained other than by inheritance from any of the three paternal ancestors should be considered as ancestral property; hence, property obtained by gift or devise could be presumed to be separate property.[3] But we can

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1. Followed in Ram Parkash v. Radhe Shyam, AIR 1963 Punjab 338.

2. AIR 1937 PC 233 = 64 IA 205. The P.C. said that Colebrooke at Mita.I.v.5, rendered pitamaha as 'paternal grandfather'. Similarly, at Mita.I.i.27, also he intended 'belonging to the paternal grandfather', even though he rendered 'paitamahe' as 'ancestral'. Followed in Godavari Lakshminarasamma v. Rama, ILR (1950) Mad. 1084, which pointed out the mistake in Vekayyamma Garu v. Venkatarammanayyamma, (1902) 25 Mad. 678 (P.C.); For a discussion of these cases, infra, 852-61.

3. Raghavachariar, Hindu Law, (Madras, 1970), 280.

recall that the Supreme Court in Arunachala's case did not go in favour of any presumption and the question in each case, therefore, would depend on the intention of the father.[1]

The decision has two implications. Firstly, due to the levy of death duties, more and more gifts by the father of his separate property may be expected[2] to take place and in most cases, a father would like to treat such property to be enjoyed by his son as ancestral, and then would proceed to allot the same to his sons as in a partition. Secondly, a grandson could be deprived of his birthright in the self-acquired property of his paternal grandfather if he devised that property with a declaration of intention or by implication that such property should be enjoyed by his son as self-acquired, which by natural law of succession would have been ancestral in his hands vis-a-vis the grandson. Thus, the rule in Laksman Dada Naik v. Ramchandra[3] has been indirectly shaken.

When a coparcener voluntarily throws his separate property into the common stock with the unequivocal intention[4] of abandoning all separate claims

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1. Srinivasan, Hindu Law, (Allahabad, 1970), III, 2343. On the method of ascertaining the intention of the father, see S. Parthasarathi v. Commr. of Income Tax, AIR 1967 Mad. 227 at 228. A clear intention to waive separate rights must be established, Lakkireddi v. Lakkireddi, AIR 1963 SC 1601, followed in Selvaraj v. Radhakrishna, AIR 1976 Mad 156.

2. But see the present position, infra, 753, n.1.

3. 7 IA 181.

4. Mallesappa v. Desai Mallappa, AIR 1961 SC 1268; Gajendragadkar J. pointed out that the doctrine of blending had been judicially evolved and did not have any textual authority behind it, as wrongly thought by the P.C. that the doctrine evolved from Mitā.I.4.30 and 31, Shiba Prasad Singh v. Prayag Kumari Devi, 59 IA 331 = AIR 1932 PC.216. But Kane accepted the P.C. view that Mita on Yajñ.II.120 contained the doctrine of merger, (printing mistake in Kane, instead

/Continued on next page:

upon it such property acquires all the incidents of joint family property.[1] A father like any other coparcener can merge his self-acquisitions with the joint family property and may waive either by mere declaration or conduct[2] all his rights over it as separate property. The effect of such a merger is this, that the separate property of the coparcener loses its separate character and becomes part of the common stock.[3]

Note 4 - p.751 - Continued:

1.120, it should be II.120), HD, III, 576. On unequivocal intention, Cp. Lakki Reddy v. Lakki Reddy, AIR 1963 SC 1268 at 1271.

1. Derrett, IMHL, 336. Raghavachariar, Hindu Law, 6th edn., 275-8. Srinivasan, Hindu Law, 4th edn., III, 2364. Mulla, Hindu Law, 13th edn., 253.

2. Subramania v. Commr. of I.T., AIR 1955 Mad. 623 at 624; Sadasiva v. Rattin, AIR 1958 A.P. 145; C. Narayana Raju v. Chamaraju, AIR 1968 SC 1276 at 1280.

3. Mallesappa v. Mallappa, AIR 1961 SC 1268at 1271. The Estate Duty Act, 1953, (Act No.34 of 1953) As Amended up to 30th April, 1974, was drawn in such a way as to prevent a member of a Mitakṣara joint family from exercising his right of merging his self-acquired properties in the joint family estate shortly before his death, with the effect that at his death he owned absolutely nothing whatsoever, so that nothing passed by reason of his death, and no estate duty would be exigible out of his estate in the hands of his heirs. The statute took care to block this way of escape by the following provisions: (1) The coparcenary interest in the joint family property of a Hindu family governed by the Mitākṣarā law is assessable to duty, section 7(1); unless the coparcener was under 18, but his father or other male ascendant was a coparcener of the same family at the time of his death, section 7(2). (2) Property in which the deceased had an interest ceasing on the death of the deceased shall be deemed to pass on the deceased's death to the extent to which a benefit accrues or arises by the cesser of such interest, section 7(1); and the value of the benefit accruing or arising from the cesser of a coparcenary interest in any joint family property governed by the Mitākṣarā school of Hindu law which ceases on the death of a member thereof shall be the principal value of the share in the joint family property which would have been allotted to the deceased had there been a partition immediately before his death, Section 39(1). For a discussion and comment, see Derrett, 'Estate Duty and the Nature of a Mitakshara Coparcener's Interest', (1958) 60 Bom.L.R.J., 161-712.

Once the unequivocal intention is deduced from the conduct of the party or the declaration of blending is established, the problem would arise to determine whether such a merger is a 'gift' (transfer) or not under the relevant statutes [1] for the assessment of specified taxes. If such a blending is not a 'gift' or 'transfer', why is it not?

The question and its answer are very much integrated with the son's birthright in the sense that, being the separate property of the father, why should it not be a 'gift' or 'transfer' if the son has no birthright in the separate property of the father according to Rao Balwant Singh's case.[2]

1. Transfer of Property Act (IV of 1882) Chapter VII. When it was applicable, Income Tax Act, 1922, S.16(3)(a)(iv). Gift Tax Act, 1958, S.2 (xii):. '"gift" means the transfer by one person to another of any existing movable or immovable property made voluntarily and without consideration in money or money's worth, and (includes the transfer of any property deemed to be a gift under section 4"). The bracketed portion has been substituted by the Finance (No.2) Act, 1971, with effect from 1.4.1972 as follows: 'includes the transfer or conversion of any property referred to in section 4, deemed to be a gift under that section'. Gift Tax Act, 1958, S.2(xxiv) defines "transfer of property": "Transfer of property" means any disposition, conveyance, assignment, settlement, delivery, payment or other alienation of property and, without limiting the generality of the foregoing includes:- (a) the creation of a trust in property; (b) the grant of creation of any lease, mortgage, charge, easement, licence, power, partnership or interest in property; (c) the exercise of a power of appointment of property vested in any person, not the owner of the property, to determine its disposition in favour of any person other than the donee of the power; and (d) any transaction entered into by any person with intent thereby to diminish directly or indirectly the value of his own property and to increase the value of the property of any other person."

2. 25 IA 54.

The problem came for decision before the different High Courts, but there was a sharp cleavage of judicial opinion. Madras High Court consistently held that a father's blending of his separate property with the common stock did not amount to a transfer.[1] The view of a division bench of the Kerala High Court [2] conforms to the Madras opinion. On the other hand, in G.V. Krishna Rao v. First Additional Gift Tax Officer, Guntur, [3] the Andhra Pradesh High Court took a contrary view. Seshachalapati J. dissented from the judgment in Stremann's case, and opined: "We are of opinion that, in the process of converting the self-acquired property into joint family property, there is an element of transfer of rights to property. It also involves the diminution of the father's right and the conferment and enlargement of rights to others".

The controversy has been ultimately resolved by the Supreme Court in Goli Easwariah v. Commr. of Gift Tax, Andhra Pradesh.[4] The Supreme Court held that 'the declaration by which the assessee has impressed the character of joint Hindu family property on the self-acquired properties owned by him did not amount to a transfer so as to attract the provisions of the Act'.[5]

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1. M.K. Stremann v. Commr. of I.T., Madras, AIR 1962 Madras 26, contrary view in Keshavlal v. Commr. of I.T., AIR 1962 Guj. 6, both these cases went to the Supreme Court, but the S.C. did not settle the point. Also Gift Tax Commr. v. P. Rangasami, AIR 1970 Mad.441 (FB). Same view in Bombay, Kisan v. Vishnu, AIR 1951 Bom 4.

2. P.K. Subramania Iyer v. Commr. of Gift Tax, AIR 1968 Ker. 190.

3. G.V. Krishna Rao v. First Additional Gift Tax Officer, Guntur, AIR 1970 A.P.126; reaffirmed an earlier decision, Commr. of Gift Tax, A.P . v. Satyanarayana Murthi, AIR 1965 A.P. 95.

4. (1970) 1 SCWR 841 = AIR 1970 SC 1722.

5. Ibid. at 847. For the provisions of the relevant Acts, see supra, p.753,n.1.

The decision of the Supreme Court [1] indirectly throws light on the point that even in self-acquired property of the father, the birthright as a concept is very much alive. The credit goes to the full bench of the Madras High Court [2] to point out the real reason as to why the merger by a father of his self-acquisitions into the common stock would not amount to a 'transfer'. Natesan J. remarked on the observation of the Supreme Court [3] on the point:

> the reference to special right and waiver of the same with reference to property acquired by an individual and held by him as his separate property, has to be related to the vestige of interest which the son has in the property acquired by his father, the birthright of the son which Hindu law recognised even in the separate property of the father. 4

We have pointed out that the Judicial Committtee [5] and the Supreme Court [6] held that the father had absolute power to alienate his self-acquisitions unilaterally. Despite this decision, the Supreme Court was aware that once a father decided even at his own volition to make a partition of his self-

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1. Goli Easwariah v. Commr. of Gift Tax, Andhra Pradesh, AIR 1970 SC 1722.

2. Commr. of Gift Tax, Madras v. Rangasami, AIR 1970 Mad. 441 (F.B.).

3. Narayanaraju v. Chamaraju, AIR 1968 SC 1276 at 1280.

4. Commr. of Gift Tax, Madras v. P. Rangasami, AIR 1970 Mad. 441 (F.B.) at 450. The point that a son has birthright in every kind of property was also made in Godavari Lakshminarasamma v. Rama, AIR 1950 Mad. 680 at 687 = ILR (1950) Mad. 1084.

5. Rao Balwant Singh v. Rani Kishori (1898) 25 IA 54 (PC).

6. Arunachala v. Muruganatha, AIR 1953 SC 495.

acquisitions, the birthright of a son would immediately become fully effective.[1] Juridically, a son's birthright in his father's self-acquired property has been preferred to be accepted as a 'dormant' right, nevertheless it is real,[2] and 'certainly not notional'.[3] This birthright, even though we accept it as 'dormant', enables a father at his pleasure without formalities to deny himself his independent power or predominant interest and look upon the property as the property of the family.[4] In Goli's case,[5] the Supreme Court put emphasis on the law of Contract and held that since blending was a unilateral act, there was no question of a 'transfer'. At the same time, the Supreme Court did not fail to point out that blending was a doctrine peculiar to the Mitākṣarā school of Hindu law.[6]

It is apparent that by blending there is a change in the mode of enjoyment of property and since the son's birthright is existent in the separate property of the father, there is no change of ownership.[7] Blending is the manifestation

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1. AIR 1953 SC 495 at 499.

2. Mayne, Hindu Law, 11th edn., 336.

3. Per Rajamannar C.J. in Godavari Lakshminarasamma v. Rama, AIR 1950 Mad. 680 at 687.

4. G.T. Commr. v. Rangasami, AIR 1970 Mad. 441 at 451.

5. AIR 1970 SC 1722 = (1970) 1 SCWR 841. Pushpa Devi v. Commr. of I.T., New Delhi, (1977), 4 SCC 184 throws light and to be distinguished.

6. (1970) 1 SCWR 841 at 844. Also pointed out by Derrett, 'Estate Duty and the Nature of a Mitakshara Coparcener's Interest', (1958) Bom.L.R.J., 161-172 at 161.

7. Vallabhdas Mohta, 'Does Throwing Separate Property into Common Hotchpot of H.U.F. amount to "Transfer"', AIR 1969 J. 27-8.

of a subjective phenomenon, a particular state of mind on the reverse way of severance of status [1] as before an actual partition.[2]

Bypassing the judicial opinions on the point, Seturaman opines [3] that since a father has not absolute power over his self-acquired immovables, there is no need to invoke any doctrine of blending in such property. Secondly, he tries to make a point that in self-acquired movables, there is no need of blending, because the father can deal with such property at his pleasure. Seturaman is technically right with regard to his opinion on the incidents of a father's self-acquired immovables, but he fails to comprehend that a son's birthright is all-pervading in every category of property in the hands of the father, though its mode of enjoyment may differ according to the circumstances and legal capacities of the co-owners. It can be said that a son's birthright in the self-

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1. Rajanikanta v. Jagamohan, AIR 1923 PC 57; Puttrangamma v. Ranganna, AIR 1968 SC 1018 at 1021.

2. Cp. reunion, see Derrett, 'Reunion in the Hindu Family and an Unexpected dictum from Orissa', (1973) 75 Bom. L.R.J., 15-16.

3. V. Seturaman, 'Theory of Blending and an Empty H.U.F. Hotchpot', AIR 1971 J., 68-73 at 71. It is submitted that the author's exploration of the texts is amateurish and the legends of the Vedic period (Tai.Saṃ.III. 1.9.4 and Ait.Br. 33.5) could be interpreted either way as indicating a father's absolute power or not; discussed ante, pp. 372-9. His contention that Vijñāneśvara was the inventor of the division of dāya into apratibandha and sapratibandha is also not correct. Asahāya's definition of dāya was similar to that of Vijñāneśvara's; see Sarasvatī-vilāsa, ed., Foulkes(London, 1881), 5, also Derrett, JIH, Vol30 (1952), 46,n.35. On the division of dāya into two types, Vijñāneśvara might have improved on Bharucī's, see Sarasvatī-vilāsa, 403; on this also see, I.S. Pawate, Dāya-Vibhāga, (Dharwar, 1975), 69. But Seturaman arrived at the correct conclusion on the incident of self-acquired immovable property (ibid., at 71) of a father because he directly went to the smṛti (e.g. Nārada, Dh.K.1219b), although he could find the same implication at Mitā.I.i.27.

acquisitions of his father is subordinate to his special power of independence and manifests itself in real perspective, and a right which was seemingly dormant springs to life, at the volition of the father when he determines to merge his self-acquisitions with the common stock.

The undoubted right of a father to merge his self-acquired properties in the joint family estate and, because of a son's birthright in his father's self-acquisitions, the courts' decision to hold such mergers or blendings as no 'gift' or 'transfer' [1] were matters of great concern from the point of view of revenue. In this respect, the shield of the Mitākṣarā birthright to prevent the State from realising taxes, indeed, showed an imbalance between the tax laws and the family law of the Hindus. This imbalance provoked legislative intervention and, appropriately, the Parliament incorporated a new provision in the Gift Tax Act: [2]

> Where, in the case of an individual being a member of a Hindu undivided family, any property having been the separate property of the individual has been converted by the individual into property belonging to the family through the act of impressing such separate property with the character of property belonging to the family or throwing it into the common stock of the family (such

1. Gift Tax Act, 1958, S.2 (xii), (xxiv).

2. Gift Tax Act, 1958, S.4(2), inserted by the Finance (No.2) Act, 1971, with effect from 1.4.1972.

> property being hereafter in this sub-section referred to as the converted property), then, notwithstanding anything contained in any other provision of this Act or any other law for the time being in force, for the purpose of computation of the taxable gifts made by the individual, the individual shall be deemed to have made a gift of so much of the converted property as the members of the Hindu undivided family other than such individual would be entitled to, if a partition of the converted property had taken place immediately after such conversion.

Since the insertion of this sub-section s.4(2) the Revenue authorities may feel safe but, for our purpose, the relevant cases discussed in this section judicially establish that a son has birthright in the separate property of his father.[1]

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1. See our view on the texts of the Mitākṣarā, I.i.27; I.v.9-10, supra, 517-28.

CHAPTER 18.

DIFFERENT KINDS OF SONS AND THE BIRTHRIGHT

1. Introduction

In our study of a son's right by birth we have mainly concentrated on the rights of the legitimate (aurasa)[1] son in respect of family property in the hands of the father. But the dharmaśāstras generally mention twelve kinds of son.[2] Out of these twelve, six are kinsmen and heirs,[3] and the rest are kinsmen but not heirs.[4]

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1. aurasa literally issue of the breast, (uras), Mitā.I.xi.2 is a son procreated by a man himself from his married wife, Kaṇe, HD, III, 655. By mediaeval times, the aurasa was defined as the son procreated on a wife of the same caste as the father: Derrett, 'Inheritance, by, from and through illegitimates at Hindu Law', Bom. L.R.J., Vol.57 (1955), 6. An illegitimate son has no birthright, Hanmanta v. Dhondavvabai, (1976), 78 Bom. L.R.675.

2. Gautama dh.sū.XXVIII, 31-33, Dh.K.1263. Baudh.II.2.3.31-33, SBE, XIV, 228-9; Dh.K.1270; Vasiṣṭha, VII, 25, 38; Dh.K.1272. Manu, IX. 158, Dh.K. 1319; Devala, Dh.K.1350; Yājñ.II. 129-33, Mitā.I.xi.1; Bṛ. XXV, 33, SBE, XXXIII, 375. For enumeration, see Kaṇe, HD, III, 645-62. Derrett, ibid., 6-7.

3. Manu, IX. 158-9.

4. Manu, IX, 158, 160.

II. Birthright and the illegitimate son

a. Rights of an illegitimate son

The śāstra meant those twelve types to be recognised in the case of twice born (dvija) castes, but in the case of śūdras an additional kind, namely the dāsīputra,[1] had been acknowledged by the sages. The dāsīputra is a son procreated by a śūdra through a female (dāsī) [2] of the sūdra caste, purchased or obtained otherwise and kept continuously and exclusively by the procreator.[3]

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1. Manu, IX. 179; Dh.K.1310. Yājñ.II. 133, 134; Dh.K.1338. Judicially observed, Rathinasabapathi v. Gopala, AIR 1929 Mad. 544 at 546. Concept recognizable in the Brāhmaṇa literature, Ai.Br. 8.1. Śat.Br.XII.3, Kāṇe, HD, III, 600, n.1133.

2. The word dāsī is not to be taken in the literal sense of a 'female slave', Rajani v. Nitai, (1921), 48 Cal.643.

3. Raghavachariar, Hindu Law, 6th ed., 433. A son of a śūdra through a twice born woman could not inherit, Ramachandra v. Hanamnaik, (1936), 37 Bom.L.R. 920, followed in Mahabir Prasad v. Raj Bahadur Singh, (1942) 18 Lucknow 585. For a discussion, see Derrett, 'The rights of an illegitimate son of a Sudra by a woman of a twice born caste', M.L.J., June, 1959, II, 19-21 at 21. Recently, the Calcutta High Court dissented from the Bombay decision in Ramachandra v, Hanamnaik, 37 Bom.L.R. 920, and held, relying on Amireddi v. Amireddi, AIR 1965 SC 1970, that an illegitimate son of a Śūdra by a brahmin concubine has the status of a son and, according to Dāyabhāga School of Hindu Law, is entitled to a half of the share of a legitimate son, Mongal Chandra v. Dhirendra Nath, AIR 1976 Cal.129. The Calcutta decision shows judicial progressiveness. The illegitimate son through a Śūdra female of a twice born man could not inherit from his putative father, but see the wrong decisions in Natha v. Mehta, (1931) 55 Bom.1 , following Bai Gulab v. Jiwanlal, (1921) 46 Bom 871, ignoring the contrary view in Bai Kashi v. Jamnadas, (1912), 14 Bom.L.R. 547, where Chandavarkar J. held that a marriage between a twice born female and a śūdra male was invalid, at 552.

From the mention of these different categories of sons in the śāstra, a question naturally arises concerning their rights in the property of the family.[1] As we have already noticed in the texts of Manu,[2] only dāyādas [3] could inherit from their father;[4] the others were merely gotrabhājaḥ.[5] These rules exclude six kinds of sons from inheritance, but Manu also ordains [6] that the legitimate son of the body 'is alone the owner of the paternal estate; but in order to avoid unkindness,[7] he shall provide subsistence for the rest'.[8] But this text

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1. On classifications of sons and their rights conferred by different smṛtis, see Kāṇe, HD, III, 650-2.

2. Manu, IX. 158, 159, 160, supra, 760, n. 3, 4.

3. In Patañjali's Bhāṣya (600 B.C.) on Pāṇini, II.iii.9, it is stated that the word dāyāda (heir) is a synonym of the word svāmī (owner). That Pāṇini (800 B.C.) regarded these two words as synonymous is very significant from the Mitākṣarā point of view of acquisition of ownership. On this, see I.S. Pawate, Daya-Vibhāga, (Dharwar, 1975), 342, n.45. Nandapaṇḍita clearly explains that all the dāyādas get property by birth: dāyādānāṃ janmanaiva svatvābhy upagamāt, Vaijayantī on Viṣṇu, V.179.151; also see Pawate, ibid., 208, m n.5.

4. Gautama calls them rikthabhājaḥ, Gautama, XXVIII, 30-31; Dh.K.1263.

5. Baudh. dh.sū.II.2.36-7; Dh.K.1270-1. Medhātithi explains Manu, IX.158; gotra harā dāya harāś ca ṣaṭ, itare viparītāḥ / Jhā, Manu-smṛti, (Calcutta), 1939), II. 291.

6. Manu, IX. 163. eka evaurasaḥ putraḥ pitrasya vasunaḥ prabhuḥ / śeṣāṇām ānṛśaṃsyārthaṃ pradadyāttu prajīvanam // Also Bṛ.XXV.35, SBE, XXXIII, 375.

7. In place of 'in order to avoid unkindness', Colebrooke renders: 'for the sake of innocence', Mitā.I.xi.28. Bühler renders: 'in order to avoid harshness', SBE, XXV, 360. ānṛśaṃsam is the highest dharma, tells the Mahābhārata, III. 297.55, on this see Derrett, Critique, 51. Medhātithi took it in the sense of dharma when he said, 'avoidance of unkindness' meant 'avoidance of sin', Jhā, Manu-smṛti, V, 148; similar was the view of Kullūka, SBE, XXV, 360, n.163.

8. Tr. Jhā.Manu-smṛti, (Calcutta, 1928), V, 147-8.

should not be taken to be denoting a rigid rule,[1] in order to exclude all other kinds of sons from inheritance excepting the legitimates, because the rule seems to be modified by subsequent texts.[2]

It is established that among the twice born castes, only the *aurasa* and the *dattaka* sons are entitled to inheritance,[3] but exactly at what period of Hindu legal history these two types excluded the others is an 'extremely difficult matter'[4] to substantiate.[5]

Aparārka's comment[6] on Yājñavalkya, (II.132) on the strength of Śaunaka's text,[7] indicates that in the *kaliyuga* (literally iron age, i.e. the

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1. Mitā.I.xi.28.

2. Manu, IX, 164, ordained one-fifth or one-sixth of the father's estate to the *kṣetraja* (soil born) son and in IX.165, put the *aurasa* and the *kṣetraja* on equal footing. Medhātithi explained that the text *should* not be *taken literally* and upheld the superiority of the *aurasa*, Jhā, *Manu-smṛti*, V, 148-9.

3. Kāṇe, HD , III, 599. Derrett, Bom. L.R.J. 57 (1955), 8.

4. Derrett, ibid., 7.

5. As for example, the *kṣetraja* (soil born, i.e. a son begotten on a man's wife (or widow) by an agnatic kinsman still survives in popular usage, see A.C. Mayer, Caste and Kinship in Central India, (London, 1960), 25. But the better view is that the *kṣetraja*, too, was obsolete in the current age (*kali-varjya*), Derrett, 'Illegitimates: A Test for Modern Hindu Family Law', *JAOS 81 (1961)* 3: 251-61 at 259. On *kṣetraja*, also see Kāṇe, HD, III, 647, 659.

6. putra pratinidhinām madhye dattaka eva kalau yuge grāhyaḥ / ata eva kalau nivartanta ity anuvṛttau śaunakenoktam, *Yājñavalkya-smṛti*, Anandaśrama Sanskrit Series, 46, Pt.II, (1904), II, 739; Dh.K.1371.

7. dattaurasetareṣām tu putratvena parigrahaḥ / Śaunaka, ibid, 739; Dh.K.1371. Cf. Parāśara : aurasaḥ kṣetrajaś caiva dattaḥ kṛtrimakaḥ sutaḥ / which in the *kali* age recognises *kṣetraja*, *dattaka* and *kṛtrima*, besides the *aurasa*, Dh.K.1352.

present age of mankind) only two kinds of sons, namely the aurasas and the dattakas, are admissible.[1] The retention of sonship only of these two types was probably well-established by the 14th century.[2] So, since the obsolescence of the other types of son in the kaliyuga besides the aurasa and the dattaka (adopted son; whose rights we shall examine later), all other kinds of sons, for the purposes of inheritance, are considered as illegitimates.

b. Rights of a Śūdra's dāsīputra

In Anglo-Hindu Law, the illegitimate sons of three regenerate classes are not entitled to inheritance or to any share in a partition between the father and his aurasa sons;[3] such illegitimates are only entitled to maintenance.[4] As a general

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1. Derrett, Bom. L.R.J. 57 (1955), 7. In this respect, we should note the text of Bṛhaspati, XXVI.69, Aiyangar, ed., 207. anekadhā kṛtāḥ putrā ṛṣibhiś ca purātanaiḥ / na śakyante'dhunā kartuṃ śakti hīnaiś cirantanaiḥ // 'sons of many descriptions who were made by ancient saints cannot now be adopted by men, by reason of their deficiency of power', tr. Jogendra Smārta Śiromaṇi, Commentary on the Hindu Law, (Calcutta, 1885), 112. Lingat observes that the obsolescence of secondary sons was due to a refinement of the moral sense, rather than to a gradual worsening of the Ages, CLI, 194.

2. Derrett, ibid., 7.

3. K. Thirumalaiyappa v. K.Sanmuganatha, (1969) 3 Mad.296.

4. Chuoturya Run v. Sahub Purhulad, (1857) 7 MIA 18; Muttuswamy v. Vencataswara, (1868) 12 MIA 203; Rahi v. Gobind, (1875) 1 Bom.97; Kuppa v. Singaravelu, (1885) 8 Mad.325; Harisingji v. Ajitsingji, (1949) 51 Bom.L.R.770. See Medhātithi on Manu, IX.143, Jha, Manu-smṛti, (Calcutta, 1926), V, 128-9. The HAMA 1956, s.20(1) and (2) guarantee the right of maintenance of illegitimates and this right of a Hindu illegitimate minor cannot be defeated even though the putative father is not a Hindu, K.M. Adam v. Gopalakrishnan, AIR 1974 Mad.232.

rule, this is also applicable to the Śūdras but an exception has been made in the case of Śūdras' dāsīputras, whose rights are the subject-matter of our present discussion.

The Śūdra's dāsīputra's rights are not innovations of Anglo-Hindu Law. His rights have been ordained by Manu,[1] and Yājñavalkya,[2] and the commentators have given full force to the texts of the sages.[3] Of all the commentators, Kamalākara Bhaṭṭa's treatment of the rights of the illegitimates in general is the most exhaustive. His comments on the texts concerning the rights of the dāsīputra run as follows:[4]

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1. Manu, IX. 179, Dh.K. 1310.

2. Yājñ.II. 133-4, Dh.K.1338.

3. Medhātithi on Manu, IX. 179, Jhā, II, 297; tr. V, 158. Mitā.I.xii.2. Dā.bhā. IX. 29-31.

4. The text is quoted by Derrett, Bom. L.R.J., 58 (1956), 179 from Vivāda-tāṇḍava, (Baroda, 1901), 379: śūdrasyānūḍa śūdrāputre sa eva / dāsyaṃ vā dāsa dāsyāṃ vā yaḥ śūdrasya suto bhavet / so'nujñāto hared aṃśam iti dharmo vyavasthitaḥ // Manu, IX. 179. pitur abhāve'rdha haraḥ / jāto'pi dāsyāṃ śūdreṇa kāmatoṃśa-haro bhavet / mṛte pitari kuryus taṃ bhrātaras tv ardha bhāginam // Yājñ.II. 133. anūḍā-jo bhrātṛ dauhitrābhāve sarvaṃ gṛhṇīyāt dauhitre saty ardham / abhrātṛko haret sarvaṃ duhitāṇām sutād-ṛte iti yājña-valkyokteḥ / [Yājñ. II. 134.]

> The same author [1] deals with the situation of the son of an unmarried Śūdra woman by a Śūdra father: 'That son of a Śūdra father who is begotten on a female slave or the female slave of his male slave may take a share as permitted by his father; thus the religious law is settled'. 2. But in the absence of his father he may take a half. 'Born of a female slave to a Śūdra father he may take a share as befits a slave; after his father's death the brothers must make him a sharer to the extent of a half-share'. 3 He who is born of an unmarried woman may take the entire estate in the absence of brothers and daughters' sons, but if a daughter's son exists, he may take only a half. For Yājñavalkya says, 'If he has no brothers he may take all, save for the sons of daughters'. 4

The texts envisage two situations when property could possibly pass to the dāsīputra: (i) before the decease of the father and, (ii) after the decease of the father.

A Śūdra, by a father's right to bring about a division of family property between himself and his sons, may give the dāsīputra a share [5] of his self-acquired property and of his divided share of his joint family property.[6] There are more liberal judicial opinions which empower a śūdra father to give away,

1. Referring to Manu.
2. Manu, IX. 179.
3. Yājñ.II.133.
4. Yājñ.II.134. Tr. Derrett, Bom. L.R.J. 58 (1956), 182.
5. Sir Richard Couch in Raja Jogendra v. Nityanund, (1890) 17 IA 128 at 132.
6. Parvathi v. Thirumalai, (1887) 10 Mad. 334 at 344. See Derrett, Bom. L.R.J. 57 (1955), 15.

if he may so choose, his entire self-acquired property to the *dāsīputra*.[1] The same court held that a *śūdra* had power to give a share of the undivided joint family property[2] to the *dāsīputra* before the property has been actually divided with his legitimate sons by metes and bounds even though a legitimate son had earlier conveyed the intention of severance of joint status.[3] On the purport of the *smṛti* texts, Srinivasan J. observed, 'the text cannot, therefore, be construed as referring to self-acquired property. It applies, in our opinion, to joint family property'.[4] In this respect, it cannot be denied that the texts and the commentaries[5] do not restrict the father's power to any particular category of property and the correctness of the decision in *Karuppannan's case* has never been disputed. It is true that a liberal interpretation of the father's power might cause attrition of the birthright of *aurasa* sons, but at the same time,

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1. *K. Thirumalaiyappa v. K. Sanmuganatha*, (1969) 3 Mad.296 at 318, based on the wrong interpretation of the *Mitākṣarā* in *Rao Balwant Singh v. Rani Kishori* (1898) 25 IA 54, notwithstanding the admission by the Court that according to strict *Mitākṣarā* law, the right by birth is recognised both in self-acquired property as well as joint family property, at 318.

2. Following *Karupannan Chetti v. Bhulokam Chetti*, (1899) 23 Mad.16 at 18. Contrary opinion in *Parvathi v. Thirumalai*, (1887) 10 Mad. 334 at 344, was ignored in *Karupannan's case*, though referred to in the judgment of the District Munsiff.

3. Same view expressed in *Deivanai Achi v. Chidambaram*, (1955) 1 MLJ 120 = AIR 1954 Mad. 657, criticised by Derrett, *Critique*, § 215.

4. *K. Thirumalaiyappa v. K. Sanmuganatha*, (1969) 3 Mad. 296, 318.

5. Medhātithi on Manu, IX. 179. Mitā. I.xii.2.

liberal judicial opinion would serve as a vehicle for social justice where the father's act is not vitiated by any motive other than making reasonable provision for the illegitimate son.

If the father during his lifetime, does not give any share to the dāsīputra, after the decease of the father he becomes a coparcener with his aurasa brothers and can enjoy the privilege of survivorship with them.[1] The dāsīputra has the right to demand a partition from his aurasa brothers,[2] and can oblige them to give him a share equal to a half of a legitimate[3] son's share. When no aurasa son exists and the dāsīputra competes with his father's widow or daughter or daughter's son, his entitlement is half of the estate.[4]

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1. Sadu v. Baiza, (1879) 4 Bom 37 F.B., relied upon in Jogendra v. Nityanund, (1885) 11 Cal.72, affirmed by P.C. in Jogendra v. Nityanund, (1891) 17 IA 128; Dorai Babu v. Gopalakrishna, AIR 1960 Mad. 501, 503; Singhai Ajit Kumar v. Ujayar Singh, AIR 1961 SC 1334, 1337.

2. Raju Tambiran v. Arunagiri, AIR 1933 Mad. 397; Shamrao v. Mt. Munnabai, AIR 1949 Nag. 43.

3. The Privy Council, in this respect, held that a dāsīputra's share would be half the share 'that which he would have taken had he been legitimate', Kamulammal v. Visvanathaswami, (1923) 50 IA 32. The most natural interpretation of ardha bhāgika, (Yājñ. II. 133) should be half a share of aurasa, see I.S. Pawate, Daya-Vibhaga, (Dharwar, 1975), 155. But the Privy Council, not understanding the Indian background, held that the dāsīputra's half is the half of what he would have have had as a legitimate son. The Supreme Court might have overruled this, but the S.C. incautiously followed the P.C. in Gur Narain Das v. Gur Tahal (1952), SCR 869 at 875. Note that Derrett's statement at IMHL, § 526 as correct: so S.C. in Gur Narain and Derrett, at Critique, §§ 311-2 wrong.

4. Kamulammal v. Visvanathaswami, (1923), 50 IA 32; Bhagwantrao v. Punjaram, AIR 1938 Nag.1; also Singhai Ajit Kumar v. Ujayar Singh, AIR 1961 SC 1334, 1337.

From commentatorial and judicial authority, it is settled that the share which a dāsīputra gets either from his father or from others after his putative father's decease has nothing to do with the concept of birthright.[1] He is not an apratibandha dāyāda with his father or father's collaterals.[2] Regarding the nature of rights of a dāsīputra, Sir Richard Couch observed, 'it cannot be said that at his birth he acquires any right to share in the estate in the same way as a legitimate son would do.'[3] Consequently, a dāsīputra, unlike his aurasa brothers, could not demand a partition from his putative father.[4] In other words, the smṛti texts conveying Śūdra's dāsīputra's rights are exceptions and are to be construed as such and not enlarged.

Judicial opinions have repeatedly emphasised that there is a fundamental difference between the right of an aurasa and that of a dāsīputra. In Krishnayyan v. Muttuswami[5] the dāsīputras were denied the right to take the

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1. Raghavachariar, Hindu Law, 6th ed., 349. Gur Narain Das v. Gur Tahal, AIR 1952 SC 225.

2. Krishnayyan v. Muttuswami, (1884) 7 Mad. 407; Ranoji v. Kandoji, (1885) 8 Mad 557. These two decision were attacked by Venkatarama Sastri who incorrectly contended in Rathinasabapathi v. Gopala, AIR 1929 Mad.545 at 546, that dāsīputras were apratibandha dayadas, but Devadoss J. rightly rejected the contention, at 549.

3. Jogendra v. Nityanund, (1890) 17 IA 128 at 132; same view in Rathinasabapathi v. Gopala, AIR 1929 Mad. 545; R. Dorai Babu Chetti v. T. Gopalakrishna Chetty, AIR 1960 Mad. 501 at 503; Thirumalaiyappa v. Shanmuganatha, (1969) 3 Mad. 296 at 297.

4. Dorai Babu, AIR 1960 Mad. 501; Gur Narain v. Gur Tahal, AIR 1952 SC 225. Singhai Ajit Kumar v. Ujayar, AIR 1961 SC 1334.

5. (1884) 7 Mad. 407.

interest of their father's brither in competition with the widows of the latter, which indicated that because of the non-existence of his birthright, a *dāsīputra* would never form a coparcenary with his putative father's collaterals. The birthright of an *aurasa* and the special rights of a *dāsīputra* have been clearly distinguished in *Parvathi v. Thirumalai*, [1] where Collins, C.J., and Muttusami Ayyar, J. remarked:

> the kinship of an "Aurasa" extends to the entire joint Hindu family, whereas that of an illegitimate son is confined to his father and mother and their branch of a joint family; the former has a concurrent and co-ordinate right in ancestral property from the time of his birth with his father and father's coparceners, whereas the latter can only take a share at his father's pleasure, and the father cannot (*sic*), before partition, give coparcenary property of his own authority and otherwise than with the consent of his coparceners. 2

c. Conclusion

Therefore, it can be said that the right of a *dāsīputra* as ordained by the sages is truly a concession of a personal nature, and despite the incorrect

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1. (1887) 10 Mad. 334 at 344: the *dāsīputra* was in competition with his father's coparceners and widow. Also *Gopalasami Chetti v. Arunachalam Chetti*, (1904) 27 Mad. 32, where the putative father of a *dāsīputra* left no separate property and his claim in competition with his putative father's father and uncle was denied.

2. (1887) 10 Mad. 334 at 344. Cp. *K. Thirumalaiayyappa v. K. Shanmuganatha*, (1969) 3 Mad. 296, supra, 767 and n. 1 thereto.

decision in Ramalinga Muppan v. Pavadai Goundan,[1] where the Madras High Court allowed the dāsīputra to represent his father in the succession to his grandfather, the śāstras nowhere make any suggestion that the dāsīputra is entitled to inherit from his father's relations. Nevertheless, we cannot accept the rule laid down by the Madras High Court in Dorai Babu v. Gopalakrishna,[2] that he has no right to demand at law any share in the family property unless his legitimate brothers are already separate from ascendants and collaterals.[3] On this judicial conservatism and shortsightedness, Derrett rightly observes: 'This is an irrational handicap for one who is already handicapped through no fault of his own, and it is to be condemned under principle III.2(5).'[4]

A Śūdra's dāsīputra has the status of a son under the Hindu law, and he is a member of the family. But his rights are limited as compared to those of a son born in wedlock.[5] The shares which a dāsīputra gets emerge more

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1. (1901) 25 Mad. 519, criticised by Derrett, JAOS 81 (1961) 3: 255-6. Cp. Govindarajulu v. Balu Ammal, AIR 1952 Mad. 1: (1951) 2 MLJ 209, where under similar circumstances, the dāsīputra was denied to represent his putative father, but not for the special text but on incorrect reasoning that a dāsīputra could not provide spiritual benefit. See Medhātithi on Manu, IX.143, Jhā, V, 128. Also Derrett, Bom. L.R.J., 57 (1955), 19.

2. AIR 1960 Mad. 501.

3. AIR 1960 Mad. 501, 503.

4. Derrett, Critique, § 215. Principle III. 2(5): '... exploitation and oppression must be restrained, rather than facilitated - and it must be remembered that one can exploit a person by negative as well as by positive acts', Critique, 44.

5. Singhai Ajit Kumar v. Ujayar, AIR 1961 SC 1334, 1337.

from his special connection with his father than from any innate right in the property of his male ancestors:

> In fact, the special text of Yājña-valkya dealing with the rights of the illegitimate son of a Śūdra clearly shows that such son does not acquire at his birth any right in his putative father's property, as he can take a share only by his father's choice. 1

1. Per Justice Patanjali Sastri in Thangavelu v. Court of Wards, (1947) Mad. 334, 339; Dorai Babu v. Gopalakrishna, AIR 1960 Mad. 501, 503; Singhai Ajit Kumar v. Ujayar, AIR 1961 SC 1334, 1337. But the author of the Bālambhaṭṭī went so far as to say that the gṛhajāta slave of a Śūdra (i.e. a dāsīputra) got his rights as heir by birth. Bālaṃbhaṭṭa refers to the word haret in Yājñ. II. 134, and says: hared ity anena janmanā putravat tasyāpi (i.e. dāsīputrasyāpi) janmanā svatvaṃ sūcitam, Bālaṃbhaṭṭī, Vyavahāra Adhyāya, (Bombay, 1914), J.R. Ghārpure, ed., 182; Setlur, ed., 517-8; modification by I.S. Pawate, Daya-Vibhāga, (Dharwar, 1975), 156, n.10. On this point, Bālaṃbhaṭṭa's opinion does not seem to be based on any śāstric or commentatorial authority unless he relied on Vijñāneśvara's general theory that all heirs get property by birth, see Pawate, ibid., 207. It needs to be mentioned that Bālaṃbhaṭṭa took a liberal view on slave's heirship in general. He says that the right of a slave to be an heir to his master is based, as all heirship is based on pratyāsatti ('immediate proximity' or 'close contact') between the slave and his master, and that this pratyāsatti between the slave and the master is of a higher and closer kind than the pratyāsatti between the father and the son: kiṃ ca putratvādi-pratyāsattya-pekṣayā dāsatva-pratyāsattir uttamottamā, Bālaṃbhaṭṭī, Vyavahāra Adhyāya, Ghārpure, ed., 185. Cp. Manu, VIII, 416. But Bālaṃbhaṭṭa does not mean to say that the slave becomes before the legitimate son to take the heritage. However, he says that in the case of a Śūdra father, the gṛhajāta slave or dāsīputra is only little less than a legitimate son and higher than a dattaka son: ādyadāsasya aurasa-kalpatvaṃ pariṇayanābhāvāt. anyeṣām dattaka-kalpatvaṃ, tatra mantra-homayor abhāvāt, Bālaṃbhaṭṭī, Vyavahāra Adhāya, Ghārpure, ed., 187; for a discussion, Pawate, ibid., 155.

In this context, an additional comment, which is not relevant to our present discussion, nevertheless not inappropriate to the general design of our study, should be made on the plight of illegitimates in the Hindu Succession Act. The HSA within the framework of a progressive legislation, has taken a retrograde step [1] by abolishing the special rights of the dāsīputra by equating him with other illegitimates.[2] So far as succession is concerned, the dāsīputra's right as illegitimate has been abolished by HSA,[3] but his right in Hindu joint family

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1. It should be noted that the HMA, s.5, by abolishing the caste distinction of marriage partners, made legitimate the offspring of inter-caste marriages who would have been illegitimates in Anglo-Hindu Law. But the HSA is harsh on the illegitimates in general. The tendency in enlightened society is to remove the distinction between legitimates and illegitimates, see Derrett, JAOS 81 (1961) 3: 252 and n.4 thereto. In Britain, by S.14 of Family Law Reform Act, 1969, the illegitimate children and their parents are entitled to succeed to each other; for details, see P.M. Bromley, Family Law, (London, 1971), 507. In a comparative context, also see Herma Hill Kay, 'The Family and Kinship System of Illegitimate Children in California', American Anthropologist, 67 (1965) 6, Part 2, 57-81 at 75-76. On illegitimate children (they prefer the expression: 'children born to unmarried mothers') in USSR, see I. Lapenna, 'The Illegitimate Child in Soviet Law', I.C.L.Q. 25 (1976) 1: 156-80 at 169. 'Children born out of wedlock" - this euphemism is preferred in Sweden as well, J.W.F. Sundberg, 'Recent Changes in Swedish Family Law: Experiment Repeated', Am.J.Comp.L. 23 (1975) 1: 34-49 at 36. These terminological changes show societies' increasing change in attitude towards illegitimacy. Another example of this is the new Civil Code, 1978 in Portugal, The Times, June 9, 1978, p.
2. HSA, S.3(1)(j).
3. Derrett, Critique, §310.

property still subsists and in that respect, the texts of Manu (IX. 179) and Yājñavalkya (II.133) and the judicial decisions upholding these texts are in full force.[1] A father can still give the dāsīputra a share and the existence of that right adds nothing but anomaly[2] to the many existing anomalies of the law regarding the Hindu joint family which could not be remedied by piece-meal legislation such as the HSA.

II. The adopted son and the Mitākṣarā birthright

a. Introduction

Unlike a śūdra's dāsīputra, an adopted son[3] (dattaka) was more or

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1. It is submitted that to uphold the equality clauses in the Constitution, all illegitimates should be treated alike. But in an egalitarian society, this cannot be achieved by taking away the existing rights (as has been done in the HSA, S.3(1)(j)), but by taking a more liberal and progressive attitude towards the illegitimates, see Derrett, §§ 215, 310.

2. In this context, the hypothetical problems in the law of Hindu joint family and succession have been illustrated by Derrett, and there is every possibility that these hypothetical situations would come for determination before the judiciary as real problems, Derrett, Critique, §§ 311-13.

3. The institution of adoption was not encouraged in the Ṛg-veda, see Kāṇe, HD, III, 641, 657, but the Brāhmaṇa literature has specific references of adoption, e.g. Śunaḥśepa's adoption by Viśvāmitra, Ai.Br., VII. 13-18. Also Atri gave his only son in adoption, for details, see Kāṇe, ibid., 662-3. During the dharmaśāstra period, adoption was well-established, Manu, IX. 141, 142. Adoption was recognised in almost all the major legal systems. Adoption was in vogue in Eshnunna (old Babylonia), R. Yaron, The Laws of Eshnunna, (Jerusalem, 1969), 107-8. The Code of Hamurabi, §§185-6, also tells us that adoption was recognised in Babylonia, J.M.P. Smith, The Origin and History of Hebrew Law, (Chicago, 1931, rept. 1960), 208f. Adoption was also known in Assyria, The Assyrian Code, 28, J.M.P. Smith, ibid., 228-9. For adoption and sale adoption at Nuzi, see supra, pp.181-94. There was nothing in Jewish law corresponding to formal adoption proceedings, G. Horowitz, The Spirit of Jewish Law, (New York, 1953), 263. Normally the relationship of natural parent and child could not be duplicated, but a child could be adopted either (i) through a vow or promise, or (ii) de facto,

/Continued on next page:

n.3. - p.774 - continued:

A.J. Silverstein, 'Adoption in Jewish Law', Connecticut Bar. Journal, 48 (1974) 1: 73-82 at 75. R. de Vaux says, 'that the notion of adoption, in the juridical sense, was known in Old Testament times, but had little influence on daily life ...', Ancient Israel, (London, 1961), 52. However, the Mishnah - a son from any source frees the father's wife from the obligation of levirate marriage - at Yevamot II, 5, is significant, see Horowitz, ibid., 261. The Greeks sought to perpetuate the family and the ancestral cult by adoption, see Driver and Miles, Assyrian Laws, op.cit., 249, n.1. The Roman maxim: adoptio naturam imitatur is well-known. The desire that the son should carry on the sacra or religious cult of the family was very strong in Rome; so the tie between father and son could be created artificially by adoption, Jolowicz, HISRL, (Cambridge, 1932), 118-9; Gaius, (tr. Poste), I. 97-107, (Oxford, 1904), 62-5; Buckland, Elementary Principles of the Roman Private Law, (Cambridge, 1912), §§ 20, 21; also his A Manual of Roman Private Law, (Cambridge, 1925), § 28; T.C. Sanders, The Institutes of Justinion, (London, 1956), 40-7, 186. The custom of adoption is fairly common among Serbs and Croats, M.S. Filipović 'Symbolic Adoption among the Serbs', Ethnology, 4 (1965) 1: 66-71 at 70. In pre-Islamic Arabia, the custom of adoption was well-known and the adopted child had the legal status of the adopter's own child. This is apparent from the verse (xxxiii. 37) in the Quran which abolishes this custom to settle the controversy which arose from the marriage of the Prophet to the divorced wife of his adopted son Zayd, N.J. Coulson, A History of Islamic Law, (Edinburgh, 1971), 13. In Chinese law, failing legitimate sons, an heir used to be adopted for ancestor worship, and to attend the family sacra, G. Jamieson, Chinese Family and Commercial Law, (Sanghai, 1921), 3, 24; also D. Bodde and C. Morris, Law in Imperial China, Exemplified by 190 Ch'ng Dynasty Cases, (H.U.P., Cambridge, Mass., 1967), Case: 42.1, 1827, reported at 243. Adoption of an heir was also recognised by the people of Manchu China, Sybille Van der Sprenkel, Legal Institutions in Manchu China, (The Athlone Press, University of London, 1966), 15-6. Adoption was known to the customary laws of Ceylon, F.A. Hayley, A Treatise on the Laws and Customs of the Sinhalese, (Colombo, 1923), 166. Similar customs could be found in Malaya, M.B. Hooker, Readings in Malay Adat Laws, (Singapore, 1970), 134-5; also his Adat Laws in Modern Malaya, (Kuala Lumpur, 1972), 211. Adoption could be found also in the customary laws of Nigeria, but it should not be confused with guardianship arrangements, E.I. Nwogugu, Family Law in Nigeria (Ibadan, 1974), 251. At the dawn of English law, parent's right over his child were inalienable and it could recognise no change of status comparable to adoptio or adrogatio of Roman law, but eventually statutory adoption was introduced in the Adoption of Children Act, 1926, amended in the Adoption Act, 1958, see T.E. James, Child Law, (London, 1962), 45-67; also P.M. Bromley, Family Law, (London, 1971), 246-7.

less on the same footing as the aurasa son in respect of the concept of right by birth.

