THE ENTITLEMENT OF FEMALES UNDER SECTION 14 OF THE [INDIAN] HINDU SUCCESSION ACT, 1956

by

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VOL I

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TO

THE MEMORY

OF

MY PARENTS

ABSTRACT

This thesis is an in-depth study of the vicissitudes of the property rights of the Hindu female, and the eventual enactment of s. 14 of the [Indian] Hindu Succession Act, 1956, under which she was accorded the right, for the first time, to be the absolute owner of any property legally in her possession.

In dealing with Article 44 of the Indian Constitution and the egalitarianism inherent in it, Chapter One introduces the background to, and the provisions of, the "Hindu Code", of which s. 14 is an integral part, as it also draws attention to the pressing necessity in India for the promulgation of a uniform civil code.

Chapter Two is a study of the traditional concept of widowhood in the light of śāstric injunctions, and the ambivalence in attitudes towards the widow and her remarriage in present-day India.

Chapter Three explores the characteristics of the "limited estate", a system of female inheritance peculiar to Anglo-Hindu Jurisprudence, while the right to maintenance prior to the Hindu Adoptions and Maintenance Act, 1956, and as interpreted in case-law, has been enumerated in Chapter Four.

Chapter Five examines the Hindu Women's Rights to Property Act, 1937, the express purpose of which was to give "better rights" to women, its effects on the inheritance pattern generally, and its drawbacks.

Chapter Six is a study of s. 14, its successful effects, as also the problems of construction with special reference to the difficulties encountered in the judicial interpretation of sub-s. (2) of s. 14.

The concluding chapter brings out the salient features of the work, and offers suggestions how best to resolve, either judicially, the areas of ambiguity, or by legislative amendment, such anomalies as have inadvertently crept in through oversight and as a consequence of piecemeal legislation.

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ABBREVIATIONS

A.C.J.	Appellate Civil Jurisdiction
A.I.R.	All India Reporter
A.P.	Andhra Pradesh
Agra H.C.R.	Agra High Court Reports
All.	Allahabad
All. E.R.	All England Reports
All. L.J.	Allahabad Law Journal
An. W.R.	Andhra Weekly Reporter
Āp.	Āpastamba
Art.	Article
Baudh.	Baudhāyana
Beng. L.R.	Bengal Law Reports
Bom.	Bombay
Bom. H.C.R.	Bombay High Court Reports
Bom. L.R.	Bombay Law Reporter
BORI	Bhandarkar Oriental Research Institute
Bṛh.	Bṛhaspati
C.A.	Court of Appeal
C.A.D.	Constituent Assembly Debates
C.L.J.	Calcutta Law Journal
C.L.R.	Calcutta Law Reports
C.W.N.	Calcutta Weekly Notes
Cal.	Calcutta
Cole. Dig.	A Digest of Hindu Law on Contracts and Succession, tr. H.T. Colebrooke. (A translation of Jagannātha Tarkapañcānana's Vivāda-Bhaṅgārnava.)
Cr. P.C.	The Code of Criminal Procedure, 1861, 1973
Critique	A Critique of Modern Hindu Law
Cut.	Cuttack
Cut. L.T.	Cuttack Law Times
Del.	Delhi
DML	The Death of a Marriage Law
DMMA	The Dissolution of Muslim Marriages Act, 1939
DPA	The Dowry Prohibition Act, 1961
EAIL	Evolution of Ancient Indian Law
ECMHL	Essays in Classical and Modern Hindu Law
F.B.	Full Bench
F.C.	Federal Court