> As compared with the adopted son, the illegitimate son's position is certainly inferior. The adopted son has a co-ordinate interest with his father in ancestral property. He can claim partition from his father. He represents the father as against the father's coparceners. He excludes the widow, the daughters and the daughter's son.[1]

b. Effects of Adoption

Though the actual birth of an adopted son takes place in his natural family yet, after his adoption, he is deemed to be notionally reborn[2] in the adoptive family. His rights in the adoptive father's property in the adoptive family emerge from this notional birth and, with certain exceptions,[3] he 'acquires all the rights of an aurasa son'.[4]

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1. Per Collins, C.J. and Muttusami, J. in Parvathi v. Thirumalai, (1887) 10 Mad. 334, 344, 345.

2. Tewari Raghuraj v. Rani Subhadra, AIR 1928 PC 87. Cp. the effect of an adoption under the Punjab Customary Law; there is no transplantation of the adopted son from his natural family into the family of his adoptive father. Only a personal relationship is established between the appointed heir and the appointer, Gurnam Singh v. Smt. Ass Kaur, AIR 1977 P & H 103.

3. He remains subject to prohibited relationship in marriage in the natural family and takes 1/4 in competition with subsequently born aurasa son. For the controversies among the different schools on the rights of an adopted son in competition with an after-born aurasa son, see Derrett, IMHL, §186. Also Raghavachariar, Hindu Law, 6th ed., §153.

4. Krishnamurthi v. Krishnamurthi, (1927) 54 IA 248, 262; Anant v. Shankar, (1943) 70 IA 232; Punithavalli v. Ramalingam, AIR 1970 SC 1730 at 1731a, pr.3.

In cases of adoption by a male Hindu during his lifetime, in Anglo-Hindu law the adopted son from the date of his adoption becomes a co-owner with his adoptive father just as if he were an aurasa son.[1] The adoptive father cannot dispose of his ancestral property without the adopted son's consent,[2] and the adopted son can demand partition of the ancestral property from his adoptive father.[3] These judicial opinions undoubtedly establish that, in the Mitākṣarā family, on his adoption an adopted son acquires a fictitious birthright with real effects in the property of his adoptive family.

c. Status of an adopted son in his natural family

In a sense, an adopted son has two lives, one in the natural family and the other in the adoptive family. Here a question would indeed arise regarding his ante-adoption birthright and acquisition of property in the natural family prior to his adoption. The answer to this question is couched in the interpretation of the text of Manu,[4] which runs as follows: 'The "given" son shall not take the family and estate of his progenitor: the piṇḍa follows the family

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1. Da.mī., VI.8. The textual authority for the adopted son's right in the adoptive family is Manu, IX. 141. Rambhat v. Laksman, (1881) ILR 5 Bombay 630.

2. Rungama v. Atchama, 1 PCR 197.

3. Parvathi v. Thirumalai, (1887) 10 Mad 334, 344-5; Rambhat v. Laksman (1881) 5 Bom.630.

4. Manu, IX. 142, gotra-rikthe janayitur na hared dattrimaḥ sutaḥ / gotra-rikthānugaḥ piṇḍo vyapaiti dadataḥ svadhā //

and the estate: the giver's funeral rites pass away.'[1]

The literal meaning of the verse does not help us in gauging the effects of adoption on the adopted son's ante-adoption interests in property. It is agreed by general consent that after his adoption the proprietary interests of the adopted son cease in the natural family, but with regard to his pre-adoption interest in the natural family, the judges and jurists are sharply divided into two camps. The High Courts of Madras [2] and Calcutta [3] have taken the view that adoption does not divest the adopted son of any property which has been vested in him prior to his adoption.[4] But the Bombay High Court [5] held that the adoption of the boy was tantamount to death in the

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1. Tr. Derrett, Bhārucī, II, 247-8. Sir William Jones renders: 'na hared' as 'must never claim'. The Ordinances of Manu, ed., S.G. Grady, (London, 1869), 208, followed by Colebrooke, Mitā, I, xi.32. Bühler renders as 'shall, never take', SBE, XXV, Golāp Chandra Sarkār Śāstrī: 'as not to take away', Hindu Law, 6th edn., 244. Kāṇe renders as: 'should not take', HD, III, 690. Variant reading: na hared dattrima kvacit does not make any difference in meaning.

2. Venkata Narasimha v. Rangayya, (1906) 29 Mad. 437, following Behari Lal v. Kailas Chunder, (1896) 1 CWN 121.

3. Shyama charan v. Sri Charan, (1929) 56 Cal 1135; Rakhalraj v. Debendra, AIR 1948 Cal.356, the implications of Manu, IX. 142, Dattaka Mīmāṃsā, VI. 6-8, and Dattaka Candrikā, II. 18-19 discussed at 359, 361.

4. This view is supported by J.C. Ghose, The Principles of Hindu Law, 3rd ed., (Calcutta, 1917), I, 715-6; Kāṇe, HD , III, 694; Ghārpure, Hindu Law, 4th ed., 154; Raghavachariar, Hindu Law, 6th ed., § 148; Derrett, IMHL, § 174.

5. Dattatrava v. Govind, AIR 1916 Bom.210 =40 Bom 429, followed in Bai Kesarbai v. Shivasangji, (1932) Bom.654 = 34 Bom LR. 1332 56 Bom.619, the view approved by Golapchandra Sarkār Śāstrī, Hindu Law, 6th ed., 243, revising his apparently correct opinion in The Hindu Law of Adoption, TLL, 1888 (Calcutta, 1891), 390. Same view of Mayne, Hindu Law, 10th ed., §194. Different view in Mahableswar v. Subramanya, (1923) 47 Bom 542, but this case and Dattatraya v. Govind are surprisingly approved in Manikbai v. Gokuldas, AIR 1925 Bom 363 = 49 Bom 520, 525.

natural family and properties vested in him either as heir to his natural father or as the sole surviving coparcener would be lost to him.

The mīmāṃsā rules support the fact that the Calcutta and Madras view [1] on Manu, IX. 142, was correct and the Bombay view [2] was vitiated with the fault of vākyabheda [3] and the text should be only applicable to riktha haraṇa in the natural family after adoption.[4] The commentators also do not seem to subscribe to the idea that property vested in the son in the natural family is divested by his adoption.[5]

This controversy has been resolved by the Hindu Adoptions and Maintenance Act,[6] which clearly states: 'any property which vested in the adopted child before the adoption shall continue to vest in such person ...'[7] In the

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1. Supra, p. 778, n. 2, 3.

2. Supra, p. 778, n. 5.

3. vākyabheda is the fault of splitting up of a sentence so as to yield two distinct vidhis (rules), see Śabara on Jaimini, II, 2. 26, Jhā, Shabara-bhāṣya, (Baroda, 1933), 257-9, K.L. Sarkār, MRIHL, 87-8. J.R. Ghārpure, Hindu Law, 4th ed., (Bombay, 1931), 154. Derrett, 'Hindu Law' in his An Introduction to Legal Systems, (London, 1968), 91.

4. Kāṇe, HD, III, 695.

5. Medhātithi on Manu, IX. 142: itaś ca bhāga-haratvaṃ datrimasya tūktam / yato janayituh sakāśad gotraṃ dhanam ca na harati, vaṃśād apetatvāt / Jhā, Manu-smṛti, (Calcutta, 1939), 285. But Medhātithi has also mentioned the opinion of someone who held a contrary view, see SBE, XXV, 355, n.142. Nīlakaṇṭha in conformity with mīmāṃsā rules interpreted the verse to convey only one rule, Vy.ma., ed., Kāṇe, 115; tr. Kāṇe and Patwardhan, 1st ed., 123.

6. Act 78 of 1956 (21 December, 1956).

7. HAMA, s.12(b). Cp. the contrary provision to the effect in English law, Adoption Act, 1958, ss.16 and 17; see James, Child Law, op.cit., 51.

light of this provision, the preceding discussion may appear to be otiose, nevertheless it helped to clear up the juridical position of the property which the adopted son might have acquired in the natural family by virtue of his birthright therein.

d. Effects of adoption in the adoptive family

Now we turn to the rights of the adopted son in his adoptive family. We have already stated,[1] and we must re-emphasise that an adopted son acquires a fictitious birthright with real effects in the adoptive family. It has also been pointed out [2] that an adoption during the lifetime of the adoptive father does not create any problems excepting those which could emerge from the co-ownership of father and son.

But after the death of a male Hindu, his widow [3] may adopt on behalf of her husband and, in Anglo-Hindu law, the adopted son's rights would not accrue

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1. Supra, 777.

2. Supra, 777.

3. The śāstric rule is this that the widow cannot adopt without being authorised by her husband, Vasiṣṭha, XV, 5; SBE, 14, 75. But the text has been interpreted differently by different High Courts. In Mithilā, excepting in the kṛtrima form the widow is incapable to adopt, Chandra Choor v. Bibhuti Bhusan, (1945) 23 Pat 763. In Bengal and Benares (Northern and Central India), the consent of the husband was required, Pudum v. Koer, (1869) 12 MIA 350, 356; Bhupendra v. Purna, AIR 1939 PC 222. In Southern India the widow required the authority either of her husband or of his sapiṇḍas after his death, Collector of Madura v. Mootoo Ramalinga, (1868) 12 MIA 397; Sri Balusu v. Sri Balusu, (1899) 22 Mad. 398 (PC). For details, see Derrett, IMHL, §§144-49. Raghavachariar, Hindu Law, 6th ed., §§ 101-29.

from the date of adoption, but would relate back to the date of the adoptive father's death, as if the adopted son was in existence at that time. Thus the adopted son's birthright, however long after the death of the adoptive father he might be adopted, would travel back to the lifetime of the adoptive father on the wings of the fiction of relation back [1] and manifest itself with all its correlative instances.[2]

e. Relation back: Anglo-Hindu law stage

Since the enactment of the HAMA, the implication of the fiction of relation back should be studied in two stages: firstly, the Anglo-Hindu law stage, and secondly, the modern Hindu Law stage.

As stated above, a widow may adopt long after [3] the death of her husband, so between the death of her husband and the date of adoption, property may have passed to heirs, survivors or alienees. In such situations, since

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1. 'Relation back': 'where two different times or other things are accounted as one, and by some act done the thing subsequent is said to take effect "by relation" from the time preceding. Thus letters of administration relate back to intestate's death, and not to the time when they were granted', Wharton's Law Lexicon, 14th ed., 858.

2. Pratapsing v. Agarsingji, (1918) 46 IA 97 = 43 Bom. 778, 792; Anant v. Shankar, AIR 1943 PC 196; approved by the SC on the point in Shrinivas v. Narayan, AIR 1954 SC 379.

3. As illustrations we can point out that the adoption was made 71 years after the death of the adoptive father in Raje V.A. . Nimbalkar v. Jayavantrav M. Ranadive, (1867) 4 BHC 191; in Shrinivas v. Narayan, AIR 1954 SC 379, the widow adopted 41 years after the death of her husband; a widow may adopt after half-a-century or more, see the remark of Hegde, J., in Govind v. Nagappa, AIR 1972 SC 1401; similar remark in the last century by Mitter, J., Kally v. Gocool, (1877) ILR Cal. 295, 303-4.

the adoption is related back to the date of his adoptive father's decease, the adopted son, by virtue of his notional birthright, would be entitled to (i) reopen partition, and (ii) question 'improper' alienations which might have taken place between his adoptive father's death and his adoption. In other words, he would divest property which had been vested in the widow or in someone else, such as a coparcener or anybody claiming as reversioner or heir.[1]

The rules of relation back and divesting have developed by analogy from the śāstric rights of the posthumous son,[2] because the position of the adopted son is analogous to that of a son who was in his mother's womb at the time of his adoptive father's death but born thereafter.[3]

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1. Anant v. Shankar, (1946) 70 IA 232.

2. Yājñ. II. 123. Mitā.I.v.8-9. Also see the text of Bṛhaspati regardding the rights of absent coparcener, Bṛ . XXV. 24, 25; SBE, XXXIII, 373. The texts are discussed by Gajendragadkar, J. in Ramchandra v. Ramkrishna, (1952), 54 Bom LR 636, 643-4.

3. The paṇḍits of the SDA pretended that the adoptee was, in fact, en ventre sa mere and fictitiously the mother had been pregnant up to the time of adoption, see Ranee Kishenmunee v. Raja Oddwunt Singh, (1824) 3 Beng.Sel.Rep., 304. Kulkarni refuses to accept the analogy between a posthumous son and an adopted son, and tries to show that during the unlimited and fictitious gestation period, the adopted son cannot acquire any right in the property of the adoptive father, S.R. Kulkarni, 'The doctrine of relation back in adoption and its validity', (1963) 65 Bom. L.R.J., 4-13 at 12. But Kulkarni misses the point that upamāna (analogy) and atideśa (transference) were accepted mīmāṃsā rules and were applied by the Anglo-Hindu judges in relevant situations. On atideśa, see supra, 724 n.3. Strictly speaking, there is no mention of dattaka at Yājñ. II.123, or at Mitā, I.vi. 8, see Derrett, 'An important development in the law of adoption', 57 Bom.L.R.J. (1955), 73-88 at 82. The analogy was doubted by the Privy Council in Bamundoss Mookerjee v. Mussamut Tarinee, (1858) 7 MIA 169, 190, but it was accepted by Melvill, J., in Rupchand v. Rakhmabai (1871) 8 BHC (ACJ), 114, 117; also by the SC in Shrinivas v. Narayan, AIR 1954 SC 379, 380a. The non-acceptance of the analogy leads to the danger of making the adopted son illegitimate and such a son, though fictitiously illegitimate, could not be adopted, see Derrett, IMHL, § 162; Raghavachariar, Hindu Law, 6th ed., § 141. So relation back is a fiction

/Continued on next page:

f. Relation back and diversting of property

The detached student, however, cannot avoid the observation that invention of a legal fiction,[1] and its application to law and life are not one and the same thing. These two processes chime ill with each other and that is why the Indian judicial and juristic scene is agitated by controversies surrounding the extent of divesting by an adopted son.

The general rule of succession is that an inheritance might never be in abeyance,[2] and that an estate once vested cannot be divested.[3] The interplay

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n.3 - p.782 - continued:

of legitimacy as well, and that is why 'whenever the adoption may be made there is no hiatus in the continuity of the line of the adoptive father', Pratapsing v. Agarsingji, AIR 1918 PC 192; 46 IA 97; approved and restated in Shrinivas v. Narayan, AIR 1954 SC 379, 385a, pr.17.

1. Bentham condemned 'fiction (as) an assumed fact notoriously false, upon which one reasons as if it were true', Jeremy Bentham, The Theory of Legislation, ed., C.K. Ogden, (London, 1931), 71. Fiction is a 'noble lie' which prevents law from coming into grips with reality, M. Barkun, Law Without Sanctions: Order in Primitive Societies and the World Community, (New Haven/London, 1968), 124. But there are non-invidious uses of legal fiction as a device to adapt the law to new conditions and 'at a .particular stage of social progress they are invaluable expedients for overcoming the rigidity of law' and the fiction of adoption is one such device, Maine, Ancient Law, (London, 1891), 27. Maine is supported by Hans Vaihinger, tr. C.K. Ogden, The Philosophy of "As If", (New York, 1925), 19-20, 33, 143. Same view by Lon Fuller, Legal Fictions, (Stanford, 1967), passim and Anatomy of the Law, (Pelican Books. U.K., 1971), 76. Also C.S. Śāstrī, Fictions in the Development of Hindu Law Texts, (Adyar, 1926), 203-4. But judicially 'fiction compels further fictions because of their fundamental conflict with natural laws ...', per Bose, J., Udhao Samb v. Bhaskar Jaikrishna, AIR 1946 Nag. 203, 205.

2. See Sutherland, J.C.C.'s remark in Lakhi Priya v. Bhairab, Chandra, 5 S.D.A. Rep.315. Also Golāp Chandra Sarkār Sāstrī, The Hindu Law of Adoption, TLL, 1888, (Calcutta, 1891), 408.

3. Deo Kishen v. Budh Prakash, (1883) ILR 5 All.509; Derrett, (1955), 57 Bom. L.R.J., 75.

between this general rule and the retro-operative birthright of the adopted son has engaged the attention of the judiciary to a considerable extent, and in order to avoid the uncertainty in the enjoyment of property, the decisions betray a growing tendency to hamstring divesting of property by an adopted son.

Before the decision in the case of Amarendra v. Sanatan,[1] there was considerable doubt as to whether adoption could be carried out at all if the effect would be to divest property from any one other than the adopting widow.[2] But this decision established that the validity of an adoption was not affected by the question as to whom it might divest of property.

Sir George Lowndes explained the significance of Hindu adoption in these words:

> In their Lordships' opinion, it is clear that the foundation of the Brahminical doctrine of adoption is the duty which every Hindu owes to his ancestors to provide for the continuance of the line and the solemnization of the necessary rites ... It can, they think, hardly be doubted that in this doctrine the devolution of property, though recognised as the inherent right of the son, is altogether a secondary consideration[3]

and

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1. (1933) 60 IA 242 = B 35 Bom.L.R. 859.

2. G.K. Dabke, (1939), 41 Bom. L.R.J., 41-8 at 41. Derrett, (1956) 58 Bom.L.R.J., 1-16 at 5.

3. Amarendra v. Sanatan, (1933) 60 IA 242, 248.

> the vesting of the property on the death of the last holder in some one other than the adopting widow, ... cannot be in itself the test of the continuance or extinction of the power of adoption. [1]

Thus, a new avenue for birthright opened and that concept up to a certain point, ensnared the decisions into giving it the widest possible effect. This becomes apparent when Meredith, J., speaks on the effects of adoption by a widow in Chandrachoor v. Bibhutibushan:[2]

> Having dated back by fiction for the purpose of continuing the line and conferring the spiritual benefit, the son takes in return the property of which his father was possessed at the time of his death, and if that property has in the meanwhile passed to someone else by inheritance, he will necessarily divest that person of it. If the property has in the meanwhile passed to someone who has in turn been succeeded by someone else, that third person will also be divested, because any one who takes the property of the father takes it provisionally and subject to the risk of defeasance should adoption take place. [3]

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1. Ibid., 255.

2. (1940) 23 Pat 763.

3. Ibid., at 853. From practical motives, though on incorrect understanding of the concept of birthright, contrary view of Chagla, C.J., in Ramchandra Hanmant v. Balaji Dattu, AIR 1955 Bom 291 where it was held that although the adoptee could divest a sole surviving coparcener's heir, he could not divest property in the hands of an heir's heir. Criticised by Derrett, 'Divesting an important full bench decision on adoption', (1956) 58 Bom.L.R.J.1-16 at 3, 7-8. Overruled by SC in Krishnamurthi v. Dhruwaraj, (1961)2 SCJ 582 (SC).

If this correct interpretation of the fiction of relation back is followed out, adoption would undoubtedly put on its ubiquitous garb of divesting and would disturb many titles to property so long as there is any 'potential mother in the joint family',[1] and this was precisely the line of Privy Council[2] decisions which acknowledged that the key to the adopted son's right to divest property was his birthright in the joint family estate, into whosoever hands it might come.[3]

But this all-pervading birthright of the adopted son has not remained intact, and gradually it has been eroded by judicial activism.

It seems to be acknowledged on all sides, though sometimes grudgingly,[4] that adoption creates birthright. The Mitākṣarā birthright is not merely a right in the property of the father, but it extends to the whole of the joint family property.[5] Following this principle, the adopted son can recover

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1. Gajendragadkar and Vyas JJ., in Ramchandra v. Ramkrishna, (1951) 54 Bom. LR 636.

2. Anant v. Shankar, AIR 1943 PC 196; followed in Neelangonda v. Ujjangauda, AIR 1948 PC 165 = 50 Bom LR 628 PC.

3. Derrett, (1956) 58 Bom L.R.J., 1-16 at 7.

4. See Kulkarni's strict but somewhat incorrect interpretation of Mitā, I.i.23, at (1963) 65 Bom L.R.J., 4-13 at 10. On the literal strength of the text, he denies the relationship of the adopted son to his adoptive father, but he failed to understand that the dattaka was 'certainly a bandhu-dāyāda', (Manu, IX. 159, 160), Derrett, (1953) 55 Bom.L.R.J., 1-8 at. Vijñāneśvara himself took note of Manu's texts and explained the rights of the adopted son at Mitā.I.xi.30-1.

5. Derrett, 'Estate duty and the nature of a Mitakshara coparcener's interest', (1958) 60 Bom.L.R.J., 161-72 at 166.

his interest in the joint family property by partition or otherwise from ancestors and collaterals within the prescribed four degrees of the Mitākṣarā coparcenary.[1] Thus, the effect of the coersive fiction of relation back can be far-reaching and if applied without any qualification, could be a menace to the devolution of estates and their secured enjoyment.

The sandhill of precedents which were built by giving full effect to the fiction was partly demolished by the Supreme Court in Shrinivas v. Naryan,[2] which narrowed the limit of the adopted son's birthright [3] and laid down the rule that the adopted son was entitled only to the property of his male lineal ancestors but not of his collaterals:

> the relation back of the right of an adopted son is only quoad the estate of the adoptive father. 4 In explaining the inconveniences of the Anant v. Shankar rule, the Supreme Court went on: 'The claim of the appellant to divest a vested estate rests on a legal fiction, and legal fiction should not be extended so as to lead to unjust results. We are of opinion that the decisions in AIR 1943 PC 196 insofar as it relates to properties inherited from collaterals is not sound and that in respect of such properties the adopted son can lay no claim on the ground of relation back.[5]

1. Derrett, 'Adoption by a daughter-in-law and divesting', (1964) 1 MLJ, 3-8 at 7.

2. AIR 1954 SC 379 = 1954 SCJ 408 = 57 Bom LR 678 = (1954) 1 MLJ 630 (SC) approving Jivaji v. Hanmant, (1950) Bom 510 = 52 Bom LR 527.

3. Derrett, (1964) 1 MLJ 3-8 at 7.

4. AIR 1954 SC 379, 387b, pr.25.

5. Ibid., 387b-388a, pr.25.

Nevertheless, within this narrow limit of the rule in Shrinivas v. Narayan, the birthright of the adopted son will follow the property of the adoptive father in whosoever hands it may be, whether it had passed to others by survivorship, succession, partition or alienation.[1]

The judicial activism in Shrinivas v. Narayan,[2] and juridical opinions[3] exposing the inconveniences of the fiction of relation back served as a prelude to legislation, and one may wonder why there should be a discussion on the law of adoption in Anglo-Hindu Law after the enactment of the HAMA. But it is interesting to note that the effect of adoptions made before the HAMA is felt even to-day. Indeed, it will be felt for some time to come and the doctrine of relation back seems to be still well and alive[4] notwithstanding the

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1. Krishnamurthi v. Dhruwaraj,(1961) 2 SCJ 582, 584; discussed by Derrett, 'Adoption, succession, and the present state of Hindu Law', (1966) 68 Bom. L.R.J., 41-48 at 43. Also S. Vaidyanathan, 'Adoption by a daughter-in-law and divesting', AIR 1967 J., 135-9 at 139.

2. AIR 1954 SC 379.

3. For a long time jurists were urging for legislative intervention. G.K. Dabke, 'Divesting of estate on adoption', (1939) 41 Bom. L.R.J., 41-8 at 48. Gajendragadkar, 'Hindu widow's power to adopt and its effect upon vesting of property', (1944) 45 Bom.L.R.J. 17-24 at 23, also from the bench, Ramchandra v. Ramkrishna, (1952) 54 Bom.L.R. 636, 641. Derrett, 'Some troublesome cases in adoption', (1953) 55 Bom.L.R.J., 1-8 at 8.

4. See Sawan Ram v. Kalawanti, AIR 1967 SC 1761; Sita Bai v. Ramchandra, AIR 1970 SC 343. Derrett, 'Adoption and relation back: the position in 1971', (1971) 73 Bom.L.R.J., 31-5, also 'Adoption': the whole hog', (1972) 74 Bom. L.R.J., 123-5. Very much alive in a recent case: Moti Lal v. Sardar Mal, AIR 1976 Raj 40, 55.

statute. But even in the Anglo-Hindu Law context, the fiction of relation back and the extent of divesting are passing through transformation and if we reconnoitre the recent sequence of decisions of the Supreme Court, the transformation may be seen in its true perspective.

But before we survey the Supreme Court decisions, let us look back to a case at the turn of the last century in which the facts were not very dissimilar from those dealt with by the Supreme Court in the recent past. The case we are referring to is Surendra Nandan v. Sailaja.[1] According to the facts of the case we find that B^1 and B^2 were living in a Mitākṣarā joint family. B^1 died leaving authority to his widow, W, to adopt a son. On B^1's death, his undivided half-share in the coparcenary property passed to B^2 by survivorship. During the life-time of B^2, W adopted AS. The adoption related back to the date of the death of B^1 and by virtue of AS's birthright, a coparcenary interest was created in the joint property co-extensive with that which B^1 had in the property, and, because of the adoption, it vested in AS. Norris and Beverley, JJ., rightly held that on his adoption AS became entitled to the share of his father B^1, notwithstanding that such share had already been vested in B^2.[2] The High Court awarded one-half of the joint family estate to AS.

In Govind v. Nagappa,[3] the facts were slightly different from those

1. (1891) ILR 18 Cal 385.

2. Surendra Nandan v. Sailaja, (1891) ILR 18 Cal. 385 at 386, following Viradhi Pratapa v. Brozo Kishoro (1876) ILR 1 Mad 69 = 3 IA 154.

3. AIR 1972 SC 1401 = (1972) 3 SCR 200.

referred above, but the Supreme Court had to deal with the same problem of computing the share of the adopted son. In the present case, the facts were as follows: F had three sons, S^1, S^2 and S^3. S^2 went out of the family by adoption. S^1 died in 1912 leaving a widow, W. After S^1's death, F and S^3 made a division of the property between them in 1933. F bequeathed[1] his properties to some of his relations in 1934 and died in the same year. W adopted AS in 1955. AS sued for his share in the property.

Even though AS was adopted in 1955, his birthright would relate back to 1912, the date of his adoptive father's death, and he would be deemed to be a coparcener with F and S^3. He would be able to re-open the partition of 1933 and would be entitled to one-third of the joint family property. But AS in his contention, ignored the fact of partition and argued that if S^1 had remained alive when F died (1934), S^1 would have got one-half of the property and this one-half was claimed by AS.

But the Supreme Court in Govind's case allowed AS one-third, the share which his adoptive father would have got had he been alive at the time of partition in 1933. Nevertheless, the SC admitted the effect of adoption in Anglo-Hindu Law and remarked that 'It is true that because he (viz. the adopted son) was not a party to the partition, he is entitled to ask for reopening of the partition and have his share worked out without reference to the partition',[2] but

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1. It is apparent that in the light of the subsequent adoption by W, F alienated his share beyond his legal power to do so.

2. Govind v. Nagappa, AIR 1972 SC 1401 at 1403a.

at the same time, it was pointed out that 'the doctrine of relation back is only a legal fiction. There is no justification to logically extend that fiction. In fact, the plaintiff had nothing to do with his adoptive father's family when F died.'[1] Supplementary to this line of argument, it could be pointed out that in cases of adoption by a widow, no adopted son in fact, would have anything to do with the supervening events, between his adoptive father's death and his adoption, which occurred in his adoptive family but so long as the fiction of relation back is not entirely abrogated in Anglo-Hindu Law, there could be no denial that in fiction the adopted son would notionally exist right from the date of his adoptive father's death. The denial of this fictional existence is 'social utilitarianism'[2] but the SC simply adumbrated the social factor,[3] and justified its taking into consideration the fact of partition in 1933 more on logical grounds than relying on any particular theory of jurisprudence. The Court stated, and rightly so from the factual point of view, that the fact of partition could not be ignored,[4] and even if S^1 had been alive in 1933 he could not prevent the partition because division of status need not be effected by bilateral agreement. It can be effected by unilateral declaration by a coparcener if the same is properly

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1. Ibid., at 1403, pr.8.

2. On social utilatarianism, see W. Friedmann, Legal Theory, (London, 1967), 325-44. Also P.B. Mukharji, The New Jurisprudence, TLL, 1960, (Calcutta, 1970), 37.

3. AIR 1972 SC 1401 at 1404b.

4. Ramchandra v. Ramkrishna, AIR 1952 Bom 463 overruled on the point and Bajirao v. Ramkrishna, AIR 1942 Nag. 19 distinguished.

communicated.[1] But the observations of the SC complicate and enliven the problem when it subsequently remarks that AS 'can no doubt ignore the actual partition by metes and bounds effected by [F] and [S^3] and ask for a re-partition of the properties, but his adoption by itself does not and cannot reunite the divided family'.[2] Now the question arises, if AS can 'ignore the actual partition by metes and bounds' and 'ask for a repartition of the properties', why cannot he realise half of the remaining joint estate which his adoptive father would have got had he been alive after F's death in 1934? Though the SC was 'concerned with the quantum of share'[3] to which AS was entitled, we do not get the answer to this question in this judgment.

The inconveniences of the doctrine of relation back and 'the interest of the society'[4] prevented the full effect of the birthright of the adopted son; and hindered his enjoyment of his admitted right to reopen the partition, though indirectly admitted[5] by the SC. Yet the point of severance of status was ultimately emphasised in these words:

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1. Correct interpretation of Raghavamma v. Chenchamma, AIR 1964 SC 136; also Puttrangamma v. Rangamma, AIR 1968 SC 1018.
2. AIR 1972 SC 1401, 1403b.
3. Ibid., 1404b.
4. Ibid., 1404b.
5. Ibid., 1403b.

> The rights of an adopted son cannot be more than that of his adoptive father. If the plaintiff's adoptive father was alive in 1933 when the partition took place, he could not have obtained anything more than 1/3rd share in the family properties. [1]

The decision curtailed the effect of relation back by acknowledging the fact of partition, and thereby the actual happenings of life prevailed over the fictions or notional birthright of the adopted son.

To have an answer to the sort of question raised above, we had to wait about two years and in 1974, V.R. Krishna Iyer, J., with some references of Govind's case, elaborated the juristic basis of such decisions in Shripad v. Dattaram.[2] Before we analyse the rationale of the judgment in Shripad's case, let us summarise the facts for a better understanding of the problem involved in the decision.

A Hindu joint family was comprised of F, S^1, SS (son of S^1) and S^2W, the widow of S^2 who died in 1921. In 1944, F and S^1 made a partition of the estate, and each took a half-share after leaving some properties for the maintenance of S^2W. F made a gift of his entire half-share in favour of SS. F died in 1946. S^2W adopted AS on 16.2.1956. On 20.4.1956, AS brought a suit for re opening the partition and claimed a half-share in the properties, challenging the validity of the gift made by F to SS. The facts of this case are identical with those of Govind's case, and the nature of the claims of the

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1. AIR 1972 SC 1401, 1405a.

2. AIR 1974 SC 878.

adopted sons is also respectively the same. But, as we shall see presently, the facts and rationale being the same, it is interesting and significant to note that the conclusions arrived at in the two cases are dissimilar.

If the fiction of relation back is given full effect, AS's adoption will date back to 1921 when his adoptive father expired, and by virtue of his notional birth AS would be deemed to be present in 1944 when the partition took place, and if the partition is ignored and the gift is nullified, AS should get half of the properties as he claimed. Even though the fact of the partition might be given effect on the basis of the rationale of Govind's case,[1] AS should get one-third of the properties.

On AS's claim for half a share of the estate, Iyer, J., observed, 'To undo the divided status and continue the coparcenary till the date of the suit so as to award a half-share to the plaintiff as representing one of the two surviving branches would be legal fiction run riot.'[2] Immediately before this, his Lordship explained the entitlement of AS by saying, 'by parity of reasoning we have to give the plaintiff a one-third share, which alone even in an aurasa son of late [S^2] would have got stirpitally.'[3] Then his Lordship asked the crucial question: 'Where is this share to come from?", and the answer was 'from the coparcenary property less what has been legitimately gone out of it.'[4]

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1. AIR 1972 SC 1401.
2. AIR 1974 SC 878, 883b.
3. Ibid., at 883b.
4. Ibid., at 883b.

In the complex formula which springs from this answer, much of that one-third has evaporated and in fact, AS got little more than 1/4 instead of 1/3.

To arrive at this conclusion, his Lordship had to uphold two 'proprietary events',[1] which would have been ineffectual if the doctrine of relation back was given full effect.

g. Lawful alienation and divesting

Firstly, the partition of 1944, he justified on the rationale of Govind's case;[2] and secondly, the alienation by F he justified by upholding and relying on a catena of decisions,[3] which stood mainly on 'equitable considerations', and not on the correct interpreation of Hindu law. Thus, the Supreme Court opened a new vista on the Hindu law of alienation vis-a-vis the rights of the adopted son, and the essence of the judgment on this point is this: if the alienation is 'lawful', as defined by this judgment, it is binding on the adopted son. In Shrinivas v. Naryan,[4] we get a definition of lawful alienation in the following words:

1. Ibid., at 887a.

2. AIR 1972 SC 1401.

3. Bhimaji Krishna Rao v. Hanumantrao, AIR 1950 Bom 271 = 52 Bom LR 290; Krishnamurthi v. Krishnamurthi, AIR 1927 PC 139 = 54 IA 248; N.R. Bijoor v. Padmanabha, AIR 1950 Bom 319 = ILR (1950) Bom 480; Somasekharappa v. Basappa Channabasappa, AIR 1961 Mys 141 = (1960) 38 Mys LJ 687. The reasoning behind these decisions has been acbtely criticised by Derrett, (1953) 55 Bom.L.R.J., 1-6. For a fuller discussion of these cases, see infra, 798-802.

4. AIR 1954 SC 379.

> When an adoption is made by a widow of either a coparcener or a separated member, then the right of the adopted son to claim properties as on the date of the death of the adoptive father by reason of the theory of relation back is subject to the limitation that alienations made prior to the date of adoption are binding on him, *if they were for purposes binding on the estate*. [1]

This is nothing but a restatement of the rules of binding alienation under joint family law, as being for the benefit of the family, according to the interpretation of the *Mitākṣarā* [2] in *Hunooman Persaud* v. *Mussumat Babooee*.[3] But in *Shripad's case*, the whole concept of 'lawful alienation' has been looked at from a different angle:

> Any disposition testamentary or inter vivos, lawfully made antecendent to the adoption is immune to challenge by the adopted son; ... lawful alienation in this context, means not necessarily for a family necessity but alienation, made competently in accordance with law [4]

and, it appears to be, the test is that 'the alienation must be lawful, not in relation to the rights of the adopted son, but it must be lawful at the date when

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1. Ibid. at 387. Emphasis supplied.

2. Mitā.I.i.27-9.

3. (1856) 6 MIA 393; also *Sankaralingam* v. *Veluchami Pillai*, (1942) 2 MLJ 678 = (1943) Mad.309 (FB). Derrett (1956) 58 Bom. L.R.J., 9. Srinivasan, *Principles of Hindu Law*, (Allahabad, 1969), I, 291.

4. *Shripad* v. *Dattaram*, AIR 1974 SC 878, 886b. A case not cited in the present judgment, *Vishnu Pandu* v. *Mahadu Baburao*, (1950) 52 Bom LR 599 = AIR 1951 Bom 170, where the adopted son was entitled to recover all 'such properties' 'subject, however, to such alienations as had been lawfully effected', ibid.at 604-5.

the alienation was made'.[1] In Bhimaji Krishna Rao's case, Chagla, C.J., and Gajendragadkar, J., relied on the observation of Viscount Dunedin in Krishnamurthi v. Krishnamurthi,[2] which runs as follows:

> When a disposition is made intra vivos by one who has full power over property under which a portion of that property is carried away, it is clear that no right of a son who is subsequently adopted can affect the portion which is disposed of. The same is true when the disposition is by a will and the adoption is subsequently made by a widow who has been given full power to adopt. For the will speaks as at the death of the testator, and the property is carried away before the adoption takes place. 3

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1. Per Chagla, C.J. and Gajendragadkar, J., in Bhimaji Krishna Rao v. Hanumantrao, AIR 1950 Bom 271; approved in Shripad's case, ibid., at 885a.

2. AIR 1927 PC 139 = 54 IA 248 = 29 Bom. L.R. 969.

3. 54 IA 248, 262. But see Nagalutchmee v. Gopoo, (1856) 6 MIA 309: in that case it was found as a fact that authority to adopt had not been given, but had it been given, and had the adoption been made in pursuance of it, it is clear that the will would have been invalid. Also recently the Rajasthan High Court correctly held that a will by a sole surviving coparcener, so far as it related to the coparcenary property, was inoperative because a coparcenary subsequently came into existence by a legal fiction of relation back after the death of the S.S.C. on account of a son being validly adopted to him by his widow after his death. Consequently, the properties in the hands of the S.S.C. passed to the adopted son by survivorship and they could not pass to the legatee under a will of the S.S.C., Moti Lal v. Sardar Mal, AIR 1976 Raj 43; Udhao Sambha v. Bhaskar Jaikrishna, AIR 1946 Nag 203 distinguished; Shrinivas v. Narayan, AIR 1954 SC 379 relied on (on logic).

The observation of the learned Viscount shows that the rule which he laid down in those words was applicable to alienation made by the adoptive father during his lifetime, which was precisely the issue in Krishnamurthi's case, and his observation obiter on the rights of the legatee vis-a-vis the son adopted by a widow is a manifestation of somewhat mistaken understanding of the doctrine of relation back. It is a cardinal principle of the law of testamentary succession that a will is 'ambulatory', which means that until the death of the testator a will has no effect at all.[1] It can be reminded that an adopted son notionally exists before the death of the adoptive father, thus restricting his power of testamentary disposition.[2]

h. Alienation by a sole surviving coparcener: the Bombay view

The emergence of a convenient but mistaken notion from Krishnamurthi's case,[3] that a sole surviving coparcener had complete power of alienation without having to justify it as a family necessity, served as a breakthrough

1. Re Thompson (1906) 2 Ch.199 at 205.

2. Alienations by will were held binding on the adopted son, Veeranna v. Sayamma, (1928) 56 MLJ 401 = ILR 52 Mad 398; followed in Sankaralingam v. Veluchami, (1942) 1 MLJ 119, the decision confirmed by the F.B., (1942) 2 MLJ 678 = ILR (1943) Mad 309 FB; followed and approved in Udhao v. Bhaskar, AIR 1946 Nag 203, 206; also Narayan v. Padmanabh, (1949) 52 Bom LR 313; Vithalbhai v. Shivabhai, (1949) 52 Bom LR 301; also see Sashi Kanta v. Pramode, AIR 1932 Cal.600; will also took effect in Rani Lalithakumari v. Rajah of Vizianagaram, AIR 1954 Mad.19 at 40. For a criticism of this line of decisions, see Derrett, 'Some Troublesome Cases in Adoption', (1953) 55 Bom.L.R.J., 1-8; also 'Divesting by an Adopted Son: A Pressing Problem for the Supreme Court', (1960) 23 SCJ, 43-57. For judicial support of Derrett's view and correct, though harsh, interpretation of the law, see Moti Lal v. Sardar Mal, AIR 1976 Raj 40, 55.

3. AIR 1927 PC 139.

and some judges happily used it as an authority to safeguard titles which were otherwise on shaky foundations. An article by Derrett,[1] unmentioned or unnoticed in Shripad's case,[2] but one of undoubted merit, points out the misunderstanding of the doctrine of relation back by Viscount Dunedin and the right implication of his observation. Different High Courts from time to time were applying the Dunedin rule in cases of alienations when the sole surviving coparcener was the adoptive father, and the Bombay High Court pointed out the limitation of the doctrine of relation back in Narayan v. Padmanabha,[3] in these words: 'one of the important limitations and exceptions is that the adopted son is bound by all the lawful alienations made by his adoptive father if he was the sole surviving coparcener of a joint family.'[4]

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1. Derrett, 'Divesting: An Important Full Bench Decision on Adoption', (1956) 58 Bom.L.R.J., 1-16 at 10; also see the articles cited at n.2, p.798 above. Derrett's emphasis on relation back as laid down by the Privy Council in decisions like Anant v. Shankar AIR 1943 PC 196, is logically and technically sound.

2. See Iyer, J., on Krishnamurthi's case, at AIR 1974 SC 878, 885b, para.15.

3. AIR 1950 Bom. 319 = ILR (1950) Bom.480.

4. Ibid., at 319b. Also see the same view of Lokur, J., in Ramchandra Balaji v. Shankar Apparao, AIR 1945 Bom. 229, followed by Chagla, C.J., in Bhimaji v. Hanumantha Rao, AIR 1950 Bom.271. Same view was also expressed at Nagpur, Prahlad v. Motilal, AIR 1948 Nag.351. In Mysore, it was held that an adopted son could not divest the vendee of an heir of sole surviving coparcener (hereafter as S.S.C.), Somasekharappa v. Basappa, AIR 1961 Mys.141, but overruled, and the rules of alienations of joint family law re-established in Paramanna v. Shidgouda Ningappa, AIR 1964 Mys 217 at 219, pr.12, followed in Mahadevappa v. Chanabasappa, AIR 1966 Mys 15, which also followed the obiter in Guramma v. Mallappa, AIR 1964 SC 510. But contrary opinion in Ramchandra v. Anasuyabi, AIR 1969 Mys 64. Bombay, however, consistently followed the view that the alienations under discussion could not be challenged by the adopted son, Mahadeo v. Rameshwar, (1967) 70 Bom LR 89; Babgonda v. Anna, AIR 1968 Bom 8. In S. Pedda Subbaya v. Soleti Ademma, (1967) 2 An.W.R.314, the Andhra Pradesh H.C. admitted that an adopted son could challenge the alienation made by a limited owner prior to his adoption (main question in this case was of limitation).

The judicial opinion that the sole surviving coparcener's alienation cannot be challenged by a son adopted by his widow is somewhat adrift from the correction notion of Hindu joint family property.

It is true that we have been accustomed to hear the sole surviving coparcener called a 'full owner' of the estate,[1] subject, of course, to the maintenance rights of other members of the joint family. But it cannot be denied that there remains a joint family even though there may be only one coparcener, and, at least for Income-tax purposes, there may be a joint family with no male member alive at all.[2] And, although a sole surviving coparcener looks on the surface like a full owner, there is still a potential[3] joint family so long as a widow (a potential mother) has the right to adopt a male child. The point has been correctly explained by Lord Simonds:

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1. Sri Rajah Venkata Narasimha Appa Row v. Sri Rajah Rangayya Appa Row (1905) 29 Mad. 437, 447; Veeranna v. Sayamma, (1928) 56 MLJ 401; Parashram v. Shriram, (1929) AIR Nag. 321; Krishtappa Venkappa v. Gopal Shivaji, (1956) 59 Bom. L.R. 176 F.B.

2. Commissioner of Income-Tax, Bombay v. Laxminarayan, (1935) 59 Bom.618, S.C. (1935) AIR Bom.412; reversed in (1937) AIR PC 239; but see Bajirao Tukaram v. Ramakrishna, (1942) AIR Nag 19, SC (1941) Nag.707. Income-Tax Commissioner v. Sarwankumar, (1945) AIR All.286, 288-9; Commissioner of Income-Tax, Central and United Provinces v. Musammat Bhagwati, (1947) 74 IA 142, SC (1947) AIR PC 143; Commissioner of Income-Tax, Madras v. Veerappa Chettiar, (1970) 1 SCWR 31.

3. Umayal Achi v. Lakshmi Achi, (1945) AIR f.c. 25: (1945) 1 MLJ. 108.

> But though it may be correct to speak of him S.S.C. as the 'owner', yet it is still correct to describe that which he owns as the joint family property. For his ownership is such that upon the adoption of a son it assumes a different quality ... 1

This peculiarity of Hindu joint family property was consciously ignored by the Bombay High Court in order to introduce a rule that the adopted son was bound by all the 'lawful' alienations made by his adoptive father if he was the surviving coparcener of a joint family.

i. Extension of a misconception

However, the rule applicable to alienations made *intra vivos* by a sole surviving coparcener was extended by Chagla, C.J., to alienations made by other members of the coparcenary after a partition thereof. The learned Chief Justice observed:

> It is possible to take the view that the position of the members of the divided family is in law the same as that of a sole surviving coparcener. Just as a sole surviving coparcener has every right and authority to dispose of the property as if it was of his absolute ownership, so also after partition the members of the erstwhile coparcenary have equally the right of disposing of the share which came to them on partition as if it was their property. 2

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1. Attorney-General of Ceylon v. Ar. Arunachalam Chettiar, (1957) A.C.513, 542; a judgment of great persuasive authority in India. Juridical approval by Derrett, (1958) 60 Bom. L.R.J., 161-72; (1960) 23 S.C.J., 43-57 at 52.

2. Krishtappa v. Gopal, AIR 1957 Bom. 214, 215 (FB); similar view in Narayan Bhagwantrao v. Namdeo Balobarao, AIR 1955 Nag 208, 210a, para.11.

Supposing there is a widow of one of the coparceners (i.e. a potential mother), this observation is not judicially sound and manifests more an eagerness to protect the rights of the alienees than a correct following of the then established Angl-Hindu Law on the point.

j. Approval of the misconception by the Supreme Court

Notwithstanding this novel approach towards establishing a rule regarding 'lawful alienation' vis-a-vis relation back, the learned judges could not find the exact solution to the problem they were dealing with from precedents, and eventually they had to decide the cases on the equities of the situation.[1] The rationale of this decision has been approved by the Supreme Court in Shripad's case,[2] and since the Supreme Court decisions are binding on all 'High Courts as well as on all trial courts',[3] that stands as the law.

Nevertheless, the line of decisions which has been relied on and approved in Shripad's case has long before been emphatically pointed out by

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1. Chagla, C.J. at Krishtappa v. Gopal, AIR 1957 Bom 214, 215a, para.3. Also Bavdekar, J., Gurupadappa v. Karishiddappa, AIR 1954 Bom 318, 321b; however in this case, Bavdekar, J. evinced strong sympathy with the correct view (i.e. giving full effect to the doctrine of relation back and birthright) notwithstanding the dictum of Lord Dunedin, and if he had not felt that, like all Privy Council dicta, it was prima facie binding upon him, he would certainly have ignored it, see at 319b, 320, 321b; Yājñ. II. 122 examined at 320.

2. AIR 1974 SC 87b.

3. G.H. Gadbois, Jr., 'Selection, Background Characteristics and Voting Behaviour of Indian Supreme Court Judges, 1950-1959', in G. Schubert and D. Danelskim, ed., Comparative Judicial Behaviour, (New York, 1969), 221-56 at 221.

Derrett to be based on an erroneous conception of the law. He suggested that 'the Bombay decisions allowing unauthorised alientions to bind an adopted son (except where made by his adoptive father as the sole surviving coparcener)[1] are unreliable and ought to be disapproved by the Supreme Court'.[2] The Supreme Court, in fact, supported the view, though obiter, in Guramma v. Mallappa,[3] where Subba Rao, J. while considering relation back in the context of the rights of a posthumously-born son, said,

> The sole surviving member of a coparcenary has an absolute power to alienate the family property, as at the time of alienation there is no other member who has joint interest in the family ... If another member was conceived in the family or inducted therein by adoption, his right to avoid the alienation will not be affected.'[4]

This was supported again by obiter of Hegde, J., in Punithavalli v. Ramalingam[5] in these words:

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1. This is to be understood as during the lifetime of the S.S.C.

2. (1956) 58 Bom L.R.J., 1-13 at 11; also the same view expressed previously at (1953), 55 Bom L.R.J., 1-8 at 4-5.

3. AIR 1964 SC 510.

4. Ibid. at 516a, pr.13, relying on Avadesh Kumar v. Zakaul Hasnain, AIR 1944 All.243; Chandramani v. Jambeswara, AIR 1931 Mad 550; Bhagwat Prashad v. Devi Chand, AIR 1942 Pat 99. Relied on by Mahadevappa v. Chanabasappa, AIR 1966 Mys 15 at 16-7. Although obiter dicta of the SC is binding on the HCs(see Derrett, (1971) 73 Bom.L.R.J., 31-5 at 34), the Bombay HC did not follow the said dicta in Mahadeo v. Rameswar (1967) 70 Bom. LR 89; also Babgonda v. Namgonda, AIR 1968 Bom.8.

5. AIR 1970 SC. 1730.

> In fact, under the Benaras School of Mitakshara rule ... the alienation effected by a sole surviving male coparcener can be successfully challenged by a person adopted subsequent to the alienation. The fiction of relation back has to be given full effect by Courts and consequences spelled out as if the fiction is a fact. [1]

But as we can see from the judgment in Shripad's case, exactly the opposite has been done by the Supreme Court. Iyer, J. considered the decisions he relied on as forward-looking judgments [2] to curtail the antiquities of the doctrine of relation back. Referring to the rationale of these decisions, his Lordship explained:

> Two principles compete in this jurisdiction and judges have struck a fair balance between the two, animated by a sense of realism, impelled by a desire to do equity and to avoid unsettling vested rights and concluded transactions, lest a legal fiction should be invading actual facts of life become an instrumentality of instability. [3]

However, despite the equitable consideration of the judges and the justification of the decisions from the point of view of realism, the technical

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1. AIR 1970 SC 1730 at 1731, pr.3. In Shripad's case, this obiter dicta has been held to be too wide, AIR 1974 SC 878, 879b. The controversy between the dicta and its opposite Bombay views has been discussed succinctly by Derrett at (1971) 73 Bom. L.R.J., 31-5 at 34-5.

2. See D.C. Srivastava, 'Legal Change and the Function of the Judiciary', (1963) 65 Bom. L.R.J., 81-91 at 87-8.

3. AIR 1974 SC 878, 882a, para.11.

correctness of the opinion of Derrett [1] is beyond any dispute. But this seeming discordance between the judge and the jurist, in fact, 'is a war of ideas not of men';[2] it is not a question of who is right and who is wrong, but of two conflicting opinions, strangely enough trying to reach the same goal, namely the abolition of the doctrine of relation back, through different means. While the judges were indulging in 'judicial unorthodoxy',[3] though unwarranted, to mitigate the rigour of a fiction, Derrett, like many others, was stressing the point that 'the undoubted fact that the correct rule is inconvenient is one which concerns the legislature principally, and not the courts'.[4]

The Anglo-Hindu Law adoptions have over-reached the HAMA and it becomes exceedingly difficult for a judge to swallow a rule which has been seemingly abolished [5] by the Parliament even though judicial reticence has prevented it from producing the desired result.[6] The fact is that since 1956, the

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1. Supra, 803.

2. Roscoe Pound, 'Justice According to Law', in Essays on Jurisprudence from the Columbia Law Review, (Col.U.P., New York/London, 1963), 217-79 at 278.

3. R. Dhavan, Juristic Techniques in the Supreme Court of India (1950-1971) in some selected areas of Public and Personal Law, Ph.D. thesis in Law, University of London, 1972, 506.

4. Derrett (1956) 58 Bom.L.R.J., 1-13 at 13; previously (1953) 55 Bom.L.R.J., 8; also (1960) 23 SCJ, 43-57 at 57. Dabke was also against judicial law-making on equitable consideration, (1939) 41 Bom L.R.J., 41-8, 48.

5. Iyer, J., obiter in AIR 1974 SC 878, 881a, 1 pr.7.

6. Infra, cases discussed, 819-28.

policy of Parliament to do away with divesting (see HAMA, S.12.C) has affected the judicial outlook and so gives an advantage to the successive illogical trend of decisions in Maharāstra. Thus, in Shripad's case, Iyer, J., while dealing with a problem, statutorily anachronistic (as he thought),[1] yet juridically alive, found the rationale of the Bombay decisions[2] judicially convenient. But he might have been conscious of their juridical unsoundness and that is why he strengthened the line of those decisions by explaining the relevancy of a particular jurisprudential theory in modern India, namely sociological jurisprudence,[3] the school of thought they represent.

k. Social engineering *versus* divesting

Since, in Shripad's case, the learned judge wanted to make sociological jurisprudence the handmaiden of justice,[4] somewhat parenthetically to

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1. AIR 1974 SC 878, 881.
2. Supra, 798-9.
3. The development of this school of jurisprudence in the United States was mainly due to the efforts of O.W. Holmes, R. Pound, Benjamin Cardozo. But the movement owes its origin to the writings of Aristotle, Hobbes, Spinoza and Montesquieu, see H. Cairns, Law and the Social Sciences, (London, 1935), 127, 168. For a comprehensive survey of this school of jurisprudential theory, see G. Gurvitch, Sociology of Law, (London, 1953), 53-155. Also W. Friedmann, Legal Theory, op.cit., 321-42.
4. AIR 1974 SC 878 at 882.

our present purpose we may be allowed to offer observations on the relevancy of that particular theory of jurisprudence. With the zeal of a champion of 'social interest', Iyer, J., remarked, 'Nor is law inhuman or inequitable or abstract, its essence being social engineering'.[1]

Iyer, J.'s penchant for this beguiling phrase - 'social engineering', coined and popularised by Roscoe Pound,[2] is revealed and elaborated elsewhere in his characteristic dithyrambic praise for the sociological definition of law in the following words: 'law is a species of social engineering and not an immutable set of "revealed" rules as some people absurdly imagine'.[3] Iyer. J's abhorrence for fiction and 'revealed' rules befogged his awareness of the fact that the idea behind the phrase, 'social engineering', since its coining by Dean Pound, appears to-day as somewhat wizened and insufficient as a panacea for every jural problem.[4] Sociological jurisprudence had its limitations and 'like any other outcropping of human thought, was a creature of a time and place',[5] and 'Pound's "social engineer", like the traffic engineer of a modern

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1. Ibid., 882a, para.11.

2. R. Pound, Justice According to Law, (New Haven, 1952), 30; also his An Introduction to the Philosophy of Law, (New Haven, 1954), 47. On the implication of this phrase and for a short summary of Pound's views, see W. Friedmann, Legal Theory, (London, 1967), 336-42. For the exposition of the theory, see Pound, 'The Scope and Purpose of Sociological Jurisprudence', (1911) 24 Harv. L.Rev., 591-619 and (1912) 25 Harv.L.Rev., 140-68; 489-516.

3. V.R. Krishna, Iyer, Law and the People, (New Delhi, 1972), 31.

4. Especially in a transitional society like India, social engineering is not a fail-proof doctrine, J. Stone, Human Law and Human Justice, (Bombay, 1965), 279-80; 284-85.

5. J. Stone, 'Roscoe Pound and Sociological Jurisprudence', (1965) 78 Harv.L. Rev., 1578-84 at 1581.

city, was bound to be a busy man, far behind in his work, however many and mighty the projects already completed.'[1]

Pound's 'teleological'[2] goal of jurisprudence is well ahead of the de facto aspirations of the people in a transitional and developing country like India,[3] where 'judicious blending of theory with empirical research'[4] is yet to emerge and even in the developed countries, remains as 'everlasting enigmas'.[5]

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1. J. Stone, (1965) 78 Harv. L. Rev., 1581. Also in a slightly different language in his Law and the Social Sciences in the Second Half Century, (U. of Minnesota P., Minneapolis, 1966), 27. But Dean Pound anticipated such criticism and warned that 'the apparatus of administering justice ... call for more than a simple apparatus of policing the Main Street', Pound, 'Synthetic Jurisprudence', in M.J. Sethna, ed., Contributions to Synthetic Jurisprudence, (Bombay, 1962), 4.

2. G. Gurvitch, Sociology of Law, op.cit., 124-30, 129.

3. J. Stone, Human Law and Human Justice, (Bombay, 1965), 279-80; 284-5. But Pound was not dogmatic about his view and recognised that 'in the house of jurisprudence there are many mansions ...' (1930-1) 44 Harv.L.Rev., 711; and pointed out that India was to 'develop a regime of justice to the measures of its own needs', Sethna, ed., Contributions to Synthetic Jurisprudence, loc.cit., 5.

4. Remarked in context of American legal system where the author claims that in the U.S.A. some research has been done, J. Hall, 'Methods of Sociological Research in Comparative Law', in J.W. Hazard and W.J. Wagner, ed., Legal Thoughts in the United States of America under Contemporary Pressures, (Brussels, 1970), 149-69 at 152.

5. C.K. Allen, Aspects of Justice, (London, 1958) 103. Also M.S. Amos, 'Roscoe Pound', in W.I. Jennings, ed., Modern Theories of Law, (London, 1933), 86-104 at 104. The same view is expressed by G.W. Paton, A Textbook of Jurisprudence, 4th ed. (Oxford, 1972), 122.

These enigmas only emphasise the difficulty of having an exact correlation between the rules of law and the views of the average man, and justify the method resorted to by Iyer, J. in Shripad's case because 'there are no precise methods of discovering what the community really thinks, so we must trust the judge to be a typical representative of his day and generation'[1] who is mostly to depend on subjective judicial experience, study and reflection, in brief from life itself'.[2]

It cannot be denied that at a certain point of administering justice, sociological jurisprudence is stretched to its limit and

> sometimes he (the judge) is influenced by the philosophy of law, sometimes he looks at the mores of the society ... sometimes at the state of law as till then fixed by the legislature or determined by other judges, and having weighed the matter from one or more of those angles, he approaches the facts and decides what the solution of the controversy before him should be. 3

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1. Paton, ibid., 122.

2. C.K. Allen, Aspects of Justice, op.cit., 103. Also W. Friedmann, 'Legal Philosophy and Judicial Lawmaking', in Essays on Jurisprudence from the Columbia Law Review, op.cit., 101-25 at 125.

3. M. Hidayatullah, 'Judicial Method', A Judge's Miscellany, (Bombay, 1972), 65-81 at 67.

In other words, we are to allow the judge independence of 'equitable application of law'.[1]

When a judge deviates, for the sake of social interest and economic progress, from the doctrine of stare decisis,[2] and resorts to 'equity', a zealous conservator of well-established legal fictions might complain but whenever the

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1. R. Pound, 'The Scope and Purpose of Sociological Jurisprudence', (1912) 25 Harv.L. Rev., 515. That judges are engaged in the task of social engineering is one of the limitations of Pund's theory, M.R. Cohen, Law and the Social Order, (Archon Books, U.S.A., 1967), 337. On Pound's conception of judicial empiricism that to arrive at a decision the judges may resort to a source outside the legal system in whole or in part, see Pound's Jurisprudence, (St. Paul, Minn. West Pub.Co., 1959), III, 473-4; 557-8. E.W. Patterson wonders as to whether such judicial empiricism is 'unwarranted lawmaking', 'Roscoe Pound on Jurisprudence', 60 Columbia L. Rev., 1124-32, at 1127. G. Sawer is also of the opinion that Pound's five volumes, Jurisprudence, give very little practical advice to counsel or judge, Law in Society, (Oxford, 1965), 23. The śāstric authority for equitable application of law is declared in the text, Bṛhaspati, II. 12: kevalaṃ śāstram āśritya na kartavyo vinirṇayaḥ, yuktihīne vicāre tu dharma-hāniḥ prajāyate. On this text see, Lingat, CLI, 250.

2. It is submitted that Iyer, J. in Shripad's case had precedents (rather communis error!) behind him. For a discussion on the doctrine of stare decisis, see R.A. Sprecher, 'The Development of the Doctrine of Stare Decisis and the Extent to which it should be Applied', (1945) 31 American Bar Association Journal, 501-9. C.K. Allen, Law in the Making, 7th edn., (Oxford, 1964), Ch.III-IV, 161-366. Winfield, 'History of Judicial Precedent', (1931) 46 L.Q.R., 207. On Indian contribution on the subject, Seervai, Justice, Law and Precedents, (1964), 66 Bom.L.R., J., 65-73. Also for the Indian point of view, see Derrett, (1960) 23 S.C.J., 57, n.56. There is a good chapter in R. Dhavan in a different context, Juristic Techniques ..., op.cit., 67-92. On the nature of stare decisis, see Max Radin, 'Case Law and Stare Decisis', in Essays on Jurisprudence from Columbia Law Review, (Col. U.P., New York/London, 1963), 3-16 at 3-5; for a balanced view and on interplay of stare decisis and social forces, in the same volume, W.O. Douglas, 'Stare Decisis', 18-38 at 18.

need is imperative 'the highest court of the country ... must have freedom to depart from its older decisions so as to give free play to new public policies'.[1] Indeed, in administering justice there is no 'slot-machine theory',[2] and antique corners of a legal system require an 'occasional spring-cleaning'.[3] This spirit of moulding the doctrine of relation back to the facts of contemporary social and economic change[4] instigated Iyer, J. and his colleagues in the Supreme Court bench to take a positive judicial action in the case under discussion --- the sort of judicial 'behaviour which to judges was once anathema becomes not only tolerable but laudable'.[5] This goes a long way to support the judicial creativity of Iyer, J. in a situation where the Bombay High Court for a long time was openly avoiding the rationale of the superior court's decisions, and the Supreme Court's stray obiter dicta,[6] instead of straightening out the law, were confusing the whole scene.

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1. Shrivastava, (1963) 65 Bom. L.R.J., 81-91 at 91.
2. H.J. Abraham, The Judicial Process, (New York, 1968), 325.
3. Viscount Kilmuir, the then Lord Chancellor of Britain, Speech on the occasion of the dedication ceremony of the University of Chicago Law centre, April 30, 1960, quoted by Abraham, ibid., 331.
4. Cp. Iyer, J.'s decision on the point of polygamy in Muslim law in Shahulameedu v. Subaida Beevi, 1970 KLT 4.
5. Said in the context of tenant's rights and prisoner's rights in the American system, E.W. Tucker, 'Two Aspects of Judicial Innovation and Evolving Social Change', Connecticut Bar Journal, 48 (1974) 3: 199-240 at 200.
6. Supra, 803-4.

1. Actual computation of shares in Shripad's case

Once the jurisprudential doctrine is explained, it remains to be seen how the learned judge tackles the complexities of the situation which sprung from giving effect to the alienation by F. Validation of F's alienation means that half of the estate is out of the reach of the adopted son. The remaining half (less half of the property set aside for W's maintenance) was in the hands of S^1. If one-third of the entire joint family estate, as awarded,[1] is given to AS from the property in S^1's hands, S^1 will be left only with approximately 1/6th. If he had alienated the property, as F did, and used the proceeds, there would have been nothing left for AS except the property set aside for the maintenance of W. But we cannot embark on hypothetical situations. As the facts then stood, keeping S^1's predicament in mind, the learned judge had to make an equitable adjustment, not rigidly but 'justly'[2] of the properties. He explained the just method in these words:

> The plaintiff[3] has to be given his one-third share as in 1944, when the partition took place. Assuming that the entire estate was then worth 3 lakhs, the adopted son would have got a lakh of rupees, say. But [F's] share has been entirely gifted away and must be ignored which means that the plaintiff's one-third share valued at one

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1. AIR 1974 SC 878 at 887a, para. 19.

2. AIR 1974 SC 878 at 887a, following Chagla, C.J., in Krishtappa v. Gopal, AIR 1957 Bom. 214 (FB).

3. We know him as AS.

> lakh will have to come out of S^1's properties which, on our arithmetical assumption, would be one-half of three lakhs, i.e, $1\frac{1}{2}$ lakhs. It would be unfair to deprive [S^1] of a lion's share out of his allotment merely because, before adoption, he had not parted with his properties. It would be eminently just to make the first defendant bear only one-half the burden cast by the notional re-entry of the plaintiff into the coparcenary and we direct a division into two equal shares of such of the properties which fell to the first defendant's share in the 1944 partition as were with the first defendant at the date of adoption ... 1 including among the items to be divided the item set apart for the maintenance of [S^2 W.] 2

We must add that since the burden of maintaining the widow fell on the whole coparcenary, and if the lands allotted for the purpose to S^2W are recalled to provide on ancestral share for AS, AS himself must share the responsibility for S^2W and his own receipts from the family must be diminished proportionately. This is not 'equity', it is law.

Suppose the estate was worth '3 lakhs' (excluding the item set apart for the maintenance of S^2W)at the time of partition in 1944; for a clear understanding, we put forward the following comparative results by computing AS's share according to judgments, previous and present.

1. AIR 1974 SC 878 at 887a. My emphasis.

2. Ibid., at 887b.

1)	Following Anant v. Shankar; Surendra v. Sailaja; Shrinivas v. Narayan; [1]	AS will get: $\frac{1}{2}$ = Rs. $1\frac{1}{2}$ lakhs =	Rupees 150,000
2)	Following Govind v. Nagappa; [2]	AS will get: $\frac{1}{3}$ = Rs. 1 lakh =	100,000
3)	In Shripad v. Dattaram; [3]	AS is awarded: $\frac{1}{3}$ = Rs. 1 lakh =	100,000

In the light of the rationale in Shripad's case, AS's share should have been calculated as follows:-

i) Suppose the whole estate at the time of partition in 1944 is 1 and certain items of property set apart for S^2W's maintenance is n. So the properties available for partition is 1-n.

ii) Out of that 1-n, F and S^1 got $\frac{1-n}{2}$ each, in the partition of 1944.

iii) AS is entitled to $\frac{1}{3}$ of $1-n = \frac{1-n}{3}$. But $\frac{1-n}{2}$ allotted in the partition to F has been 'lawfully' alienated and (according to the rule in Shripad's case) should be ignored.

iv) So AS should get $\frac{1}{2}$ of the property in the hands of S^1, that means $\frac{1}{2}$ of $\frac{1-n}{2} = \frac{1-n}{4}$, i.e. in the present case Rs. 75,000.

But in fact, AS's share in Shripad's case is computed as follows:

1. AIR 1943 PC 196; (1891) ILR 18 Cal. 385; AIR 1954 SC 379.

2. AIR 1972 SC 1401.

3. AIR 1974 SC 878.

AS got $\frac{1}{2}$ of the property in the hands of S^1, that means $\frac{1-n}{2} \times \frac{1}{2} = \frac{1-n}{4}$, say rupees 75,000 + $\frac{n}{2}$ (half of what was set apart for S^2W's maintenance) = say, Rupees 100,000.

Here recalling $\frac{n}{2}$ (i.e. $\frac{1}{2}$ of the property set apart for the maintenance of S^2W) to make up the share of AS (Rs. 100,000), the Supreme Court went wrong. AS, as we have stated earlier, like other coparceners, must bear in law the responsibility for S^2W and his own receipts from the family property should have been diminished and calculated accordingly.

From the above allotment in Shripad's case, there need be little hesitation in accepting that S^1 is also the loser. He got Rs.150,000 in a partition between him and his father. Under the Govind principle, nobody can dispute his getting Rs. 100,000. Despute all the judge's good intentions, he is left with only Rs. 75,000 + $\frac{n}{2}$. S^1 may lament over this inequitable result of equitable allotment, but this is a result of the conflict between fiction and fact, a nagging problem which has beset the judiciary for a long time.

m. Relation back and the Hindu Adoptions and Maintenance Act, 1956

It needs hardly any more elaboration to show how the doctrine of relation back and the resulting divesting, in the Anglo-Hindu Law context, disrupted the 'comfort and expectations of the members of the family who had in no way assented to or been parties to the adoption'.[1] It is also indubitably agreed to

1. Derrett, Critique, § 157. In many cases the motivation behind a widow's adoption was to cause distress to the heir or collaterals of her deceased husband, Derrett, (1960) 23 SCJ, 43-57 at 57.

be just that the far-reaching effect of the Anant v. Shankar rule [1] regarding divesting of property deserved abolition. There need be little hesitation in accepting the judicial intervention as in Shrinivas v. Narayan [2] was only a partial solution [3] to the problem and that is why Parliament, as in other branches of Hindu law, had to step in and the HAMA was passed.

n. Relevant provisions of the HAMA

The three sections of the Act which are primarily relevant to our present purpose are set out below:

s.4. Overriding effect of the Act

> Save as otherwise expressly provided in this Act, ...
>
> (a) any text, rule or interpretation of Hindu Law, or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have any effect with respect to any matter for which provision is made in this Act.
>
> (b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus insofar as it is inconsistent with any of the provisions contained in this Act.

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1. Gajendragadkar, (1944) 46 Bom. L.R.J., 17-24 ar 23. Derrett, ibid., at 57.

2. AIR 1954 SC 379.

3. The decision in Shrinivas v. Narayan was orthodox and, although it manifests judicial activism in a limited sense it was not 'social engineering'. However, judicial legislation can hardly cope with the orthodox effect of the fiction of relation back in Hindu law of Adoption.

s.5. Adoption to be regulated by this Chapter

> (1) No adoption shall be made after the commencement of this Act by or to a Hindu except in accordance with the provisions contained in this Chapter, and any adoption made in contravention of the said provisions shall be void.

s.12. Effects of adoption

> An adopted child shall be deemed to be the child of his or her adopted father or mother for all purposes with effect from the date of the adoption and from such date all the ties in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family:
> Provided that ---
> ... (c) the adopted child shall not divest any person of any estated which vested in him or her before the adoption.

o. Interpretation of the provisions

Taking into account the above provisions of the Act, especially, ss.5(1) and 12(c), the juridical community may suppose that the Act abolished the inconvenient doctrine of relation back, effecting the fictitious birth of the adopted child not from the date of the adoptive father's death, but from the date of adoption, thus rendering divesting of interim titles impossible.

There is no gainsaying the fact that the operation of a statute does not depend on the jurists' understanding of the presumed or imputed intention of the legislature to be derived from the wording of its provisions, but sometimes it depends entirely on the judicial interpretation of the rules contained in those

provisions; and this is exactly what has happened in the case of the HAMA.

The rule was well-established in Anglo-Hindu Law that when a widow adopted, she adopted for and on behalf of her husband. The intention of the Legislature 'seemingly behind'[1] section 12, proviso (c) is that when a widow adopts, she adopts to herself, - a proviso indicating women's liberation,[2] as well as the abolition of the ugliness of the doctrine of relation back.[3] The judicial interpretation of the proviso opened up with Hanumantha Rao v. Hanumayya,[4] which was a case involving adoption after the enactment of the HAMA. The facts of the case run as follows: a joint family consisted of F, S^1 and S^2. S^1 died in 1924, leaving his widow, W. F died in 1936. On June 17, 1957, W adopted AS. AS sued S^2 and his sons for partition and possession of a half-share in the family properties. The Andhra Pradesh High Court held, and quite rightly, that since the enactment of the HAMA, all adoptions would take effect from the date of adoption,[5] and the property of S^1 which passed by survivorship to S^2 long before the adoption should be deemed to be

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1. Derrett, Critique, §179.
2. But in fact, it has not happened, see infra, 819-28. Also Critique, §170. also Derrett at (1974) 76 Bom. LRJ, 16-17.
3. This has also not been abolished, see Derrett (1972) 74 Bom.LRJ. 97-9. Also the cases discussed, infra, 819-28.
4. (1964) 1 An. W.R. 156.
5. See HAMA, s.12, supra, 817.

vested [1] in S^2, and on the strength of the proviso (c) of S.12, it could not be divested by AS.

But the lambent optimism that relation back is abolished by the statute, kindled in Hanumantha Rao's case [2] was anaesthetized by the Bombay High Court in Ankush Narayan v. Janabai,[3] which was also a case involving the problem of post-statute adoption. A summarisation of the facts of the case may be useful. F died in 1917 leaving two widows, W^1 and W^2 and a daughter, D by W^1. W^1 died in 1948. W^2 adopted AS in December, 1957. On December 31, 1957, AS sued W^2, his adoptive mother and D, his step-sister, for possession of the estate. It was rightly contended on behalf of W^2 that when an adoption was made under the HAMA by a widow, it would not divest her from her own property, but she would merely obtain a son for herself. But the Bombay High Court rejected this contention and held that essentially the consequences of the Act's provisions were that the widow's adoption provided an heir for her husband. The Court explains that when either of the two spouses

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1. Amarendra v. Sanatan, (1933) 60 IA 242. Derrett rightly points out in this respect that property passing by survivorship does not vest, (1966) 68 Bom. L.R.J., 4-48 at 45. This view was anticipated by Golāp Chandra Sarkār Sāstrī, The Hindu Law of Adoption, TLL, 1888 (Calcutta, 1891), 410. Supported by B.N. Sampath, (1970) 2 SCJ, 1-10 at 10.

2. (1964) 1 An. W.R. 156.

3. (1965) 67 Bom. L.R. 864. Criticised by H. Gujrathi, AIR 1966 J., 19-20. Derrett, (1966) 68 Bom. L.R.J., 44-48 at 44-5. P. Diwan, at (1966) Annual Survey of Indian Law, (1969), 361-3. Ankush Narayan approved by SC in Sita Bai v. Ramchandra, AIR 1970 SC 343.

adopts, both get a child and the child stands as a new member of the family exactly as if he had been born in it, and the proviso (c) of s.12 of the Act does not limit [1] the general proposition in the main body of the section. Thus, the adoption creates a relationship with the collaterals and the adopted child becomes a coparcener.[2] The High Court did not give any importance to the proviso (c) of s.12, and opined that the most important part of the section was the last phrase before the proviso commenced. From the judgment, we are left with the impression that the proviso was visualised as a mere caprice of the Legislature rather than a rule of law to be given its relevant effect. The Court held that AS was entitled to divest his adoptive mother, notwithstanding the fact that she was an absolute owner under s.14(1) of the Hindu Succession Act.[3] The Bombay view on s.12(c) was in direct conflict with the opinion put forward by the Andhra Pradesh High Court in _Hanumantha's case_.[4]

Nothing could cause greater dismay among the protagonists of reform than this Bombay decision, which revived the doctrine of relation back supposedly entombed by Parliament. Some respite was provided by the Madras High Court in _Arumugha Udayar_ v. _Valliammal_,[5] where Ramamurthi, J. inter-

1. _Ankush Narayan_ v. _Janabai_, (1965) 67 Bom. L.R. 864, 866.

2. (1965) 67 Bom. L.R., 864, 868.

3. Act 30 of 1956 (17 June 1957).

4. (1964) 1 An. W.R. 156.

5. AIR 1969 Mad.72; decided on 20 June, 1967, despite contrary decision by SC in _Sawan Ram_ v. _Kalawanti_, AIR 1967 SC 1761, decided on 19 April, 1967.

preted s.5(1) and s.12(c) and observed that since the enactment of the HAMA, an adoption by a widow was an adoption to herself and would such an adoption in no way affect the devolution or enjoyment of property by others. Despite favourable reception of the judgment by jurists, judicially it was in a limbo, because a couple of months before this decision, the Supreme Court's view in Sawan Ram v. Kalawanti,[1] in effect, overruled the present opinion of the Madras High Court by anticipation.

In Sawan Ram (which has aroused all jurists' antagonism), F died before 1948 leaving a widow, W. W inherited her husband's property under the Anglo-Hindu Law of intestate succession and, thus, she had only a limited ownership in the property. She mortgaged lands of F's estate to M in 1948. In 1949 she purported to make a gift of the suit land to her grandniece, N. R, the collateral of F, was the presumptive reversioner. He sued for a declaration that the alienations were without legal necessity and not binding upon him as reversioner. R was successful in the trial court. W appealed to the High Court and, during the pendancy of the appeal, W adopted N's son, AS, in 1949. W died later in the same year. After W's death, the litigation commenced again, and R sued for possession of the lands on the ground that since the adoption was governed by the HAMA, AS could not succeed to the property of F and could not oust him (R) as the nearest reversioner. The Supreme Court rejected the contention of R and held that F, the deceased husband of W,

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1. AIR 1967 SC 1761.

would be deemed to be the adoptive father of AS and by the application of the doctrine of relation back, AS would defeat the interest of R as the nearest reversioner.[1]

The importance of Sawan Ram's case lies in the fact that it is the first decision of the Supreme Court on the effect of adoption by a widow after the enactment of the HAMA. On the effect of widow's adoption, Bhargava, J. explained in the course of the judgment:

> The most common instance will naturally be that of adoption by a female Hindu who is married and whose husband is dead, or has completely and finally renounced the world ... In such a case, the actual adoption would be by the female Hindu while the adoption will be not only to herself, but also to her husband.[2]
>
> On adoption by a widow, therefore, the adopted son is to be deemed to be a member of the family of the deceased husband of the widow ... The right, which the child had, to succeed to property by virtue of being the son of his natural father, in the family of his birth is, then, clearly to be replaced by similar rights in the adoptive family and, consequently, he would certainly obtain those rights in the capacity of a member of that family as an adopted son of the deceased husband of the widow ... taking him in adoption.[3]

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1. Cp. the P.C. decision on adopted son and reversionary heir, Bhubaneswari v. Nilkomul, (1885) 12 IA 137 at 140.

2. Emphasis supplied.

3. AIR 1967 SC 1761 at 1764, para.7 to 1765, para.8.

For a better understanding of the implication of the above observation, we need to go back to Hanumantha's case, in which the Andhra Pradesh High Court interpreted s.12 of the HAMA in these words:

> On a fair interpretation of the provisions of sec.12 of the Act we are of the opinion that the section has the effect of abrogating the ordinary rule of Mitakshara law that as a result of the adoption made, by the widow, the adoptee acquires rights to the share of his deceased adoptive father which has passed by survivorship to the father's brother. [1]

This observation of the High Court was expressly disapproved by the Supreme Court, though obiter, in Sawan Ram's case.[2] The Supreme Court, however, noticed the objective presence of s.12(c) in the statute by admitted that the proviso prevented the actual divesting of property already vested in any one, but neutralised it by adding that in no way did it prevent the adoptee being the adopted son of the widow's deceased husband.[3] We shall see presently that their Lordships' leaning towards 'cultural continuity'[4] of the Hindu society embedded in the relationship between father and son brought back the doctrine of relation back with its corollary of divesting despite its seeming abrogation in the HAMA.

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1. (1964) 1 An. W.R. 156.

2. AIR 1967 SC 1761, para.7.

3. Ibid., para.9.

4. Derrett, (1971) 73 Bom. L.R.J., 31-5 at 32.

The Supreme Court's dicta in Sawan Ram were beyond all prognostications and we have already noticed that the Supreme Court allowed AS to dislodge R from his position as reversioner. The jurists reacted to the decision, and particularly to the dicta in their own characteristic ways.

Derrett, in order to prevent the revival of divesting by an adopted son, tried to save the Act from the onslaught of the dicta in Sawan Ram on a subtle and technical point. This is apparent from his comment on the dislodging of R by AS, where he tried to explain it away by saying that:

> in loose terms, this could appear to most readers as a "divesting". But because reversionership is a mere spec successionis 1 and the right of reversion rests in the reversionary body (up to the Government of India) as a whole, the adoption did not work a divesting. 2

Paras Diwan's reaction was vigorous and he opined that Sawan Ram's case should be overruled, or that the unnecessary obiter dicta should be disavowed at least.[3] In the same vein, G.K. Dabke attacked[4] the interpretation of the

1. The view that reversionership is a spec successionis was taken by the FB in Krishnaji v. Rajaram, (1938) Bom 679 at 690; a wrong decision on the point of determining the rights of the adopted son, Dabke , (1939) 41 Bom.L.R.J., 41-8 at 44, 48.

2. Critique, ¢180. Also Sampath, (1970) 2 SCJ, J, 1-10, at 10.

3. P. Diwan, 'Adoption by a Hindu widow: adopted son's relationship with the deceased husband', (April, 1969), 21 Law. Rev. (University of Punjab), i-xviii.

4. Dabke, 'Divesting on adoption', (1968) 70 Bom. L.R.J., 143-8.

Supreme Court of s.5(1) of HAMA in Sawan Ram's case as wrong and pointed out that ss. 7, 8 and 14(3), 14(4) of the Act clearly indicated that neither spouce could adopt so as to thrust a child on the other.[1] He sharpened his weapons and attacked [2] again in another article with ridicule, by showing that a literal interpretation of the decision in Sawan Ram will bring back all the evils of divesting.

However, neither Derrett's subtlety nor the bellicosity of Dabke and others in the light of the dicta in Sawan Ram's case had much effect on the revival of the old law. In the context of post '56 adoption, Derrett pointed out the legal position in his remark that 'that adoption relates back as the old phrase goes is still the basic principle',[3] and admitting the semantic fertility of the legal language, he concluded the article with banter: 'Hence relation back is saved under the Act by that little word "to"'.[4]

Dabke criticised [5] Derrett and asked for reconsideration on a misunderstanding of this utterance.[6] What Dabke considered Derrett's juridical

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1. Ibid., at 144.

2. Dabke, 'That little word "to" in s.5(1) of the Hindu Adoption and Maintenance Act, 1956', (1969) 71 Bom. L.R.J., 13-4. This point has been elaborated by Derrett with concrete examples, Critique, §§169-73.

3. Derrett, (1968) 70 Bom. L.R.J., 51-5 at 54.

4. Ibid., at 55.

5. Dabke, (1968) 70 Bom. L.R.J., 143-48 at 147-8.

6. Supra, n.4.

resignation was, in fact, a reluctant compromise with judicial interpretation, and this is quite clear from the sentence which follows: 'Had it been up to the Supreme Court to determine what that word meant, the present writer would have advised, cautiously, against giving that sense ...'[1]

The apprehension that the old law remained securely hinged on this little word, 'to', has been proved to be true by subsequent decisions, and before the din of Sawan Ram has receded, the Supreme Court in Sita Bai v. Ramchandra[2] gave its blessing to divesting in the context of post '56 adoption. The facts of the case reveal that a joint family consisted of two brothers, B^1 and B^2. In 1930 B^2 died, leaving his widow, W (Sita Bai). B^1 had an illegitimate son IS (Ramchandra). On 4 March, 1956, W adopted AS. On 13 March, 1958, B^1 died. In the opinion of the Supreme Court, AS became a member of the coparcenary with effect from his adoption, and on the death of B^1 he took by survivorship from him. It might appear to be surprising that the Supreme Court in Sita Bai's case did not cite Sawan Ram. We are informed[3] that their

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1. Derrett, loc.cit., at 55. Derrett made his view abundantly clear at (1966) 68 Bom. L.R.J., 41 at 45, which Dabke, of course, did not fail to note, loc. cit. at 147. Subsequently, Derrett has made his view clear by saying that 'relation back' should be confined to social and religious spheres, Critique, § 183.

2. AIR 1970 SC 343; decided on 20 August, 1969. Criticised by B.N. Sampath, 'The Doctrine of relation back: an unfortunate revival', (1970) 2 SCJ, J., 1-10 at 1. Also Critique, § 185.

3. Bai Chanchal v. Manishankar (1971) 12 Guj LR 576. For a discussion on this case, see Derrett, 'Adoption: the whole hog', (1972) 74 Bom. L.R.J., 97-9.

Lordships in Sita Bai's case might have marked some looseness in an obiter at the end of the judgment, which suggests that property in the hands of the sole surviving coparcener becomes his own. This opinion, though obiter, certainly conflicts with the view taken in Sita Bai's case, and may explain why the Supreme Court in the latter does not cite the former. In Sita Bai's case, the Supreme Court's specific approval of the disturbing decision of the Bombay High Court in Ankush Narayan v. Janabai [1] gives the impression that the old law of divesting is again brought into play. In Ankush Narayan's case, the Bombay High Court (as we have seen) wrongly allowed the adopted son to divest his adoptive mother's inheritance which had vested in her absolutely under s.14(1) of the HSA, and the decision in effect, has been overruled on the point by the Supreme Court in Punithavalli v. Ramalingam.[2] In this case, Hegde, J. clearly set out the law as follows: 'The full ownership conferred on a Hindu female under section 14(1) is not defeasable by the adoption made by her to her deceased husband after the Act came into force.'[3] Punithavalli's case cuts only one wing of the ugly reappearance of the old law of divesting for, otherwise, the ghost of relation back remains 'at large'[4] and this is apparent from the tendencies in the courts as manifested in Bai Chanchal v. Manishankar,[5] where the facts are

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1. (1965) 67 Bom.LR.864.

2. AIR 1970 SC 1730.

3. Ibid. at 1731.

4. See the article of Derrett of the same title in a different context, (1974) 76 Bom. L.R.J., 16-17.

5. (1971) 12 Guj LR. 576.

more or less identical to those in Sita Bai's case. F died in 1918 leaving two sons, S^1 and S^2. S^1 dies in 1923, leaving his widow, W. W adopted AS in 1958. AS through his adoptive mother, sued S^2 for partition. He was allowed one-half of the joint family property, notwithstanding S^2 remaining the sole surviving coparcener for thirty-five years. The Gujarat High Court followed Sita Bai v. Ramchandra,[1] and made it a reality that even under the new law, so long as there is a potential mother in the family, there is a possibility of divesting the seemingly vested property in the hands of the sole surviving coparcener by the adopted son by virtue of his birthright.

p. Conclusion

Acoordingly, in the end, we are back to where we started regarding the main point, namely, the material problem of the effect of the Mitākṣarā birthright manifested in the case of the adopted son in the form of divesting and thus, 'we have gone the whole hog. Relation back is a reality indeed'[2] - and so is the birthright of the adopted son, because the statutory glue of HAMA on this textual right, though it is based on a fiction, has come unstuck.

Despite the judicial revival of the doctrine of relation back, with utmost respect to the Supreme Court, it is submitted that the Andhra Pradesh High Court in Hanumantha's case[3] caught the right spirit of the statute where Ramamurthi, J. opined that at least so far as it was related to the doctrine of

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1. AIR 1970 SC 343.
2. Derrett, (1972) 74 Bom. L.R.J., 99.
3. (1964) 1 An. W.R. 156.

relation back, the Mitākṣarā birthright of the adopted son was abrogated by the HAMA. But the backlash to the observation has come due to the inadvertence of the Legislature which, without categorically abolishing the Mitākṣarā birthright, tried to abolish its fictional offshoot of relation back and divesting. In the case of Shripad v. Dattaram,[1] which we have discussed at some length, in the context of pre-'56 adoption,[2] there is a flimsy hope [3] that previous interpretations of the Supreme Court of s.12, so far as it is related to relation back, will receive a rethinking; but, at this stage, any patchworth, however brilliant, would rip apart at some of the seams.

In a sacramental sense, relation back is a spiritual link and in the social sense, a healing balm, but in the secular sense it is a 'confounded nuisance',[4] and short of cautious and overall statutory reform, either by the institution of a uniform Adoption Act [5] for all communities, or by making the law

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1. AIR 1974 SC 878.

2. Supra, 793-815 . But see Moti Lal v. Sardar Mal, AIR 1976 Raj 40; The fiction of relation back is given effect in the context of Mitākṣarā birthright and SC decision ('social engineering') has very little influence to abolish or even to erode the fiction.

3. AIR 1974 SC 878, obiter at 881a, para.7.

4. Derrett, (1971) 73 Bom. L.R.J., 31-5 at 31.

5. The Indian Conference of Social Work and other welfare organisations urged the enactment of a uniform adoption law for all the communities and submitted to the Parliament a Draft Adoption Bill, 1972. The peculiar features of the Bill are stated by H.S. Ursekar, 'Adoption Laws', in Narmada Khodie, ed., Readings in Uniform Civil Code, (Bombay, 1975), 70-6 at 74-6. This has not become law.

of adoption contain a part of the Code of Family Law or the Civil Code, [1] the seemingly jejune and moribund provisions of the HAMA are incapable of coping with the problem of divesting.

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1. Derrett, (1968) 70 Bom. L.R.J. 55.

CHAPTER 19.

TYPES OF PROPERTY AND THE CONCEPT OF RIGHT BY BIRTH

1. Introduction

In the preceding Chapter we dealt with the rights of the different types of sons and saw that apart from the special rights of a śūdra's dāsīputra [1] and the derivative birthright of the dattaka [2] in the form of relation back, no other secondary son had any inherent right in the property of the father. So, hereafter, our study will be concentrated only on the mutual rights in family property of an aurasa son and his father.

While studying the Mitākṣarā we have seen that Vijñāneśvara envisaged son's right by birth in all types of properties of the father and the grandfather.[3] We also noted that Vijñāneśvara, from the practical point of view, imposed some limitations on birthright in respect of the movables in the hands of the father.[4] We may recall that the British authorities decided in favour of administering the personal law of the Hindus according to their śāstras.[5] So, during the Anglo-

1. Supra, 764-70.
2. Supra, 774 ff.
3. Mitā.I.i.27. Discussed supra, 520-5.
4. Supra, 527-8.
5. Supra, 632.

Hindu Law period the *smṛti* texts and commentaries went through the process of judicial interpretation and as a result, not unexpectedly, many *śāstric* rules, including the rules on separate property, took a meaning quite different from that which they originally conveyed.

II. Nature of family property in classical Hindu Law

From the *śāstric* texts we come to know that there could be two types of properties in the hands of the father.[1] First, a father would manage the property which passed to him from his father on behalf of himself and his sons. Secondly, a father could have self-acquired property in which, though the sons acquired a right by birth, yet, the sons had no right to partition the same before the death, retirement or disqualification of the father.[2] The *śāstra* confers on the father a right to make a partition during his lifetime and, if he so wishes, he can retain a double share for himself.[3]

But we should not be deluded by this categorisation of property into ancestral and separate. So long as the coparceners were joint, all their acquisitions used to go 'into the common pool'.[4] That means all property however

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1. The texts dealt at supra, 331-46.

2. Mitā.I.ii.7.

3. Nārada, Dh.K.1171a. Bṛ : jīvad vibhāge tu pitā gṛhṇītāṃśa dvayaṃ svayam, Dh.K.1172b, these texts cited by Jīmūtavāhana in Dā.bhā.II.35, are not controverted in the Mitā., see Derrett, (1956) 19 SCJ (Jour.), 103-11 at 105, n.6.

4. Mayne, *A Treatise on Hindu Law and Usage*, 5th ed., (London/Madras, 1892), §215. Derrett, ibid., 106. RLSI, 114.

acquired by any member belonged 'to the whole family'.[1]

Though there are sāstric texts which throw light on the concept of self-acquisition yet, to the ancient and mediaeval Hindus the concept had importance only in the context of partition.[2] The text of Manu,[3] which by its literal meaning seemingly denies any property to the sons and wife, has been interpreted[4] as conferring ownership to the acquirer without having any power of disposal. These interpretations of the text strengthen our statement that any acquisition by members used to go to the 'common pool' and the texts of Manu,[5]

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1. Kāṇe, HD, III, 578. This explains Haradatta's comment on Gautama, 28.29 that while the father is alive whatever is earned by a member, whether learned or not (vidusāvidusā) belongs to the father, Kāṇe, ibid., n.1088. Also Derrett, (1958) 60 Bom. L.R.J., 161-72 at 164.

2. Goldstücker, On the Deficiencies in the Present Administration of Hindu Law, (London, 1871), 18 and n. thereof.

3. Manu, VIII. 416.

4. Śabara, on Jaimini, VI.i.12 and VI.i.14. Medhātithi on Manu, VIII.416. Jhā, Manu-smṛti, (Calcutta, 1939), II, 239. Dā.bhā. I.16-17. Kāṇe, ibid. (555-6; 578.L.Rocher, 'Janmasvatvavāda and uparamasvatvavāda: the first chapters on inheritance in the Mitākṣarā and Dāyabhāga', Our Heritage, 19/1 (1971), 3-13 at 8 also approves the same view but his citation of Manu, VIII. 416 is inaccurate, instead of 8.146 it should be 8.416. Bhāruci, however, is prepared to allow a better title to the acquirer. He comments on Manu, VIII.416: 'their goods may be utilised only with their consent ...' their "propertyless-ness" must be understood to be propounded in a secondary (or figurative) sense', Bhāruci's Commentary on Manusmṛti, tr. Derrett, (Wiesbaden, 1975), II, 210.

5. Manu, IX.205-6; IX.208.

Yājñavalkya [1] and Kātyāyana [2] which deal with self-acquisitions, only high-light the point that the importance of this category of property lies only in case of a division.

In the Mitākṣarā there are clear indications that there were no separate pools for separate property of the individual members of a joint family. This explains why Vijñāneśvara did not lay down any rule for the devolution of property which was 'in part the common property of a united family, and in part the separate acquisition of the deceased ...' [3] In this connection, Vijñāneśvara has dealt [4] 'only with cases in which the property in question has been either wholly the common property of a united family, or wholly the separate property of the deceased husband'.[5] To the Privy Council, this appeared to be confusing, but to Vijñāneśvara this was crystal-clear. Since there was no status of separate property apart from the status of the individual, Vijñāneśvara was not obliged to lay down a rule for a third situation. This is also apparent from Vijñāneśvara's answer to the pūrvapākṣin who alleges that without one's own separate property, religious duties prescribed by the Vedas could not be

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1. Yājñ. II. 118-9.
2. Kāty. Kāṇe, ed., 851; Dā.Bhā.II. 65-73; Kāṇe, HD, III, 578.
3. Katama Natchiar v. The Rajah of Shivagunga, (1863) 9 MIA 539, 607-8.
4. Mitā.II.i.
5. 9 MIA 539 at 607.

performed.[1] To this, Vijñāneśvara's answer was that 'sufficient power for such purposes is inferred from the cogency of the precept (which enjoins their performance)'.[2] This shows that self-acquisitions used to go to the common stock and Vijñāneśvara showed that the practice did not conflict with the ācāras of Hindu life.

Small wonder, therefore, that for the purposes of succession, property as such, whether joint or separate, had no status independent of the status of the individual.[3] On the death of a propositus, the devolution of property depended on the sole question of whether he and his dāyādas were joint or separate.

Thus, when a father and his male issue were joint the ancestral property as well as all their acquisitions, formed a common pool and at the death of the father, the property as a whole passed to the sons as survivors.

When a male Hindu died without leaving any sons, and if he was joint with his brother, the whole property regardless of whether it were ancestral or self-acquired, used to pass to the brother and not to the widow of the propositus.[4]

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1. Mitā.I.i.18. Bhāruci also advocated this view, see Bhāruci on Manu, VIII. 416, Derrett, Bhāruci, II, 210. Also for a discussion, see RLSI, 132-4.

2. Mitā.I.i.26.

3. Derrett, (1956), 19 SCJ Jrnl. 107.

4. Mitā.II.i.30; II.i.39. Smṛti Candrikā, XI.i.23-6, Setlur, I, 278. Vyavahāra-mayūkha, 71, Setlur, I, 337. Madana-pārijāta, Setlur, II,534, para.1. The Sarasvatī-vilāsa, §480, explains that if the husband is joint, he has no niyata, "special", "several" or "distinct" proprty: "Not so: the wife and daughter rule applies to the wives of a divided man, only where special property belongs solely to their husband. It is to be borne in mind that the wife and daughter rule applies in the case of a divided man; because there is no possibility for the wives of an undivided man to take their husband's

/Continued on next page:

This explains why on the determination of this point in the eighteenth century [1] and in the nineteenth century,[2] up to the decision in Katama Natchiar v. Srimut Rajah Mootoo Vijaya,[3] the courts concentrated on the status of the co-parceners rather than on the nature of acquisition of the property. The First Shivagunga case strongly supports our view on this point.

If we project the complex facts of the First Shivagunga case in a simple way, it appears that B^1 and B^2 were two undivided brothers. B^2 was granted an estate by the Government which should be considered as his self-acquisition. B^1 died before B^2, leaving three sons, S^1, S^2 and S^3. B^2 died without any male issue. On B^2's death, S^1 took possession of the estate, and after his death, he was succeeded by his son, SS. Out of seven wives of B^2, three were alive at the time of his death. B^2 also left a few daughters and their descendants, both male and female.

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n.1 - p.835 - continued:

share in the joint property, seeing that no special property belongs to their husband." The relevant words of the original Sanskrit are: avibhakta-patnīnām tu patyur niyata-dravyā bhāvāt samudita-dravye patyaṃśo-grāhitvasyā-śakyatvāt.

1. Infra, 838-40.

2. See Srimat Mootoo Vijaya v. Rany Anga Mootoo (1844) 3 MIA 278 (hereafter as the First Shivagunga case); Varadiperumal v. Ardanari Udaiyan, (1863) 1 MHCR 412; restated in Godavari Lakshminarasamma v. Godavari Rama Brahman, (1950) ILR Mad. 1084 at 1089-90.

3. (1863) 9 MIA 539; (hereafter as the Second Shivagunga case).

For our present purpose, the relevant question decided by the Privy Council was to whom ought the estate to have descended according to Hindu law after the death of B^2 - to the widow of B^2 or to S^1, the son of B^1?

The paṇḍits at every stage of the litigation,[1] gave sole importance to in their answers to the status of jointness at the time of B^2's death, and opined that 'the succession to the separate self-acquired property of a member of an undivided family who died leaving no son, son's son or son's grandson is governed by the same rules[2] as the succession to the joint property of such family'.[3] That means, according to their view, the property should go to S^1.[4] So far as they were following the traditional śāstric[5] rule, the paṇḍits were correct. This also goes to support our previous statement that acquisition of any joint coparcener used to go to the joint pool.

Léon Sorg also tells us that in French India (Pondichery), if two Hindu brothers were joint and one of them died without male issue, the self-acquired property left by the deceased, used to go to the surviving brother and the widow

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1. Answer to the Sudder Court on 28 October, 1833, 9 MIA 539-547-8; answer of the paṇḍits on 16 January, 1837, ibid., at 550.

2. Emphasis supplied.

3. 9 MIA 539, 550.

4. For the rules of devolution of joint property on this point see, Sadabart Prasad Sahu v. Foolbash Koer, (1869) 3 Beng.LR 31; Rajah Ram Narain Singh v. Pertum Singh, (1873) 20 WR 189; Phoolbas Koonwur v. Lalla Jogeshur Sahoy, (1876) ILR 1 Cal. 226 (PC); Debi Parshad v. Thakur Dial, (1875), ILR 1 All 105, the Second Shivagunga case explained at 110.

5. Supra, 835, n.2.

of the propositus was only entitled to maintenance.[1]

But we have a thought-provoking report of an arbitration from Pondichery in The Private Diary of Ananda Ranga Pillai,[2] which might shed more conclusive information on the matter. The parties involved in this litigation were Christian converts, but the case was decided 'in consonance with the custom and usages'[3] of the caste and the 'śāstras'.[4] The facts of the case reveal that B^1 and B^2 were two brothers living jointly. B^1 died on 12 February, 1746, leaving a widow, W^1. B^1 had a son who predeceased his father. S left a widow, SW. B^2 had a wife, W^2. B^1's estate consisted both of ancestral and self-acquired properties. Both W^1 and B^2 were respectively claiming the estate as the rightful heir of B^1, and to resolve this dispute, Dupleix had to appoint twenty arbitrators who were 'leading members of the different castes'.[5] On behalf of W^1 her two brothers

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1. Avis No.57, 18 May, 1837, Léon Sorg, Avis du Comité consultatif de Jurisprudence Indienne, (Pondichery), 1897), 160. Sorg later admits that the rule was abandoned but he remarks at p.21 that the distinction between joint and separate property is a recent development and even as lat as the period of publication of his work, he found that in certain families there were no distinctions between the two categories of property, see G.D. Sontheimer, The Joint Hindu Family: its evolution as a legal institution, (London University, Ph.D. thesis, unpublished, 1965), 379.