Gau.	Gauhati
Gaut.	Gautama
Guj.	Gujarat Law Reporter
HAMA	The Hindu Adoptions and Maintenance Act, 1956
HD	History of Dharmaśāstra
H.L.C.	House of Lords Cases
HLI(A)A	Hindu Law of Inheritance (Amendment) Act, 1929
HLPP	Hindu Law Past and Present
HMA	The Hindu Marriage Act, 1956
HMGA	The Hindu Minority and Guardianship Act, 1956
H.P.	Himachal Pradesh
HSA	The Hindu Succession Act, 1956
HWRA	The Hindu Widows' Remarriage Act, 1856
HWRPA	The Hindu Women's Rights to Property Act, 1937
I.A.	Indian Appeals
I.C.	Indian Cases
ICLQ	International and Comparative Law Quarterly
IDA	Indian Divorce Act, 1869
IIAS	Indian Institute of Advanced Studies
IL	Indology and Law: Studies in Honour of Professor J. Duncan M. Derrett
I.L.R.	Indian Law Reports
IMHL	Introduction to Modern Hindu Law
ISA	The Indian Succession Act, 1925
J.& K.	Jammu and Kashmir
K.L.T.	Kerala Law Times
Kant.	Karnataka
Ker.	Kerala
L.R.	Law Reports
Lah.	Lahore
Lond.	London
Luck.	Lucknow
M.B.	Madhya Bharat
MBh	Mahābhārata
M.I.A.	Moore's Indian Appeals
M.L.(A)A	The Marriage Laws (Amendment) Act, 1976
M.L.J.	Madras Law Journal
M.P.	Madhya Pradesh
M.W.N.	Madras Weekly Notes
Mad.	Madras
Matt.	Saint Matthew

Mor. Dig.	Morley's Digest
Mys.	Mysore
Mys. L.J.	Mysore Law Journal
N.W.P.H.C.R	North Western Provinces High Court Reports
N.Y.	New York
Nag.	Nagpur
Nār.	Nārada
O.U.P.	Oxford University Press
Or.	Orissa
P.C.	Privy Council
P.D.	Parliamentary Debates
P. & H.	Punjab and Haryana
Pat.	Patna
Pesh.	Peshawar
Punj.	Punjab
Punj. L.R.	Punjab Law Reports
Q.B.	Queen's Bench
Q.B.D.	Queen's Bench Division
RASB	Royal Asiatic Society of Bengal
RISI	Religion, Law and the State in India
RV.	Ṛgveda
S.B.	Special Bench
S.B.E.	Sacred Books of the East
S.C.	Supreme Court
S.C.J.	Supreme Court Journal
SMA	The Special Marriage Act, 1954
Sau.	Saurashtra
Tr.-Co.	Travancore-Cochin
Trip.	Tripura
Vas.	Vasiṣṭha
Ves.	Vesey
Viṣ.	Viṣṇu
W.R.	Sutherland's Weekly Reporter
Yāj.	Yājñavalkya

PREFACE

The purpose which this investigation is intended to serve is sufficiently indicated by its title. The inheritance pattern leading to the enactment of s. 14 of the Hindu Succession Act, 1956, is the story of the emergent awareness, and the urgency that it assumed in certain sections, of the Constitutional promise of equality to women in Independent India. The departure from tradition in this respect, and the destruction in large measure by the "Hindu Code" of the system known to the Anglo-Hindu Jurisprudence, heralds in the abstract a new dawn, and s. 14 in particular, in consigning the legal "limited estate" to the oblivion it so richly deserved, the means to achieving the economic independence which must necessarily be the corner-stone for the emancipation of the Hindu female in the fullest sense of the term.

But while de jure equality may be one step in the process of this emancipation, factual equality continues to elude, and the myth kept alive of the innate intellectual and temperamental imbalances as between men and women. A great deal has been written about the Indian woman - as much by Indian men as by others - and much doubtless will continue to be written: her role, her status, her place and so on. But the posturings of equality, the incessant prating, are a convenient facade behind which the unacceptable face of an unequal society persists in taking refuge. Almost nowhere in the Sovereign Socialist Secular Democracy of the Republic of India is the Hindu female's status on par with that of her male counterpart, and frequently it is much to her disadvantage.[1]

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1. Gail Omvedt observes: "I have on several occasions heard upper class Indians say to show their liberalism: 'I only believe in two castes - men and women,' and the author's comment: "Undoubtedly there is little question here as to who is the Brahmin who the Sudra," is a telling indictment of the realities of Indian social conditions today. See "Caste, Class and Women's Liberation," M. Barnabas et. al. ed., Challenges of Societies in Tradition, (Mad., Macmillan, 1978), 238-52, at 251, f.n. 2.