2. Translated from Tamil by order of the Government of Madras, ed., J.F.Price, (Madras, 1904), The Kanakarāya Mudali's case is reported in Vol.I, 314-30. On this case, also see D. Annoussamy, 15 JILI (1973), 594-9.

3. A.R.P. Diary, I, 322.

4. Ibid., 322.

5. Ibid. On the method of solution of disputes between parties in the French territories, see Derrett, RLSI, 282-3.

contended that there was a partition between B^1 and B^2 and hence W^1 was entitled to inherit the estate of her deceased husband to the exclusion of B^2. B^2, on the other hand, established that there was no such partition as alleged on behalf of W^1, and the arbitrators being satisfied with B^2's contention, decided that the estate should devolve upon B^2 as the survivor. [1]

Keeping in mind the opinion of the paṇḍits [2] in the First Shivagunga case, [3] one can realise that in this arbitration also, the parties and the arbitrators were concentrating [4] on the sole question of jointness or separation of B^1 and B^2 and to all concerned the nature of the property, whether ancestral or self-acquired (though most of the property in this case was self-acquired), [5] was irrelevant to the resolution of the substantive issue. So far so good; but the disquieting factor in the report is the answer of the arbitrators to the question of Dupleix who interposed: 'Supposing that the partition had been made; how would this affect his [B^2's] position?' The arbitrators replied: 'Even then, as Kanakarāya Mudali had no son, and as Chinna Mudali was his brother, the latter had a right to the estate of the deceased. Even if there had been no brother, and if he had had only a cousin, this cousin could claim the property.' [6]

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1. Ibid., 321.

2. Supra, 837.

3. (1844) 3 MIA 278.

4. A.RP. Diary, I, 319, also 323-4.

5. Annoussamy, 15 JILI (1973), 594-9 at 598.

6. A.R.P. Diary, I, 322. It is not impossible that either the question or the answer was misunderstood. In a case of partition, concerning 'limited estate', the inheritance would go to the brother on the widow's death if he survives her.

This answer removes the case completely from the rationale of the First Shiva-gunga case and is the antithesis of what the śāstra propounds.

But this curiously oblique opinion of the arbitrators does not falsify our observation because, apart from this answer to the hypothetical question, in fact, the case was decided on the point of absence of partition between B^1 and B^2. Moreover, if the question of partition was altogether immaterial, it remained unexplained as to why the arbitrators were probing into it. In deducing the rationale of this case, one should bear in mind that none of the arbitrators were acknowledged śāstrins; they were all 'leading castemen'[1] and out of these twenty caste leaders, ten were Chettis who were respectable śūdras.[2] So it is not unlikely that the opinion represents an irritating blending of an inscrutable custom with the śāstra because the opinion strongly suggests that even a separated coparcener's widow had only the right of maintenance.[3] Therefore, for our purpose, the answer of the arbitrators to the second question of Dupleix should not be given much weight.

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1. A.R.P. Diary, I, 315.

2. See L. Rocher, 'Jacob Mossel's Treatise on the Customary Laws of the Vellālar Chettiyars', JAOS 89 (1969) 1: 27-50 at 28-9.

3. A.R.P. Diary, I, 322.

III. Emergence of self-acquired property: Anglo-Hindu Law

During the Anglo-Hindu law period a new dimension has been given to self-acquired property. We have seen that by 1867 a father's testamentary power over his self-acquired property was well-established.[1] Besides this recognition of testamentary disposition, the whole concept of self-acquired property passed through a revolutionary change and in this respect, the nineteenth century witnessed a transition from the Mitākṣarā multiple agnatic ownership to individual ownership; and its devolution to joint collaterals, depriving the widow of the propositus, was abolished.

The decision in the Second Shivagunga case[2] was a turning point in the history of the Hindu law of property. It may be recalled that in the First Shivagunga case,[3] their Lordships of the Judicial Committee made it known 'that the question of division or non-division appeared to be the only point on which the main question of title to the property would ultimately depend.'[4] But in the Second Shivagunga case, the Judicial Committee looked at separate property from a different angle, and Lord Justice Turner in the course of delivering judgment, rejected the above observation of their Lordships in the

1. See Baboo Beer Pertap v. Rajender, (1867) 12 MIA 38; earlier recognised in Madras, P. Narrainsvami Chetti v. P. Arunachella Chetti, (1860) 11 Madras S.D., 115.

2. (1863) 9 MIA 539.

3. (1844) 3 MIA 278.

4. (1863) 9 MIA 539 at 594.

First Shivagunga case and laid down the rule that:

> even if the late Zemindar (B^2) continued to be generally undivided in estate with his brother's family, this Zemindary was his self-acquired and separate property, and as such was descendible, like separate estate, to his widows and daughters and their issue preferably to his nephews ...
>
> Upon this view of the law, the question whether the family were undivided or divided becomes immaterial. The material question of fact would be whether the Zemindary was to be treated as self-acquired/property, or as part of the common family stock. 1

separate/

With this remark, the Privy Council emancipated a male Hindu's self-acquisitions from the archaic and mediaeval conception of communal ownership of agnates and established the rule that self-acquisitions were ipso facto separate. In the light of what we have said hitherto, the calm disposal of the issue in the words chosen above is surprising but it should be remembered that in England in 1863 a person could own property by various titles concurrently, e.g. as owner in fee simple, as beneficiary under a trust, as cotenant under a tenancy in common, as tenant in tail, or as joint tenant with benefit of survivorship, and by 1863 it was by no means clear how many analogies of English law had taken root in India. Although the decision could be hailed as a paradigm of modernity, a liberalising judgment, there was something ironic in the fact that their Lordships whilst professing to apply the correct Mitākṣarā position, departed

1. (1863) 9 MIA 539, 589.

from its concept that the devolution of property did not depend on the nature of the property but on the status of the propositus. This revolutionary swing to individualism, namely, that self-acquired property of an undivided coparcener should belong exclusively to the acquirer and passed on his death to his heirs, instead of passing by survivorship to other coparceners, had necessarily far-reaching effects on the Mitākṣarā coparcenary concept, and especially on the birthright of sons in the self-acquired property of their father.

The virtual abolition of son's birthright in the self-acquired property of the father was achieved by successive judicial leaps. Ten years after the decision in the Second Shivagunga case, it was held by the Calcutta High Court in Lochun Singh v. Nemdharee Singh [1] that a son had no right to demand partition of his father's self-acquired properties. In Rao Balwant Singh v. Rani Kishori,[2] the Judicial Committee, misunderstanding the texts of the Mitākṣarā,[3] confirmed that a father had absolute right to dispose of his self-acquired immovables. Although these judicial developments deprived the son of his birthright in his father's separate property yet, because of the ipso facto separate nature of such property, the decisions reinforced, somewhat unexpectedly, the birthright of a separated son in the self-acquisitions of his father.

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1. (1873) 20 WR 170.

2. (1898) 25 IA 54; texts analysed supra, 517-28; cases discussed, supra, 743-6.

3. Mitā.I.i.27; I.v.9-10.

We have repeatedly pointed out that according to the Mitākṣarā,[1] a son acquires a right by birth in ancestral property as well as in the self-acquired property of the father, and until a partition, both father and son lived on all the property without making any distinction between the two classes.[2] From this obviously the natural and logical rule emerges, and the śāstrakāras accordingly ordained,[3] that in the case of the father making a partition, the share of each of the sons would come from the entire common stock comprised of the ancestral property as well as self-acquisitions. The śāstra also took care of an after-born son and if and when a son was born after a partition, as mentioned above, all the separated sons were obliged to contribute fractions to make up the share of the after-born son.[4] This śāstric position has changed since the Second Shivagunga case,[5] and other cases[6] which intoned the dirge of birthright in the father's separate property; and a partition by a father is valid even though no item of the father's self-acquired property is given to the son. In other words, when a son is separated from his father, he may not take with him, unless the father so wishes, any part of the

1. Mitā.I.i.27.

2. See Sāyaṇa on Tai.Saṃ.II, vi.1,6; Dh.K.1161 and on Ai.Ār.II, i, 8; Dh.K.1163. Derrett, (1956) 19 SCJ (Jnl.), 107. For Sāyaṇa's texts, see supra, 581-82.

3. Mitā.I.ii. generally does not make any distinction between ancestral and self-acquired property.

4. Mitā.I.vi.8-10.

5. (1863) 9 MIA 539.

6. See supra, 843.

separate property of his father, and - however unjustly - the sons who remained united with the father also would not have any *svāmyam* in such property. Thus, so far as father's separate property is concerned, the separated (*vibhakta*) and united (*avibhakta*) sons have no preference over each other. So, regarding separate property, if during the lifetime of the father one class of sons has no preference over the other, why, after the death of the father, following the old rule which is valid in the context of separate property before the *Second Shivagunga case*, should the united sons exclude the separated sons from the inheritance of the separate property of the father? After the *Second Shivagunga case*, the exclusion of the separated sons in this context would be a wrong interpretation of the law.[1]

Though our observation is the logical outcome of the judicial development in respect of self-acquired property, yet the cases on the point do not speak with one voice and the majority of the decisions show a nostalgia for a rule which is no longer logically sound. In *Fakirappa* v. *Yellappa*,[2] a grandson enforced a partition against the wishes of his paternal uncles and the grandfather. After the death of the grandfather, the separated grandson and uncles who were united with their father, became contestants in respect of their shares in the property which was acquired by the grandfather himself before the partition with his grandson. Ranade and Jardine, J.J. held that, as between the

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1. See K.S. Aiyer, AIR 1949 Jnl., 39-42. Derrett, (1956) 19 SCJ (Jnl.), 103-11.

2. (1896) 22 Bom 101.

united sons and a separated grandson, on the grandfather's death the property left by him, both ancestral and self-acquired, would go in preference to the united son.[1] Jardine, J. thought that the claim of the grandson was contrary to the spirit and presumptions of Hindu law, but both Jardine and Ranade, J.J. significantly added that to hold otherwise would stimulate many unpleasant litigations. In Nana Tawker v. Ramchandra Tawker,[2] the Madras High Court theoretically accepted that the sons had an interest by birth in their father's self-acquisitions, but Munro and Pinhey, J.J. qualified their observation by saying that since a father could dispose of his separate property at his pleasure, it was not coparcenary property in the ordinary sense.

On the same point, the Allahabad High Court in Kunwar Bahadur v. Madho Prasad[3] held that 'the mere fact that some of these sons continued to live in his (father's) house joint in food with him would not deprive the sons

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1. Relied on a text in West & Bühler, Hindu Law, 3rd edn., 68, 366. Bṛhaspati has a similar text: putraiḥ saha vibhaktena pitrā yat svayam arjitam / vibhaktajasya tat sarvam aniśāḥ pūrvajāḥ smṛtāḥ // Bṛ.XXV.19, SBE, 33, 372-3; Dh.K.1568. It is submitted that the text is not applicable in post-Second Shivagunga case situations. For a critical comment on the text, see Derrett, (1956) 19 SCJ (Jnl.), 106.

2. (1908) 32 Mad.377; reaffirmed in C. Narasimha v. C. Narasimham, 1932 Mad.361, which following Viravan Chettiar v. Srinivasachariar, AIR 1921 Mad. 168, 171-2, pointed out that the view taken in Nana Tawker's case that succession to separate property was by survivorship and not by inheritance was wrong. Blind following of Madras in Ragubardayal v. Ramdulare, (1928) 6 Rangoon 367, 371.

3. (1918) 49 IC 620.

who were living away from him of their share in his estate',[1] consisting of ancestral as well as self-acquired properties. But the decision fudged the issue by pointing out that although descendants 'ceased to reside' in their father's house and lived separately, 'there was no finding ... that there was a partition between them'.[2]

But the point was made clear in Badrinath v. Hardeo,[3] where Stuart CJ. and Srivastava, J., concurring, rejected the Bombay view in Fakirappa's case and opined that in the absence of any śāstric text to the contrary, self-acquired property was not subject to the rights of survivorship but should be governed by the rules of inheritance and all the sons of the propositus, whether they remained separate or united with him, would share equally and there should be no difference in this respect whether the father acquired the property before or after the division with the son who was separated.[4] To this line of rational argument we can add the dissenting opinion of Hamilton, J. in Ganesh Prasad v. Lala Hazari Lal,[5] where he observed on the point in these words: 'My answer to the reference is that undivided sons do not exclude the divided

1. (1918) 49 IC 620b.

2. (1918) 49 IC 620, also the headnote at 620a.

3. AIR 1930 Oudh.77. There is a strong suggestion that this case would have been followed had the property been self-acquired in Khushaldas v. Shrimati, AIR 1936 Sind.199.

4. AIR 1930 Oudh.77 at 79.

5. AIR 1942 All.201; the majority opinion of this bench and 22 Bom 101 were followed in Vasudeo v. Vishvanath, AIR 1948 Bom.313, criticised by K.S. Aiyer, at AIR 1949 Jnl., 39-42.

son'.[1] But the majority of the bench held the opposite view and toed the line of the decision in Fakirappa's case.[2] In Ganesh Prasad v. Lala Hazari Lal,[3] the full bench re-emphasised the point that a father had an absolute power of disposal over his self-acquired property and sons would succeed to such property by inheritance and not by survivorship. Although, as we have pointed out,[4] the rule that a father has absolute power of disposition over his self-acquired property, and especially over his immovables, emerged from an incorrect understanding of the Mitākṣarā [5] by the Judicial Committee, [6] and since in this respect we know the opinion [7] and attitude [8] of the Supreme Court, we are not disputing the rule at this stage. It is also logical that if a son has no birthright in his father's separate property, it should pass by inheritance and not by survivorship,[9] but it should not remain unmentioned that according to

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1. AIR 1942 All.201 at 217a.
2. (1896) 22 Bom 101.
3. AIR 1942 All.201.
4. Supra, 744-47.
5. Mitā.I.i.27; I.v.9-10.
6. (1898) 25 IA 54.
7. Arunachala Mudaliar v. Muruganatha, (1954) SCR 243.
8. A rule which is in vogue for three-quarters of a century, becomes part of the law, Gurunath v. Kamalabai, AIR 1955 SC 206.
9. Contrary opinion in Ramappa v. Sithammal, (1879) ILR 2 Mad 182 (F.B.). Golāp Chandra Sarkār Śāstrī tells us that the rule laid down in this case would be applicable to self-acquired property of the father, Hindu Law, 4th ed., 285, but from the judgment itself the nature of the property cannot be ascertained.

śāstric texts[1], sons have a special position as first heirs even in their father's self-acquisitions which pass to them as apratibandha dāyādas.[2] In fact, there are views that partition with the father does not interfere with the right of inheritance of the divided sons. Thus, it was held in Ramappa v. Sithammal[3] that 'under the Mitakshara law a divided son (no undivided sons surviving) is entitled to succeed to his father's share in preference to his father's widow'. Jagannātha's remark to this effect is very significant:

> If a father, having made a partition with his sons, die after reuniting himself with any parcener whomsoever, it would follow, that his property could not be inherited by the divided sons: but no other persons ought to take the succession while sons live, since none can like them have a present right[4] to his property.[5]

Our objection is concentrated on the mistakes of the judges in the line of decisions in and based on Fakirappa's case;[6] those failed to comprehend the significance of the decision in the Second Shivagunga case on the rights of the sons, and especially of the separated sons, in the self-acquired property of the

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1. Baudhāyana's text: satsvaṅgajeṣu; Dā.bhā. IV.2 and 21, 'Male issue of the body being in existence, the wealth goes to them'. Manu, IX. 104. See Derrett, (1956) 19 SCJ (Jnl.), 105, n.3.

2. In this respect Nīlakaṇṭha made no distinction between 'reunited' sons and 'not reunited' sons, Vyavahāra-mayūkha, IV.9.16.

3. (1879) ILR 2 Mad 182.

4. Emphasis supplied.

5. Colebrooke, Digest of Hindu Law, (London, 1801), III, 522.

6. (1896) 22 Bom 101.

father. In effect, a son's birthright in the separate property of his father was abolished in this case,[1] and it was established that in all circumstances such property would pass by inheritance.[2] The decision also made it possible that when a father separated a son, he would not be obliged to give any portion of his separate property to the son. The great inconveniences of such restatement of the law were masked by the law of 'merger';[3] whereby the father could render his self-acquisitions joint-family property by intention alone. Thus, the inconveniences relate only to families where the father omitted to do this. Now we repeat[4] our question whether when the ownership of self-acquired property has undergone such transformation, it is logical or substantially correct to rely on the texts which exclude the separated son from a share in such property in competition with the united sons? The answer, as we have found in Badrinath v. Hardeo[5] should certainly be in the negative; but it is submitted that the learned judges in the decisions which ran counter to that in the present case made their mistakes by applying texts which were relevant to a situation when, except in

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1. (1863) 9 MIA 539.

2. See Srimut Rajah Mootoo Vijaya v. Katama Natchiar, (1866) 11 MIA 50, 71.

3. On 'merger', supra, 747-59.

4. Supra, 845.

5. AIR 1930 Oudh 77. The judges in Satruhan Prasad v. Sudip Narayan, AIR 1955 Pat 408 and in Vishweshwarlal v. Bhuramal, AIR 1968 Raj 277 at 278b, thought that Oudh case was overruled in Mt. Ram Dei v. Mt. Gyarsi, AIR 1949 All 545 (FB). But in fact, there is no mention of the latter in the former.

the context of partition, there was no distinction between joint and separate property in the family. And, in fact, the view of the Oudh case [1] has got a place in the statute book. For the purposes of devolution by inheritance of separate property of a Hindu male, The Hindu Succession Act [2] does not make 'any distinction between a son who was divided and a son who was undivided with the father'.[3]

It is stated in the Act that 'The property of an intestate shall be divided among the heirs in Class I of the Schedule in accordance with the following rules:-[4]

> Rule 2. -- The surviving sons and daughters and the mother of the intestate shall each take one share.[5]

Here in the phrase 'surviving sons', the Act does not make any distinction between separated and united sons. Thus, the Act reflects the view of the Oudh case and gives statutory recognition to separate property as a distinct category in which a son has no right by birth.

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1. AIR 1930 Oudh 77.
2. Act 30 of 1956 (17 June, 1956).
3. S.8, H.S.A., explained in clause 7 of the Hindu Succession Bill, Bill No. XIII of 1954, see Derrett, (1956) 19 SCJ, Jnl., 103. Raghavachariar, Hindu Law, 4th edn., 776. The distinction on this point between divided and undivided sons has been retained in respect of coparcenary property, H.SA., s.6, Explanation, 2; Raghavachararіar, 4th ed., 794-5.
4. H.S.A., s.10.
5. H.S.A., s.10, Rule 2.

IV. Property inherited from the maternal grandfather

It remains to examine the rights of sons in another category of property which is neither 'ancestral' in the technical sense,[1] nor self-acquired by the father. The property we are concerned with is that property which is inherited by the grandsons from their maternal grandfather, through the mother. Under the Mitākṣarā scheme, the question would arise regarding the nature of rights in such property inherited by grandsons, inter se as well as between them and their male issues. In fact, the question came for determination before several High Courts and ultimately to the Privy Council in Raja Chelikani Venkayyamma Garu v. Raja Chelikani Venkataramanayyamma,[2] where the facts were as follows: MF, a Hindu governed by the Mitākṣarā law, died in 1869 leaving his wife, W who died in 1875, and a daughter, D. D died in 1884 leaving two sons, DS^1 and DS^2. DS^1 died in 1892 and DS^2 died in 1901. The property left by MF was his separate property and descended on DS^1 and DS^2 after the death of D. The point for decision was whether DS^1 and DS^2 would inherit the property jointly with benefit of survivorship or jointly or in common without benefit of survivorship. The Judicial Committee accepting Mayne's contention,[3] held 'that under Mitakshara law the two sons of a Hindu's only daughter succeed on their mother's death to his estate jointly with benefit of survivorship as being

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1. As envisaged by Vijñāneśvara, see Colbrooke, Mitā.I.i.27.

2. (1902) 29 IA 156 (hereafter as the Jagampet case).

3. (1902) 29 IA 156 at 159.

joint ancestral estate'.[1]

We have noticed in the Second Shivagunga case,[2] that the Judicial Committee abolished survivorship in separate property and explained the instances of joint property and separate property in this well-known passage:

> According to the principles of Hindu law, there is co-parcenaryship between the different members of a united family, and survivorship following upon it. There is community of interest and unity of possession between all the members of the family, and upon the death of any one of them the others may well take by survivorship that in which they had during the deceased's lifetime a common interest and a common possession. But the law of partition shows that as to the separately acquired property of one member of a united family, the other members of that family have neither community of interest nor unity of possession. The foundation, therefore, of a right to take such property by survivorship fails; ... 3

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1. (1902) 29 IA 156 . Saminadha Pillai v. Thangathanni, (1895) 19 Mad 70, Jasoda Koer v. Sheo Pershad Singh, (1889) 17 Cal 33 overruled.

2. (1863) 9 MIA 539.

3. (1863) 9 MIA 543, 615. Goldstücker in his criticism of the judgment pointed out that the Judicial Committee applied a rule applicable 'to a divided family to an undivided one', On the Deficiencies in the Present Administration of Hindu Law, (London, 1871), 20. K.V. Venkatasubrahmanya Aiyar, resented the importation from English law by Colebrooke, terms, such as 'coparcener' and 'survivorship', (1942) MLJ Jnl., 63-82 at 63-4. It is true that from a very technical point of view, Aiyar's complaint deserves attention, but considering the difficulty in translating a legal work from one language into another, the Judicial Committee was justified in following the renderings of Colebrooke. Moreover, the 'original texts do not treat much of the law

/Continued on next page:

In the Jagampet case,[1] DS[1] and DS[2] were allowed to hold the property as joint tenants with the right of survivorship. In the context of the Mitākṣarā law, it means that the two brothers were holding the property as if they had right by birth in it and their male issues also will have their birthright. But we shall see presently that this approach of the Judicial Committee was wrong. But before we point out the exact mistake, we are to look into another case which dealt with the same problem. The case we are alluding to is Muhammad Husain Khan v. Babu Kishva Nandan Sahai [2] where the Judicial Committee took

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Note 3 - p.853 - continued:

relating to undivided families', and this is also true of the Commentaries, see Krishna Kamal Bhaṭṭācārya, The Law Relating to the Joint Hindu Family, TLL, 1884-5, (Calcutta, 1885), 53. Despite their difference in origin, there are striking resemblances between apratibandha dāya and joint tenancy in Common law; on this, see Littleton, 288. Coke on Littleton, 186a. For elaboration, see James Kent, Commentaries on American Law, ed., C.M. Barnes, 13th edn., (Boston, 1884), 360-1. Also Megarry and Wade, The Law of Real Property, (London, 1966), 403-8. On the differences between the two concepts, see the view of Sir Barnes Peacock in Sadabarat Pershad Sahoo v. Foolbash Koer, (1869) 12 WR (FB) 1. Also Golāp Chandra Sarkār Sāstrī, Hindu Law, 4th edn., (Calcutta, 1910), 250. In Common law, coparcenary there is no jus accrescendi (survivorship), see Richard Preston, Essay on Abstracts of Title, 2nd edn., (1823-24), ii, 70. Sir William Blackstone, Commentaries on the Laws of England, 15th edn., ed., E. Christian, (1809) ii, 188. Also see Megarry and Wade, op.cit., 442. For the Hindu law position, see Mitā.II.i.30; II.i.35, elucidated by Mitra Miśra, Vīramitrodaya, III, i.10. Also Mitā.II.ix.4. Madana Pārijāta, rights of reunited male in preference to the wife in saṃsṛṣṭa property, Setlur, II, 535; also R. Sarvādhikārī, The Hindu Law of Inheritance, TLL, 1880 (Calcutta, 1882), 775.

1. (1902) 29 IA 156.

2. (1937) 64 IA 250.

a contrary view on the point. When the facts of the matter are projected, we get the following information. F inherited a village from his maternal grandfather. He died leaving a will whereby he gave his son S only a life interest in the estate, and gave his daughter-in-law, SW, an absolute estate in the remainder. For our present purpose, F's power of disposition in respect of the property in question was at issue.

The Judicial Committee held that :

> under Hindu law a son does not acquire by birth an interest jointly with his father which the latter inherits from his maternal grandfather ... The expression "ancestral estate" must be confined to the property descending to the father from his male ancestor in the male line.[1]

The Judicial Committee observed that the property which F inherited from his maternal grandfather should be treated as his self-acquired property,[2] and he had full power of disposal over that estate. That means S had no birthright in that property. This observation of their Lordships of the Judicial Committee runs counter to the observation of their Lordships in the Jagampet case. In this divergence of opinion on the point, a reappraisal of the Mitākṣarā would not be inappropriate.

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1. Ibid. at 250; following Atar Singh v. Thakar Singh, (1908) 35 IA 206, a case on Punjab customary law.

2. (1937) 64 IA 250, 267.

Vijñāneśvara states that 'it is a settled point that property in the paternal and ancestral (grandparental) estate is by birth'.[1] This does not leave any scope for imagining that this would also include property inherited through the maternal line. In the Jagampet case, the Judicial Committee was misled by its blind following of the inaccurate rendering by Colebrooke of the word paitāmaha as 'ancestral'. In Muhammad Hussain Khan's case,[2] the Judicial Committee pointed out that 'Colebrooke apparently used the word "ancestral" to denote grand-paternal and did not intend to mean that in the estate which devolves upon a person from his male ancestor in the maternal line his son acquires an interest by birth'.[3] This is certainly the correct interpretation of the text, and in fact, has been relied on by the Madras High Court in Godavari Lakshminarasamma v. Godavari Rama Brahman.[4] After much consideration of the Jagampet case and Muhammad Hussain Khan's case, Rajamannar, C.J. approved the view of Mayne [5] and Mulla [6] that 'after the later decision, the Jagampet case must be confined to its own facts.'[7]

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1. Mitā.I.i.27.
2. (1937) 64 IA 250.
3. Ibid. at 266.
4. (1950) ILR Mad 1084 = AIR 1950 Mad 680.
5. Hindu Law, 10th ed., 664.
6. Hindu Law, 10th ed., 246.
7. (1950) ILR Mad 1084 at 1103.

But a postscript must be added to our conclusion on the Jagampet case. At all material times, the two brothers in this case treated the property as their joint property. The decision of the Judicial Committee was based on 'the mode' rather than on 'the nature of the ownership'.[1] This point has been emphasised in the judgment in these words:

> There is certainly nothing in the evidence which supports the view that the grandsons held the property in common rather than jointly; there is no separate dealings with any share. It is not suggested that if they succeeded jointly they ever ceased to hold it in the same way. The property was treated and dealt with as a whole, and so far joint ownership rather than ownership in common is the more probable.[2]

This strongly suggests an element of blending[3] and from the mode of enjoyment of the property, it could be suggested that the two brothers wanted the property in question to be treated as joint property.[4] Had the Judicial Committee expressed their observation more categorically on the point of blending, the decision could have stood on its own facts.

In the Jagampet case, Lord Lindley observed that 'members of a joint family who succeed to self-acquired property take it jointly ... but it may be that where sons succeed, the inheritance as to them is unobstructed.'[5] Now,

1. (1902) 29 IA 156 at 167.

2. (1902) 29 IA 156, 166.

3. For a discussion on blending, see supra, 747-59.

4. This point has been emphasised in Muhammad Husain Khan v. Babu Kishva Nandan Sahai, (1937) 64 IA 250 at 265.

5. (1902) 29 IA 156, 165.

we find an explanation of unobstructed heritage in the observation of Rajamannar, C.J. in Godavari Lakshminarasamma's case,[1] where he remarks: 'The only instance of apratibandha daya known to Hindu law is the rights of a son, son's son and son's son's son in the property, of the father, father's father and father's father's father. This is the jenmanaiva swatwa of Vignaneswara.'[2] The observation of the learned Chief Justice, though obiter, is most interesting. It will be borne in mind that the court were instructed at great length by K.V. Venkatasubrahmanya Aiyer, one of the celebrated teachers of Hindu law at Madras, and an advocate on the appellate side of the High Court. The Chief Justice goes on:

> According to the Mitakshara, the son has a right by birth in every kind of property. This must always be borne in mind ... The misconceptions prevailing in this branch of the Hindu law are mostly due to the mistake of equating the right by birth (jenmanaiva swatwa) with equal ownership (sadrisam swamyam). Though it is true that the son has a right by birth in all kinds of property belonging to the father, the amplitude of his ownership differs accordingly to the nature of the property. 3

The learned Chief Justice is trying to establish that a son has 'equal ownership' (sadṛśaṃ svāmyam) in ancestral property, but in self-acquired property of the father, a son has merely 'right by birth' (janmanaiva svatva).[4] Here, by trying

1. (1950) ILR Mad 1084.

2. Ibid., 1104-5.

3. (1950) ILR Mad 1084 at 1105.

4. The bench was obviously influenced by the persuasion of K.V. Venkatasubrahmanya Aiyer, who was the counsel for the appellant. See his identical views at (1942) MLJ, Jnl., 70.

to expose the mistake of others, the learned Chief Justice is equally exposing his own misunderstanding. Although the modern position is truly this, that the son has no svāmyam, Vijñāneśvara himself had envisaged that the sons had svāmyam but not svātantryam [1] in the self-acquisitions of the father.[2] The learned Chief Justice betrays his knowledge that even in self-acquired property of the father, a son had birthright, but he was trying to explain away the Mitākṣarā position by saying that equal ownership (sadṛ śaṃ svāmyam) exists only in ancestral property. It is an example of that ubiquitous phenomenon, the desire to read traditional, authoritative texts as congruent with the facts of one's own time.

Rajamannar, C.J. observes that 'in property described as swarjita or swayamopath[t]a, the son's ownership is dormant and subordinate to the father's.'[3] At the same time, he tends to contradict himself by saying, 'But it is certainly not notional. It is ... real.'[4] We have already pointed out [5] the observation of the learned Chief Justice that the only instance of apratibandha dāya known to Hindu law is the rights of a son, etc., in the property of the father. Now his Lordship adds to this by saying that:

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1. On these concepts, see supra, 432-33.
2. Derrett, (1956) 19 SCJ, Jnl., 109, n.1.
3. (1950) ILR Mad 1084, 1105.
4. Ibid., 1105.
5. Supra, 858.

> according to the Mitakshara school of Hindu law no property or interest in property of one person is taken by another by survivorship unless the latter had already an interest in the property by reason of his relationship. This can only be in apratibandha daya, in which there is always the right by birth. [1]

This is true, but Rajamannar, C.J. knew that since the Second Shivagunga case, a son had not even svāmyam in the self-acquired property of the father. He was indulging in a patchwork and was trying to justify the modern position by saying that in self-acquired property 'son's ownership is dormant and subordinate to the father's.' [2] In addition to this, he was trying to prove that because the father had absolute power of disposal and a son had no right of partition, he had no right by birth in his father's self-acquisitions. [3] But we have already shown [4] that the father's absolute power of disposition over his self-acquired immovables emerged from a misunderstanding of the Mitākṣarā; and 'the right of partition', the absence of which presupposes the absence of the right by birth [5] is, in fact,

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1. (1950) ILR Mad 1084, 1106.

2. Ibid., at 1105.

3. Ibid., at 1105.

4. Supra, 744-46.

5. This view was wrongly taken in Sartaj Kuari v. Deoraj Kuari, 15 IA 51 at 64. But the decision should be confined to its own facts, see Shiva Prasad v. Rani Prayag Kumari, 59 IA 331, 345; see also Mt. Ram Dei v. Mt. Gyarsi, AIR 1949 All. 545 at 549a.

to put it more accurately, a remedy [1] which follows the right inherent with birth. Rajamannar, C.J. put the cart before the horse by saying that since the son had no power to demand a partition of self-acquired property from his father, he had no birthright in it.[2] That this observation of the learned Chief Justice was wrong could be proved from the rights of a disqualified coparcener to which we now turn.

V. Disqualified coparcener

It was held in Tirbeni v. Muhammad [3] that birthright could not be affected by superveneient insanity. In Amrithammal v. Vallimayil Ammal,[4] a congenital idiot was admittedly precluded from claiming a partition of the joint family estate from his father. Nevertheless, he was held to be a coparcener with his father and the latter's bequest in favour of his wife was held to be inoperative. Again the Madras High Court in Muthuswami Gurukkal v.

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1. Obiter, Commr. of IT Punjab v. Dewan Bahadur Dewan Krishna Kishore, (1941) 68 IA 155 at 176.

2. Though this may, historically, be the true explanation here, between about 1830 and 1860 the Hindu law in, e.g. Madras, came to deny that birthright - first of all partition was denied, as the Mitākṣarā allows.

3. (1905) 28 All 247.

4. (1942) 2 MLJ 292 (F.B.); Krishna v. Sami, (1885) 9 Mad 64 followed; severely criticised by K.V.V. Aiyer, 'Coparcenership of Disqualified son under the Mitakshara', (1942) MLJ Jnl., 63-81 at 65-7.

Meenammal [1] held that superventent insanity as a disqualification could be a bar to demanding partition but it could not prevent the disqualified coparcener from taking the benefit of survivorship and becoming the sole surviving coparcener.[2] In spite of some doubts,[3] it appears that a disqualified coparcener is entitled to enjoy full coparcenary rights, including the right to alienate undivided property and he is 'disqualified from nothing except the right to demand partition.'[4] Here, a question may arise whether a man who could not demand partition himself can create in the alienee an equity to demand at maximum that share which, if he were undisqualified, he could have obtained at the date of suit. The question should be tackled from the point of view of the family and to consider the matter simply from the point of view of the legal difficulty of a man giving what he apparently does not possess, would be juridically impracticable.[5]

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1. (1918) 38 MLJ 291 = ILR 43 Mad 464; followed in Dilraj Kuar v. Rikheswar, (1934) 13 Pat 712; Vithaldas v. Vadilal, (1935) 38 Bom LR 257; Mool Chand v. Chahta Devi, ILR (1937) All 825 (F.B.); Bhagawati v. Parameswari, AIR 1942 All 267.

2. This view has been wrongly criticised by K.V.V. Aiyer, loc.cit., 82, but the learned writer's view has been proved to be erroneous by the decision of the Supreme Court, Kamalammal v. Venkatalakshmi Ammal, AIR 1965 SC 1349.

3. Derrett, IMHL § 409.

4. Derrett, Critique, § 148. IMHL, § 409. See Kesava v. Govindan, (1946) Mad 452 = AIR 1946 Mad 287; inadequately distinguished in Venkatalakshmammal v. Balakrishnachari, AIR 1960 Mad 270, 273.

5. Derrett, Critique, § 148.

If the family is in South India and a coparcener (precisely a disqualified coparcener) has an individual need which the family (rather, the manager) cannot satisfy and if unilateral severance of status [1] is out of the question, there is no reason why money should not be obtained and the equity created merely because actual partition at the alienor's option is not available to him.[2] Indeed, 'his disqualification is personal, it cannot affect the alienee, and the notional partition for the purposes of calculating the value of the equity is nowhere treated as a severance of status.'[3]

Now the Supreme Court in Kamalammal v. Venkatalakshmi Ammal,[4] has reaffirmed the point that in Madras, prior to the Hindu Inheritance (Removal of Disabilities) Act, 1928, a disqualified coparcener (a congenital deaf-mute) became by birth a coparcener with the father and could be the sole surviving coparcener.

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1. A demand for unilateral severance of status, in the circumstances, would amount to renunciation for, by definition, no share is available at his demand, Derrett, Critique, § 148.

2. Derrett, ibid., § 148.

3. Derrett, ibid., § 408. Contrary view in Deonath Sahay v. Lekha Singh, AIR 1946 Pat 419, which, it is submitted, was wrongly decided, see IMHL, § 409; Critique, 117, n.5. Surprisingly the court also ignored the Hindu Inheritance (Removal of Disabilities) Act, 1928.

4. AIR 1965 SC 1349.

VI. Conclusion

The above discussion on disqualified coparceners shows the mistake in the observation of Rajamannar, C.J., who opined that sons had no birth-right in the separate property of their father because they could not claim a partition of such property.[1]

But whatever we might point out as the correct view on father's self-acquired property vis-a-vis son's right by birth, it is too late to restore this birthright;[2] and hereafter our discussion on this concept should be confined mainly to the instances of joint family property.

1. (1950) ILR Mad 1084 at 1105.

2. Affirmation in Deivanai Achi v. Chidambaram Chettiar, AIR 1954 Mad 657 at 671. But we must not overlook those revenue cases which are built on the proposition that the son has birthright in his father's self-acquired property and the cases on 'gift' or 'transfer' of property dealing with father's making his self-acquired property ancestral property between himself and his sons, for a discussion, see supra, 747-59.

CHAPTER 20.

BIRTHRIGHT AND PARTITION

1. Introductory remarks

We have already noticed [1] Vijñāneśvara's broad principle that in the property of the father and the grandfather ownership is by birth; [2] and have noted also that the judiciary, sometimes by misinterpretation and sometimes out of expediency, has whittled down that rule to a great extent.[3]

We have pointed out that the Judicial Committee in the case of Rao Balwant v. Rani Kishori [4] in effect abolished a son's right by birth in the self-acquired immovable property of the father by pronouncing that a father could dispose of self-acquired immovables without the consent of his sons, though this was not the correct interpretation of Vijñāneśvara's view.

Consequently, only ancestral property remained as the subject of a son's birthright, and therefore, he could question or impugn only its improper alienation by his father.

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1. Supra, 520-5.
2. Mitā.I.i.27.
3. Supra, 745-47, 841-42, 859.
4. (1898) 25 IA 54.

Apart from a son's right to question or prevent alienation of ancestral property by the father, birthright also entails a son's right to demand partition of such property against the wishes of his father.

II. The notion of partition

At one time jurists thought that among the Hindus the character of property was only centripetal as opposed to centrifugal. Maine was mainly responsible [1] for popularising such an interpretation of the śāstra which, although partly tenable, was apparently not the whole truth. Maine observed:

> The mature Roman law, and modern jurisprudence following in its wake, look upon co-ownership as an exceptional and momentary condition of the rights of property. This view is clearly indicated in the maxim which obtains universally in Western Europe, Nemo in communione potest invitus detineri ("No one can be kept in co-proprietorship against his will"). But in India this order of ideas is reversed, and it may be said that separate proprietorship is always on its way to become proprietorship in common ... As soon as a son is born, he acquires a vested interest in his father's substance, and on attaining years of discretion he is even, in certain contingencies, permitted by the letter of the law to call for a partition of the family estate. As a fact,

1. Also Mayne, Hindu Law, 10th ed., (Madras, 1938), 254. Jolly, TLL, 1883, 97; but he accepted a son's right to partition at 125.

> however, a division rarely takes place (1) even at the death of the father, and the property constantly remains undivided for several generations though every member of every generation has a legal right to an undivided share in it. (2)

Indeed it is in everyone's interest that the members of a Hindu joint family 'should remain "joint in food worship and estate" as long as possible',[3] but the *ṛṣis* never intended family property to be absolutely indivisible.[4] And, despite his initial denial, Maine himself had to admit the textual authority of the *śāstra* allowing the son to demand division of the family estate.[5] Gautama and Manu ordained that '*Dharma* increases if they are separate, hence separate performance of rituals is consistent with *dharma*.'[6] From

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1. Emphasis mine. Only 20 years after the publication of Maine's *Ancient Law*, a leading journal recorded that 'the archaic principle of joint family is fast decaying', anonymous, *Calcutta Review*, (1881) Vol.1, XXIII, 14. In 1883 a writer observed: 'Separation is the only means that promises to afford relief from the social incubus, and to separation many families have now resorted', L.S.S. O'Malley, *Modern India and the West*, (London, 1941), 325, quoting Shiv Chunder Bose, *The Hindoos as They Are*.

2. Maine, *Ancient Law*, New edn., (London, 1930), 283.

3. Derrett, *Critique*, § 186.

4. The texts in the *dharmaśāstras* imply to this effect, supra, 369, n.5.

5. See the paragraph quoted supra, n.2 , especially the last part.

6. Gautama, XXVIII.4. Manu, IX. 111; Derrett, *Bhāruci*, II, 238. For discussion of similar texts, I.S. Pawate, *Dāya-Vibhāga*, (Dharwar, 1975), 104-5.

the point of view of partition between father and son, Bhāruci's comment on Manu, IX.111, is very significant. Bhāruci says:

> Now when partition is consistent with dharma, a state of indivision is not right when grounds for a separation have been taught. And this in effect, is what has been stated. This is how a partition between father and sons is to be explained, for the cause of such separation is similar. Nor should one doubt the existence of such a partition because the text says partition may take place "after the death of the father ..." [1]

This shows that as early as the sixth or seventh century,[2] partition between father and son was not altogether an unknown phenomenon among the Hindus. It is also well known that Gautama had knowledge of sons who were dividing the family property against the wishes of their father, although the practice was considered by the sage as socially outrageous.[3] Thus, it is small wonder that in the 12th century we find in the Mitākṣarā, sophisticated and comprehensive rules concerning the law of partition between father and son.

Vijñāneśvara consolidated the concept of a son's co-ownership with his father, and there cannot be two minds on the question that co-ownership

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1. Bhāruci, II, 238. Medhātithi takes a neutral stand on the spiritual aspect of partition: 'neither separation by itself nor non-separation by itself is either meritorious or sinful', Medh. on Manu, IX.111; Jhā. V, 91.

2. On the date of Bhāruci, see Derrett, Bhāruci, I, introd., 9-10.

3. Gautama, XV. 15 and 19; Kāṇe, HD, III, 566-7, 571.

connotes a right to demand partition of the property concerned.[1] The crucial text in the Mitākṣarā on this point in respect of ancestral property runs as follows:

> And thus though the mother is having her menstrual courses (has not lost the capacity to bear children) and the father has attachment and does not desire a partition, yet by the will (or desire) of the son a partition of the grandfather's wealth does take place. 2

Mitra Miśra restated the Mitākṣarā doctrine and explained the jural basis of a son's right to demand partition from the father: 'Here again, partition at the desire of the sons, whether in the lifetime of the father or after his demise, may take place by the choice of a single coparcener, since there is no distinction.'[3] This right of partition emerges from the birthright of a son. Thus, the author of Bālaṃbhaṭṭī made it crystal-clear that 'the meaning is that that (viz., division) follows from ownership by birth alone.'[4]

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1. Where there was joint ownership there was also the right to partition, judicially accepted per Lord Watson, Madho Prashad v. Mehrban Singh, (1890) ILR 18 Cal.157, 161. Also Shankar Baksh v. Hardeo Baksh, (1888) 16 IA 71, 75-6; Sundar v. Parbati, (1889) 16 IA 186.

2. Mitā.I.v.8. The text is correctly interpreted by S.C. in Puttarangamma v. Ranganna, AIR 1968 SC 1018 at 1020. Earlier S.C. in Raghavamma v. Chenchamma, AIR 1964 SC 136.

3. Tr. Golāp Chandra Sarkār Śastrī, The Law of Inheritance asin the Viramitrodaya of Mitra Miśra, II.1.23, (Calcutta, 1879), 89.

4. Bālaṃbhaṭṭī on Mitā. I.v.1.

Since father and son are co-owners of ancestral property, before a partition their rights extend over the whole property. In Appovier v. Rama Subba Aiyan, Lord Westbury illustrated the situation in these words:

> According to the true notion of an undivided family, no individual member of that family, whilst it remains undivided can predicate of the joint undivided property that he that particular member has certain definite share and rights of the coparcener in an undivided Hindu family governed by the law of the Mitakshara, which consists of a father and his sons, do not differ from those of the coparceners in a like family which consists of undivided brethren.[1]

III. Ancestral movables

A little ramification on these old cases may not be irrelevant, when we see that the Bombay High Court was reluctant to accept a son's birthright in ancestral movables by disallowing him the right to demand partition from his father, thus contradicting the clear texts affirming such a right in the

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1. (1886) 11 MIA 75, 89; also Suraj Bunsi Koer v. Sheo Proshad Singh, (1878) 6 IA 88, 100. Earlier in K. Natchiar v. S.R.M. Raganadha B.G. Taver, (1863) 9 MIA 539, 611, Turner, L.J. had referred to the property as "the common property of a united family". "There is", he said, "community of interest and unity of possession between all the ('coparceners'), members of the family, and upon the death of any one of them the others may well take by survivorship that in which they had during the deceased's lifetime a common interest and a common possession."

Mitākṣarā.[1]

Initially, the judiciary wanted to confine the textual authority only to the ancestral immovables. We may recall[2] that for practical purposes, Vijñāneśvara allowed some independence to the father in dealing with ancestral movables. The Bombay High Court interpreted this independence as a bar to the right of a son to demand partition from his father. In Ramchandra Dada Naik v. Dada Mahadev Naik,[3] Sausse C.J. and Arnould J. held that 'on this side of India a son (Hindu) has no right to enforce partition of ancestral movable property in the hands of his father'. Now, neither the Mitākṣarā nor the Mayūkha (IV.1.5) (which is of paramount authority in Bombay)[4] restricts only to immovables a son's right to demand partition of ancestral property. However, the mistaken view of this bench, although doubted, was not directly overruled[5] by Melvill, J. in Lakshman Dada Naik v. Ramchandra Dada Naik,[6]

1. Mitā.I.i.27.

2. Supra, 527-28.

3. (1861) 1 Bom HC Rep. Appx.76.

4. The special authority of the Mayūkha in Gujarat and Bombay, when in conflict with the Mitāksarā, has been considered and recognised in Lallubhai v. Mankuvarbai, (1876) 2 Bom 388, 416; Sakharam v. Sitabai, (1879) 3 Bom. 353, 365; Bhagirathibai v. Kahnujirao, (1886) 11 Bom 285, 294; Mulji v. Cursandas, (1900) 24 Bom 563 = 2 Bom LR 721.

5. In Lakshman v. Ramchandra, (1880) 7 IA 181, the P.C. while confirming the decision of Melvill, J. abstained from pronouncing a decided opinion against the older judgment, but certainly they did not speak in its favour.

6. (1876) ILR 1 Bom. 561.

but in Jugmohandas v. Mangaldas,[1] the Bombay High Court decided that 'there is no distinction between movable and immovable property as regards the right of a son in an undivided family governed by the Mitakshara law to partition in the lifetime of the father.'[2] The Madras High Court[3] and the Calcutta High Court[4] rightly made no distinction between movables and immovables and laid down the broad rule that sons could compel a division of ancestral property of any category at the hands of their father and the grandson may maintain a suit against his grandfather for compulsory division of ancestral family property.

However, although ultimately the judiciary recognised a son's right to demand partition in all categories of ancestral property at the hands of his father, the matter did not rest there.

IV. Apaji v. Ramachandra

An interesting point arose out of a situation where the grandfather was still alive and the father was living jointly with him; or where, even though the grandfather was deceased, the father was living with his brothers (collaterals).

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1. (1886) ILR 10 Bom. 529.
2. (1886) ILR 10 Bom.529.
3. Nagalinga Mudali v. Subbiramaniya Mudali, (1862) 1 Mad HC Rep.77 at 80.
4. Laljeet Singh v. Rajcoomar Singh, (1873) 12 Beng.L.R. 373. Also Allahabad, Jogul Kishore v. Shib Sahai, (1883) ILR 5 All 430 (FB.).

A father's living with his brother and his nephews is a very common phenomenon among the Hindus, but to deny a son the right to separate from his father and his uncles is to deny him such right in respect of ancestral property as envisaged by Vijñāneśvara. While no one of the Mitākṣarā school has denied a son his birthright, the Bombay High Court was reluctant to extend it to a situation like that just mentioned.

The classic case on this point was Apaji v. Ramchandra,[1] in which it was held that under the Mitākṣarā law, a son could not sue his father and uncles for a partition of the joint family properties and/or possession of his share therein when his father was not assenting thereto.[2] The majority decision of the full bench in Apaji's case held sway in some areas for a long time,[3] but the case deserves our attention not so much for its ratio decidendi, but especially for its remarkable dissenting judgment of Telang, J., which contained the correct interpretation of the Mitākṣarā.[4]

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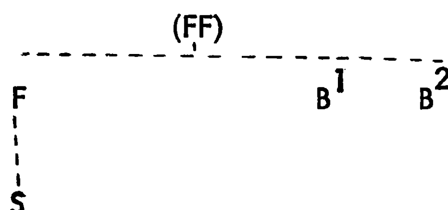
1. (1892) ILR 16 Bom 29. The truth of this statement can be seen at Aher Hamir v. Aher Duda, AIR 1978 Guj 10; majority view in Apaji's case followed

2. Criticised by Golāp Chandra Sarkār Śāstrī as: 'a misapprehension on ... of the Mitakshara', A Treatise on Hindu Law, 7th ed. (Calcutta, 1936), 502-3. J.C. Ghose, the decision 'was never contemplated by Vijnanesvara', The Principles of Hindu Law, 3rd ed. (Calcutta, 1917), 563. Commented upon unfavourably by Kane, HD, III, 570-1. Derrett, the rule 'is admittedly bad Mitakshara law', Critique, § 204. R.C. Mitra is uncritical, The Law of Joint Property and Partition in British India, TLL, 1895-96, (Calcutta, 1897), 50, 333. Srinivasan's projection of the case is unreliable, Hindu Law, III, 1811.

3. Jivabhai Vadilal v. Vadilal, (1905) 7 Bom.LR 232; Bhupal v. Tavanappa, AIR 1922 Bom.292.

4. Derrett, Critique, § 204.

The situation in Apaji's case may be better understood by means of the following illustration:



The joint family consisted of B[1], B[2], F and S. S, the plaintiff sued the defendants, B[1], B[2] and F for apartition of the ancestral property. F did not consent to this partition. The Subordinate Judge passed a decree for S which was confirmed by the District Judge. On appeal to the Bombay High Court, the case was referred to the Full Bench.

The point for decision was:

> Under Hindu law applicable to this Presidency, (the Satara District in this case), can a son in the lifetime of his father sue his father and uncles for a partition of the immovable ancestral family property and for possession of his share therein the father not assenting thereto?[1]

In the present case, the specific question before the Full Bench was whether such right of the son to partition also exists where the ancestral property is held in coparcenary by the father in union with his brothers and nephews.[2]

Sergant, C.J. observed that, while it was well-settled in all the Presidencies that, under the Mitākṣarā law, a son could claim partition of

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1. (1892) ILR 16 Bom 29 at 30, 32.

2. (1892) ILR 16 Bom 29 at 33.

the ancestral properties inherited by the father whether he assented to it or not, such a right was not available without the consent of the father during the father's lifetime in the case of ancestral property held in coparcenary, when the father was joint with his father or brothers or nephews.[1] The Chief Justice referred to a decision of the Privy Council,[2] in which it was observed: 'according to Mitakshara, (Chap.i, Sec.5, Verse 3), there can be no partition directly between grandfather and grandson while the father was alive'. While Sargent, C.J. admitted that the observation of the Privy Council was obiter, he scrupulously clung to it as the correct (judicial) meaning of the placitum. But it seems from his subsequent remarks that his Lordship was swayed from the Mitākṣarā on a consideration of public policy.

It is a familiar situation in India that the ascendants, descendants and collaterals live together holding property in common. But familiar also is the break -up of joint families, and new families are set up when one or more of the coparceners realise their shares in a partition. This fusion and fission are ever-changing phenomena of the Hindu way of life.[3] But Sargent, C.J. missed this point and observed:

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1. (1892) ILR 16 Bom 29, 33.

2. Rai Bishenchand v. Mt. Asmaida Koer, (1884) ILR 6 All 560 (P.C.), 574 = 11 IA 164, 179.

3. Subba Ayyar v. Ganasa Ayyar, (1895) ILR 18 Mad 179, 182.

> It is, moreover, to be remarked that "equal right of ownership of father and son in property acquired from the grandfather" does not necessarily imply a separate and independent right by one of the coparceners to have that property segregated from the joint family estate in the hands of several lines of coparceners - and indeed, it is plain that if the son could assert such right against the will of the father, the segregation might lead to grave practical difficulties. 1

But what the Chief Justice thought of as a matter of public policy or 'practice of the Hindu community',[2] in fact, emanated from his misunderstanding of the Mitākṣarā. This is apparent when his Lordship remarked that they should not go beyond the express texts of the Mitākṣarā considering the 'feeling' or 'practice' of the Hindu community'. The Chief Justice, like others of his colleagues,[3] analysed the texts in the Mitākṣarā on partition. The controversial text[4] in this respect runs as follows:

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1. (1892) ILR 16 Bom 29 at 36.

2. ILR 16 Bom 29 at 36.

3. Bayley, J., Candy, J., concurred; Telang, J. dissenting.

4. adhunā vibhakte pitaryavi dyamānabhrātṛke vā pautrasya paitāmahe dravye vibhāgo nāsti / adhriyamāṇe pitari* ityuktatvāt / bhavatu vā svārjitavat pitur icchayaivetyāśaṅkita āha - bhur yā pitāmahopāttā nibandho dravyam eva vā / tatra syāt sadṛśam svāmyaṃ pituḥ putrasya caiva hi // Yājñavalkyasmṛti, 5th ed. (Nirnaya Sagar Press, Bombay, 1949), 227.

* 'pitṛto bhāgakalpanā' (Vy.120)

> If the father be alive and separate from the grandfather, or if he have no brothers, a partition of the grandfather's estate with the grandson should not take place (1) since it has been directed that the shares shall be allotted in right of the father, if he be deceased or, admitting partition to take place, it would be made according to the pleasure of the father, like a distribution of his own acquisitions: to obviate this doubt the author says --
>
> It is well known that the ownership of father and son is the same in land which was acquired by the grandfather, or in a corrody or in chattels (which belonged to him). (2)

Although Telang, J. could not agree with Colebrooke's rendering of the placitum and favoured Jolly's translation,[3] the fault of misinterpretation

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1. Ghārpure renders: pautrasya paitāmahe dravye vibhāgo nāsti, as 'the grandson would not have a (right)to) partition in the grandfather's estate', otherwise he follows Colebrooke closely, Yājñavalkya Smṛti, The Collection of Hindu Law Texts, II, IV (Bombay, 1939), 1019.

2. Tr. Colebrooke, Mitā.I.v.3.

3. 'Supposing the father to be divided (from his coparceners) or to have no brothers, shall the estate, which has been inherited from the grandfather, not be divided at all with the grandson in that case, because it has been directed that shares shall be allotted in right of the father if he is deceased (and not otherwise); or admitting partitions to take place (in that case), shall it be instituted by the choice of the father alone: in order to remove the two doubts, which might thus be entertained, the author says.' Julius Jolly, Outlines of an History of the Hindu Law of Partition, Inheritance and Adoption, As Contained in the Original Sanskrit Treatises, TLL, 1883, (Calcutta, 1885), 125, n.1.

of the text does not lie with Colebrooke. There is always a danger in reading a placitum of the Mitākṣarā in isolation. Every text should be seen in the light of Vijñāneśvara's cardinal principle of birthright and his exiguous style of projection. Vijñāneśvara, the jurist par excellence, always kept in mind the opposing view, and never missed a chance to voice it through the lips of the pūrvapakṣin, his imaginary opponent, with the intention of carrying home to his readers the final point; and this text also is an example of his interpretative technique and juridical style which, if read incautiously or in isolation, can be a trap to an inalert reader.

The text is a continuation of his comment on the text of Yājñavalkya: 'But among grandsons by different fathers, the allotment of shares is according to the father.'[1] Vijñāneśvara says that the implication of the text is this, that distribution of ancestral property among the grandsons should be per stirpes and not per capita.[2] To dissipate any possible misunderstanding of this, he expanded this interpretation in a further paragraph, and posed the possible doubts which could be raised from his earlier statement. These doubts may seemingly take the shape of a rule, namely, that there can be no partition at the instance of the grandson when the father is alive, has brothers, and does not desire partition and, consequently, a son's right of partition is taken away as in the case of a father's self-acquisitions.[3] The doubts which may emerge

1. Mitā.I.v.1.

2. Mitā.I.v.2.

3. Succinctly explained in Subba Ayyar v. Ganasa Ayyar, (1895) ILR 18 Mad 179, 181.

from the placitum,[1] have been explained by Viśveśvara Bhaṭṭa in his Subodhinī by contemplating two situations: (1a) when the father is alive and separated from his own father, the grandson is not entitled to partition the grandfather's property. The father, being separated from the grandfather, cannot get the grandfather's wealth and, because the father is surviving, the grandson cannot demand a partition of his grandfather's property because the father's presence is obstructing the title of the son.[2] (1b) Again, where the grandfather is alive and joint with his only son, the father, and although the latter by reason of his being unseparated obtains the property, the grandson cannot demand a partition unilaterally from the grandfather because his own father obstructs his title. Therefore, in either of these two situations, a grandson whose father is living does not get a share in the property of the grandfather without the consent of his father. The father's presence, whether separated or unseparated from the grandfather, is considered as an obstruction to the right of his son in the grandfather's property.

Analogous with these two situations is a third state of affairs wherein the father is living jointly with his brothers and nephews. Here also the presence of the father obstructs the son's title and consequently, he is not

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1. Mitā.I.v.3.

2. dvārasya nirūdhvatvāt: 'as the door is blocked', text, J.R. Ghārpure, ed. The Subodhinī, The Collection of Hindu Law Texts, No.3, (Bombay, 1914), 52; tr. ibid., No.4, (Bombay, 1930), 132. Cp. Bālaṃbhaṭṭī, 151, ll. 13-14: tasya satvācca dvāra nirodhena pautrasya paitāmaha dravya prāpty abhāvaḥ /

considered entitled to sue his father and uncle for partition of the ancestral property against the will of his father.

Here, parenthetically, we may mention that Jīmūtavāhana, to reach the same end, took a different stand. He did not say that the father, when alive, obstructs the right of the son, but he said: 'The grandsons and great-grandsons whose fathers are alive cannot offer oblations in the parva occasions, they are not therefore entitled to the estate of their grandfather and great-grandfather respectively.'[1]

The right answer to these doubts and also to Jīmūtavāhana's view may be found in the Vīramitrodaya, Mitra Miśra expressly refutes Jīmūtavāhana by saying:

> This, however, is not acceptable; because, it has been established that in the grandfather's property the grandsons also acquire ownership by birth; hence the equality of the grandsons' share (with a son's share) in the grandfather's property is based upon the authority of the texts, (2) and not founded upon any equitable principle. For the capacity for presenting funeral oblations is not alone the criterion of the right to heritage, since the younger brothers are entitled to heritage, although

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1. See Golāp Chandra Sarkār Śāstrī, ed., Vīramitrodaya, II.i.23a.

2. vacanena nivartate, Vīramitrodaya, II.i.23a, Golāp Chandra Sarkār Śāstrī, ed., 35. Cp. loka-prasiddham in the Mitākṣarā, n. 5 below, p. 881.

> they are not competent to offer oblations while there is the eldest brother. And the fitness for presenting oblations, (which the younger brothers have) is not wanting in grandsons too (while their father is alive). 1

The placitum [2] has two parts, namely, (i) the doubts or objections, and (ii) the answer. Vijñāneśvara anticipated these objections, and that is why he put an end to them by citing the well-known rule from Yājñavalkya that in the property of the grandfather, the ownership of father and son is equal.[3] The key to the paragraph lies in the phrase: bhavatu vā svārjitavat pitur icchayaivetyāśaṅkita āha: which he puts immediately before quoting the substantive rule of Yājñavalkya (II.121).

We notice that Vijñāneśvara never intended, as Telang, J. rightly observed,[4] to impose a restriction on what was considered to be the unqualified and inherent right of a son (coparcener) to demand a partition of ancestral property. Vijñāneśvara was conscious that, although a son's co-ownership with father was well-known (loka-prasiddham) [5] and a coparcener's right to demand a partition unassailable, in his own days, as in our time, the question

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1. Tr. Golāp Chandra Sarkār Śāstrī, The Law of Inheritance as in the Vīramitrodaya of Mitra Miśra, (Calcutta, 1879), 91.

2. Mitā.I.v.3.

3. Yājñ. II.121.

4. (1892) ILR 16 Bom. 29, 40.

5. The Mitākṣarā, Nirnaya Sagar Press, edn., 227.

of partition by the son was probably a matter of frequent disputes. That is why Vijñāneśvara allowed more space for this and made it absolutely clear that 'In such property, which was acquired by the paternal grandfather through acceptance of gifts, or by conquest or other means (as commerce, agriculture, or service), the ownership of father and son is well-known: and therefore, partition does take place (vibhāgo 'sti).'[1] Then he comes back to the text on computation of shares, and says that allotment will be per stirpes; but that does not mean that in respect of his right a son is in any way unequal to his father.[2] And, finally, he adds that the right to demand partition is in the son and it is by his will, and not by the father's desire, that the partition takes place.[3] So, even though the father is joint with his brothers, a son's general right to demand partition does not alter. This is borne out by Kāṇe's observation:

> When the son's right of ownership by birth in ancestral property came to be recognised by such smṛtis as that of Yājn., it followed as a logical consequence that any person who acquires a right by birth can demand partition and separate possession of his share at any time. 4

This was precisely the view of Telang, J. in his dissenting judgment in Apaji's case but, although Sargent, C.J. acknowledged Telang, J.'s

1. Mitā. Nirnaya Sagar Press, ed., 227; Colebrooke, I.v.5.
2. Mitā.I.v.6.
3. Mitā.I.v.8.
4. Kāṇe, HD, III, 571.

accurate knowledge of Sanskrit,[1] he did not pay proper heed to his textual interpretation, the reasons for which we have already mentioned.[2]

The erroneous decision of the Bombay Full Bench was followed in Bombay,[3] but the High Courts of Calcutta,[4] Allahabad,[5] Madras,[6] and Patna [7] did not commit the same error and held to the general point that a Hindu governed by the Mitākṣarā law was competent to maintain a suit for partition of ancestral properties even when his father and grandfather were both alive. These are old cases and one may wonder why we should devote space to them in our present study. But as recently as the 'sixties and 'seventies, we find that the problem has not diminished in its vigour. In 1964, the Gujarat High Court [8] followed the majority decision of Apaji's

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1. (1892) ILR 16 Bom 29 at 35.

2. Supra, 875-6.

3. Jivabhai Vadilal v. Vadilal, (1905) 7 Bom LR 232; Bhupal v. Tavanappa, AIR 1922 Bom 292.

4. Laljeet Singh v. Rajcoomer Singh, (1874) 12 Beng LR 373; Rameshwar v. Lachmi (1903) ILR 31 Cal 111; Mussamut Deo Bunsee v. Dwarkanath, (1868) 10 WR 273.

5. Jogul Kishore v. Shib Sahai (1883) ILR 5 All 430.

6. Subba Ayyar v. Ganasa Ayyar (1895) ILR 18 Mad 179, 183.

7. Digambar Mahto v. Shib Sahai (1922) ILR 1 Patna 361 obiter at 362.

8. Jaswantlal v. Nichhabhai, AIR 1964 Guj 283, 287.

case on the point with the comment that the rule does not apply to a suit for partition by metes and bounds once the father had admitted the son's right to severance of status. 'But the problem remains where the father altogether denies the right to sever.'[1]

Again in 1973, the same matter as in Apaji's case came for decision before the Mysore High Court.[2] After a discussion of the case laws and relevant texts on the problem, the Bench rightly adopted the dissenting opinion of Telang, J. The Court observed that 'the right of partition is considered as a necessary incident of the co-ownership of property by members of a Hindu joint family',[3] and hence, as in the present case, 'a son during the lifetime of the father is competent to maintain a suit against him and his uncles for partition of the joint family properties when the father was not assenting thereto and continued to remain joint with his brothers.'[4]

Before the Mysore decision, the question of the right of partition of a coparcener came before the Supreme Court in the case of Puttarangamma v. Raganna.[5] The Supreme Court held that 'It is now a settled doctrine of Hindu law that a member of a joint Hindu family can bring about his separation in status by a definite, unequivocal and unilateral declaration of his intention to

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1. Derrett, Critique, § 204;
2. Devagya Tuklya v. Shivgya Igya, AIR 1973 Mys 4.
3. AIR 1973 Mys 4 at 10.
4. AIR 1973 Mys 4 at 4.
5. AIR 1968 SC 1018 = (1968) 3 SCR 119.

separate himself from the family and enjoy his share in severalty.'[1] The Supreme Court did not examine the text[2] which became a point of debate in Apaji's case, but gave pride of place to the text[3] which confers right of partition generally on the son against his father's will.

V. Conclusion

Although the observation of the Supreme Court in Puttarangamma's case generally upholds the right of a son to seek partition from his father, the the incorrect rule,[4] to the effect that a son may not demand partition against his father's will when the father is joint with an ascendant and collateral, passed sub silentio[5] and 'nothing less than the overruling of the Bombay case by the Supreme Court will serve to set us free from this anomaly.'[6]

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1. AIR 1968 SC 1018 at 1020.
2. Mitā.I.v.3.
3. Mitā.I.v.8. The SC also relied on Vīramitrodaya, II.23; Sarasvatī-vilāsa, 28; Vyavahāra-mayūkha, IV.III.1. Also earlier SC in Raghavamma v. Chencamma, AIR 1964 SC 136.
4. Apaji v. Ramchandra (1892) 16 Bom 29.
5. The assumption of the Mysore Bench, AIR 1973 Mys 4, that the majority view in Apaji's case has by implication been overruled by the SC in Puttarangamma's case is a misunderstanding of the SC decision.
6. Derrett, Critique, § 204.

But, nevertheless, the Supreme Court decision in Puttarangamma's case [1] has placed the birthright of a son on a firm foundation, and because of their birthright the coparceners of joint family property have the right to partition,[2] the right to restrain alienation by the head of the family exeept for necessity,[3] the right to maintenance [4] and the right of survivorship.[5] All these rights of the coparceners imply plurality of ownership over the same property as opposed to absolute individual ownership. To examine the validity of continuation of the joint family property in modern India is the theme of our next chapter.

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1. AIR 1968 SC 1018.

2. Derrett, IMHL, § 404. Narayana Prabhu v. Janardhana Mallan, AIR 1974 Ker 108.

3. Derrett, IMHL, § 404.

4. Ibid., §§ 400-1.

5. Ibid., § 408. Chhotey Lal v. Jhandey Lal, AIR 1972 All 424.

CHAPTER 21

BIRTHRIGHT IN THE CONTEMPORARY SOCIO-ECONOMIC SETTING

1. Character and Incidents of Coparcenary (Juridical Joint Family)

At the concluding stage of our study, by way of recapitulation, but certainly not for the sake of repetition, we should apprise ourselves of the character and incidents of coparcenary (joint family/ancestral) property.

The Hindu joint family is a social, economic and religious unit, consisting of all males lineally descended from a common male ancestor, their wives, unmarried daughters and other dependants. It is generally accepted that, within this wider social unit, the male [1] descendants from

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1. A female cannot be a coparcener, Jagarnath v. Deputy Director of Consolidation, AIR 1977 All 176. But statutory extension of coparcenary interest, Hindu Women's Rights to Property Act, 1937, S.7(2). The S.C. opines that the Act 'clothed her with all the rights and concomitants of a coparcener's interest' and 'it is futile to contend that the widow couldnot be treated ... as a member of the Hindu coparcenary ...', even though 'acquisition of interest by birth , is wholly wanting in her case', Controller of Estate Duty, Madras v. Alladi Kuppuswamy, AIR 1977 S.C. 2069, ¶11. But the strict Mitaksara view is stated by the S.C.: 'A Hindu female ... is not a coparcener because a coparcenary 'includes only those persons who acquire by birth an interest of the ... coparcenary property', Pushpa Devi v. Commr. of I.T., New Delhi, (1977) 4 SCC 184, 185. In the light of these contradictory opinions of the S.C., one should also see the earlier decisions Satrughan v. Sabujpari, AIR 1967 SC 272; State Bank of India v. Ghamandi Ram, AIR 1969 SC 1330, 1333-4.

the common ancestor in the male line, form the economic consortium of co-owners of the joint family property, which is known as the coparcenary.[1] To be precise, a Hindu coparcenary comprises only those males who take by birth an interest in the joint, ancestral, or coparcenary property.[2] The coparcenary extends up to four degrees of relationship, including the common ancestor for the time being, i.e. a person himself,

1. On the distinction between Hindu joint family and coparcenary, State Bank of India v. Ghamandi Ram, AIR 1969 SC 1330, 1333-4; Babu Lal v. Chandrika Prasad, AIR 1977 NOC 229 (All); Pushpa Devi v. Commr. of I.T., New Delhi, (1977) 4 SCC 184, 185.

2. Surjit Lal Chhabda v. Commr. of Income-tax, Bombay, AIR 1976 SC 109. On Owners of coparcenary interest other than coparceners, see IMHL, §§ 412-8.

his sons, son's sons and son's grandson.

The important feature of the coparcenary is that every coparcener has got an interest in every parcel of the joint family property,[1] and since every coparcener's right is integrated with similar rights of other coparceners, no coparcener can claim that he is the owner of a particular portion of the property. This Mitākṣarā doctrine of samudāyika svatvavāda leads to two things. First, no coparcener can claim a definite or specified share in the property until he exercises his right to claim a partition.[2] Secondly, a coparcener cannot voluntarily transfer any specific portion of the joint family property until and unless it is allotted to him at a partition. Thus, although a coparcener's substantive right to claim a partition sounds individualistic, the nature of joint family property is essentially corporate. And this economic consortium is also supposed to be the lifeblood of the social unit of the joint family as an institution.

Thus, a study of the relevancy of birthright or coparcenary property in contemporary India, apart from its juridical aspect is, of course, integrated, like many other variables, with an examination of the structural trends of the institution of family among the Hindus.

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1. State Bank of India v. Ghamandi Rami, AIR 1969 SC 1330; followed in Mst. Kashmira v. The Deputy Director of Consolidation, AIR 1975 All 458.
2. Girijanandini v. Brijendra, AIR 1967 SC 1124, 1127; Commr. of Gift Tax, Madras v. N.S. Getty Chettiar, AIR 1971 SC 410.

II. Family in India

a. Traditional pattern of family

We need have no hesitation in saying that over the centuries, the family has been the most important social unit in India.[1] However, despite the existence of sporadic examples[2] of the nuclear family system, the traditional pattern of living among the Hindus was that of the joint family whose members were bound together by ties of common ancestry, common property and common worship.[3]

b. Impact of modernisation

Since the nineteenth century,[4] India had significant cultural contact

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1. A. Beteille, 'Family and Social Change in India and Other South Asian Countries', Economic Weekly Annual, 16 (1964), 237-44.

2. In this respect, I.P. Desai points out that in India in the past, nuclear group did exist 'but nuclearity was not the prevalent pattern of family', Some Aspects of Family in Mahuva, (New York, 1964), 40. Also Y. Singh, Modernization of Indian Tradition, (Delhi, 1973), 175-6.

3. Aileen D. Ross, The Hindu Family in its Urban Setting, (Bombay, 1961), 8. Judicial observation in Appovier v. Rama Subba Aiyan, (1886) 11 MIA 75.

4. The sociological consequences of fifteenth and sixteenth century contact with the Portuguese were only marginal, L.S.S. O'Malley, 'The Impact of European Civilization', in L.S.S. O'Malley, ed., Modern India and the West: A Study of the Interaction of their Civilizations, (London, 1941), 45. The Portuguese were followed by the Dutch and the French in the 17th and 18th century. The British contact with India started in the early 17th century but the consolidation of British power was complete only towards the end of the 19th century, Y. Singh, op.cit., 85-6.

with the West. Nineteenth century Western culture was fundamentally different in its ethos from the traditional cultural pattern of Hinduism. The prevailing Indian values based on status and hierarchy experienced a confrontation with the theoretical equality and individualistic doctrines of the West. The then legal rationalism of the West, recognising a contractual-individualistic relationship between man and society, pervaded the intellectual atmosphere of the Indian elites who found their own legal values immersed in communal and familistic status allocation. Hand in hand with philosophy and legal learning, the impact of the industrial revolution began to be felt in India and the process of urbanisation and industrialisation commenced. Thus, although with independence, India committed herself to modernisation, the shifting of values in Indian society had already begun with British rule.[1]

c. Programme of industrialisation

A programme of industrialisation, modernisation and development usually involves changes in social organisation[2] and some social scientists[3]

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1. M.N. Srinivas, Social Change in Modern India, (Berkeley, 1966), 53. Gunnar Myrdal, Asian Drama: An Inquiry into the Poverty of Nations, (Pelican, 1968), 1,54. But British attempt of modernisation failed to revolutionise Indian society because Government action could attack traditional values only on a broad front, J.C. Heesterman, 'Political Modernization in India', in A.R. Davis, ed., Traditional Attitudes and Modern Styles in Political Leadership, Papers Presented to the 28 International Congress of Orientalists, Canberra, January 1971, (Sydney, 1973), 29-56 at 48-9.

2. H. Nagpaul, The Study of Indian Society, (New Delhi, 1972), 91. S.K. Kuthiala, From Tradition to Modernity, (New Delhi, 1973), 20.

3. W.J. Goode, World Revolution and Family Patterns, (Glencoe, 1963), 239. Parsons also believes that increasing economic rationality shows an increase in percentage of nuclear families, T. Parsons, The Social System, (Glencoe, 1951), 182-91.

postulate the general view that increase in industrialisation connotes a corresponding increase in nuclearisation of the familial system. But it is not axiomatic that industrialisation in all societies leads to a transition from a joint or extended to a nucleated structure of family. In this respect, Peter Laslett puts forward a broad observation:

> The evidence seems to suggest in fact, that the size of the household has tended to grow rather than shrink with the coming of industrialisation, though its size has fluctuated since. The multigenerational family of kin living under the same roof or in close geographical proximity may even be somewhat commoner in the contemporary industrial city than it was amongst the peasantry. Urbanisation, mechanical communications, the growth of wealth and the increase in the expectation of life may actually have strengthened the familial tie in some ways and widened the network of kinship. 1

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1. P. Laslett, 'The History of Population and Social Structure', International Social Science Journal, Paris, UNESCO 17 (1965) 4: 582-93, 588-9. Goode also observed: 'Just how industrialisation or urbanisation effects the family system, or how the family system facilitates or hinders these processes, is not clear', W.J. Goode, World Revolution and Family Patterns, op.cit., 1-2. In Japan, the traditional stem family has survived urbanisation. In Turkey also, the factory organisation is patterned on the traditional extended family, Bryce Ryan, 'Traditional Societies Can Change', in Carle C. Zimmerman and Richard E. DuWors, ed., Sociology of Underdevelopment, (Vancouver, 1970), 35-46 at 38-9; 'Traditional Groups in the Developmental Process', in D. Narain, ed., Explorations in the Family and Other Essays, Professor K.M. Kapadia Commemoration Volume, (Bombay, 1975), 544-62 at 551. Traditional social patterns have been well-preserved or even reinforced among some migrant groups in the Middle East, V.F. Costello, Urbanization in the Middle East, (Cambridge University Press, London, 1977), 106. In Indian context, see Ross, op.cit., 49-50.

Thus, in the light of the preceding observation, it cannot be said with certainty that industrialisation is incompatible with the joint family. At the same time, there is no denying the fact that the economic pattern of India is changing and, in some spheres, very fast; but India's transformation from rural agrarian to urban industrial economy is not total. The emphasis on agriculture is no less than on industry and demographically 80% of India still remains mainly rural and agrarian. Thus, in the rural setting there is no visible shift as such of economic balance in favour of a nucleated household.[1]

d. Change of values

Not infrequently, social scientists try to explain the perspective of family in India in terms of abstract and esoteric value considerations. The educated younger generation steeped in modern thought often complains [2] of the suffocating atmosphere of the joint family. Although a joint family 'is always an exciting group to live in',[3] one must admit that in the last two decades the younger generation, throughout the world, is absorbing new values. The reasons for this development do not appear to be exclusively economic, but are largely of a psychological nature. The 'world-wide trends of juvenile unrest,

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1. But see infra,914-16.

2. K.M. Kapadia, Marriage and Family in India, (Bombay, 1966), 291-2. Also Cora Vreede-de Stuers, 'Attitude of Jaipur Girl Students towards Family Life', in D. Narain, loc.cit., 151-62.

3. Irawati Karve, Kinship Organization in India, (Poona, 1953), 14.

student revolutions and 19th century anarchist revivalism [1] illustrate these trends in industrial societies, as well as in the so-called underdeveloped countries of Asia, Africa, and Latin America. They have a psychological rather than an economic-mechanical physiogonomy'.[2] Indeed, Indian youths have their fair share [3] of this global trend; but the sub-culture of the younger generation is not a reliable variable from which to visualise a total social situation for the simple reason 'that those who behave as non-conformists at their younger age and break away from joint family organisation conform to the same structural arrangement in the society when they become parents, parents-in-law, and grandparents.' [4]

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1. For an analysis, see Henry Bienen, Violence and Social Change, (University of Chicago Press, Chicago/London, 1968), 66ff.

2. U.R. Ehrenfels, 'Matrilineal Joint Family Patterns in India' in G. Kurian, ed., The Family in India: A Regional View, (Mouton, The Hague, 1974), 91-106 at 102-3.

3. S.C. Dube, Contemporary India and its Modernization, (Delhi, 1974), 112-24.

4. Ramakrishna Mukherjee, 'Family in India', in D. Narain, ed., Explorations in the Family and Other Essays, (Bombay, 1975), 1-64 at 51. Also Derrett, Critique, pr.19. One should also note that 'if the role-structures grow without a concomitant response from values, modernisation may become an instrument in the hands of the traditionally established power groups to maintain the status quo', Yogendra Singh, 'Historicity of Modernisation (A Comparative Analysis of India, China and Japan)' in D. Narain, ed., ibid., 647-62 at 660. Thus, Irving Louis Horowitz observes that modernity might also reinforce tradition, Three Worlds of Development, (OUP, New York, 1966), 308.

e. Empirical data

On Contemporary trends in family structure in India, there is disharmony [1] among social scientists, and this is well expressed in Pauline Kolenda's statement concerning two of the best known Indian social anthropologists: '... Irawati Karve suggests that it is the larger or smaller joint family that is the typical of India. S.C. Dube, on the other hand, suggests that nuclear family or small joint family is typical.' [2] In consideration of these disagreements, Aileen D. Ross pertinently observes that 'before a definite trend can be established or predicted, there is the necessity of analysing the many variables in the total situation in which each family is found'. [3]

Since at this stage we cannot come to a definite conclusion regarding trends in family structure in India, let us see if empirical data can be of any help. Findings from some of the sociological and anthropological studies from different parts of India are given overleaf:

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1. R. Mukherjee, ibid., 2.

2. Pauline M. Kolenda, 'Religion, Caste, and Family Structure: A Comparative Study of the Indian Joint Family', in M.B. Singer and B.S. Cohn, ed., Structure and Change in Indian Society, (Chicago, 1968), 339-96 at 342.

3. Aileen D. Ross, The Hindu Family in its Urban Setting, (Toronto, 1961), 23. Also D.A. Chekki, 'Modernization and Social Change: The Family and Kin Network in Urban India', in G. Kurian, ed., The Family in India: A Regional View, (Mouton, The Hague, 1974), 205-31 at 206.

(1) Province	(2) Location	(3) Proprtion of Joint Families	(4) Proportion of Nuclear Families	(5) Year
West Bengal	Kanchanpur, District, Burdwan	39%	61%	1962 [1]
" "	4 villages, Burdwan District	36%,44% 46%,46%	64%,56% 54%,54%	1959 [2] 1964 1965
" "	Shyambazar area, Calcutta	58%	42%	1964 [3]
" "	Lake area, Calcutta	66%	34%	1964 [4]
Uttar Pradesh	Thakurs of Sena-pur, Jaunpur District	74.5%	22.5%	1962 [5]

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1. T.K. Basu, The Bengal Peasants from Time to Time, (New York/Calcutta, 1962), 89-92.

2. Jyotirmoyee Sarma, 'The Nuclearization of Joint Family Households in West Bengal', Man in India, 44 (1964), 193-206. L.K. Sen, 'Family in Four Indian Villages', Man in India, 45 (1965), 1-16. Sen found 56% nuclear, 38% extended, ibid., 5.

3. J. Sarma, op.cit., 193-206.

4. Ibid.

5. R.D. Singh, Family Organization in a North Indian Village: A Study in Change, Ph.D. Dissertation, Cornell University, 1962, cited by P.M. Kolenda, 'Regional Differences in Indian Family Structure', in R.I. Crane, ed., Regions and Regionalism in South Asian Studies: An Exploratory Study, (Duke University, Program in Comparative Studies in Southern Asia, 1967), 147-226 at 151, 225.

(1) Province	(2) Location	(3) Proportion of Joint Families	(4) Proportion of Nuclear Families	(5) Year
Uttar Pradesh	Untouchable Chamars of Senapur, Jaunpur District	34%	66%	1961 [1]
" "	Rajputs of Khlalapur, Shaharanpur District	51%	49%	1956 [2]
" "	Untouchable Chuhras of Khalapur	44%	56%	n.d. [3]
" "	Sherapur, Fyzabad District	56%	44%	1959 [4]
" "	Sirkanda, Dehra Dun District (in the sub-Himalayas)	39%	61%	1963 [5]

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1. B.S. Cohn, 'Chamar Family in a North Indian Village: A Structural Contingent', Economic Weekly, 13 (1961), 1051-55.

2. J.T. Hitchcock, The Rajputs of Khalapur: A Study of Kinship, Social Stratification and Politics, Unpublished Ph.D. Dissertation, Cornell University, 1956, cited by Kolenda, op.cit., 151, 221.

3. Kolenda, op.cit., undated, 151.

4. H.A. Gould, Family and Kinship in a North Indian Village, Unpublished Ph.D. Dissertation, Washington University, St. Louis, cited by Kolenda, op.cit., 151, 221.

5. G.D. Berreman, Hindus of the Himalayas, (Berkeley and Los Angeles, University of California Press, 1963); also 'Unpublished field census of Village Sirkanda', 1963, cited by Kolenda, 151, 218.

(1) Province	(2) Location	(3) Proportion of Joint Families	(4) Proportion of Nuclear Families	(5) Year
Delhi	Rampur	54%	46%	1958 [1]
"	Khatris of Delhi City	More than 28%	Less than 72%	1965 [2]
Rajasthan	Koma, Jodhpur District	57%	43%	1963 [3]
"	Barmer District (4 Panchayati Samiti areas)	48%	52%	1964 [4]
"	Jalore District	47%	53%	1964, 1965, [5]
Kashmir	Pandits (Brahmins) Utrassu-Umanagari, Anantanag District	60%	40%	1965 [6]

1. O. Lewis, Village Life in Northern India (Urbana, Illinois, 1958), cited by Kolenda, op.cit., 151, 223.

2. Kapoor, cited by Kolenda, op.cit., 151.

3. A.B. Bose, S.P. Malhotra and L.P. Bharara, 'Socio-Economic Difference in Dispersed Dwelling and Compact Settlement Types in Arid Regions', Man in India, 43 (1963), 119-30.

4. S.P. Malhotra and M.L.A. Sen, 'A Comparative Study of the Socio-Economic Characteristics of Nuclear and Joint Households (II)', Journal of Family Welfare, 11 (1964) 2: 21-32.

5. A.B. Bose and P.C. Saxena, 'Composition of Rural Households in Rajasthan (Studies in Households III)', Indian Journal of Social Research, (1964), 299-308; 'Composition and Size of Rural Joint Households (Studies in Households IV)', Indian Journal of Social Research, (1965), 30-40; 'Some Characteristics of Nuclear Households', Man in India, 45 (1965), 195-200.

6. T.N. Madan, Family and Kinship: A Study of the Pandits of Rural Kashmir, (London, 1965), 72.

(1) Province	(2) Location	(3) Proportion of Joint Families	(4) Proportion of Nuclear Families	(5) Year
Madhya, Pradesh	Ramkheri, Malwa	41%	59%	1960 [1]
Gujarat	Two high school classes in Baroda:			1961 [2]
	(i) Homes of Brahmin students	42%	58%	
	(ii) Homes of Bania students	37%	63%	
	(iii) Homes of Patidar students	62%	38%	
Maharashtra	Badlapur, Thana District	14%	86%	1959 [3]
	Nagpur District	38%	62%	1962 [4]
Andhra Pradesh	Shamirpet, Telangana	18.5%	81.5%	1955 [5]
Orissa	Brahmins of Bira-Narasinghapur, Puri District	53%	47%	1956 [6]

1. Adrian C. Mayer, Caste and Kinship in Central India, (London, 1960), 177-83.

2. Savitri Sahani, 'The Joint Family: A Case Study', Economic Weekly, 13 (1961), 1823-28.

3. W.A. Morrison, 'Family Types in Badlapur: An Analysis of a Changing Institution in a Maharashtrian Village', Sociological Bulletin, 8 (1959), 45-67.

4. E.D. Driver, 'Family Structure and Socio-Economic Status in Central India', Sociological Bulletin, 11 (1962), 112-20.

5. S.C. Dube, Indian Village, (London, 1955), cited by Kolenda, op.cit., 152.

6. A. Ray, 'A Brahmin Village of the Sasana Type in the District of Puri', Orissa, Man in India, 36 (1956), 7-15.

(1) Province	(2) Location	(3) Proportion of Joint Families	(4) Proportion of Nuclear Families	(5) Year
Madras	Brahmins of Kumbapettai, Tanjore District	42%	58%	1956, 1960 [1]
"	Paramalai Kallar, a sub-lineage of Tenalapatti hamlet, Madras District	8%	92%	1957 [2]
Mysore	Four zones of Gokak taluka Belgaum District	59%,55% 66%,62%	41%,45% 34%,38%	1960 [3]
"	Untouchable Paraths of Bangalore	24%	76%	1959 [4]
Kerala	Two census tracts of Angadi village, Ernad taluq, largely Nayar in caste	55%,61%	45%,39%	1962 [5]

1. E. Kathleen Gough, 'Brahmin Kinship in a Tamil Village', American Anthropologist, 58 (1956), 826-53; 'Caste in a Tanjore Village', in E.R. Leach, ed., Apects of Caste in South India, Ceylon and North-west Pakistan, (Cambridge, 1960), 11-60.

2. Louis Dumont, Une sous-caste de l'Inde du sud, (Mouton, Paris, 1957), cited by Kolenda, op.cit., 152, 219.

3. M.G. Kulkarni, 'Family Pattern in Gokak Taluka', Sociological Bulletin, 9 (1960), 60-81.

4. Gertrude Marvin Woodruff, An Adidravida Settlement in Bangalore, India, Unpublished Ph.D. Dissertation, Radcliffe College, 1959, cited by Kolenda, op.cit., 153, 226.

5. Joan P. Mencher, 'Changing Familial Roles among South Malabar Nayars', Southwestern Journal of Anthropology, 18 (1962), 230-45.

From these 34 studies of the differential incidence of joint or nuclear family types, Pauline Kolenda observes that the rural areas of the Gangetic plains have a higher proportion of joint families than those in Central India, Maharashtra, Andhra and Madras. It is also noticeable that in the Gangetic plain itself, joint families are more common among the Rajputs and nuclear families predominate among the lower castes.[1] Among the Brahmins of rural Kashmir, 60% of families are joint, and the same is true for the Brahmins of Orissa,[2] Nayars [3] of Kerala and upper caste Patidars of Gujarat.

In analysing the factors which could possibly be associated with the variation in types of families in one region or in one group, Kolenda concludes that an economic explanation (that the joint family is a convenient labour pool), classical Hindu law,[4] caste identity, ownership of land, or the dominant or

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1. Kolenda, op.cit., 154.

2. Bailey argues, in his study of an Oriya village, that expanding non-agricultural employment opportunities caused the partition of joint families, F.G. Bailey, Caste and the Economic Frontier, (Manchester University Press, 1957), 92. However, in the light of recent research on the joint family, the opinion does not hold in India as a whole.

3. But see Kathleen Gough, 'Changing Household in Kerala', in D. Narain, ed., Explorations in Family and Other Essays, op.cit., 218-67.

4. Kolenda, op.cit., 165. The Thakurs of Senapure and Ramkheri follow the Benares School of the Mitākṣarā law, A.C. Mayer, Caste and Kinship in Central India, op.cit., 242. But Thakur brothers never demand a partition of family land during their father's lifetime, and even after the father's death they seldom divide, R.D. Sing, Family Organisation in a North India Village, op.cit., cited by Kolenda, op.cit., 165. In Ramkheri, however, some break-up seems to occur during the father's lifetime, Mayer, op.cit., 179-81; 241.

subservient status of castes have no causal association with a preponderance of joint family types.

Subsequent to Kolenda's compilation, a few more studies throw some light in this direction. Gore, in his study of 494 Agarwal families of the Haryana area, found that his sample as a whole conformed to the joint family pattern.[1] In this respect, Joginder Kumar's study of rural Mitākṣarā is also interesting. The data from 50 villages in Madras, Delhi, Uttar Pradesh and Rajasthan, showed that both joint and nuclear families existed in equal proportions in these rural areas.[2] The study indicates that in the Southern state of Madras about 60% families are nuclear; the developed region of the Delhi area has 57% nuclear families,[3] while in Uttar Pradesh 42% of the families are of this type. Jurisprudentially, it may be of some significance that, in North India, the nuclear families emerge from the break-up of existing joint families; but in the Southern part of India the tradition appears to be the establishment of a separate nuclear home shortly after marriage.[4]

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1. M.S. Gore, Urbanisation and Family Change, (Bombay, 1968), 232.

2. J. Kumar, 'Family Structure in the Hindu Society of Rural India', in G. Kurian, ed., The Family in India: A Regional View, (Mouton, The Hague/Paris, 1974), 43-74.

3. Ghosh in his study of Naraina, a village 14 miles from Delhi, found 0% to 60.9% increase in nuclearisation, although until today only a minority of the families in the village are nuclear. However, the village being surrounded by the city of Delhi, the study cannot be considered as symptomatic of a general trend in rural areas, B.R. Ghosh, 'Changes in the Size and Composition of the Household brought about by Urbanization in Delhi Area', in G. Kurian, ed., The Family in India, loc.cit., 249-61, 250, 260-1.

4. J. Kumar, loc.cit., 70.

Dan Chekki, in his study of 230 urban families of Kalyan and Gokul in the district of Dharwar, Mysore, found that the frequency of nuclear families and extended families was almost the same.[1] But it would be fallacious to argue from this study that urbanisation is leading to stereotyped nuclearisation. Chekki concludes that 'the nuclear family far from being isolated and atomized, is organically fused with the extended kin network. Both nuclear and non-nuclear families in the city maintain close ties with a wide range of blood and affinial relatives.'[2] Among all the ethnic groups in Palakkara, Central Kerala, Kathleen Gough also noticed only a partial transition to nuclear households.[3]

As a study of the influence of industrialism on the typology of the family, Milton Singer's research on a group of successful industrialists in Madras city is worth noting. He found from his sample that while there were striking changes within three generations in residential, occupational, and educational factors, as well as social mobility, and ritual observances, these changes had not transformed the traditional joint family structure into atomised nuclear units. Singer noticed that urban and industrial members of a family were maintaining numerous ties and obligations with extended kin, geographically distri-

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1. D.A. Chekki, 'Modernization and Social Change: The Family and Kin Network in Urban India' in G. Kurian, ed., Family in India, op.cit., 205-31 at 216.

2. Ibid., 226.

3. K. Gough, 'Changing Households in Kerala', in D. Narain, ed., op.cit., 218-67 at 264, 267.

buted.[1] His sample significantly shows a structural congruence between joint family organisation and the organisation of industrial firms, indicating symptoms of the emergence of a modified joint family within the urban and industrial setting.[2]

But Singer's findings from the Madras sample are no safe guide to postulate a general proposition that business firms can be smoothly run as joint family concerns.

In a more diffused study, Allan Cohen found that in seven out of eight business and intergenerational families, there was sharp inter-role conflict between family roles and business roles of the members.[3] The author concludes that the characteristics of the traditional Indian family are in many ways different from the characteristics expressly desired for business enterprises[4] and the prescribed family roles of the members are hindrances to a coordinated policy

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1. Milton Singer, 'The Indian Joint Family in Industry', in M.B. Singer and B.S. Cohn, ed., Structure and Change in Indian Society, (Chicago, 1968), 423-52, 443-7. Also Milton Singer, 'Introduction: The Modernization of Occupational Cultures in South Asia', in M. Singer, ed., Entrepreneurship and Modernization of Occupational Cultures in South Asia, (Duke University Program in Comparative Studies on Southern Asia, 1973), 1-15 at 11.

2. The adaptive resiliency of the joint family has also been shown by earlier research, K.M. Kapadia, Marriage and Family in India, 2nd ed., (Bombay, 1958), ch.12.

3. A.R. Cohen, Tradition, Change and Conflict in Indian Family Business, (Mouton, The Hague/Paris, 1974), 297-99.

4. Ibid., 4.

and growth of the business organisation.[1]

Contrary to the observations of Kumar, Chekki and Singer, Kaldate's [2] and Driver's [3] studies indicate that urbanisation is associated with a high incidence of nuclear families. But, again Kaldate's and Driver's findings are not supported by those of Desai [4] and Kapadia.[5]

There is fairly general agreement that among the land-owning classes there is a relatively high proportion of joint families,[6] but still there is no

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1. Ibid., 297-99. Morris criticises Singer's thesis and states that 'as the scale of private enterprise grows in South Asia, the business firm will cease looking, as it does now, like a legal fiction behind which the joint family operates. The great new enterprises will take on more of the impersonal character that we know in the West.' He adds: 'This is not to imply "convergence" in any decisive way. The modern corporate form will take on a more important role, but joint families will still continue to be a major device through which new firms will appear. The very wealthy great entrepreneurial families will continue to play important roles in the activities of the impersonal corporations, as wealthy families still do in North Atlantic enterprises', M.D. Morris, 'Economic Change and Occupational Cultures in South Asia: Comments on Ames, Owens and Singer', in M. Singer, ed., Entrepreneurship and Modernization ..., op.cit., 287-301 at 296.

2. S.S. Kaldate, 'Urbanisation and Disintegration of Rural Joint Family', Sociological Bulletin, 9 (1961), 108-10.

3. E. Driver, Differential Fertility in Central India, (Princeton, 1963), 43-44.

4. I.P. Desai, Some Aspects of Family in Mahuva, (New York, 1964), 40.

5. K.M. Kapadia, 'Rural Family Pattern: A Study in Urban-Rural Relationship', Sociological Bulletin, 9 (1956) 2: 119.

6. This is also evidenced in Gujarat, Hemalatha Acharya, 'Some Possible Variations in Family Types in Gujarat', in G. Kurian, ed., The Family in India, op.cit., 179-90. Epstein, in her study of two Mysore villages, suggests that the development of a cash economy, necessarily leads to the break-up of joint families, Scarlett Epstein, Economic Development and Social Change in South India, (Manchester University Press, 1962), 178.

dearth of contrary evidence. The Paramalai Kallars of Tengalapatti, in Madras, own land and are dominant caste in the village, yet they have only 8% joint families.[1] The Rajputs of Sirkanda, who also own lands, have joint families only in 39% cases.[2]

Irawati Karve generalised in the 'sixties that the conjugal, or nuclear, family was becoming the normal pattern even though sentiment and moral values continue to play a role in the familial institutions of the Hindus. She observed that: '... there is no doubt that even in rural areas the joint family as depicted in Indian scriptures and law books is disappearing.'[3] In the 'seventies in the same vein, social scientists are saying:

> But one must not lose sight of the fact that even though nuclear families are on the increase, ... these nuclear families cannot live in isolation without active co-operation and contacts with extended kin. ... It may be stated as a general conclusion that in India the traditional extended family still exists as a functional unit in most ways except residentially. 4

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1. Kolenda, op.cit., 152. It should be noted that among the Pramalai Kallars, the sons inherit after the death of their father, Kolenda, op.cit., 165.

2. Kolenda, op.cit., 151.

3. I. Karve, 'The Family in India' in B.N. Varma, ed., Contemporary India, (London, 1964), 47-58 at 57.

4. K. Ishwaran, 'The Interdependence of Elementary and Extended Family', in G. Kurian, ed., The Family in India, op.cit., 163-77 at 176-7.

This leaves us with Dube's observation that:

> the traditional typology of simple, compound and extended family does not accurately fit the norms of family organization met with in India. At one point of time, the size and actual composition of a family often denotes only a particular stage in its development cycle. Simple families grow into extended families and then break up into simple families again ... Perfect three generation extended families are rare, and not many simple families can remain technically simple for a long period. [1]

f. Evaluation of empirical survey

Desai [2] and Mukherjee [3] are among those who are of the view that the joint family in India is as important today as ever. Desai exposes the fallacy of inferring that there is a rising incidence of nuclearisation but, additionally, concedes that the co-resident and commensal kin groups my be nuclear but 'joint family'-wise integration is maintained among those units which are identified as components of a joint structure.[4] Ramakrishna Mukherjee also, has

1. S.C. Dube, 'Men and Women's Roles in India: A sociological Review', in Barbara E. Ward, ed., Women in New Asia, (UNESCO, 1963), 177.

2. I.P. Desai, 'Symposium on Caste and Joint Family: An Analysis', Sociological Bulletin, 4 (1955) 2: 97-117.

3. R. Mukherjee, 'Indian Tradition and Social Change', in T.K.N. Unnithan, et al. ed., Towards a Sociology of Culture in India, (New Delhi, 1965), 200.

4. I.P. Desai Some Aspects of Family in Mahuva, op.cit., 25-7, 40 ff. However, Desai admits that the whole issue needs re-thinking and further research, 'A Note on the Family Research in D. Narain, ed., Explorations in Family and Other Essays, op.cit., 65-8. The S.C. rightly dissented from the rule in McIntyre v. Harcastle (1848) 1 All E.R.696 on the ground that the structure of social life in India 'is not based on pure individualism', Sri Ram Pasricha v. Jagannath, (1976), 4 SCC 184, 188.

modified his views lately. He observes:

> The data available on variations in family structure in India are sparse and sporadic. They cannot give a precise estimate of the relative incidence of the nuclear and joint families in India as a wholle. Nevertheless, they suggest that an appreciable number of nuclear families, as co-resident and commensal kin groups, is to be found almost anywhere in India. 1

However, although a considerable number of nuclear families are noticed in the foregoing surveys, this need not necessarily lead us to believe that there is a definite trend from jointness to nuclearisation,[2] or that, in a certain year in future, all families will turn into nuclear families. First, in most cases, we do not have sufficient empirical data regarding the situation prior to these studies. Secondly, it is fallacious to assume that there was no existence of nuclear families in classical and medieaval India. Indeed, variations in family structure must have existed in those days.[3] Although *śāstric* literature points to a multigenerational joint family, there existed a number of 'non Aryan groups, subject to different laws, among whom the fami l y was not joint'.[4]

1. R. Mukherjee, 'Family in India', in D. Narain, ed., *Explorations in Family and Other Essays*, op.cit., 46.

2. The Code of Civil Procedure (Amendment) Act, 1976 (Act.104) envisages and recognises both nuclear and joint family and does not interfere with the concept of "family" in any personal law for the time being in force, a new Order XXXIIA, rule 6, a-e. A Hindu undivided family is a juristic person, rule 10.

3. R. Mukherjee, 'Family in India', in D. Narain, op.cit., 52.

4. Derrett, 'The History of the Juridical Framework of the Joint Hindu Family', *Contributions to Indian Sociology*, VI (1962), 20-21, 24.

A comparison of the dimensions of the household in pre-British India with that of modern India, also does not indicate that the trend is towards definite nuclearisation.[1] Henry Orenstein noticed that there had been a slight increase in the average size of the household from 1867 census to that of 1951.[2] The preceding observations show that playing the numbers game of counting the structural character of families in a particular region or regions in India is no safe guide to lead to the conclusion that the trend of family organisation is proceeding one way or the other.

The joint family is a way of life; it is also a concept - a constellation of values; and so long as our value system does not change, the joint family as a norm will retain its identity; and so it has done until today. To discern the overall societal values of the Hindus, isolated demographic study is inadequate. In addition to demographic studies, one must study the subjective expectations Hindus have of family life, and in this respect, Orenstein and Micklin observe that for the last 2,000 years, joint family life was not merely an ideal but a cogent actuality of the Hindu way of life[3] and this, even today, is borne out by the attitude of the Hindus towards family

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1. A.M. Shah, 'Changes in the Indian Family: An Examination of Some Assumptions', Economic and Political Weekly, Annual Number, January 1968, 127-34 at 134.

2. H. Orenstein, 'The Recent History of the Extended Family in India', Social Problems, 8 (1961) 4: 41-50.

3. H. Orenstein and M. Micklin, 'The Hindu Joint Family: The Norms and the Numbers', Pacific Affairs, 39 (1966-67), 314-25 at 315, 325.

structure and relationships.[1]

However, life in India is becoming increasingly secularised and materialistic and due to social mobility, interpersonal relationships are becoming more and more functionally specific and in large cities in particular, traditional social institutions for maintaining cultural patterns are changing rapidly, and new modes of living and working are emerging.[2] It remains questionable whether the joint family will be able to absorb modernity within itself, or whether these new forces will pave the way for the development of a quasi-joint family or an elementary family beybetter suited for the day.

III. Change in Family Structure and Birthright

Birthright is the genesis of coparcenary property, on which the economic structure of the joint family rests. The concept also ideally suits multi-generational joint families. At this point, one may argue that if there is a visible trend towards nuclearisation, birthright is an anathema in the social context. But we cannot afford to forget that in its legal context the definition

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1. Attitude study reveals that joint family is still the cultural ideal, I.P. Desai, Some Aspects of Family in Mahuva, op.cit., 167. Kapadia, Marriage and Family in India, (O.U.P., 1959), 261. R. Owens, 'Industrialization and the Indian Joint Family', Ethnology, 10 (1971) 2: 223-50 at 243. K. Ishwaran, 'The Interdependence of Elementary and Extended Family', in G. Kurian, ed., The Family in India, op.cit., 163-77 at 168-9.

2. H. Nagpaul, The Study of Indian Society, op.cit., 106.

of joint family is specialised.[1] Birthright may operate even within the nuclear 'household' of sociological conception.[2] For example, a father and an unmarried son, or a widow and her unmarried son are sufficient to constitute a juridical joint family. Despite the popular legal definition of joint family, namely, that it should be 'joint in food, worship and estate',[3] it does not necessarily imply that in practice the juridical joint family should always conform to this definition.[4] Thus, a son with his own conjugal unit or part of his conjugal unit, may live separately from his father, nevertheless they can continue to be members of the coparcenary.[5]

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1. A.M. Shah, 'Changes in the Indian Family: An Examination of Some Assumptions', op.cit., 131; also The Household Dimension of the Family in India: A Field Study in a Gujarat Village and a Review of Other Studies, (Orient Longman, New Delhi, 1973), 119. Also Bhim Singh v. Ratnakar, AIR 1971 Ori. 198, 200.

2. Shah, ibid., 131. Gowli Buddamma v. Commr. of I.T., Mysore, AIR 1966 SC 1523; N.V. Narendranath v. Commr. Wealth Tax, (1969) 1 SCWR 1182 = (1969) 2 SCJ 727; Sita Bai v. Ramchandra, AIR 1970 SC 343. Derrett, Critique, § 80.

3. Neelkisto v. Beerchunder, (1869) 12 MIA 523.

4. Even Christians could be members of a Hindu coparcenary, see Sridharan v. Commr. of Wealth Tax, AIR 1970 Mad 249, for a study of the case, Derrett, at 1970 2 MLJ, 1-8.

5. 'Even if the members live apart and never correspond they may still be joint ...', Derrett, IMHL, § 397. In Gujarat Hemalatha Acharya observes that the joint family type that is currently in vogue is the type where property is joint but residence separate, 'Some Possible Variations in Family Types in Gujarat', in G. Kurian, ed., The Family in India, op.cit., 179-90, at 181. Also see Kathaperumal v. Rajendra, AIR 1959 Mad 409.

All these factors indicate that we cannot say with certainty that birthright is totally incompatible with nuclearisation; at the same time, we cannot say either that birthright is the life blood essential to the survival of the sociological joint family. Joint families have survived in Assam and Bengal without the incidence of birthright. Thus trends in the structural modification of the sociological family are not the only criteria for continuation or abolition of the concept of birthright; the justification for either should also be sought elsewhere, preferably in the national mood, the economic situation and the policy of the government toward property vis-a-vis the family and the individual.

However, it must be reiterated that birthright is congruous only with collateral and three or four generational joint families where the proprietary interactions operate between the adult male members only. In a nuclear family of a father and his minor sons, birthright may technically exist but that does not substantially warrant its continuation. In nuclear families, the retention of birthright as a fetter to the power of the father in dealing with property is simply recognition of one of the disadvantages of joint families. It is better, I submit, for the minor sons to be left to the care of the father for their well-being than to their legal co-ownership in the family property.

IV. Economic realities

According to its legal definition a joint family implies joint holding of estates; but legal scientists sometimes overemphasise this fact of joint holding, which is not always warranted by economic facts. A joint family may not have any property worth mentioning and 'in a considerable number of cases there is nothing to share except debts.'[1] Aileen Ross points out that 'economic factors have probably been the main determinant of the increasing number of family separations, for the inability of the land to support the growing population has forced many sons to leave home to seek their livelihood in the growing cities.'[2]

Today, the exalted notion of joint family as a unit of production and consumption is valid only in respect of a minority. The vast mass of people who live below the poverty line may not have been of concern to the lawyers and the courts, but certainly, while engaging in law reform, this is a matter for the legislature to take note of.

Empirical data show that in 1955-56, 86% of the population had per capita annual income of less than Rs. 360 (approximately £24-00) and 69%

1. B. Shivaramayya, 'Towards a Secular Concept of Family', in T. Mahmood, ed., Family Law and Social Change, (Bombay, 1975), 145-67 at 162.

2. Aileen D. Ross, The Hindu Family in its Urban Setting, op.cit., 41.

less than Rs. 240.[1] According to Ojha,[2] the poor constituted 51.8% of the rural population and in 1967-68 this rose to 70%. In Pranab Bardhan's study [3], the rural poor figure as: 38% in 1960-61, 44.6% in 1964-65, 53% in 1967-68. While Bardhan, like Ojha, has observed an upward trend in rural poverty, Minhas [4] noted some decline: 52.4% in 1956-57, 46% in 1960-61, 39.3% in 1964-65, 37.1% in 1967-68. Midway between these two trends, Dandekar and Rath observed that poverty in the rural and urban areas has been constant over the years with 40% of the population remaining below the poverty line.[5] On the total economic situation of the population Dube remarks: 'Between the affluent (less than 5 per cent) and those below the poverty line (approximately 40 per cent), there is the nebulous middle class. This deceptive label hides more than it reveals. A sizeable part of it is

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1. Report of the Committee on Distribution of Income and Levels of Living, (1964), Part I, 10-12, 22-24; rpt. L.M. Sanghvi, ed., Law and Poverty: Cases and Materials, (Bombay, 1973), 10-14 at 12.

2. P.D. Ohja, 'A Configuration of Indian poverty: Inequality and Levels of Living', Reserve Bank of India Bulletin, 24 (1970) 1: 16-27; rpt., Sanghvi, loc.cit., 4-8 at 7.

3. P.K. Bardhan, 'On the Minimum Levels of Living and the Rural Poor', Indian Economic Review, 1 (1970), 129-36.

4. B.S. Minhas, 'Rural Poverty, Land Distribution and Development Strategy', Indian Economic Review, 1 (1970), 97-128.

5. V.M. Dandekar and N. Rath, Poverty in India, (Economic and Political Weekly, Bombay, 1971). All these studies defined 'poverty line' in terms of either a minimum monthly per capita expenditure of Rs.15 to 20 (approximately, £1-00) at 1960-61 prices or of a minimum calory requirement of 2,250 units.

marginally above the poverty line, but its security is extremely precarious.'[1] According to official estimates as these stood in 1972, 40% of the people in India were living below the poverty line.[2]

The general economic condition certainly has influence on the composition of the household. The National Sample Survey defined 'household' as a group of persons usually living together and taking their principal meals from a common kitchen, and the observations of the Survey on such households and their sizes are instructive in the context of the reform of family law. The Survey reveals:

> In the rural area a little more than 68 per cent of the households did not possess more than two rooms, and in the urban area this percentage was a little more than 69. Households possessing from three to six rooms account for 29 per cent in the rural sector and about 27 per cent in the urban sector where the majority of the households, 58.45 per cent in the rural area and 51.51 per cent in the urban area, had three to six members. Among the six Population Zones it was observed that in the

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1. S.C. Dube, Contemporary India and its Modernization, (Vikas Publishing House, Delhi, 1974), 6.

2. Indian Express, Delhi, 17 August 1972, p.5; quoting Mohan Dharia, the then Minister of State for Planning. The recent trend is also not encouraging, The Measurement of Indian Poverty, 1950-1980, Indian Institute of Public Opinion Quarterly Report, October 1968, 15, 36, rpt., Sanghvi, op.cit., 8-10.

> three rural zones, namely, South ... West ... and Central India ... the percentage of households possessing one room was higher than ine the other three zones, namely, North ... East ... and North-West India ... In the first three zones, this percentage was of the order of 42 and in the other three zones it varies from 25 to 34. The crowding in one room accommodation in big cities like Calcutta, Bombay, Delhi and Madras, was still worse than in either small or big towns. In these cosmopolitan cities, about 65 per cent of the households lived in one room whereas about 36 to 38 per cent of the households in small and big towns possessed the same type of accommodation. [1]

Let some sociologists say what they may; what joint family can survive or flourish in such households?

By way of furnishing these statistics, it is not our intention to highlight the poverty of India, nor do we suggest that during the classical, Islamic or British periods the masses were better off than they are today. What we do suggest is this, that law, or the 'visible symbol'[2] of the invisible fact of

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1. The National Sample Survey, Eleventh Round, August 1956 - January 1957, No.51 (The Cabinet Secretariat: Government of India), 6. Urban factors such as restricted housing space considerably affect family size, S.K. Kuthiala, From Tradition to Modernity, (New Delhi, 1973), 83.

2. Emile Durkheim, The Division of Labor in Society, (Illinois, Free Press, 1947), 64.

social solidarity in a society, must reflect the actual way of life of the masses; and, in this respect, economic realities should be taken into consideration in any prospective reform of the law of property.

V. Government Policy

a. Family planning

The social objective of the government is the control of the population; explosion and 'the ultimate object is to see that the idea of a small family becomes a way of life for the people.'[1] In his field research, Kuthiala significantly found that 69.9% of the industrial workers, and 66% of the agricultural workers approved the government programme advocating smaller families.[2] Also, in the same study, 67% of the agricultural workers and 70.3% of the industrial workers showed a strong desire to have a family of only 3-4 children. However, the success of birth control devices is more visible among the educated and economically well-off individuals than among other villagers.[3] Moreover, those that practice birth control often only postpone their families by this means.

b. Land reform

Birthright envisages collectivity of property within the familial organisation, but the land reform legislation in India shows a trend towards division of

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1. Report of the Small Family Norm Committee, (1968), Para.432.
2. S.K. Kuthiala, op.cit., 84.
3. Ibid., 85.

joint family holdings and co-operative farming on non-traditional lines.[1] Land reform policies, like the land ceiling laws, are providing a powerful legal force for the disintegration of the joint family. The land reform laws enacted in the states have fixed ceilings in agricultural holdings.[2] Originally, the ceilings were imposed on the holdings of individuals, but lately they are imposed on family holdings. To make the provisions of this legislation equitable the need for a definition of 'family' arose which, in fact,

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1. U.R. von Ehrenfels, 'Matrilineal Joint Family Patterns in India', in G. Kurian, ed., The Family in India, op.cit., 91-106 at 91. On land distribution and land ceiling legislation, see G. Myrdal, Asian Drama, (Pelican, 1968), II, 1316-18. On co-operative farming in India, see D.R. Gadgil, ed., Report of the Committee on Direction of Cooperative Farming, Ministry of Community Development and Cooperation, Government of India, (New Delhi, 1965). S.K. Goyal, Some Aspects of Co-operative Farming in India, (London, 1966). H . Laxminarayanan and K. Kanungo, Glimpses of Cooperative Farming in India, (London, 1967).

2. Madhya Pradesh Ceiling on Agricultural Holdings Act, 1960; The Madras Land Reforms (Fixation of Ceilings on Land) Act, 1961; The Gujarat Agricultural Land Ceilings Act, 1960. Some of these Acts were struck down by the SC on the ground that 'ceiling' was offending the equality clause of the Constitution, Karimbil Kunhikoman v. State of Kerala (1962) SCJ, 510; A.P. Krishnaswami Naidu v. State of Madras, (1965) 1 SCJ 239. The Constitution (Seventeenth Amendment) Act, 1964, furnished a blanket protection to the legislation relating to ceiling on agricultural holdings. Also see, H. C.L. Merillat, 'Abstract of Law and Land Reform in India', Law and Society Review, 3 (1968) 2 and 3: 295-300.

envisages a nucleated unit as opposed to the traditional joint family. The Congress Working Committee proposed that a family unit for purposes of the land ceiling should be husband, wife and three minor children, and in 1972, the then Minister for Planning, defending this proposal, pointed out that under Hindu law a person was entitled to a share in the ancestral property and that the definition of family was changed in order to eliminate the possibility of a Hindu joint family unit getting greater privileges in the matter of land ceiling as compared to other communities.[1]

By way of illustration, we may consider the definition of a family unit in the Andhra Pradesh Land Reforms (Ceilings on Agricultural Holding) Act, 1972. Section 3(f) of the Act defines a 'family unit' as follows:

> (i) in the case of an individual who has a spouse or spouses, such individual, the spouse or spouses and their minor sons and their minor unmarried daughters, if any; (ii) in the case of an individual who has no spouse, such individual and his or her minor sons and unmarried minor daughters; (iii) in the case of an individual who is a divorced husband and who has not remarried, such individual and his minor sons and unmarried minor daughters, whether in his custody or not; and (iv) where an individual and his or her spouse or both are dead, their minor sons and unmarried minor daughters.

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1. Sunday Standard, Delhi, 9 July 1972, p.7.

> Explanation: Where a minor son is married, his wife and their offspring if any, shall also be deemed to be members of the family unit of which the minor son is a member. [1]

The ceiling area, as provided in the Act is, in the case of a family unit, consisting of not more than five members, one standard holding. If there are more than five members, an additional extent of one-fifth of a standard holding for each member is allowed, but under no circumstances can a family unit hold more than two standard holdings.[2]

Apart from the definition of 'family unit', which is equated with the nuclear family, the provisions of the land ceilings legislation in general have influenced the joint family system. For example, to safeguard against the possible evasion of the law, partitions, like transfers,[3] have been invalidated,

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1. Cp. the definition of 'family' in the Finance Act, 1975, s.3, Amendment to s.10 of the Income Taxt Act, 1961: '"family" in relation to an individual, means - (i) the spouse and children of the individual; and (ii) the parents, brothers and sisters of the individual or any of them,wholly or mainly dependent on the individual.'

2. In the Kerala Land Reforms Act, 1963, as amended, ceiling area of any family could never exceed more than twenty acres in extent, Ch.III, s.82(c) and explanation 2.

3. See the Kerala Land Reforms Act of 1963, as amended, s.84. U.P. Zamindari Abolition and Land Reforms Act (1 of 1951), s.18: the ordinary rule of Hindu law that the manager of the family can transfer family property for legal necessity does not apply. There is no provision in the Act that one of the co-Bhumidars can transfer more than his own share, Bhawani Prasad v. Ram Deo, AIR 1975 All 87.

if made after specified dates mentioned in the various Acts. This, at least indirectly and impliedly, restricts the power of a father to make partition among the sons and, conversely, takes away the sons' birthright to demand a partition from their father. However, married sons, who have reached their majority seem to be entitled to a standard holding of their own. But these laws *pro tanto* derecognise birthright in the sense that, irrespective of the number of minor sons, the maximum family holding cannot exceed two standard holdings. In this respect, the government policy seems to encourage nuclear families among the agricultural and land-owning classes who normally conform to the joint family norm.

c. Taxation Laws: the undivided Hindu family

Joint family property as an appendage to the *Mitākṣarā* birthright was also a problem in revenue matters. We notice that particular indulgence was shown to the joint family in the laws relating to income tax.[1] The provisions in the Income Tax laws for a larger initial margin of income exempt from taxation gave to the Hindu undivided family a distinct advantage over other tax payers. On the surface, considering the joint family as a unit of consumption and production and maintenance of a group, the tax advantages seem to be fair. But in actual practice, these advantages became instruments of evading the tax laws and while, sociologically, joint families were breaking up, more and more tax-

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1. See I.S. Gulati and K.S. Gulati, *The Undivided Hindu Family: A Study of its Tax Privileges*, (Bombay, 1962).

induced joint families werd coming into being.[1]

A Hindu undivided family is a distinct unit for the assessment of income tax and an individual member is not liable to be taxed in respect of his income from the family property.[2] Moreover, according to section 66[3] of the Income Tax Act, 1961, the income from the joint family is not to be included in the individual's income for the purposes of determining the rate of tax on his total taxable income. In order to take advantage of this provision a member could convert his separate property into joint family property.[4]

The birthright of a coparcener to partition the joint family property could also be used as a convenient device to evade income tax.[5] A joint family with income slightly over the exemptions limit could avoid the tax liability altogether by one of its members resorting to partial partition. Some-

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1. B. Sivaramayya, 'Towards a Secular Concept of Family', in T. Mahmood, ed., Family Law and Social Change, op.cit., 145-67 at 164.

2. Income Tax Act, 1961, s.10: 'In computing the total income of a previous year of any person, any income falling within the following clauses shall not be included - (2) '(subject to the provisions of sub-section (2) of section 64, substituted by the Taxation Laws (Amendment) Act, 1970, with effect from 1.4.1971) any sum received by an individual as a member of a Hindu undivided family, where such sum has been paid out of the income of the family, ...'

3. To be read with s.86(v).

4. For a discussion on merger, see supra, 747-59.

5. Udayyan Chinubhai v. Commr. of I.T., Gujarat, AIR 1967 SC 762; I.T. Officer v. Bachu Lal, (1967), 1 SCWR 14 at 20.

times, in the case of a family with income considerably higher than the initial exemption limit, a partition would be the convenient device to place the separated members or units into lower income brackets subject to exemption or a lower rate of taxation.

The devices commonly used to defeat the tax laws through the concessions given to the Hindu undivided family have been summed up in the Report of the Direct Taxes Enquiry Committee:

> The normal modes by which Hindu undivided family has been utilized by taxpayers for purposes of tax avoidance may be stated as under:-
>
> (a) create as many smaller Hindu undivided families within the main family as possible, so that each one of the sub-branches in the main family becomes a separate unit of assessment and thereby has its income and wealth subjected to lower rate of tax;
>
> (b) where the Hindu undivided family has enormous properties, have partial partition of family assets, as many times as possible, so that neither the family nor the individual faces higher tax liability;
>
> (c) whether there is ancestral property or not, have the self-acquired property thrown into the family hotchpot so that individual's income liable to higher tax rate is reduced and also liability arising due to clubbing of income under section 64 of the Income-Tax Act, 1961, is avoided; and
>
> (d) retain the ancestral property as the property of joint family as otherwise the property as well as the income from such property will be assessed in the hands of the members along with their individual incomes and wealth at a much higher rate.

The Committee also observed that 'the Hindu undivided family as a unit of assessment is retained in most cases only when it enables the persons to reduce their tax liability and that in other cases it is promptly partitioned without considerations of sentiment coming in the way.'[1]

It would not be to our purpose to explore each one of these alleged grievances. Once the decision was taken to tax the Hindu undivided family as a distinct entity, the latter became the 'villain whether any individual family was well-to-do, rich or very rich. Various requisites are reserved in relation with a family's particular circumstances and all are resisted by other assessees on some hypothetical 'moral' basis which it is not our task to investigate.

The Committee somewhat dramatically, commented that the old notions of compassion and altruism were fast fading away in the Hindu undivided families and therefore, the institution did not deserve special concessions and, in the context of large scale avoidance of taxes, fiscal benefit to the state should be taken into consideration. The Committee recommended that Hindu undivided families should be taxed at rates which are substantially higher for the lower slabs of income than the rates applicable to individuals.

1. Direct Taxes Enquiry Committee, Final Report, Government of India, (1971), 73-75, quoted in Report of the Committee on Taxation of Agricultural Wealth and Income, Government of India, Ministry of Finance, (1972), 96-7.

However, the higher rates of tax suggested by the Direct Taxes Enquiry Committee would be effective only if the income and wealth of the Hindu joint families are large enough and if there are no ways open to it for splitting them. Thus, commenting on this, the K.N. Raj Committee on Taxation of Agricultural Wealth and Income observes:

> Since an HUF can be divided and subdivded into smaller units of HUFs - each such unit comprising a separate taxable entity in addition to the main HUF - the incidence of the higher rates proposed can, in fact, be avoided quite easily, particularly if the main HUF had not been divided earlier into the maximum permissible number of HUFs. We have, therefore, grave doubts about the adequacy of the measures taken already or proposed to be taken for dealing with such evasions. The HUF is an important entity among those belonging to the higher ranges of income and wealth, and continued recognition of it as a separate tax unit is therefore likely to affect seriously the effectiveness of all direct taxes including those on agriculture. We are of the view that the recognition given to HUFs should be totally withdrawn for tax purposes, and the income and wealth of each HUF considered divisible among the nuclear families constituting it and treated as part of the income and wealth of each such family while assessing the taxes on them. It is sometimes mentioned that there are practical difficulties in implementing such a course on the ground that interest of coparceners in the family keeps on fluctuating with birth and deaths of members. We do not see why a notional apportionment of the

> family income and assets cannot be made at a fixed point of time every year. [1]

d. Present position

Thus, manipulation of the rules of joint family law, such as the right of partition, merger, and abuse of recognition by revenue authorities of the altruistic sentiments behind joint family life as machineries for tax evasion became, indeed disturbing to the revenue authorities and Parliament had to step in with suitable reforms of the Finance laws.

As to the abuses of the ruler of merger of separate property into the joint family pool, the Income Tax law relating to the Hindu undivided family has been amended, and such converted property of the individual, for the purposes of income tax, shall be considered as the property of the individual and not of the family.

Sub-section 2 of s.64 of the Income Tax Act, 1961, inserted by the Taxation Laws (Amendment) Act, 1970, runs as follows:

> Where in the case of an individual being a member of a Hindu undivided family, any property having been the separate property of the individual has, at any time after the 31st day of December, 1969, been converted by the individual into property belonging to the family through the act of impressing such separate property with the character of property belonging to the family or throwing it into the common stock of the family (such

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1. Report of the Committee on Taxation of Agricultural Wealth and Income, Government of India, Ministry of Finance, (1972), 97-8.

> property being hereinafter referred to as the converted property), then, notwithstanding anything contained in any other provision of this Act or in any other law for the time being in force, for the purpose of computation of the total income of the individual under this Act for any assessment year commencing on or after the 1st of April, 1971, -
>
> (a) the individual shall be deemed to have transferred the converted property, through the family, to the members of the family for being held by them jointly;
>
> (b) the income derived from the converted property or any part thereof, (insofar as it is attributable to the interest of the individual in the property of the family), shall be deemed to arise to the individual and not to the family.

The larger initial margin of income exempt from taxation for a Hindu undivided family, which was leading sometimes to fictitious partition or merger, has also been reduced; and, at the present moment, in respect of income tax, there is no perceptible distinction between an individual and a Hindu undivided family.[1] However, now members will benefit more by partition than by living jointly.

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1. The total income exempted from income tax for every individual in the Finance Act, 1973 (The First Schedule Part I), was Rs. 5,000. For the Hindu undivided family it was Rs. 7,000. In the Finance Act, 1974, (The First Schedule Part I), in both cases the exempted limit is Rs.5,000. From income exceeding Rs. 5,000 the rate of income tax is higher for Hindu undivided family than individuals, Finance Act, 1974, The First Schedule, Part I, A, II.

The corporate image of a Hindu undivided family has been further eroded by the Taxation Laws (Amendment) Act, 1975, in its penal clauses in respect of offences by the karta or any member of Hindu undivided families.

> S.278C: '(1) Where an offence under this Act has been committed by a Hindu undivided family, the Karta thereof shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. ...
>
> (2) Notwithstanding anything contained in sub-section (1) where an offence under this Act has been committed by a Hindu undivided family and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any member of the Hindu undivided family, such member shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

The present section keeps the notion of representation of the family by a karta, but at the same time, authorises the state to punish the individual who commits any fiscal offence.

The present development in the Tax laws has its own indirect reflection on the institution of birthright and the mood of Parliament indicates that the legislature does not view the concept with favour. However, the reforms of the Tax laws in respect of the Hindu undivided family are signposts in the direction of reform in the sphere of family law.

VI. Negation of Individualism

a. Past and present

The joint Hindu family is a social, economic and religious institution and the economic collectivity of the group is contained in the coparcenary. It may be re-emphasised that the coparceners are the co-owners of the joint property in the family. The joint family system was the natural outcome of an agrarian society. In the static economy of the pre-industrial era the family was the unit of both production and consumption.[1] Lack of scope for changing one's vocation, absence of social mobility and the bonds of kinship tied down the individual to the position and setting to which he belonged. The juristic basis of birthright was consistent with the Hindu phenomenology of human nature and 'holism'.[2] It was suited to the economic order of a group-oriented and non-egalitarian society and became anathema to an individual-oriented and universalistic state of affairs. In its pure form, the joint family system leaves little room for the gifted individual to exercise any leadership, enterprise and initiative.

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1. A.A. D'Souza, 'Introduction', The Indian Family in the Change and Challenge of the Seventies, (Indian Social Institute, Sterling Publishers, 1972), 2.

2. The term used by Louis Dumont, tr. Mary and James Douglas, 'Preface by Louis Dumont to the French edition of the Nuer', in J.H.M. Beattie and R.G. Lienhardt, ed., Studies in Social Anthropology, (Oxford, 1975), 329-42 at 338. For an analysis of Dumont's emphasis on holism and hierarchy in traditional Indian society, see Y. Singh, Modernization of Indian Tradition, (Delhi, 1973), 34-9.

At present, although most of India is rural and agrarian, egalitarian ideas of individualism have penetrated the rural frontier due to social mobility, spread of education, mechanised transport, political consciousness and the influence of the mass media.[1] We must not ignore the fact, too, that only about one-fifth of India's population resides in an urban setting.[2]

b. Legislative Intervention

The need for individualising property was beginning to be felt during the Anglo-Hindu law period. With the establishment of British rule, and as a result of contact with the West, social changes started to take place and the urban, educated élite felt the need to free self-acquired property[3] from the fetters of family collectivism. The English-educated class, who were earning substantially in newly-established professions, like the civil service, medicine and law, reacted sharply against the regime of joint property. According to the then Hindu law, incomes earned by an individual member as a result of special training financed by the family were presumed to be earnings for the family.[4] The rule contemplates that such earnings were considered as coparcenary property and the birthright of the coparceners operated in full force. This was unfair to the individual and his immediate family, because during his

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1. B. Kuppuswamy, Communication and Social Development in India, (New Delhi, 1976), ch.14.

2. H. Nagpaul, The Study of Indian Society, (New Delhi, 1972).

3. Also see our discussion on the famous Shivagunga cases, supra, 832-44.

4. Gokul Chand v. Hukam Chand Nath Mal (Firm), AIR 1921 P.C. 35.

lifetime he was subject to all the restrictions of dealing with joint property, and at his death, the property would go to the coparceners by survivorship to the exclusion of his widow and daughters. To remedy this state of affairs, the legislature had to step in,[1] and the result was the enactment of the Hindu Gains of Learning Act, 1930.[2] Section 3 of the Act provided that individual family members acquired a separate and exclusive right to the property earned by means of learning financed out of the family fund. The enactment shows that the westernised and enterprising Hindus were no longer prepared to be guided by the dictates of their traditional laws and the legislature had to step in to help them to fulfil their aspirations.

c. Judicial intervention

The judiciary had to play its part in straightening up this part of Hindu law. We have stated earlier that the *Mitākṣarā* view represents the *samudāyika svatvavāda* which means that every coparcener has got an interest in every parcel of joint family property. Moreover, every coparcener's right is qualified by the existence of the similar rights of other coparceners, and therefore, no coparcener can assert that he is the owner of a particular portion of the property; quite legitimately this leads to the rule that no coparcener can voluntarily transfer any specific portion before it is allotted to him at a partition.

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1. Derrett, *Critique*, § 89.

2. The Madras Act of 1890 to this effect never reached the statute book. The sāstric authority for this enactment could vaguely be found in Gautama, 28.28: 'the learned man need not give his self-acquired property to his unlearned coparceners.', also Gautama, 28.31.

d. Involuntary (execution) sale

The monolithic character of joint family property stood in the way of the creditworthiness of an individual Hindu. To protect the creditor, the Privy Council in Deen Dayal v. Jugdeep Narain,[1] laid down the rule that the purchaser of an undivided share of the family property in execution sale for a separate debt acquired a share in such property and also the right to ascertain and realise it by partition. Thus, the Judicial Committee by introducing into Hindu law the equitable principle of the bonafide purchaser, seemingly opened a new individualistic trend in family property. The trend was clarified in Muddun Thakoor v. Kantoo Lall,[2] in which the Privy Council observed that joint family property could be sold in execution of a money decree against the father. It shows that the birthright of sons could no longer stand in the way of execution sales.

From these decisions, however, one should not assume that the judiciary was out to disintegrate the joint family property. The judiciary had to accommodate contingencies of civil law through the application of the English principle of justice, equity and good conscience,[3] and the resulting recognition of a sort of individualism was only expediental and incidental.

1. (1877) 4 IA 247; also Mahabeer Pershad v. Ramyad (1874) 12 Beng. LR 90; Suraj Bansi v. Sheo Prasad, (1880) 5 Cal 148 = 6 IA 88.

2. (1874) LR 1 IA 321; also Nanomi Babuasin v. Modun Mohan, (1885) LR 13 IA 1.

3. Derrett, RLSI, 311-12.

e. Voluntary alienation

In respect of voluntary alienation, the Mitākṣarā notion that no coparcener can individually alienate his share in the joint family property is still the general rule. However, there is a difference of opinion among different High Courts on this point. The Calcutta High Court upheld the general rule that the alienation of his coparcenary interest by an individual coparcener was invalid.[1] The Allahabad High Court[2] was also of the same opinion; but the High Courts of Bombay and Madras,[3] that means South India generally, deviated from the Mitākṣarā rule and, relying on equity, validated the alienation of coparcenary interest for valuable consideration (mortgage or sale, but not gift)[4] by a coparcener. In conformity with strict Mitākṣarā law, the

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1. Nandaram v. Hashee Pandee (1823) S.RP. 23 L; Sheo Shurrun v. Sheo Sahai (1826) 4 S.RP. 138; Jivan v. Ramgovind (1832) 5 S.R. 163.

2. Balgovinddas v. Narain Lall (1893) 20 IA 166 = 15 All 339; Lachman Prasad v. Saman Singh (1917) 44 IA 163 = 39 All 500. Also recently: under the Benares school of Mitākṣarā, a coparcener cannot, without the consent of other coparcener, sell his undivided share in the joint family estate for his own benefit, Babu Lal v. Chandrika Prasad, AIR 1977 NOC 229 (All), relied on Sukh Ram v. Gauri Shankar, AIR 1968 SC 365.

3. The view of the Madras school on this point is stated in Raghunath v. Radhakrishna, AIR 1975 Ori. 214.

4. In South India improper gifts of joint family property are void; elsewhere all improper alienations are voidable, Critique, §129. The whole question of improper gift was reviewed by the Andhra Pradesh HC in Rattamma v. Venkata Subbamma, AIR 1973 AP 226. It was pointed out that the legislature would probably soon abolish all curbs on a coparcener's alienation of his interest. The court allowed a coparcener to give his interest to his brother and nephews to the disadvantage of his own wife. But cp. Kandammal v. Kandish Thevar, AIR 1977 NUC 220 (Mad): a gift of ancestral immovable property by the father in favour of his wife is void.

views of the High Courts of Calcutta and Allahabad were right, but Bombay and Madras viewed the situation through the prism of equity and laid down that by alienating his coparcenary interest, a coparcener incurs an obligation and although this is _ultra vires_, equity should not allow him to evade the performance of the obligation and thus the mortgagee or vendee was allowed to pursue his rights by a suit for general partition [1] against the joint family as a whole.[2] This allowed individualistic members to anticipate their shares or use them for temporary purposes, but this South Indian solution did not solve the problems of coparceners in North India. Earlier jurists were not happy with the equitable solution on this point and, indeed, Priyanath Sen remarked that the High Courts have 'lent a helping hand to the diverse influences at work in undermining the integrity of a joint family under the Mitakshara law.'[3] The jurists of that period were more interested in keeping the purity of the respective doctrines of the _Mitākṣarā_ and the _Dāyabhāga_ than in the aspirations of the individual coparceners. However, while Sen's juridical interpretation of the _Mitākṣarā_ doctrine is understandable, it cannot be denied that the inconveniences of the rigorous rules in respect of alienation of joint family property was felt even in his days, but nobody was bold enough to say that the institution should be abolished. Today, in the throes of individualism, we can say that his medieaval institution has outlived its purpose.

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1. _Venkatammal v. Sinna,_ AIR 1975 Mad 316.

2. Derrett, _Critique,_ § 140.

3. P.N. Sen, _The General Principles of Hindu Jurisprudence,_ TLL, 1909, (The University of Calcutta, 1918), 154.

VII. Equality of the sexes and birthright

We may recall that under the Mitākṣarā law, a Hindu coparcenary is comprised only of the male members who take by birth an interest in the joint; family property.[1] This shows that birthright envisages a family property complex from which females are excluded as owners.

There is no doubt that the Constitution contemplates a social revolution brought about through the use of law as a mechanism of social engineering, and equality of the sexes is guaranteed by the Constitution.[2]

The aim of the Hindu Succession Act, 1956, as we shall presently see, was to rationalise the law of succession, to improve the position of women and to effect social justice in the domain of family property; but the conservative resistance [3] against abolishing male birthright defeated the most important

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1. Kāṇe, HD, III, 591. Jagarnath v. Deputy Director of Consolidation, AIR 1977 All 176.

2. Art.15.

3. On the opinions in favour and against abolition of birthright, see Report of the Hindu Law Committee, (Delhi, 1947), 14-17. H.L. Levy, 'Lawyer-scholars, Lawyer-politicians and the Hindu Code Bill, 1921-1956', Law and Society Review, 3 (1968-69) 2 and 3: 303-16. Lotika Sarkar, 'Jawaharlal Nehru and the Hindu Code Bill', in B.R. Nanda, ed., Indian Women: From Purdah to Modernity, (New Delhi, 1976), 87-98. On typical orthodox argument against reform, see Why Hindu Code is Detestable, published by the Shastra Dharma Prachar Sabha, (Allahabad/Calcutta, undated), 105. The same orthodox view was expressed by N.C. Chatterjee in Parliament. He was opposed to any change in the traditional Hindu law but, ironically, challenged the government to enact a uniform Civil Code for all citizens. D.E. Smith, Religion, Politics and Social Change in the Third World: A Source Book, (New York, 1971), 84-6.

purpose of the legislation. The HSA seemingly provided women with an equal right of inheritance with men, but the inequality of the sexes stayed in the retention of the Mitākṣarā coparcen ary. Since it often tips the scales against women in the matter of succession., the concept of ancestral property is against public policy.[1]

Section 6 of the HSA provides that the female heirs of a male Hindu get a share of his property (his share in the coparcenary property plus his self-acquired property) which is calculated by a partition;[2] but the sons get a share of their father's property in addition to their own interest as coparceners. Thus, the inequality of the sexes still continues. There is no bar in the Constitution against females holding the highest office of the state, but it is indeed ironic that women cannot be members of the Mitākṣarā coparcenary.[3]

VIII. The Hindu Succession Act, 1956

a. General tenor of the Act

In the context of the traditional Hindu view of family law, the Hindu Succession Act made radical changes in the law of succession. Despite its

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1. Mst. Sham Kaur v. Hari Singh, AIR 1973 P & H 71, 74-5.
2. Sushilabai v. Narayanrao, AIR 1975 Bom 257.
3. The National Committee on the Status of Women (1971-74) attacked birthright as an institution of sex discrimination. The Committee recommended its abrogation, J.P. Naik, Status of Women in India: A Synopsis of the Report of the National Committee on the Status of Women (1971-74), (New Delhi, 1975), 53-4.

weakness and resulting anomalies, it is indeed to be conceded that the Act, for the first time, represents a major attempt by the legislature to demythologise the Hindu law of property. As we have stressed earlier, it seems that one of the significant intentions of Parliament was to confer on women equal rights of inheritance with men. The proposed Hindu Code Bill of 1948 (as amended by the Select Committee) had one chapter on joint family and from the point of view of male birthright, section 86 of the Code was really revolutionary. The section provides:

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

This proposed abrogation of birthright was undoubtedly a step toward individualism and equality of the sexes in the law of family property. However, it is well known that the statute of 1956 did not abolish the institution of birthright. The legislature sought reform through a compromise and allowed the continuation of the doctrine of survivorship in an attenuated form.

The Hindu Succession Act introduced several close relatives, including women, as simultaneous heirs for a man's separate property and made it imperative that the same law should apply to his interest in coparcenary property at <u>Mitākṣarā</u> law.[1] Section 6 of the Act provides:

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1. RLSI, 420.

> 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 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 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.

It appears from this section that the occasion for the application of the rule of survivorship will appear in comparatively few cases, nevertheless the operation of birthright within the scheme of inheritance, in appropriate cases, frustrates the social goal. For calculating the deceased's interest, it is provided by section 6 (Expl.1) that it should be theinterest which the deceased would have realised had there been an actual partition [1] of the property immediately prior to his death.

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1. Rangubai Lalji v. Laxman, AIR 1966 Bom 169 = (1966) 68 Bom LR 74. Substantially based on Munnalal v. Rajkumar, AIR 1962 SC 1493, ably criticised by S.R. Gokhale, AIR 1965 J. 85-7.

b. Anomalies and uncertainties

This half-hearted attempt to abolish an archaic institution, in fact, created anomalies and uncertainties in the law of succession and, if certainty[1] is one of the purposes of codification, then Hindu Succession Act falls far short of it. A few illustrations are furnished to throw light on the anomalies emerging from the Hindu Succession Act.

(i) When F dies after 1956 leaving S and SS, there is no clear directive in the Act as to whether SS has a birthright in the share which is undoubtedly grandparental property[2] so far as SS is concerned. Dabke[3] took great pains to emphasise the view that, in such cases, after the Hindu Succession Act, the birthright of SS no longer survives. The Assam and Nagaland High Court[4] also decided that in the given situation, SS had no birthright. However, it is submitted that neither the juridical opinion of Dabke nor the decision of the Assam and Nagaland High Court is the correct interpretation of the existing law[5] and, despite the Hindu Succession Act, the Mitākṣarā

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1. On the purposes of codification, see A.T. Von Mehren, The Civil Law System: Cases and Materials for the Comparative Study of Law, (Prentice Hall Inc., 1957), 31-3.

2. Derrett, RLSI, 338: 'Birth Control and the Intended Abolition of the Hindu Joint Family', Lawasia, 4 (1973), 2: 155-68 at 166.

3. G.K. Dabke, (1966) 68 Bom L.R.J., 113-5.

4. Ghasiram v. Commr. of Gift Tax, AIR 1967 A & N 48. The point was not correctly argued before the bench, hence the decision is per incuriam.

5. Derrett, Lawasia, 4 (1973) 2 : 166.

birthright survives.

(ii) In another situation, suppose a joint family consists of FM, F, S^1 and S^2. At the death of F after 1956, S^1 and S^2 will be treated as joint in respect of 2/3 of the estate; and the remaining 1/3, that belonged to F by legal fiction, will pass to the sons as heirs, each holding 1/6 absolutely; thus, the same property will pass to them by different tenures.[1]

(iiia) (F) = W
S

(iiib) (F) = W
S^1 S^2

We shall presently see that even in situations within the proviso of s.6, the birthright still operates, although according to this proviso the property is supposed to devolve by intestate succession. The 'deemed' partition to compute the shares of the heirs pushes back the Hindu Succession Act to the pre-Hindu Succession Act situation and unconsciously invigorates the law of partition and coparcenary in an incongruous setting.

In these illustrations, suppose F dies after 1956. The shares passing in illustration (iiia) are 1/3 and in illustration (iiib) 1/4.

The shares in the notional partition before F's supposed death would be:

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1. For judicial support of our view see a recent case: Commr. of I.T. Gujarat -I v. Dr. Babubhai Mannsukhbhai (deceased), (1977) 108 ITR 417. It was held in this case that in the case of Hindus governed by the Mitākṣarā where a son inherits the self acquired property of his father, the son takes it as the joint family property of himself and his son and not as his separate property. The court refused to accept the contrary opinion of the Allahabad HC in Commr. of I.T. v. Ram Rakshpal, (1968) 67 ITR 164 as the correct interpretation of the law.
2. Derrett, Lawasia, 4(1973) 2: 166.

F, 1/3; W, 1/3; S 1/3. W gets 1/3 absolutely[1] as a share, and S being the coparcener with his father gets 1/3 as his birthright. The remaining 1/3, being the share of F, is divided between W and S, and each gets 1/6 as heiress and heir respectively. Finally, they get: W (1/3 + 1/6) = $\frac{1}{2}$; S (1/3 + 1/6) = $\frac{1}{2}$.

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1. Rangubai Lalji v. Laxman, AIR 1966 Bom 169; logical following of Munnalal v. Rajkumar, AIR 1962 SC 1493. The female heirs were wrongly ignored by Patel, J. in Shiramabai v. Kalgavda, (1963) 66 Bom LR 351; F died leaving W and S. The estate was divided: F, $\frac{1}{2}$; S, $\frac{1}{2}$. F's $\frac{1}{2}$ again divided between S and W, each getting $\frac{1}{4}$. Finally, S ($\frac{1}{2}+\frac{1}{4}$) = 3/4. For defence of the case, B. Shivaramayya, 'Ascertainment of a Deceased Coparcener's Share', (1965) 67 Bom LRJ, 65-7. But see Derrett, 'The Ascertainment of a Deceased Coparcener's Share', (1964) 66 Bom LRJ, 169-73; 'Adoption, Succession and the Present State of Hindu Law', (1966) 68 Bom LRJ, 41-8, 45f; Critique, ¶ 271. Also Paras Diwan, Modern Hindu Law: Codified and Uncodified, 2nd ed., (Allahabad, 1974), 371. Patel, J. revised his opinion in Rangubai's case, approved in Sushilabai v. Narayan Rao, AIR 1975 Bom 257 (F.B.). In Rangubai's case, Patel, J. interpreted the 'deemed' partition as an 'actual' partition but, subsequently, the Allahabad High Court by interpreting it as only 'notional' partition brings back the controversy on HSA, s.6, Expl.1, Controller of Estate Duty v. Anari Devi, AIR 1972 All 179. According to the fact of this case F died leaving behind two widows, one son and three daughters. On notional partition, F's share came to $\frac{1}{4}$. This $\frac{1}{4}$ devolved by succession, each widow taking 1/40 and son and each daughter taking 1/20. For a defence of the case, Paras Diwan, loc.cit., 371. The Allahabad decision was anticipated by Derrett, (1966) 68 Bom LRJ, 41-8, and Mulla, Hindu Law, 13th ed., 780-1. While the ratio of Rangubai case is well-established, the Allahabad decision is better where women reap large rewards under the HSA at the cost of a son's birthright. However, the two decisions together show the confusion which exists in the interpretation of s.6 of the HSA. This law can be settled only by the Supreme Court. It is interesting to note that in Vidyaben v. Jagadishchandra AIR 1974 Guj. 23 the Gujarat HC followed Rangubai but recently the same HC in Commr. of I.T. Gujarat - I v. Shantikumar, 1976 105 ITR 795 Guj disagreed with Rangubai. For a critical discussion and support for Rangubai, see Derrett, 'Hindu Succession Act (XXX of 1956), Section 6: A Re-appraisal of Rangubai v. Laxman ...', Supreme Court Journal, 15th May '78, 64-66.

In the second illustration (iiib), W would take $\frac{1}{4} + \frac{1}{2}$, S^1 and S^2 $\frac{1}{4} + \frac{1}{2}$ each, $\frac{1}{4}$ being their birthright. Now the question arises as to whether the coparcenary between S^1 and S^2 is broken at this stage? Are they separated from each other involuntarily [1] and, if so, can we impose a partition on them although they did not declare an 'unequivocal' [2] intention to that effect? These are the questions emerging from their birthright and without being conservative, we can say that so long as the Mitākṣarā birthright survives, S^1 and S^2 are not separate and enjoy $(\frac{1}{4} + \frac{1}{4}) = \frac{1}{2}$ in coparcenary tenure.

Again it deserves to be mentioned that in Madras and Andhra, W would take nothing, but provision for maintenance in a partition,[3] hence F's share would be $\frac{1}{2}$ (F, $\frac{1}{2}$; S, $\frac{1}{2}$) and 1/3 (F, 1/3; S^1, 1/3; S^2, 1/3) respectively. In final computation, the property will be divided as follows: in illustration (iiia): S, $\frac{1}{2} + \frac{1}{4}$; W, $\frac{1}{4}$; in illustration (iiib): S^1, 1/3 + 1/9; S^2, 1/3 + 1/9; W, 1/9. These regional variations show the intolerable diversities within the Mitākṣarā system. This is not a happy situation and if uniformity and

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1. Mrs. Sujata Manohar has correctly opined that sons will not be divided by any such deemed partition, 'Rangubai Lalji v. Laxman Lalji and Section 6, Hindu Succession Act, 1956', (1966) 68 Bom LRJ, 60-2 at 62. This view is rightly supported by Derrett, Critique, 217, n.9. But for the trend in judicial opinion, see Fathimunnisa Begum v. Tamirasa, AIR 1977 AP 24: 'Only when the proviso to s.6 applies, there is a change in the character of holding the property from joint ownership to that of tenants-in-common. If there are only male heirs left by a Hindu, even if he died after the HSA came into force, the joint family continues until there is a disruption by partition or otherwise.'

2. Raghavamma v. Chenchamma, AIR 1964 SC 136.

3. Critique, § 271. In North India she takes a share under similar situation, Vishwa Nath v. Prem Nath, AIR 1975 J & K 92.

certainty are our prime objectives, birthright needs to be abolished and the trauma of 'deemed'[1] (notional or actual) partition should be replaced by a simple division of the deceased's estate in equal shares among the entitled heirs.

c. Pious obligation and Hindu Succession Act

Apart from creating anomalies in the suecessorial scheme under the Hindu Succession Act, birthright causes serious problems in the Hindu law of debt. A natural correlative to birthright is the sons' (and sons' sons') liability[2] to pay their father's (and grandfathers') private, antecedent,[3] untainted[4] debts.

The supposedly spiritual justification of the rule that a father's soul will remain in Hell unless his debts are paid[5] has no logical or juridical support,[6] since it did not prevent the rules being abolished so far as the separate

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1. HSA, s.6, Expl.1, Critique, §§215-19.

2. By virtue of pious obligation, the interest of sons in joint family property is answerable: Nan Bachchan v. Sita Ram, AIR 1977 All 126; debts arising out of a surety bond executed by the father: Smt. Chhabirani Bai v. Girdharilal, AIR 1976 MP 69; debts incurred by the father in the course of a business, Paramanand Jain v. Firm Babulal Rajenda Kumar Jain, AIR 1976 MP 187; but no pious obligation of sons where the business is not the kulācāra of the family, Sankaranarayanan v. The Official Receiver, Tirunelveli, AIR 1977 Mad 171; sons liable for pre-partition debts of the father, Keshav Nandan Sahay v. The Bank of Behar, AIR 1977 Pat 185, followed Pannalal v. Mt. Naraini, AIR 1952 SC 170.

3. On antecedency, see Derrett, Critique, §§131-33.

4. Critique, § 127.

5. Nārada, I.9. Kātyāyna quoted in Vyavahāra-mayūkha, V.iv.11. Also Derrett, Critique, § 49.

6. Derrett, Critique, § 49.

property of the son was concerned. Because of birthright, the birth of a son diminishes his father's credit, and therefore, it is equitable that sons must act as legal sureties to the extent of their interest in joint family property,[1] to guarantee payments of their father's debts.[2] This is the rationale behind the so-called doctrine of pious obligation [3] in its temporal context.

The courts take a very strict view of a son's liability in this respect, and unless the debts are proved to be incurred through wilful dishonesty or crime,[4] the sons are compelled to pay even though the debts were incurred or contracted by the father imprudently, inadvertently, or unconsciously. Thus, birthright with its corollary of pious obligation makes a mockery of itself by allowing a father to pile up unlimited debts. Because of this archaic rule, on the one hand, there is no restitutory compensation for the creditor when the debts are tainted (avyavahārika) [5] and, on the other, there is no protection for the son against an unrighteous father. This unbridled individualism of the father

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1. Nan Bachchan v. Sita Ram, AIR 1977 All 126.

2. Sampath, op.cit., 60. Derrett, Lawasia, 4 (1973) 2: 165.

3. On its origin, Kāṇe, HD, III, 442ff. Derrett, 'India Pietas: A Current Rule Derived from Remote Antiquity', Zeitschrift der Savigny-Stiftung fuer Rechtsgeschichte, Rm. Abt. 86 (1969), 37-66.

4. Perumal v. Devarajan, AIR 1974 Mad 14.

5. In a recent case the Andhra Pradesh HC rightly held debts as avyavahārika in which a father purported to borrow for expenses of civil and criminal litigation against his own son, the object of the litigation being to deny the son's legitimate rights to property and to assert his own exclusive right to it, M. Veera Raghaviah v. M. China Veeriah, AIR 1975 AP 350.

at the expense of birthright certainly needs curtailing even in the context of joint family law. It is of interest that no one has taken the initiative to propose this.

Indeed, it is good that immorality should be discouraged, whereupon sons should not be forced to pay their father's immoral (and illegal) debts; but that does not deter collusion between father and son, and a son has been known to put his father in the witness box to aver that a particular debt was tainted.[1] The judiciary sometimes intervened, rightly [2] or wrongly,[3] to protect the creditor from the abuses of the avyavahārika rule, but the anomalies still remain unresolved, except in Kerala.[4]

After the Hindu Succession Act, the pious obligation provokes another problem. There is no denying the fact that to a certain extent, the birthright has been eroded by the Hindu Succession Act. In a situation where the deceased leaves sons as well as daughters as heirs, the daughters along with the sons take their shares in the father's separate property and in his interest in the

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1. Girdharee Lal v. Kantoo Lal, (1874) 1 IA 321 (PC); discussed in Luhar Amrit Lal v. Doshi, AIR 1960 SC 964 at 967.

2. As in Girdharee Lal v. Kantoo Lal, 1 IA 321 (PC).

3. In Luhar Amrit Lal's case, the SC said that sons cannot effectively allege that the proved debt is tainted unless they also allege and prove that it was tainted to the knowledge of the creditor. The decision is most unfortunate and for the correct law and viable suggestions, see Critique, ¶139. However, the SC is followed in Thoga v. Suresh, AIR 1975 J & K 16.

4. Infra, 972.

coparcenary property. Under the present circumstances, it seems that following the principles of pious obligation, the creditor should proceed only against the property in hands of the son. Should the daughter be exempted from sharing the liability of her father's debts even though she is sharing the interest of the father in joint family property like the son? We know that because of a son's birthright, a daughter's entitlement will be less than that of a son but equality of the sexes demands equity and we suggest that all the heirs should have equal shares and equal liabilities for the debts of the deceased.

d. Section 30 of the Hindu Succession Act

It is indeed expedient for some to argue that by virtue of s.6, collateral joint families will eventually die out; and the legislature also took care to ensure that lineal joint families will also wither away if fathers take advantage of testamentary disposition conferred by s.30 of the Hindu Succession Act.

S.30 provides:

> Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so disposed of by him, in accordance with the provisions of the Indian Succession Act, 1925, or any other law for the time being in force and applicable to Hindus.
>
> Explanation. The interest of a male Hindu in a Mitakshara coparcenary property or the interest of a member of a tarwad, tavazhi, illom, kutumba or kavaru in the property of the tarwad, tavazhi, illom, kutumba or kavaru shall, notwithstanding anything contained in this Act or any other

> law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this sub-section.

It may appear from the opening part of the section that Parliament was giving a Hindu a general power of testamentary disposition. But, in fact, that is not the case, and the key phrase of the section ('which is capable of being so disposed of by him') has been elaborated in the Explanation to that section. Birthright and coparcenary property still remain [1] and the father has no power to will away property beyond his self-acquisitions and his interest in the coparcenary property.[2] It is logical that a father cannot will away the interest of his sons in the joint family property of which they are owners from their birth.

Section 30 of the Hindu Succession Act generates a contradiction in the Mitākṣarā law. The general rule of Mitākṣarā law does not allow a coparcener to dispose of his property inter vivos, but the Act allows him, in most cases, to do so by will. To be precise, in South India only a coparcener can transfer his interest for valuable consideration. Mitākṣarā law in general forbids a coparcener to make a gift [3] of his interest in the joint family property. Now throughout India a Mitākṣarā Hindu can usually will away

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1. Where a male Hindu dies leaving widow etc., birthright is eroded, otherwise the main rule of s.6, HSA, must apply, Ramaprasada v. Ratnavel, AIR 1976 Mad 393 at 396.

2. See Moti Lal v. Sardar Mal, AIR 1976 Raj 40 at 55.

3. Derrett, IMHL, § 463.

his coparcenary interest. The section appears to be a step towards freedom of the individual and strikes a modern note within the archaic symphony of the joint family system but, in fact, apart from arousing discrepancies within the law of transfer, the National Committee on the Status of Women complain that the section has become an instrument of perpetuating discrimination against women because, in many cases, to deprive the females, properties are being disposed of by Hindus in favour of their sons.[1]

While the sentiment of the members of the National Committee on the Status of Women is understandable, it does not explain or pinpoint the socio-juridicial problem, in this respect involved with the actions of a Hindu father. Nor does it detect the shortsightedness of the 1956 reformers who, for the sake of removing the dependence of women, in fact, and indeed, in many cases, conferred disproportionate benefits on the daughters.

The reasons for the seeming discrimination against women by avoiding the provisions of s.6, Hindu Succession Act, should not be sought in these avoidances as such, but in the extent to which these provisions are relevant within the context of the wider spectrum of Hindu society.

In the West, since the last quarter of the last century, equality of women has been steadily recognised and the post-war years have accelarated the emancipation of women. In India too, the need for emancipation of women was felt by a section of the society and 'the self-respect of the males

of influential communities could not bear the contrast between the status and expectations of Western women and the status of their own wives and sisters.'[1] But the social development which coincided with the emancipation of women in the West did not occur in India. Unlike the West, and despite The Dowry Prohibition Act 1961, arranged marriages and the dowry system still remain,[2] and the majority of men and women in India believe that the true place for women is the kitchen. Thus, the emancipation of women in India, based on imitation of the West, is merely on paper.

In a sociological context, the framers of the Hindu Code saw it as part and parcel of a scheme whereby by the mere stroke of a pen the Indian public would rid itself of antiquated values and would build up a modern nation. The economic benefit to women in the Hindu Succession Act is part of that scheme, but it did not go hand in hand with their social emancipation. Nor does it seem that the reformers were interested in the equality of women with men; all they were interested in was the removal of the dependent position of women and this, they thought, would be achieved if they could accord better rights to them than to their male relatives.

This jurisprudential device to emancipate women produced serious social and juridical consequences. Despite equal rights of daughters with

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1. Derrett, 'Adoption, Succession and the Present State of Hindu Law', (1966) 68 Bom. LRJ, 41-8 at 45.

2. Padmini Sengupta, The Story of Women of India, (New Delhi, 1974), 236.

sons in the successorial scheme of the Hindu Succession Act, the sons still remained custodians of the prestige and responsibility of the family in the true Hindu tradition. A daughter who has gone away from the family after her marriage with, say, her gift of affection from the father,[1] her dowry and her share of the family estate under the Hindu Succession Act, should be treated nevertheless as a guest by her brother whenever she comes herself or with her children to her brother's house, and Indian tradition demands that her visits and expenses incurred for her should not be grudged by her brother's family. But these Indian folk-ways show that the Hindu Succession Act awarded women rights upon a footing which had no rational background. And that is why, to create a social and economic balance and to do justice to the sons, many a Hindu father might have to take advantage of s.30 of the Hindu Succession Act by devising property in favour of his sons.

However, having said that, we cannot afford to overlook the fact that s.30 of the Hindu Succession Act alone neither satisfied the women nor provides satisfactory means to a father who wants to regulate the devolution of family property after his death; thus, the Hindu law of joint family property and succession needs overall legislative review.

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1. Guramma v. Mallappa, AIR 1964 SC 510. For a critical discussion, Derrett, Critique, ¶ 124. Guramma's case confirmed by SC in Ammathayee v. Kumaresam, AIR 1967 SC 569. Gift in favour of mother held void: Tirupurasundari v. Kalyanaraman, AIR 1973 Mad 99; gift of ancestral immovable property in favour of wife held void: Kandammal v. Kandish Thevar, AIR 1977 NOC 220 (Mad); cp. Rattamma v. Venkata Subbamma, AIR 1973 AP 226.

IX. Possible advantages of the joint family system

When all is said in favour of abrogation of birthright and joint family, we should not fail to analyse the advantages which are normally put forward in support of the joint family system.

a. Moral and spiritual factors

Considering the advantages and disadvantages of the system, Golap Chandra Sarkār Śāstrī said: 'This institution like every other, has its advantages and disadvantages, but its advantages are both spiritual and secular, whilst its disadvantages are merely secular in character.'[1] It is true that the Hindu religio-philosophical doctrines exert considerable influence on that society; and moral and spiritual elements are merged with the secular aspects of joint family life, but the survival of moral and spiritual factors does not necessarily depend on the existence of birthright. And birthright itself is a secular concept.

b. Miniature welfare state

It is assumed that the Hindu joint family in the ideal sense is a miniature 'welfare state',[2] and in the absence of adequate social security measures, the institution takes the major responsibilities of looking after

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1. Golāp Chandra Sarkār Śāstrī, Hindu Law, 4th ed., 193.

2. Derrett, Lawasia, 4 (1973) 2: 155-68 at 162.

the aged, the infirm widows, orphans, the sick and the unemployed.[1] The truth of this contention is undeniable, but at the same time, individualism must be recognised by abolishing the Mitākṣarā birthright, and it can be done more securely because Hindu piety and solidarity, characteristics for which the nation is famed, can [2] be left to those same individuals to manifest, whatever the legal title to their assets.

c. Mental health

The psychoanalysts argue that the joint family is an emotional nexus and that the warmth and togetherness that exist among the members make life meaningful and stable. It is believed that the joint family system minimises anxiety, tension, conflict and frustration and does not lead to mental health problems.[3] In a recent survey, Dr. Sethi concludes that unitary families living in strange and unfamiliar environments are more prone to psychiatric

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1. W.J. Goode, World Revolution and Family Pattern, (New York, 1963), 245. D.A. Chekki, 'Modernisation and Social Change: The Family and Kin Network in Urban India', in G. Kurian, ed., The Family in India, op.cit., 205-31 at 227. In the same volume, 'K. Ishwaran, 'The Interdependence of Elementary and Extended Family', 163-77 at 177.

2. In spite of Derrett's massive principles in his Critique, Ch.2.

3. W.S. Taylor, 'Behaviour Disorders and the Breakdown of Hindu Family', Indian Journal of Social Work, June, (1943), 164-5. Morris Opler, 'Family, Anxiety and Religion in a North Indian Locality', in Marvin Opler, ed., Culture and Mental Health, (New York, 1960), 273.

disorders such as depression than are joint families.[1] Although there is some weight in these arguments, no one can assume with certainty that joint families are free from psychosomatic problems. In joint families there is abundant room for clash of wills[2] and it should be noted especially that the junior male members do not receive the kind of socialisation which would permit them to act independently.[3] Such an atmosphere is hardly conducive to mental stability. Moreover, the alleged psychic advantages appertaining to joint living or the large household do not apply to legal joint families which we have been discussing.

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1. B.B. Sethi, paper read at International Congress of Psychotherapists in Paris, The Statesmen Weekly, July 17, 1976, p.3.

2. Hemalatha Acharya observes that in Gujarat familial tensions, especially between the mother-in-law and the daughter-in-law, have increased the incidence of suicide among daughters-in-law, 'Some Possible Variations in Family Types in Gujarat', in G. Kurian, ed., Family in India, op.cit., 179-90 at 180. There are few suicides in Burma, where the joint family is confined to a handful of immigrant Hindus. Muslim joint families are very rare in most regions of India; information supplied by Derrett on the margin of my first draft.

3. T.G.P. Spear, Modern India, (Ann Arbor, U.S.A., 1961), 65-7. H. Nagpaul, The Study of Indian Society, (New Delhi, 1972), 79. The general rule is this, that the senior member acts as the manager of a joint family. A senior member may give up his right as manager with consent of all the members, Narendrakumar v. Commr. of Income Tax, AIR 1976 SC 1953.

CHAPTER 22.

JOINT FAMILY LAW IN KERALA

1. Significance of Kerala

Of the 20 million people in Kerala,[1] 61% are Hindus, 21% Christians and 18% Muslims. The Hindu community in Kerala consists of the Brahmins, the Nayars, the Kshatriyas and other upper Castes, the Ezhavas, and other backward and polluting Castes. The traditional personal laws of these various groups of Hindus were not homogeneous[2] and to discuss them in detail would be beyond the scope of our present study. However, a short survey of the Kerala systems of family law is worthwhile for three reasons: first, the Hindu society of Kerala stands merged in the general stream of social life in India;[3] secondly, the joint families in Kerala, whether

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1. Before the re-organisation of States in 1956, following Indian independence, Kerala consisted of three separate and more or less autonomous administrative units, namely, Travancore and Cochin; states administered by the Indian rulers; and the Malabar district which constituted part of the then Madras Province. The State of Kerala was fomed in 1957; it comprised Malabar District plus the Malayalam-speaking taluks of South Kanara, and Travancore-Cochin, minus the Tamil-speaking taluks of the extreme south.

2. IMHL, § 571.

3. T.K.N. Unnithan, 'Contemporary Nayar Family in Kerala', in G. Kurian, ed., The Family in India, op.cit., 191-203 at 202.

matrilineal or patrilineal, have the basic organisational characteristics of a Mitākṣarā joint family; and a number of patrilineal Hindus were governed by the Mitākṣarā law as custom, although variations from it had judicial recognition;[1] and thirdly, Kerala has gained special significance by its pioneering legislation[2] on abolition of birthright which is our central theme.

II. TYpes of Families

Among the Hindus in Kerala we come across both matrilineal and patrilineal families. The matrilineal system is followed by the Nayars, Khatriyas, certain temple Castes, and some Ezhavas. Brahmins[3] and other Hindus follow the patrilineal system.[4] The Kanikkars and Uralis of Travancore are matrilineal but patrilocal. However, their Marumakkattayam[5]

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1. Also Mitākṣarā law is applicable to illam, makkattayam and marumakkattayam as residual law, IMHL, § 574.

2. The Kerala Joint Hindu Family System (Abolition) Act, 1975, 30 of 1976.

3. It is significant to note that there are five extant matrilineal Nambudiri illam in the extreme north, Joan P. Mencher and Helen Goldberg, 'Kinship and Marriage Regulations among the Namboodiri Brahmans of Kerala', in G. Kurian, ed., The Family in India, op.cit., 291-316 at 294. Also Mayne's Treatise on Hindu Law and Usage, 10th ed., Appx. III, 967.

4. Unnithan, op.cit., 197.

5. The word marumakkattayam is from marumakan = 'sister's son' and tayam = 'share', 'inheritance'. The patrilineal descent system is referred to by the word makkattayam, makan = 'son', C.J. Fuller, The Nayars Today, (Cambridge University Press, London, 1976), 54. Also Mayne, 967.

system of succession and inheritance by the sister's son has eventually been replaced by the Makkattayam system of succession by sons.[1] It deserves mentioning that the joint family system is not confined within the frontiers of a particular community, and in Kerala some Christians, too, live in joint families which conform to a regime analogous to the Mitākṣarā joint family with birthright. Again, the 'Mappillas were originally governed by marumakkattayam law, which embraced all aspects of joint-family and succession."[2]

III. Tarwad

In the marumakkattayam system, the traditional family unit is called a tarwad.[3] In the aliyasantana system, it is called a kutumba.[4] A tarwad was a segment of a matrilineage, some three to six generations deep, containing both its male and female members.[5] Juridically, it was a property group consisting of all the descendants of a common ancestress[6] in the female line.

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1. B. Mukherjee, 'The Structural Features of the Tribal Families of India', in G. Kurian, ed., The Family in India, op.cit., 75-90 at 86.

2. Derrett, RLSI, 525. See the Mapilla Succession Act, 1918; the Mapilla Marumakkatayam Act, 1928. Also onMappillas, Kathleen Gough, 'Mappilla: North Kerala', in D.M. Schneider and K. Gough, ed., Matrilineal Kinship, (University of California Press, Berkeley and Los Angeles, 1961), 415-42.

3. The Madras Marumakkatayam Act (22 of 1933), section 3(i) defines tarwad as a 'group of persons forming a joint family with community of property governed by the Marumakkattayam law of inheritance'.

4. IMHL, §572.

5. Kathleen Gough, 'Changing Households in Kerala', in D. Narain, ed., Explorations in the Family and Other Essays, op.cit., 218-67 at 225.

6. Mayne, 10th ed., 968.

However, the tarwad has got a legal personality apart from its members for certain purposes and for other purposes, it is a group of persons. It is a right and duty-bearing unit and, in that sense, has greater affinity with a corporation.[1] Traditionally, tarwad property was impartible.[2] Every member of a tarwad has equal rights in the property by reason of his or her birth in the tarwad.[3] The members took by survivorship all the property left by a member dying intestate.[4]

IV. Karnavan

The tarwad property was administered by the eldest male member, called the karnavan.[5] The karnavan was the mother's brother who was a co-

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1. Gopala Menon v. Kalyani Amma, 1964, KLT 166. Cp. joint Hindu family is not a corporate entity, Mahavirprasad v. M.S. Yagnik, AIR 1960 Bom.191; N.V. Subrahmanyam v. Additional Wealth Tax Officer, Eluru, AIR 1961 AP 75; Chhotey Lal v. Jhandey Lal, AIR 1972 All 424 FB.

2. Mayne, 10th ed., 969. Derrett, IMHL, §576.

3. Kalliani Amma v. Govinda Menon, (1912) 35 Mad 648; Kabakandi Koma v. Siva Sankaran (1910) 20 MLJ 134.

4. IMHL, § 576. The same rules apply to the members of a kutumba under the Aliyasantana customary law, Jalaja Shedthi v. Lakshmi Shedthi, AIR 1973 SC 2658, 2659.

5. Mayne, 10th ed., 969. In the absence of any adult male member, the senior-most female could act as the managing member (karnavathi), ibid., 969. In the Aliyasantana system, they are known as ejaman or ejamanthi, ibid., 969. In the Aliyasantana system, the eldest member of the kutumba, whether male or female, was entitled to be the manager, Raghavachariar, Hindu Law, 6th ed., 715.

parcener and had an economic interest in the tarwad.[1] He is in a fiduciary position relative to the junior members and he has no larger right of ownership than any such members. He had absolute powers of decision so far as management of the family property was concerned, but he could not alienate any portion of the immovable property without unanimous consent of the junior members.[2] However, he had a larger power of disposal in respect of movables.[3]

The karnavan had a dual role to play. As the head of his sister's family, he had to protect the interest of the members of that matrilineal segment, and as a father and husband to his own conjugal unit, he may experience a degree of role conflict arising from external social influences and expectations.[4]

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1. Cp. the mother's brother (U Kni) in the matrilineal Pnar Khasi families (Kur or its smaller lineage ting) of Assam is not a coparcener. The youngest daughter is the heiress of the family, B. Mukherjee, 'The Structural Features of the Tribal Families of India', in G. Kurian, ed., The Family in India, op.cit., 75-90 at 85. For a comparison between a Karnavan and U Kni, see U.R. Von Ehrenfels, 'Matrilineal Joint Family Patterns in India' in Kurian, ed., ibid., 91-106 at 94-5.

2. The Madras Marumakkattayam Act, 1933, s.33(1). Mayne, 10th ed., 980. Raghavachariar, 6th ed., pr.641, 648.

3. Raghavachariar, pr.641. The Kerala HC observed that the karnavan is the representative of the tarwad. He is not the agent of the members of the tarwad as such, but only the legal entity called 'tarwad', Gopala v. Kalyani, 1964 KLT 166.

4. Theoretically, 'matrilineal descent groups do not require the statuses of father and husband', D.M. Schneider, 'Introduction: The Distinctive Features of Matrilineal Descent Groups', in D.M. Schneider and K. Gough, ed., Matrilineal Kinship, op.cit., 1-29 at 14. But 'there is always potential conflict between the bonds of marriage and the bonds of descent', ibid., 17. Schneider explains: '... where stable marriage is a normative element such that there is strong and consistent pressure on all husbands and wives to be firmly bound to each other, this will constitute a source of strain on the matrilineal descent group', ibid., 17. For a discussion on role-conflict, see ibid., 17-25. Rao also observes: 'The central point in the change of the matrilineal kinship system

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Unnithan [1] points out that often his role as a father and husband conflicted with his juridically-perceived role as a karnavan and as a result, strife and tension over the role-conflict of karnavan became the normal scene in the marumakkattayam families in Kerala and, particularly during the nineteenth century, the authority of the karnavans came to be increasingly challenged.[2] These divergent roles of a karnavan may contain the seeds of degeneration of the joint family system among the matrilineal groups in Kerala.

V. Individuation of tarwad property

From ancient times, tarwads split into tavazhis,[3] which are sub-tarwads or miniature tarwads within the tarwad proper.[4] However, it was during the nineteenth century that tarwad property in Central and North Kerala came to

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Note 4 - p.957 - continued:

is the changing basic behaviour patterns. The assimilation of the concept of paternity strikes the keynote of the changing tarawād organization. This has resulted in the establishment of close bond of affection with one's children and the corresponding dwindling of the tie that existed with one's sister's children', M.A.S. Rao, Social Change in Malabar, (Bombay, 1957), 203.

1. T.K.N. Unnithan, 'Contemporary Nayar Family in Kerala', in G. Kurian, ed., op.cit., 191-203 at 196.

2. C.J. Fuller, The Nayars Today, op.cit., 128.

3. Narayana v. Sankara, (1947) Trav LR 625.

4. IMHL, §573.

be ever more frequently divided into tavazhis.[1] It was a settled law that one or more members of a tarwad could not claim partition and separate possession of their share of the tarwad property without the consent of all the members thereof.[2]

In 1908, the Marumakkathayam Committee set up by the Travancore Government, realised that it would be best if an individual were allowed to realise his interest in the tarwad through a partition, but recommended that 'individual partition is at present opposed to the sentiments of the community',[3] and, instead, partition could only be demanded by tavazhi. But individuation or conjugalization was in the air, and a man's conjugal family gained importance at the expense of the greater extended unit. In this respect, the formation of a tavazhi by a section of the family was the first step, and gradually a custom developed [4] whereby property might be donated or bequeathed to a woman and

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1. K.E. Gough, 'Changing Kinship Usages in the Setting of Political and Economic Change among the Nayars of Malabar', JRAI, 82 (1952), 71-87 at 79. J.P. Mencher, 'Changing Familial Roles among South Malabar Nayars', Southwest Journal of Anthropology, 18 (1962), 230-45 at 231. Fuller isolates three basic factors which contributed towards the increase in the frequency of tarwad partition: (i) growth of population; (ii) young men's ambition to become a karnavan; (iii) frequency in transfer of self-acquired property by men to their wives (sambandham partners), promoting dispute between men and their matrilineal relatives, C.J. Fuller, The Nayars Today, op.cit., 126-7.

2. Mayne, 10th ed., 969-70.

3. Report of the Marumakkathayam Committee, Travancore, (Trivandrum, Govt. Press, 1908), 69.

4. IMHL, pr. 578.

her children.[1] During the nineteenth century, advantage of this customary practice was increasingly taken by Nayar men who began to use their independent cash earnings to build private houses, which they gave to their wives and to their wives' uterine descendants in joint ownership.[2] However, if they failed to donate or bequeath their self-acquisitions,[3] all such property reverted to their matrilineal property group.[4] The custom achieved legislative recognition in The Malabar Marriage Act of 1896 (N Act No.6 of 1896) which provided in section 23:

> Where a man following the Marumakkattayam or the Aliasantantana Law of Inheritance dies intestate in respect of his self-acquired or separate property or any portion thereof, one-half of such property or in the even of no member of his Tarwad surviving him, the whole of such property shall devolve on his widow if he leaves no children, or on his children in equal shares if he leaves no widow or on his

1. L. Moore, Malabar Law and Custom, 3rd ed., (Madras, 1905), 174.

2. K. Gough, 'Changing Households in Kerala', in D. Narain, ed., Explorations in the Family ..., op.cit., 225. Fuller, op.cit., 127.

3. Every person governed by the Marumakkattayam or Aliyasantana law of inheritance, if of sound mind and not a minor, could dispose of his self-acquired or separate property by will under the provisions of Malabar Wills Act 1898, Raghavachariar, 6th ed., 732.

4. Kallati Kunju Menon v. Palat Erracha Menon, (1864) 2 MHCR 162; affirmed by the majority of the FB in Govindan Nair v. Sankaran Nair, (1909) 32 Mad. 351 FB. It was felt that the FB decision was opposed to the consciousness of the people, Vishnu v. Akkammma, (1911) 34 Mad.496; Chakka v. Kunni, (1916) 39 Mad.317 FB; Abdureheman v. Hyssein, (1919) 42 Mad.761.

> widow and children in equal shares if he leaves both widow and children. [1]

Similar legislation to this effect reached the statute book in Travancore in 1899, although it fell short of the individualistic aspirations of the Nayars.[2]

The Travancore and Cochin legislatures passed statutes concerning marumakkattayees, not on a general basis applicable to all marumakkattayees, but on a caste basis. Consequently, there remained many marumakkattayees in the Travancore area who did not come under any statutes and followed their customary law until modified by the enactment of the Hindu Succession Act, 1956.[3] In 1913, the first Travancore Nayar Act allowed the wife and children of a Nayar dying intestate to inherit one-half of his self-acquired property, while the other half merged with the matrilineal joint property. The provision - obviously a compromise - fell short of the Marumakkathayam Committee's recommendations and of the demands of the Nayar reform leaders.

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1. Section 24: 'Where a woman following the Marumakkattayam or the Aliyasantana Law of Inheritance died intestate in respect of her separate or self-acquired property or any portion thereof, one-half of such property shall devolve in equal shares upon her children, in the event of no member of the Tarwad surviving her, the whole of such property shall devolve on her husband.' The Act was a dead letter, but served as a precedent for similar legislation in Cochin and Travancore about twenty to thirty years later.

2. Fuller, op.cit., 134.

3. Moothath, 'The Kerala Joint Hindu Family System Abolition Bill, 1973 - A Study', KLT (1973) J., 91f.

The Nayar Service Society which was founded in 1914, demanded radical reform and in 1925, the second Nayar Act [1] came into force, allowing almost unrestricted partition of joint family property.

Among the Nayars of Cochin, the first legislative breakthrough was the Cochin Nayar Act of 1920. In respect of devolution of self-acquired property, the provision in the Act was the same as in the Travancore Nayar Act of 1913. The Cochin Nayar Act (29 of 1113 M.E.) 1938, allowed further individualisation of property. Until 1938, men were not entitled to take individual shares of their ancestral property, but under the Act of 1938, they got this right. In matters of inheritance, a man's immediate family gained priority over the matrilineal segment, and the Act provided that a man's personal intestate property, whether self-acquired or acquired by a partition from his _tarwad_, would pass in equal shares to his mother, widow, sons and daughters.[2] Before this legislation, a woman could legally claim the shares in the ancestral property pertaining to herself and her uterine descendants separately from the rest of the _tarwad_ only after the decease of her mother, mother's brothers and own brothers, or of any more distant linear ascendants. The Act allowed women to claim their own individual shares as well as those of their minor uterine descendants. It also provided that, at her death, a woman's self-acquired property and her share from the _tarwad_ property would pass in equal shares to her sons and daughters.[3]

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1. Travancore Nayar Act, (2 of 1100 M.E.), 1925.
2. Cp. Ss. 19-24, The Madras Marumakkattayam Act, 1933.
3. Cp. Ss. 25-28, The Madras Marumakkattayam Act, 1933.

The Madras Marumakkathayam Act (Act No.22), 1933, s.38,[1] which granted *tavazhy* partition, was applicable to all *marumakkattayees* in Madras State. The Act was amended by the Madras Marumakkathayam (Amendment) Act, 26 of 1956 (Kerala), s.9, whereby individual right of partition was conferred on all persons who were governed by it. The Kerala Nayar Act, 1958, did contribute to loosening the rigid character of Nayar family structure. The Madras Aliyasantana (Mysore Amendment) Act, 1961, by s.5, introduced a new section (s.37A) into the Madras Aliyasantana Act, 1949,[2] and granted the members of a *kutumba* or *kavaru* an unrestricted right to claim partition and an absolute interest in the *per capita* share from the date of such claim.[3]

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1. S.38(1): 'Any tavazhi represented by the majority of its major members may claim to take its share of all the properties of the tarwad over which it has power of disposal and separate from the tarwad:

   Provided that no tavazhi shall claim to be divided from the tarwad during the lifetime of an ancestoress common to such tavazhi and to any other tavaz-i or tavazhis of the tarwad, except with the consent of such ancestress, if she is a member of the tarwad.

   (2): The share obtained by the tavazhi shall be taken by it with the incidents of tarwad property.

   Explanation - For the purposes of this Chapter, a male member of a tarwad or a female member thereof without any living child or descendant in the female line, shall be deemed to be a tavazhi if he or she has no living female ascendant who is a member of the tarwad.'

2. The Act conferred a right to partition properties on all the members of the *kutumba*, but the basic matrilineal concept of *Aliyasantana* customary law was not disturbed by the Act, *Jalaja* v. *Lakshmi*, AIR 1973 SC 2658, 2659.

3. IMHL, 360, n.7.

The effect of this legislation was that gradually the tarwads became shallower and narrower with lesser generational depth and included fewer distantly related kin. But it was not predominantly a case of social change through legal change; in fact, social change and legal change went hand in hand. In some instances, it seems that the legislation was giving legal validity to emerging social norms. For example, in much of Travancore, tarwad division was occurring on a large scale even before the passing of the 1925 Act. Although much land was theoretically impartible and inalienable, it was being sold or mortgaged.[1] In South Malabar and Cochin, the great majority of tarwads were divided between individuals or between tavazhis soon after the Acts in the 1930s. In most tarwads which had not divided their property, 'partition suits' were pending in the courts.[2] Joan Mencher informs us that many of the larger tarwads began to divide their property immediately after the 1933 Act, and by 1960 all the large tarwads in Malabar either had been partitioned or had cases pending in courts.[3] In

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1. T.C. Varghese, Agrarian Change and Economic Consequences: Land Tenures in Kerala, 1850-1960, (Calcutta, Allied Publs., 1970), 99-100.

2. K. Gough, 'Nayar: Central Kerala'; 'Nayar, North Kerala'; 'Tiyyar: North Kerala'; 'Mappilla: North Kerala'; 'The Modern Disintegration of Matrilineal Descent Groups' in D.M. Schneider and K. Gough, ed., Matrilineal Kinship, op.cit., 298-442; 631-52 at 646. Also the same observation in her study of the Nayars of Palakkara, (1949-1964), Central Kerala, 'Changing Household in Kerala', in D. Narain, ed., op.cit., 218-67 at 226.

3. J.P. Mencher, 'Changing Familial Roles among South Malabar Nayars', Southwest Journal of Anthropology, 18 (1962), 230-45 at 237.

the Cochin tarwad studied by Chie Nakane, the first division was made in 1898 and the final partition of the property by individual members was in 1944.[1] These anthropological data justify the legislative measures, and also prove that joint living or joint ownership of property was increasingly dying out and being replaced by an individualistic norm.

VI. Nambudiri joint family (illam)

A traditional Nambudiri household is a patrilineal stem family. It is suited to long-term ownership of impartible manorial estates.[2] The illam property concept is integrated with the marriage customs of the Nambudiris. In order to maintain the illam property intact, only the eldest son was allowed to marry a Nambudiri woman and beget Brahmin children.[3] The younger sons of a Nambudiri illam remained members of the natal household with rights of maintenance in the illam property. The non-Brahmin wives of the younger sons and their children had no right in the property of the Nambudiri

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1. Chie Nakane, 'The Nayar Family in a Disintegrating Matrilineal System', International Journal of Comparative Sociology, 3 (1962), 19-28 at 21.

2. Gough, 'Changing Household in Kerala', in D. Narain, ed., op.cit., 230. Derrett, IMHL, §574.

3. Joan P. Mencher and Helen Goldberg, 'Kinship and Marriage Regulations among the Namboodiri Brahmans of Kerala', in G. Kurian, ed., The Family in India, op.cit., 291-316 at 294.

family.[1] These marriage rules restricted the number of legitimate heirs and minimised the pressure to partition the family estate;[2] if only the eldest son could produce an heir to the family estate it would never have to be divided. This extreme emphasis on primogeniture and complete denial of any rights to the non-Brahmin wives (sambandham partners) and their children might conform to the values of a medieavel landed aristocracy and religious elite, but in the modern context, they are nothing but discriminations on the ground of caste and sex and causes of fecklessness and frustrations among the younger sons of the family.

From the beginning of the 20th century, pressures arose among the Brahmans, as among other Castes, for individual control of private earnings, and for individual claims to property. This social aspiration found expression in the Cochin Nambudiri Act of 1939, by which all Nambudiri men were permitted to marry within their Caste and to claim on behalf of their conjugal families separate shares in the estate. The non-Brahmin wives and children of Nambudriris were also permitted to claim maintenance and the right to inherit the property of their husbands and fathers.

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1. Of course these women and children had their rights in their own tarwad. That is why Nambudiri system of property ownership should not be studied in isolation. In kin terminology, marriage patterns and in property ownership, the Nambudiris form a part society within the larger social context of Kerala, Mencher and Goldberg, op.cit., 294.

2. C.J. Fuller, The Nayars Today, op.cit., 3.

VII. Ezhavas

Among Ezhavas it was a traditional custom that all brothers married a single wife in fraternal polyandry. Such an arrangement yielded only one set of children in each generation to inherit the property of the joint family.[1] Although they were roughly patrilineal, their joint families neither fit into the Mitākṣarā type nor into the typical matrilineal category.[2] The Ezhavas had no birthright or pious obligation.

By the 1920s, the custom of fraternal polyandry had fallen into disapproval, and under the Cochin Makkathayam Thiyya Act of 1940, all members of the patrilineal joint family were permitted to claim separate shares of the ancestral property. The Act also permitted daughters, and the widows of the deceased male members, to claim such shares.

VIII. The Hindu Succession Act of 1956 and the Kerala Joint Families

The tarwads and tavazhis, kutumbas and kavarus, and illams were severely shaken by the Hindu Succession Act. Section 7 of the Act provides

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1. Commenting on the fraternal polyandry among the Khasas, R.N. Saksena says: 'Fraternal polyandry also leads to the setting up of an intense form of joint family. Due to the absence of "male jealousy" and the high status given to the eldest brothers, all other possible causes of dispute among the brothers that may split the family are eliminated', 'Marriage and Family in the Polyandrous Khasa Tribe of Jaunsar-Bawar', in G. Kurian, ed., The Family in India, op.cit., 107-17 at 113.

2. IMHL, § 570.

that when a Hindu to whom the Marumakkattayam, Aliyasantana or Nambudiri law applies dies after the commencement of the Hindu Succession Act, the undivided interest of such a Hindu shall devolve by testamentary or intestate succession under the provision of the Hindu Succession Act and not according to Marumakkattayam or Aliyasantana or Nambudiri law. It does not need re-emphasising that the Mitākṣarā coparcenary with its survivorship rule outlived the Hindu Succession Act under certain stated conditions, but in the matter of succession to the interest of the member of a tarwad, tavazhi, kutumba, kavaru or illam, survivorship was abrogated. However, succession is a matter that opens after the death of the propositus and until such time, all the rights of the members of a joint family, e.g. right to a partition, the right to impugn alienation etc., remain operative.[1] Both patrilineal and matrilineal families needed the abolition of birthright to put an end to the joint family system, and this was precisely what was not done in the Hindu Succession Act. Thus, as in the Mitākṣarā system, and in Nambudiri and Marumakkattayam systems as well, the joint family with all its rules survived the Hindu Succession Act.

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1. For example, s.7(1) of the HSA says nothing whatsoever as to the nature of the interest held by a marumakkattayee in the property of his tarwad during his lifetime. Despite the enactment of the HSA, it remains an undefined and undivided interest, Dhanalakshmi Bank Ltd., Trichur v. Neelakantan Nambudiripad, 1964 KLT 219.

IX. Post-Independence Social Revolution and Kerala

The local legislation in Kerala and the Hindu Succession Act were legislative measures intended to bring about an egalitarian society, but the most fundamental causes for change should be sought in the political and constitutional reforms that have taken place in India in the past three decades. However, significantly, Kerala experienced the post-independence social revolution in a special way. High literacy and high unemployment, combined with the coming into power of the Communist and Socialist Parties, heightened the process of political socialisation which ran counter to the traditional status quo of the familial institutions. The Governments, led by or in partnership with the left-wing parties,[1] introduced various social and economic measures, such as, land reforms.[2]

Apart from these external factors, the matrilineal joint family as an institution was disintegrating from within. If we take the case of the Nayars, we realise that the tarwad régime was relevant only for a few. One does not fail to notice that Nayar society is polarised between Nayar aristocracy and

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1. The Communists came to power in the first election but since 1959, Kerala has mostly been ruled by unstable Congress-led coalitions, alternating with periods of direct rule from New Delhi.

2. The Kerala Land Reforms Act, 1963, which came into force in January 1970, fixes a ceiling (approximately 15 acres on average) on a household's land-owning. A similar reform was first proposed by the Communist Government of 1957, but the Nayar Service Society and the Christian churches opposed the government's proposal.

the Nayar masses, and the majority of these Nayar masses are poor peasants and agricultural labourers who were continuously in process of establishing nuclear families. Again, the suppression of the initiative and aspirations of the enterprising members of the matrilineal complex by the autocratic karnavans led to conflict and tension within the family organisation and gradually the tarwad failed to function as a viable social and economic unit. This was yet another reason for the division of joint family property and the establishment of smaller households by separated members.[1]

The socially oppressed members of the Nayar aristocracy and the economically impoverished Nayar masses found common ground with the socially disadvantaged Ezhavas, Pulayas, Pariahas, and other polluting Castes, and gave a new but dynamic momentum to the socio-economic changes in Kerala.[2] They realised that their survival depended on the transformation of the established economic institutions, and particularly on a change in the pattern of land ownership by family units. Thus, the political situation influenced the social scene and the familial and social factors were crying for political decisions. In Kerala the time was ripe for a legislative initiative for legal change in familial organisation, which indeed found expression in The Kerala Joint Family System (Abolition) Bill, 1973.[3] The Bill was passed

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1. A.C. Mayer, Land and Society in Malabar, (O.U.P., 1952), 131-7.

2. T.K.N. Unnithan, 'Contemporary Nayar Family in Kerala', in G. Kurian, ed., The Family in India, op.cit., 191-203 at 200.

3. On this, see P. Parameswaran Moothath, 'The Kerala Joint Hindu Family System (Abolition) Bill, 1973 - A Study', KLT (1973) J., 91-5; 99-101. Derrett, 'Law Reform in Kerala', KLT (1974) J., 2-6.

in the Kerala State Legislature and The Kerala Joint Hindu Family System (Abolition) Act 1975, 30 of 1976, received the assent of the President on 10th August, 1976.

X. Summary of the relevant provisions of the Act

Section 2 ofthe Act defines the joint Hindu family. For the purposes of this Act, a joint Hindu family means any Hindu family with community of property. This includes the tarwad, or tavazhi of the Marumakkattayees, Kutumba or kavaru of the Aliyasantanas, illoms of the Nambudiris and undivided Hindu families of the Mitākṣarā law.

In Section 3, the Act abolishes birthright, which provides that, after the commencement of this Act, birth in the family of the ancestor will not confer any right to property.[1]

Section 4(1) puts an end to joint-tenancy in the Mitākṣarā joint family and converts it into a tenancy-in-common, each member thereof holding his or her share separately as full owner, as if a partition had taken place among all the members. However, having regard to the spirit of Hindu joint family life, the proviso to the sub-section safeguards the right to maintenance, to marriage and funeral expenses, or to residence, out of the coparcenary property.

Section 4(2) deals with Hindu joint families other than Mitākṣarā families, and provides that on the day this Act comes into force all members of

1. The provisions of the Act (ss.3,4,7) are criticsed by P.B. Menon for their ambiguity and, particularly s.3 leaves some extra-judicial loopholes, 'Some Stray Thoughts on the Kerala Joint Hindu Family System (Abolition)Act, 1975, Act 30 of 1976', KLT (1977) Pt.17-18, J., 37-38.

such families will hold the family property as tenants-in-common, as if a partition of such property _per capita_ had taken place among all the members; and each one of them would hold his or her share separately as full owner.

Section 5 abrogates pious obligation of a Hindu son, son's son or son's son's son in respect of untainted debts of their father, father's father or father's father's father. However, section 5(2) guarantees the rights of the creditors and alienees in respect of debts and alienations contracted before the commencement of this Act.

XI. Comment on the Act

The main provisions of the Act (ss. 3, 4, 5, and 6), in fact, contain the provisions (ss.86-89) in Part V of the Hindu Code Bill (L.A. Bill 42 of 1947), as amended by the Select Committee; which provisions were abandoned in favour of the provisions in the Hindu Succession Act.

Both from the sociological and juridical angles, the present Kerala statute is revolutionary and, speaking on the Bill, the Law Minister of Kerala rightly said that it was intended to end the 'primitive' joint family system.[1] In the jurisprudential context, the legislation is epoch-making in the sense that for the first time, an Indian legislature is expressly abrogating an 850

1. _Indian Express_, Delhi, 12 July, 1973, 5.

years' old[1] concept of birthright,[2] which had been the corner-stone of Vijñāneśvara's theory. Juridically, if the Hindu Succession Act epitomises a legislative compromise with anomalous consequences, the Kerala statute, being a legislative expression of social consciousness and economic realities, is a fine piece of legislation with its clarity and boldness.[3]

However, the opportunity could have been utilised to abolish the Christian and Muslim joint families as well,[4] but probably the legislature did not take the risk of provoking these communities in a matter of personal law(?), although, excepting in custom, in none of these communities had joint family law any religious foundation.

XII. Effect of the Legislation on Joint Family System

The Act puts an end to two main substantive disadvantages of the joint family system.

(i) Restriction on alienation

As in the case of the manager (kartā) of a Mitākṣarā Hindu undivided family, the power of alienation of joint family by a karnavan was also restricted. In this respect (except now in Kerala), the action of a manager is still determined

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1. The textual authority goes back to Gautama and even earlier, to the Vedas, Kāṇe, HD, III, 553, 543.
2. Excepting the anomalous provision in s.6, HSA, and puerile device in s.30, HSA.
3. But see P.B. Menon, KLT (1977) J., 37-38.
4. As rightly hoped by Derrett, KLT (1974) J., 2-6.

by a 121 years' old dictum laid down by the Judicial Committee in Hunooman Persaud's Case.[1] According to this rule, the manager of a joint Hindu family has no power to alienate for consideration joint family property so as to bind the interests of adult or minor coparceners unless the alienation is made for legal necessity,[2] or for the benefit of the estate.[3]

The restriction on the power of the manager, which is an incident of birthright, is repugnant to the modern concept of ownership; and an individual's right of free disposition, which the seventeenth century English Levellers called 'birthright',[4] is indeed inseparable from the ownership of property.

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1. Hunnooman Persaud v. Massumat Babooee (1856) 9 MIA 393. One may say that the rule goes back to Brhaspati.

2. Father's alienation for legal necessity is binding on sons, Fakirappa v. Venkatesh, AIR 1977 Knt. 65.

3. The persons entitled to question an alienation of joint family property are: (i) any coparceners, (ii) any widows who took under the 1937 Act; (iii) any mortgagee of the joint family property; (iv) any purchaser of an interest in it, Critique, § 128.

4. John Lilburne, 'England's Birthright Justified' (October, 1645), in Haller, Tracts on Liberty in the Puritan Revolution, III, 261, cited by C.B. Macpherson, The Political Theory of Possessive Individualism, (O.U.P., London, 1962), 137, n.2. Lilburne listed in 1646 the basic rights of man: 'Liberty of conscience in matters of Faith, and Divine worship; Liberty of the Person, and Liberty of Estate: which consists properly in the propriety of their goods, and a disposing power of their possessions', Macpherson, ibid., 137. Overton also understood the right to property to be a 'propriety ... people have in their goods to doe with them as they list', quoted by Macpherson, ibid., 138. Also W. Markby, Elements of Law, (Oxford, 1885), 247.

The restrictions were also hindrances to business initiative [1] and commerce, and a manager had no power to alienate family property for the purposes of starting any trade or industry, however lucrative it might be, unless the proposed trade or industry was the kulācāra of the family;[2] and it is needless to point out that in a technologically innovative age, many industries would fall outside the kulācāra of traditional business families. Indeed, as Derrett has rightly observed, the Privy Council rule in Hunnoman Persaud's Case 'turned out to be an iron cage',[3] for managers, but the restrictions on the power of alienation could be used by an unscrupulous manager

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1. Critique, § 122.

2. Sanyasi Charan Mandal v. Krisnadhan Banerji, AIR 1922 PC 237; Benares Bank v. Hari Narain, AIR 1932 PC 182; followed in context of illam and tarwad in K.M. Narayanan Namboodiripad and Others v. Vadakkedath Manakal Sankaran Namboodiripad and Others, AIR 1947 Mad 76. F.B. In an interesting judgment, the Madras High Court recently observed that when a father 'sells ancestral property in order to discharge an antecedent debt, it would be binding (on the son) even though the antecedent debt had been contracted for starting a new business'. The family was agricultural but starting a new business, like the bus in this case and raising loan for purchasing the bus, cannot be called avayavahārika, Rajan v. Kanikonda, AIR 1975 Mad 117 at 118. Cp. Sankarananarayanan v. The Official Receiver, Tirunelveli, AIR 1977 Mad. 171; in this case, the debt contracted by the manager was not avayavahārika as such 'still in view of the fact that they started a business which is not the kulachara of the family and have incurred obligations therein, the minor coparceners in the family cannot be held to be bound by any such obligation."

3. Critique, § 122.

as a fraudulent device against a vendee of the joint family property. No one needs reminding of dishonest law suits by erstwhile minors who have been put up by the managers of joint families to set aside alienations after having enjoyed the consideration paid by the alienee, or where the alienation had not turned out according to expectations.[1] The abolition of birthright in Kerala has put an end to this state of affairs.

(ii) Right to partition

In relevant cases, a member's right to sue for partition against father or other paternal ancestors in Mitākṣarā and Nambudiri laws, and against mother and maternal uncle in marumakkattayam[2] law, has led to a large volume of litigations, putting pressure on the judiciary which is overburdened with cases. It is well known that partition suits are causes, as well as results, of animosity within the family organisation and, in rural areas, sometimes the whole village is polarised into feuding groups behind the disputing parties and a substantial amount is spent. These social evils are remedied in Kerala by the statute.

From the preceding discussion, it is apparent that the abolition of birthright is not an issue only applicable to Kerala; it needs abrogation in the rest of India as well.

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1. Derrett, KLT (1974) J., 2-6 at 3.

2. Robin Jeffrety, The Decline of Nayar Dominance: Society and Politics in Travancore, 1847-1908, (New York, 1976), 183-4.

CHAPTER 23.

CONCLUSION

1. The Problem

We have seen that birthright runs counter to the prevailing individualistic trend in the society; it is also a fetter against economic independence of the individual.[1] Also, we have sufficient reasons to say that within the existing successorial scheme the birthright creates anomalies. Thus, while the sociological, economic and juristic arguments are against birthright, its continuation is not justified only because a few agricultural and business families find it a machinery of professional convenience. Business families, if they want to pursue their trade as a family guild, are free to take advantage of the Company law and the law of Partnership. The agricultural families, if they survive the onslaught of land reform, can also carry on jointly without birthright like the joint families in Bengal and Assam.[2]

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1. J.P. Naik, op.cit., 54. Also Peter Rowe, 'Indian Lawyers and Political Modernization', Law and Society Review, 3 (1968-69) 2 and 3: 219-50 at 237.

2. For distinction between Mitākṣarā and Dāyabhāga joint-families, see Batai Bala Dasi v. Chabilal Sen, AIR 1974 Patna 147, 149. On the applicability of Dayabhāga law, Rohan Kumar v. Lachhuman Pathak, AIR 1976 Patna 287. For a vivid picture of Dayabhaga joint family in Bengal see a novel by Romen Basu, A House Full of People, (Calcutta, 1968).

II. Methodology

Now, the question arises, what form would the reform take? There are three possibilities: (i) the implementation of the article 44 of the Constitution; (ii) to have a Uniform Code of Family Law for the whole of India as a step toward the Civil Code; (iii) to abolish birthright and consequently, the juridical joint family in order to tidy up Hindu family law of property. The third, again, is a step toward the first two.

The Constitution has a provision for a Civil Code [1] in article 44,[2] which states: 'The State shall endeavour to secure for the citizens a uniform Civil Code throughout the territory of India.'

Despite constitutional projection and juridical support for a Uniform Civil Code for all Indians, debates between protagonists of pro-reform and no-reform groups still continue.[3]

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1. The pioneering thought of a 'Codicis Indicae', for the 'worshippers of Christ, followers of Mahomet, children of Brama', was of Jeremy Bentham as far back as 1782, see S.G. Vesey-Fitzgerald, 'Bentham and the Indian Codes', in G.W. Keeton and G. Schwarzenberger, ed., Jeremy Bentham and the Law, (London, 1948), 222. A.S. Nataraja Ayyar goes so far as to say that Art.44 was anticipated by Kumārila, Mīmāmsā Jurisprudence, (Allahabad, 1952), 31.

2. On the Directive Principles in general, and particularly on the debates over incorporating Art.44, see K.C. Markandan, Directive Principles in the Indian Constitution, (New Delhi, 1966), 106-9.

3. See Tahir Mahmood, 'On Securing a Uniform Civil Code', in Narmada Khodie, ed., Readings in Uniform Civil Code, (Bombay, 1975), 173-90 at 173-8.

While a considerable number of jurists,[1] social scientists and political ideologues[2] are advocating implementation of the article, fundamentalists[3] and

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1. For juridical opinions in favour of a Civil Code in India, see K. Venkoba Rao, 'Revision of Indian Statutes or a Bharat Civil Code', (1953), 55 Bom L.R.J., 47-50. Derrett, Hindu Law Past and Present, (Calcutta, 1957), Preface, v; 'The Indian Civil Code or Code of Family Law', Law Quarterly, (Calcutta,) 3/3 (1966), 137-44 at 140; RLSI, 546 ff; Critique, 1; 'Birth Control and the Intended Abolition of the Hindu Joint Family', Lawasia, 4 (1973) 2: 155-168; 'The Indian Civil Code or Code of Family Law: Practical Propositions', in Narmada Khodie, ed., Readings in Uniform Civil Code, op.cit., 21-38. M.C. Jain Kagzi, 'Advisability of Legislating a Uniform Civil Code', Jaipur Law Journal, 5 (1965), 199. R.C.S. Sarkar, 'Uniform Civil Code', Journal of Constitutional and Parliamentary Studies, 3 (1969) 3: 76-89 at 85. D. Hinchcliffe, The Islamic Law of Marriage and Divorce in India and Pakistan since Partition, Ph.D. thesis, London University, unpublished, 1971, 424. J.M. Shelat, Secularism: Principles and Applications, (Bombay, 1972), 126. P.B. Gajendragadkar, The Indian Parliaments and the Fundamental Rights, TLL, 1972 (Calcutta, 1972), 64. K.S. Hegde, 'Welcome Address', in Tahir Mahmood, ed., Islamic Law in Modern India, (I.L.I., 1972), 3-4. Paras Diwan, 'The Uniform Civil Code: A Projection of Equality', in M. Imam, ed., Minorities and the Law, ILI, New Delhi, (Bombay, 1972), 418-25; in the same volume, Ram Singh, 'Yonder Polemics of a Uniform Civil Code', 426-39; Mohammed Imam, 'Muslim Law Reform in India and Uniform Civil Code', 385-417 at 388; M.H. Beg, 'Democracy, Minority and National Integration', 75; S.C. Thanvi, 'Indian Minorities - Legal and Social Factors of National Integration', 95; K.B. Agarwal, 'Advisability of Legislating a Uniform Indian Marriage Code', 440-59 at 441. P.B. Mukharji, 'Uniform Civil Code', in Narmada Khodie, ed., Readings in Uniform Civil Code, loc.cit., 3-9; also in the same volume, A.B. Shah, 'Why Uniform Civil Code?', 10-20; U.C. Sarkar, 'Uniform Civil Code for India', 217-21.

2. But see the statement of the then Prime Minister on defence of personal laws of the Muslim community. She said that the guarantees provided in the Constitution for the minorities would be honoured and 'we will not tolerate any injustice done to the minorities at any level', The Overseas Hindusthan Times, 11 January, 1973. Mohamed Shafi Qureshi, the then Deputy Railway Minister emphasised that any change in the existing Muslim personal law can be brought about only by Muslims themselves, Hindusthan Standard, 1 January, 1973.

3. A.A.A. Fyzee thought that a Civil Code would hurt the feelings of a vast majority of Muslims in India, 'The Reform of Muslim Personal Law in India', Humanist Review, 8 (1970), 389. Views expressed in the Constituent Assembly by Ismail Saheb, Naziruddin Ahmed and Hussain Imam, VII Constituent Assembly Debates, (1949), 447-9. Also Bashir Ahmed Sayeed, (former judge of the Madras High Court), 'Why This Anxiety to Alter Islamic Personal Law', Radiance, weekly, Delhi, 30 January, 1972. On reforms of Muslim law in other parts of

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sceptics are consistently opposing a Civil Code or a Uniform Code of Family law. As one of these sceptics , Rajkumari Agarwala remarks:

> And shall it not be better, more rational and realistic to try the other approach, viz. attempt at "universality in diversity", permit respective personal laws to remain as preserves of "ethnic and cultural identity, ego satisfaction and the rest" with appropriate changes brought into cure unsatisfactory spots in each system individually? 1

However, despite her opposition to a Uniform Civil Code, she is concerned about the 'unsatisfactory spots' in the respective family laws of the various communities which, she concedes, undoubtedly warrant reform; and it is desirable that reformist zeal should be expressed in a positive tone.

Note 3 - p.979 - continued:

the world, see J.N.D. Anderson, 'Codification in the Muslim World: Some Reflections', Rebels Zeitschrift (Berlin-Tübingen), 30 (1966), 247. N.J. Coulson, Succession in Muslim Family, (Cambridge, 1971), 135-64. J.N.D. Anderson and N.J. Coulson, 'Islamic Law in Contemporary Cultural Change', Saeculum, 18 (1967), 13-92. RLSI, 515. T. Mahmood, Family Law Reform in the Muslim World, (1972). For Hindu fundamentalists, see Guru Golwalker of the R.S.S., The Motherland, New Delhi, 21 August, 1972; also Swami Kripatriji, al-Jami'at, daily, Delhi, 28 September, 1972.

1. R. Agarwala, 'Uniform Civil Code: A Formula Not a Solution', in T. Mahmood, ed., Family Law and Social Change, (Bombay, 1975), 110-44 at 144. But cp. J. Minattur, 'The longer a secular state applies divergent laws, the stronger will be the hurdles in the way of national integration ...','Law and Religion in a Secular State', (1976) K.L.T. J., Pt.6 & 7, 14-16. Also same view expressed by K.S. Hegde, 'A society which is compartmentalized by its laws can hardly become a homogeneous unit ...', 'Welcome Address', in Tahir Mahmood, ed., Islamic Law in Modern India, op.cit., 3-4. Kamila Tyabji rejected reform altogether; she thought that a Civil Code would 'serve no purpose except to divide us', 'Muslims, Reform and Integration', Times of India, 7 December, 1969.

Between these two extremes of positivism and negativism, jurists are trying to find a solution in gradualism, and the prevailing mood among many of them is symptomatic of the idea of implementation of the Civil Code through gradual reform of the respective personal laws of Hindus and Muslims.[1] This gradualism is expressed by Derrett who states: 'The logical way to proceed is not, I submit, to wait until Art.44 is put into effect before improving the present statutory element in Hindu law, but to amend the Hindu law first, see it in action, and then bring the other personal laws into comparison and confrontation with it.'[2] With the same objective in mind, but in the context of Muslim personal law, Upendra Baxi, rather vaguely demurs: 'The issue of the reform of Muslim personal law must be severed from the issue of the implementation of the article 44 Directive'.[3] The views of the gradualists in general and Derrett's view, as quoted above, in particular, represent a synthesis[4] between the Benthamite doctrine of law as a determined agent for creating

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1. See J.N.D. Anderson, 'Muslim Personal Law in India', in Narmada Khodie, ed., Readings in Uniform Civil Code, op.cit., 41-61 at 43.

2. Critique, 51.

3. U. Baxi, 'Muslim Law Reform, Uniform Civil Code and the Crisis of Commonsense', in T. Mahmood, ed., Family Law and Social Change, op.cit., 24-46 at 42.

4. This is better expressed by C.K. Allen: 'At least in Democratic Countries, it is not a process solely of command and obedience, but of the action and reaction between constitutionally authorised initiative on the one hand and social forces on the other', Law in the Making, (Oxford, 1964), 427. Also, V.R. Krishna Iyer, Law and the People, (New Delhi, 1972), 33.

new norms,[1] inaugurated by the Napoleonic Codes,[2] and the historical approach of Savigny who believed that Reform should be done slowly in response to clearly formulated social sentiments, and 'not by arbitrary will of the law-giver'.[3] In this respect, the historical school is in company with the sociologists [4] who assert that through instant radical reform of the law

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1. W. Friedman, Law in a Changing Society, (London, 1959), 3.

2. See the appreciative comments of A.T. Von Mehren that 'the greatest achievement' of the French Civil Code was to give France a national unified and coherent body of law', The Civil Law System, (Prentice-Hall Inc., 1957), 12.

3. F.C. v. Savigny, Ueber den Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft, (1814), tr. A. Hayward, sub.tit., On the Vocation of Our Age for Legislation and Jurisprudence, (London, 1831), 30. On Savigny's theory, see J.E.G. de Montmorency, 'Savigny', in J. Macdonell and E. Manson, ed., Great Jurists of the World, Continental Legal History Series, Vol.2, (London, 1967), 209-11. J. Stone, Law and Social Sciences in the Second Half Century, (University of Minnesota Press, Minneapolis, 1966), 4. K.W. Ryan, An Introduction to Civil Law, (Sydney, 1962), 31. On criticism of the historical school, J.H. Hallowell, The Decline of Liberalism as an Ideology with Particular Reference to German Politico-Legal Thought, (London, 1946), 63-65. For a criticism of the viability of Savigny's theory, see Hermann Kantorowicz, 'Savigny and the Historical School of Law', Law Quarterly Review, 53 (1937) 209: 326-43.

4. Savigny regarded law essentially as Volksrecht - i.e. law is 'peculiar to the people, like their language, manners and constitution', On the Vocation ... op.cit., 24. 'Thus, law is always organically connected with the development of social life', Kantorowicz, op.cit., 332. The social anthropologists say that law is social life itself, G. Cochrane, 'Legal Decisions and Precessual Models of Law', Man, 7 (1972) 1: 55.

society gets a shock and hardly gets any time to adjust itself.[1] Again, where a legal concept creates anomalies, as birthright does, instead of reflecting the social structure, 'it would serve not to contribute to the continuing integration of the social system but to disrupt it.'[2] Thus, considering the juridical and sociological factors, Hindu law needs a gradual [3] but determined process of reform, and abolition of birthright is justified as a step in the right direction.

III. Comparative Experience

a. Towards individualism and uniformity

We have noticed in the course of our comparative survey that, although not exactly identical with the Mitākṣarā birthright, the ancient Germanic,[4] Greek [5] and South Slavonic [6] legal systems showed some positive

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1. I.R. Jenkins, 'The Ontology of Law and the Validation of Social Change', Archives for Philosophy of Law and Social Philosophy, BNF. Nr.5, Wiesbaden, (1968), 62. However, law can bring social change under certain circumstances, J.H. Beckstrom, 'Handicaps of Legal-Social Engineering in a Developing Nation', 22 Am.J. Comp.L., (1974), 697-712 at 697.

2. E.E. Dais, 'Law, Value and Validation in Basic Social Change: Some Reflections on the Underdevelopment Problem', Archives for Philosophy of Law and Social Philosophy, BNF Nr. 5, (1968), 94.

3. Hasty codification has its weaknesses. The French Code was drafted in 4 months. Despite its merits the haste led to many lacunae, K.W. Ryan, An Introduction to the Civil Law, op.cit., 29. The draft of the German Civil Code took 22 years. Its systematic structure and conceptualism justify the time factor, Ryan, ibid., 32.

4. Supra, 160.

5. Supra, 85, 90.

6. Supra, 101.

signs of corporate family ownership of property. But eventually, through the reception of developed Roman law, renaissance and liberalism, the individualistic Weltanschauung became predominant in legal science as in every field of thought. This politico-legal philosophy went hand-in-hand with modernistic trends, and in the law of property, group ownership had to give way to increasing individualism which was also obviously suited to changing economic conditions. Thus, in the civil law countries, starting with France,[1] the liberation of property from the kin group found legislative expression in the Codes.[2]

Even in the late 'seventies, one does not fail to notice the co-existence and conflict between mediaeval and modern values in Indian society and, set between tradition and modernity, family law in India is at a crossroads. Indeed, in the throes of modernisation, the experiences of the civil law system [3]

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1. The Code Napoleon, 1804.

2. A few examples of Codes: The German 'Bürgerliches Gesetzbuch' of 1896; The Austrian Civil Code, 1811. The Swiss Civil Code, 1907. The Greek Civil Code, 1941. The Italian Civil Code, 1942. The Ethiopean Civil Code, 1960. The Civil Code of Portugal, 1967, enacted on the centenary of its predecessor. The Communist countries have recodified their civil laws, like U.S.S.R. (1964), Czechoslovakia (1964), Hungary (1959), and Poland (1964). For a short summary of these Codes, see K.W. Ryan, An Introduction to Civil Law, (Sydney, 1962), 26ff. A.A. Ehrenzweig, Psychoanalytical Jurisprudence, (Leiden/New York, 1971), 117-9. J.N. Hazard, Communist and Their Law, (Chicago, 1969).

3. Derrett, 'The Indian Civil Code or Code of Family Law', Law Quarterly, (Calcutta) 3 (1966) 3: 137-44; also, 'The Indian Civil Code or Code of Family Law: Practical Propositions', in Narmada Khodie, ed., Readings in Uniform Civil Code, op.cit., 21-38 at 23.

are valuable for the reformers of Indian law. Even concerning our limited venture of abolishing birthright, the civil law system offers a stimulating parallel as regards unifying the law of succession. For example, a problem similar to the unification of the Hindu plural systems of inheritance arose to confront the drafters of the French Civil Code.

b. The French Civil Code

At that time, more or less like the Mitākṣarā and the Dāyabhāga among the Hindus, two systems of property ownership were prevalent in France. Throughout the ancien régime in France, a family concept of property prevailed. In the pays de droit coutumiers,[1] that is, the coutumes of the northern region in particular, an owner of property did not have the freedom of alienation, either inter vivos or mortis causa, but he was bound to preserve the property for the benefit of his heirs. Also, particularly, the institution of réserve coutumiére considerably restricted the power of a testator to dispose freely of his property upon death. Thus, in customary law, the normal mode of transmission was intestate succession, which in fact, guaranteed the vested interest of the natural heirs.

In the pays de droit écrit (regions of written law), where customary tradition was not followed, the Roman law of testate succession had been the rule and the family received much less protection from these rules as to the legitima portio than under customary law. Significantly, in the southern

1. J.H. Merryman, The Civil Law Tradition, (Stanford, 1969), 13.

part of France, the whole estate formed a single mass, distributable upon intestacy in accordance with Justinian's Novels; but in the north, as in the case of Hindu coparcenary and separate property, intestate succession varied with the origin and character of property.[1]

The object of the Code was to unify [2] the private law of France and, in the sphere of property, the codifiers realised that reconciliation [3] between the customary and Roman principles was impossible and the result was a victory for the Roman system. The object of the codifiers was to secure the maximum possible division of property and to treat the heirs, theoretically, according to the principles of egalité even though it involved curtailment of the testator's liberté. However, the Code gave all Frenchmen a large measure of freedom in dealing with property. The French experience of modernisation and the rationale behind the reform may serve as a parallel inspiration towards the abolition of birthright, the concept behind the group ownership of family property.

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1. K.W. Ryan, An Introduction to the Civil Law, (Sydney, 1962), 27-8.

2. J.H. Merryman, The Civil Law Tradition, op.cit., 29.

3. Cp. the proposals for codifying a Civil Code in Indonesia in 1962. Some were in favour of retaining the customary law, others in favour of written law to be borrowed from abroad to suit the modern conditions, S.L. Daniel, 'The Lady and the Banyon Tree: Civil Law Change in Indonesia', in An Introduction to the Study of Comparative Law, ILI, (New Delhi, 1970), op.cit., 97-100.

c. Franco-Hindu law

By the French arrête of 6th January, 1819, the Civil Code of France was extended to French India, but the arrête made it clear that Indians, whether Christians, Muslims or Hindus, should be judged, as in the past, in pursuance of the laws, usages and customs of their Caste and community.[1] But French jurists like Sanner were disturbed by the 'miserable' subtlety and 'unjust discrimination between sexes'[2] of the Hindu law-givers and they conveniently overlooked this arrête and advocated that, in French India, the rights of the Hindus in relation to property should be like the rights of Frenchmen in France. In their anxiety to ignore the Hindu law principles and import French notions, Justice Maharajan remarks: that

> the Hindu law notion that a son acquires interest in the joint family property by birth has been done away with. According to French jurisprudence so long as a Hindu father is alive, he can sell his properties for good consideration, because he is the sole and exclusive owner of the properties of the family. His sons would have no power to impugn his sales so long as the sales are genuine.[3]

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1. Justice Maharajan, 'Administration ofFranco-Indian Laws - Some Glimpses', JILI, .15 (1973) 1: 122-37 at 131. Cp. Warren Hastings Plan of 1772 and Plan of March 28th, 1780, RLSI,232.

2. J. Sanner, Droit civil applicable aux Hindous dans les établissements français de l'Inde (The Civil Law Applicable to Hindus in French India), (Pondichery, 1916-17), cited by Maharajan, ibid., 130.

3. Maharajan, ibid., 131. For bibliography on Franco-Hindu law, see RLSI, 283, n.1.

However, the French courts have tried to do equity by permitting sons to file suits restraining fathers from wasting their properties.

The French authorities established a Comité Consultatif (Consultative Committee) composed of representatives of different Castes of Hindus whose opinions on questions of the śāstra were considered but not always accepted by the French judges.[1] It is indeed interesting to note that towards the concept of a son's birthright vis-à-vis gift and bequest by his father the approach of the French judicial administration varied according to their cultural and 'psychological conditioning'.[2] In respect of a Hindu father's power of making a gift or a bequest, the French jurists like Sanner attempted to apply the French concept of 'reserve' from the Civil Code; that means a Hindu father could not dispose of by gift or bequest more than half a share if he had one child, more than one-third if he had two children, and more than a one-fourth share if he had three or more children.[3] The Indian judges opined that Hindu law provided for a certain portion of property which a father could dispose of by way of gift or bequest. They pointed out that a custom prevailed among the Pondichery Hindus based upon a text of Brhaspati,[4] which provided that a father could donate whatever was in excess of what was

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1. RLSI, 282-3.

2. Maharajan, op.cit., 131.

3. Maharajan, op.cit., 131. Cp. Germanic law, supra, 130.

4. Text cited by Leon Sorg, Avis du Comité Consultatif de Jurisprudence Indiene, (Pondicherry, 1897), 322.

necessary for the 'conservation' of the family. On the basis of this text, the Comité Consultatif gave an opinion on 13 December, 1871, that a Hindu could not make a will or gift of more than 1/8 share of his properties. The French jurists preferred, in the language of the Civil Code, to call this 1/8 quotité disponible and the balance as the 'reserve', but the Indian judges considered it to be a Hindu custom recognised from time immemorial.

Whatever might be its juristic basis, the whole argument hinges on son's birthright vis-à-vis father's power of dealing with family property. Although birthright as such was not recognisable in Franco-Hindu law, the French judicial administration could not completely do away with the wider implications of the concept as it concerned family property. The courts had to admit that the father had no power to make a gift or bequest beyond 1/8 of the family property.

But it is to be admitted that, in French India, a son had no power to demand partition from his father and in an alienation of family property for consideration, a father was absolutely free. Due to the absence of birthright, the Hindu notion of pious obligation had no part to play in French India.[1] Thus, we notice that there the Mitākṣarā law was modernised partly through the influence of French juristic thinking and partly through the influence of the French Civil Code.

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1. Maharajan, op.cit., 131.

d. Luso-Hindu law

Well into the modern period the Hindus of the Portuguese territories in India were governed by Hindu law substantially as administered by the 16th century pre-Portuguese Muslim rulers.[1] In matters of inheritance, according to customary law, sons excluded daughters. The Foral of Alfonoso Mexia of 1526 [2] mentions that, according to the then rule, a daughter could not inherit; and, in default of a male heir, the property of a deceased passed to the Treasury. This shows that śāstric law was not applied to these Hindus. It was not palatable to the Hindus that, in default of male heirs, their properties should pass by escheat to the Treasury and they tried to persuade the Portuguese king to decree that the law of Portugal should apply to descent and distribution of Hindus' estates. After 1691, the Portuguese law did apply to the Hindus but, ironically, this gave the daughters equal rights of inheritance with the sons, a state of affairs again not liked by the Hindus.[3] During the eighteenth century the Hindus repeatedly failed in their attempts to get the old customary rule that sons exclude daughters reinstated. They did not want their estates to pass to the Treasury in default of male heirs but, to prevent that, they did not like their property being inherited by daughters either. The Portuguese could not satisfy this Hindu demand and Portuguese

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1. RLSI, 282.

2. Cited by Derrett, RLSI, 282.

3. Derrett, 'Hindu Law in Goa: a Contact between Natural, Roman and Hindu Laws', ZVR 67 (1965) 2: 203-36, rept. Essays in Classical and Modern Hindu Law, (Leiden, E.J. Brill, 1977), II, 131-65 at 140.

law remained in force; indeed, in 1880, Hindu law as such was abolished in favour of the Portuguese Civil Code.[1] Of course, the Hindus in some cases by-passed the Portuguese law and the Hindu preference for male heirs in their heritable system was achieved through a deed of transfer of their shares by the sisters in favour of their brothers.[2] However, the application of the Portuguese Civil Code to the Hindus proved the fact that even as early as the 1880s, Hindus could adjust to an alien Code of law.

IV. Recommendation

In the ultimate analysis, it appears that the advantages of birthright are outweighed by disadvantages. It is time for Parliament to abrogate this antiquated concept and in the light of our preceding observations, we suggest a bill.

Proposed Bill :

THE JOINT HINDU FAMILY SYSTEM ABOLITION BILL

An Act to Abolish the Joint Family System Among the Hindus in India

Preamble:- WHEREAS it is expedient to abolish the joint family system among the Hindus in India;

BE it enacted in the .... year of the Republic of India as follows:-

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1. RLSI, 282.
2. Derrett, Hindu Law Past and Present, (Calcutta, 1957), 53.

1. Short title, extent and commencement:-

(1) This Act may be called the Joint Hindu Family Abolition Act ...

(2) It extends to the whole of India.

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

2. Definition:-

In this Act, 'Joint Hindu Family' means any Hindu family with community of property and includes -

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

(2) any undivided Hindu family based on custom with the incidents of coparcenary or ancestral property.

3. Birth to give rise to rights in property abolished:- On and after the commencement of this Act, no birthright shall be recognised in any property.

Explanation:- Birth in this section also means adoption and the doctrine of relation back in respect of property is abrogated.

4. Joint tenancy to be replaced by tenancy in common:- On the day this Act comes into force, all members of an undivided Hindu family governed by the Mitakshara law or by custom, holding any property as joint tenants shall hold such property as tenants in common as if a partition had taken place among all the coparceners and each one of them shall hold such property as full owner thereof.

Provided that --

Nothing in this Section shall affect the right to maintenance or the right to marriage or funeral expenses out of the coparcenary property and such expenses shall be borne by the tenants in common proportionately to their shares in the coparcenary property which existed before the commencement of this Act. This Act will also not affect the right of residence, if any, of members of an undivided Hindu family, other than persons who have become entitled to hold their shares separately.

5. Section 6 of the Hindu Succession Act abrogated:-

(1) After the commencement of this Act, Section 6 of the Hindu Succession Act will have no application in the matter of succession.

(2) The estate of a Hindu dying intestate will pass at his death in equal shares to the heirs as provided by Section 8 of the Hindu Succession Act.

6. Section 30 of the Hindu Seccession Act abrogated:- On and after the commencement of this Act any Hindu may dispose of his property by will in accordance with the provisions of the Indian Succession Act, 1929. (39 of 1925).

7. Pious obligation of Hindu son abrogated:-

(1) On and after the commencement of this Act, save as provided in sub-section (2), the doctrine of pious obligation of son,

grandson and great grandson for the debts of their male ancestors shall be deemed to be abolished.

(2) Sub-section (1) of this section shall not affect the rights of a creditor or any other person in respect of debts contracted before the commencement of the Act and any such right can be enforced as if this Act had not been passed.

8. Liability for debts contracted before the Act not affected:- Where a family debt has been contracted before the commencement of this Act by a manager of a Hindu joint 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 by the creditor against all or any of the members liable therefor in the same manner and to the same extent as it would have been enforceable before this Act.

9. Repeal:- Save as otherwise expressly provided in this Act, any text, rule or interpretation of Hindu law or any custom or usage as 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.

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V. Epilogue

It seems that for the present we are to remain satisfied with the abolition of birthright; however, it is imperative that in the near future India will have to unify the family laws as a step toward the implementation of article 44 of the Constitution. The unification of family law involves taking into consideration the personal laws of communities like Jews,[1] Armenians, Parsees,[2] and the tribes,[3] but of particular importance are the laws of the two major communities, namely, Hindus and Muslims. In both these communities, there are orthodox fundamentalists, but at the same time, there are ample progressive elements on both sides who want modernisation of their personal laws.

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1. The general scheme of inheritance laid down in the Indian Succession Act, 1925, is applicable to Christians and Jews, Part V, ss.29-49.

2. The Indian Succession Act, 1925, furnishes a distinct scheme of inheritance for the Parsi Community, ss.50-56. Mrs. Meher Rohinton Master-Moos opines, in the context of the personal law of the Parsees, 'that personal and religious laws should not be merged in the miasma of general civil laws applicable to all persons in India', 'The Personal Law of the Parsees with Reference to a Proposed Family Law Code', in Narmadia Khodie, ed., Readings in Uniform Civil Code, op.cit., 116-69 at 169.

3. For example, Naik examined all the customary laws of the important tribes of Madhya Pradesh and recommended to the Government that the provisions of the Hindu Code Bill should not be made applicable to the tribes at least for 20 years. T.B. Naik, 'Applied Anthropology in India: A Trend Report', in A Survey of Research in Sociology and Social Anthropology, Vol.III, Indian Council of Social Science Research, New Delhi, (Popular Prakashan, Bombay, 1972), 240-81 at 258.

Although these arguments have become stale, it needs to be re-emphasised that the Hindus have realised that *śāstric* precepts cannot be their only juridical guidance.[1] There is little room for doubt that 'the *dharmashastra* is a complete science, like any other *shastra*,'[2] but in the modern jurisprudential context, it is seen 'as some kind of mammoth dug from the Siberian snows, its thousand-year-flesh to be fed by bits and pieces to the judges ...'[3] Even in their contemporary setting, the *dharmaśāstras*, as a literary law elaborated by an elite, seem to have had an oblique influence on most of the customs that governed the everyday life of the Hindus. It is indeed conceivable that local customary practices have often imitated Brahminic standards, and conversely, the *dharmaśāstras* also gradually incorporated norms that eventually acquired the authority of the sacred law; but their origin lies more in customs than in immutable texts.[4] Thus, classical

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1. A comparable example is the Hindu state of Nepal. For two centuries, a Code of Hindu law (*Muluki Ain*), based on the ancient texts, was applied in the courts of Nepal. But in 1963, a new legal Code was promulgated which established equality before the law. The Code forbade certain forms of caste distinctions, legalised intercaste marriages, prohibited polygamy, and guaranteed to women new rights relating to divorce and inheritance, D.E. Smith, *Religion and Political Development*, (Boston, 1970), 101. Joshi and Rose, *Democratic Innovation in Nepal*, (Berkeley, 1966), 474-5.

2. Derrett, *Hindu Law Past and Present*, op.cit., 9.

3. Derrett, *Critique*, 10.

4. R. Lingat, tr. Derrett, *The Classical Law of India*, op.cit., 202-4. RLSI, 157-64. R.M. Unger, *Law in Modern Society: Toward a Criticism of Social Theory*, (New York/London, 1976), 113. In this respect, Ludo Rocher's observation is worth noting: 'We are not among those who believe that the more recent *dharmasastras* were composed with the intention to innovate and depart from what had been said by the older ones. On the contrary, we are convinced that the more recent authors tried their very best to maintain the

/Cont'd. on next page:

Hindu law was not divorced from social realities.[1]

During the commentatorial epoch, there are ample examples of manipulation of the texts. Vijñāneśvara, like some other authors, often cites second-grade texts of doubtful authority and for some of his famous propositions, namely, those regarding the nature of property and the character of the joint family estate, he really relies not on the doctrines of the *śāstra*, but rather upon popular usage, which for him was a good source.[2] Thus, it has to be conceded that the joint family law that we see today 'has grown out of a few, exiguous, and not unambiguous Sanskrit texts, developed, expounded, and meanwhile manipulated by doctrines from English common law and equity.'[3]

Fundamentalist Hindus should accept the fact that the sages did not consider the *śāstra* as the only source of law; they gave pride of place to

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Note 4, p.996 - continued:

general scheme laid out by their predecessors. But in the meanwhile, the actual situation did change, and every now and then authors of more recent *dharmasastras* could not prevent themselves from reflecting some of these changes', "Lawyers" in classical Hindu Law', *Law and Society Review*, 3 (1968-69), 2 and 3: 383-402 at 399.

1. See B.S. Cohn, 'Notes on the History of the Study of Indian Society and Culture', in M. Singer and B.S. Cohn, ed., *Structure and Change in Indian Society*, 3-28, 7-8.

2. Derrett, 'Vijnanesvara and the Future of Hindu Law', *Allahabad University Law Journal*, 2 (1967), 4-11 at 9.

3. Derrett, 'Birth Control and the Intended Abolition of the Hindu Joint Family', *Lawasia*, 4 (1973) 2: 155-68 at 160.

sadācāra (good custom) as well.[1] Nor did the ṛṣis consider law as something static or intangible,[2] and Manu himself said:[3] 'Distinct are the dharmas of the kṛta Age, distinct in the tretā and the dvāpara Age, distinct in the kali Age, because of the worsening of those Ages.'[4]

Indeed, no one could put more effectively the principle of evolution and orientation of laws in accordance with changing social conditions.[5]

Considering the need for reform, H.V. Pataskar, the then Law Minister, told the Loksabha in 1955 that the time had come for man-made law, responsive to changing social needs, to replace 'immutable' divine law. He pointed out:

> But this is not the proper time to consider what Manu said 2,000 years ago divorced from its context with the present time. ... What is known as Hindu law at present is entirely different from what was laid down by Manu or Yagnavalkya or any of those other sages centuries back.

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1. Manu, II.12. Lingat, CLI, 14-17. Derrett, RLSI, 29, n.1.

2. Lingat, CLI, 184.

3. Manu, I.85: anye kṛta yuge dharmās tretāyām dvāpare yuge / anye kali yuge nṛṇām yugarūpānusārataḥ // also Parāśarasmṛti, I.24.

4. Tr. Derrett, CLI, 184.

5. S.S. Dhavan, 'Secularism in Indian Jurisprudence', in G.S. Sharma, ed., Secularism: Its Implications for Law and Life in India, ILI, New Delhi, (Bombay, 1966), 102-38 at 106. Also CLI, 184-9.

He added: 'Society is never static and, similarly, law also must not be so.'[1]

Again, those Hindus who still believe that the ultimate source of their law is the Vedas,[2] should look at a particular hymn of the Ṛg Veda where they may find that perhaps the fountain of Hindu law flows from ethnography as much as, as it is thought, from the mouth of Brahmā:

> Who verily knows and who can here
> declare it, whence it was born and
> whence comes this creation?
> The gods are later than this world's
> production. Who knows, then
> whence it first came into being?
> He, the first origin of this creation,
> whether he formed it all or did
> not form it,
> Whose eye controls this world in
> highest heaven, he verily knows
> it, or perhaps he knows not. 3

Now we come back to Muhammadan law. Theologically, the tenets of the Qur'ān are immutable to the Muslims, but teleologically Islam has no

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1. Quoted by D.E. Smith, Religion, Politics and Social Change in the Third World: A Source Book, (New York, 1971), 81.

2. Vedo 'khilo dharma-mūlaṃ / In this respect, Medhātithi on Manu, II.6, enumerates amongst the sources of dharma the practices of the sādhus: Vedo 'khilo dharma-mūlaṃ smṛti-śīle ca tad-vidām, ācaraś caiva sādhūnām ātmanas tuṣṭir eva ca. However, the ācaras of the sādhus coalesce with customs, Lingat, CLI, 180.

3. R.V. X.129, 6-7, tr. R.T.H. Griffith, The Hymns of the Rigveda, (Benares, 1897), II, 576.

conflict with progress.[1] There are Muslims who are of the opinion that:

> The Holy Qu'ran and the Sunnah depict events and certain answers to the questions as they took place and arose while the Book was being revealed. As nobody can comprehend the infinite variety of human relations and situations for all occasions and for all epochs, the Prophet of Islam left a very large sphere free for legislative enactments and judicial decisions even for his contemporaries who had the Holy Qu'ran and the Sunnah before their eyes. This is that principle of Ijthihad or interpretative intelligence working within the broad framework of the Qu'ran and the Sunnah. 2

The fundamentalists hold the view that derivation of legal rules through reason (ijt ihad) leading to consensus (ijma) among the learned was

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1. For a discussion, R.J. Zwi Werblowsky, 'Progress and Stagnation: the Dilemas of Islam', in his Beyond Tradition and Modernity, (University of London, 1976), 61-82. Also Asghar Ali Engineer, "Causes of Misconception of Muslim Personal Law', in Narmada Khodie, ed., Readings in Uniform Civil Code, op.cit., 191-216. Ahmad Zaki Yamani, Islamic Law and Contemporary Issues, (Jidda/Karachi, Rajab 1388 A.H.).

2. The Introduction of the Report of the Commission on Marriage and Family Law, Pakistan, 1955, quoted by D.E. Smith, Religion, Politics, and Social Change in the Third World: A Source Book, op.cit., 76. Cp. the orthodox reply to this by Maulana Ihtisham-u-Haw: 'Perhaps our Introduction-writer does not know that the Qu'ran is the sacred Word of God and embodies his Divine Guidance, who has the fullest knowledge and embodies prescience of every epoch from the beginning of time to its end', Smith, ibid., 76-7.

a 'gate' that was closed after the death of Ibn Hanbal (c. 855 A.D.).[1] The Pakistan Marriage and Family Law Reform Commission seems to rehabilitate the doctrine of Ijtahad and the gate of Ijtahad was indeed thrown wide open by the High Court of West Pakistan in Rashida Begum v. Shabad Din and Others,[2] in which Muhammad Shafi, J. observed:

> There are some traditions which take away the human beings away from this world. It is a good thing to be spiritual but Islam does not allow it to be taken to absurd extreme. ... In any case, the traditions require thorough research and minute examination on absolutely new basis. ... I am further of the view that the exegesis of the Holy Qu'ran should be developed by the judges as well as by the chosen representatives of the people by a subtle method of reasoning and analogy in the light of the given fact. 3

The Indian Muslims too can take a lesson from this progressive and enlightened observation of the High Court of West Pakistan.

What is needed at the present moment in India is this: in order to modernise and unify personal laws, the communities should come together on

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1. E. Adamson Hoebel, 'Fundamental Cultural Postulates and Judicial Law-making in Pakistan', American Anthropologist, 67 (1965) 6, Pt.2, 43-56 at 50.

2. PLD (W.P.) 1960 Lahore 1142.

3. PLD (W.P.) 1960 Lahore 1142 at 1173-4.

a secular plane,[1] and should try to find common grounds in their personal laws. To achieve a common objective, the communities need a certain amount of self-criticism, which indeed every society needs to preserve its humanity[2] and to keep pace with changing situations. What will unite the Islamic *'Ulama* and the Hindu *dharmaśāstrin*, is not reliance on the orthodox interpretation of the *Qu'ran* or on mummified and quasi-sacrosanct texts of the *śāstra*, but on the civic habits and human aspirations of the people in conjunction with a programme of substantive justice in familial relations.

This search for the latent and living law includes the legal sense as well as the moral sense of a society. It is folly to enact as law any proposition which does not have the backing of the moral sense of the majority of the population. The so-called Hindu Code had already drawn very extensively, perhaps overdrawn, on the public's good sense inclining them to resort to litigation only when no other means of accommodation can be found. The imbalance between the law in the statute book and people's way of life has resulted in large-scale avoidance of the courts. Peter Rowe informs[3] us in

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1. For a scholarly discussion on secularism, see R.J. Zwi Werblowsky, *Beyond Tradition and Modernity: Changing Religions in a Changing World*, Jordan Lectures 1974, (University of London, 1976), Ch.I and II. Also G.S. Sharma, ed., *Secularism: Its Implications for Law and Life in India*, ILI, (Bombay, 1966).

2. In a brief passage of his *Republic*, Plato evokes a society in which men, reduced to animal contentment, have lost the capacity of self-criticism. He calls the society the City of Pigs, *Republic*, 372D.

3. P. Rowe, 'Indian Lawyers and Political Modernization', *Law and Society Review*, 3 (1968-69) 2 and 3: 219-50 at 237.

his study that there is great hostility and resistance to the Hindu Code. In the majority of the cases, family and personal disputes are settled outside the court system,[1] and the percentage of such settlements is as high as 98% and never below 80%. Cases on maintenance, divorce, and suits by a daughter or sister for her share of property under the Hindu Succession Act, mostly involve townspeople. It seems that villagers are simply ignoring the provisions of the Hindu Succession Act; on the other hand, they may not be fully aware of them. Dan Chekki also found that among the Lingayats in some areas of Mysore, in matters of marriage, succession to property, adoption and maintenance, there is a greater adherence to the customary law than to the modern statutes.[2] Although some studies show that an overwhelming majority of people favour monogamy,[3] polygamy continues to be unlawfully practised, and, significantly, empirical data show that its rate is not lower among the Hindus than among the Muslims whose personal law still permits it.[4]

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1. Rowe, ibid.

2. D.A. Chekki, 'Modernization and Social Change - The Family and Kin Network in Urban India', in G. Kurian, ed., The Family in India, 205-231 at 219.

3. 'A Study of Opinion Regarding Marriage and Divorce', study conducted by Mysore University under B. Kuppuswamy in 1957, see Jaipur Law Journal, 5 (1965), 117, n.24. Kanti Pakrasi and Ajit Haldar, 'Polygynists of Urban India, 1960-61', Indian Journal of Social Work, 31 (1970) 1: 49-62.

4. T. Mahmood, 'Family Law Reform: Perspective in Modern India', in T. Mahmood, ed., Family Law and Social Change, (Bombay, 1975), Pt.I, 93-109 at 97; the author refers to a study made at the Indian Statistical Institute, The Hindusthan Times, 12 December, 1969.

On these problems of modernisation of the legal system, Gunnar Myrdal observes:

> Thus the combination of radicalism in principle and conservatism in practice, the signs of which were already apparent in the Congress before independence, was quickly woven into the fabric of Indian politics. Social legislation pointed the direction in which society should travel, but left the pace indeterminate. Many of these laws were intentionally permissive. In banning dowries, child marriages, and untouchability, the government did not vigorously seek to enforce its legislation. Laws that were compulsory were either not enforced at all or were not enforced according to their spirit and intention. [1]

Avoidance of new norms by a section of the community does not imply a failure of the legislation, it only emphasises the fact that society needs time to adjust itself to new juridical expectations. However, in the name of modernisation and uniformity, law reform does not warrant a complete break from a people's past. In context of a possible unification of African laws, Allott opines:

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1. Gunnar Myrdal, Asian Drama: An Inquiry into the Poverty of Nations, (Pelican, 1968), I, 276. 'There is a vast difference between putting the law on the Statute Book and seeing that it is actually carried out', Social Legislation, Its Role in Social Welfare, The Planning Commission, Government of India, (New Delhi, 1956), 348. In context of codification in developing countries, this is also the observation of A.T. von Mehren, 'The Potentials and Limitations of Codification', Journal of Ethiopian Law, 8 (1972) 1: 195-7 at 195.

> ... if the uniform legal system is to evolve in a satisfactory manner, one which expresses the characteristic ethos and ways of life of the people, it is essential that immediate attention should be paid to the present customary law, which reflects, par excellence, the people's own choice of legal system. So far as possible, one wants to avoid revolution in the legal sphere, and abrupt discontinuity with the past and present. What one seeks is a smooth evolution of legal institutions, so that the new law is based on and is in harmony with the old. [1]

In India, to squeeze the unruly multitude into a narrow juridical mould would be oppressive unless their past is taken into consideration. This means that India needs uniformity [2] in her personal laws in order to achieve the Constitutional goal and to play her part in the global [3]

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1. A.N. Allott, 'The Study of African Law', (1958), Sudan Law Journal and Reports, 257-65 at 258.

2. We are not unaware of the fact that in a country like India, with multiple customs and diverse personal laws, it is really difficult to achieve total uniformity but if our priorities are right it is not altogether impossible. The Civil Code of Ethiopia, 1960, contemplates three forms of marriage, Civil, Religious and Customary (Art.578-580), but in all three types, the effects, as regards personal relationship between the husband and the wife and their property are the same, W. Buhagiar, Journal of Ethiopian Law, 1 (1964) 1: 73-99 at 73. But keeping diversity within a Uniform Code may frustrate its desired goal. For example, in Ethiopia the Sharia courts still exist as they did before the promulgation of the Civil Code. Norman Singer points out that Ethiopia is caught in a situation of 'legal dualism' and if Ethiopia wants to have a modern legal system an unequivocal decision must be made in the near future to unify its law in the real sense, N.J. Singer, 'The Status of Islamic Law in Ethiopia', in John Gilissen, ed., Le Pluralisme juridique, (University of Brussels, 1972), 207-41 at 235. India can gain something from the Ethiopian experience.

3. On this see René David, 'The International Unification of Private Law', in International Encyclopedia of Comparative Law, II. ch.5.

unification of private laws, but she also needs a judicious transfiguration of what she has inherited into a new form without losing the best of the old. Indeed, the government of the day has the prerogative to take the lead; but those responsible for drawing up a Uniform Code of Family Law must achieve a balance between religion, law, society and the state.[1]

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1. For an assessment of the respective roles of religion, law, society and the state in India, one must see Derrett's magnum opus, Religion Law and the State in India, (London, 1968). For comparable experiences, Izhak Englard, 'The Problem of Jewish Law in a Jewish State', in H.H. Cohn, ed., Jewish Law in Ancient and Modern Israel, (Ktav Publishing House, 1971), 143-67; 'The Relationship Between Religion and State in Israel', in the same volume, 168-89; also in the same volume, Amnon Rubinstein, 'Law and Religion in Israel', 190-224. Max Rheinstein, 'The Family and the Law', International Encyclopedia of Comparative Law, Vol.IV, 3-16. M.E. Marty, 'Secularization in the American Public Order', in D.A. Giannella, ed., Religion and the Public Order, No.5: An Annual Review of Church and State, and of Religion, Law and Society, (Cornell University Press, Ithaca/London, 1969), 3-26; in the same volume, B.J. Coughlin, S.J., 'Values and the Constitution', 89-114.

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APPENDIX I

A SIGNIFICANT INSCRIPTION THROWING LIGHT ON A FATHER'S POWER OF ALIENATION: Epigraphica Carnatica, 15, Supplementary Inscriptions. New Inscriptions from Belur Taluk, No. 320.[1]

Vīrōdhikṛtu-saṃvatsarada pu śudha 15 Ādīvārana svastī śrīmatu pratāpa-
cakravarttī Hoyīsaṇa ...

Vaṃṇṇanu Bhaṇḍārī Ādīyaṇṇasana kayyalu tatukālōcīta-krayava koṭṭu
koṇḍa nīvēsanavanu tamma ārādyata ...

nerasī kalla naḍsī koṭṭaru adan ar īyade ā-Devaṇṇa makkaḷu Nāgaṇṇa
sōvaṃṇamgaḷu Narasīṃha-dēvararasara munde ī ...

vara makkaḷu parākīvū nīmma tande   māḍī dharma-vīdhīya āgadendare
haṃgaḍu ... ṃdu pramā ...

Tr. Derrett: 'In the year Vīrodhakṛt, the fifteenth of the bright half of the month Puṣya, Sunday (= A.D. 1252)*. Hail'. (While) the mighty emperor Hoysala (Someśvara (?) was ruling the earth Devaṇṇa paid cash into the hands of Treasurer Ādīyaṇṇa and bought at the appropriate time a dwelling house and gave it to their respected ... and erected a stone. The sons of Devaṇṇa, viz. Nāgaṇṇa and Sovaṇṇa, who had been unaware of this, went before King Narasīṃha (to dispute) this ... those

1. Reference kindly supplied and translated for me with commentary and notes by Derrett.

sons, "Take care! You are bound not to render void the dharma-disposition (the vidhi, or precept of or for dharma) which has been made by your father", he said: (therefore there is) an authority (.) ... '

Commentary and Notes by Derrett,

'1. Sons, not consulted in this gift, dispute the trans ction, apparently wanting the gift set aside.

2. The point of law asserted by the King in person is analogous to what we find in Kāty. (ed. Kāṇe)ślokas 566 and 642 (see Kāṇe's notes thereon).

3. Dharma-vidhi is the operative word. It can mean the injunction implied in the father's action, which the sons must respect, or the performance by the father of the injunction inherent in precepts of dharmaśāstra: on the whole I think the latter more probable.

4. The date is settled by material at my Hoysaḷas (1957), 126, 128.

5. The stone contained a record of the gift and was a private śāsana issued by the father, the donor. The donee must have been a maṭhādhipati or the like.

6. The word nerasi, which I have left untranslated, implies completing and joining, and the erection of the stone was obviously the sign that the transaction was completed: but I am not sure, since it stands at the beginning of the line, and the ends of the lines are lost, that it is a complete word.

7. 'Authority', this is taking _pramā_ to be the beginning of _pramāṇa_, which is far more likely than the alternative, _pramāda_ ('folly'). If I am right the present stone records the decision (there will be a substitute for the donee's _jayapatra_ in the following lines lost from the inscription, and _pramā(ṇa)_ refers to the 'ground' upon which the donee's title is now based, irrespective of the 'stone' we heard about before.

8. There is a poignancy in the story for which a knowledge of Hoysaḷa history is required. Someśvara Hoysaḷa had been chased out of the Tamil country in that very year. Our inscription is at Halebiḍ, which is actually the Hoysaḷa capital itself, Dorasamudra. Someśvara had only recently returned there after a long absence. He brought with his his son Narasiṃha, a lad of fourteen or so, which was significant, since in a few years, after the father went away to Kaṇṇanūr again, the boy was an under-king representing his father in the Deccan, roughtly equivalent to the modern Mysore. The boy acted in a judicial capacity in our case while he was still hardly more than a princeling. And of course he would take the view that one must uphold the _dharma_ dispositions of one's father. In fact, he proved a fairly good sub-king, and we have no evidence that he let his father down. See the appropriate chapters of my _Hoysaḷas_, and remember that I did not have this dated inscription available to me when establishing the dates and movements of the royal family at that very critical period.'