In the family itself, to adapt Engels' general observation, there is no doubt but that while the husband is still the bourgeois, the wife represents the proletariat.[1]

The inclusion in a legal thesis of a chapter which projects the psychology of the Hindu widow - whose estate typified the woman's estate generally - is to indicate that if, despite the Legislative intendment, traditional attitudes linger on, women are equally to blame for their implicit acquiesence in the predicament they are in. The temptation to forego liberty and remain a "thing" is the consequence of centuries of conditioning, of over-dependence and of the strong environmental forces of educational and social tradition, and today by subjugating the ethical urge to affirm her existence as an individual in her own right, the Hindu woman "evades at once both economic risk and the metaphysical risk of a liberty in which ends and aims must be contrived without assistance."[2]

From the legal perspective, that the law in present day India has only partly fulfilled its role of social engineering and much else besides remains to be done, is evident when we consider the plight of females in the minority communities. As yet the vast tracts of their personal laws - not without their own archaic and eccentric features - are, either through callous indifference, or because of political expediency, left untouched, and this is where the Introductory chapter plays its part in the questions that it poses: Whither the furtherance of the egalitarian ideal? Whither Art. 44 of the Constitution and the promise of a uniform civil code?

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1. F. Engels, "The Origin of the Family, Private Property and the State," K. Marx and F. Engels, Selected Works, (Lond., Laurence and Wishart, 1968), 468-593, at 510.

2. S. de Beauvoir, The Second Sex, H.M. Parshley tr. and ed., (Harmondsworth, Penguin, 1982), Intro., at 21.

The right of the female to maintenance in the traditional Hindu law, its interpretation in case-law and the importance that it assumed in the context of s. 14, the rise of the "limited estate", its re-assertion in the Hindu Women's Rights to Property Act, 1937, - the professed aim of which was to give "better rights" to women - and its demise finally in 1956, have been dwelt upon. In the treatment of s. 14, special emphasis has been placed on the difficulties of interpretation, and in areas of controversy, what seemed the correct construction, projected. But such propositions as have been put forward are by their very nature tentative, for nothing is gained by assuming that the scope of a rule is clear when in fact the position is otherwise; and while those submissions might not emerge as the eventual solution, that is of little moment provided that the existence and nature of the problems are clearly apprehended.

Much thought has been given to the order and arrangement of the material, but in the attempt to explain the new legislation in the context of the old law, a certain overlap became inevitable though the quite extensive use of cross references has, to a considerable extent, obviated this problem.

In the presentation of the study, this writer was mindful at every stage of a compelling danger: Where the sensibilities are sharpened to a heightened perception of the inequities that the female of the species must endure in male-dominated societies, the susceptibility towards a subjective handling of potentially emotive material had to be guarded against. The attempt throughout has been to maintain the balance, to keep perspective in sight, and like the Imagination of that "inventor of harmonies", the poet Samuel Taylor Coleridge, to reconcile "a more than usual state of emotion with a more than usual order."

CHAPTER ONE

INTRODUCTION —— TOWARDS THE FURTHERANCE OF THE EGALITARIAN IDEAL AS EMBODIED IN ARTICLE 44 OF THE INDIAN CONSTITUTION

"The woods are lovely, dark and deep,
But I have promises to keep,
And miles to go before I sleep,
And miles to go before I sleep."

Robert Frost,
From 'Stopping by Woods on a Snowy Evening'

1. The Secular Nature of the Indian Constitution

In a land as vast and populous as India, it is only to be expected that there would be a corresponding diversity —— cultural, linguistic and religious. In particular, in the religious sphere, "no other country can compare in the vast expanse covered from animism and stone worship to the highest theological and metaphysical absolutes and universals."[1] Apart from the Hindu majority, there are sizeable minorities of Muslims, Christians, Jews and Zoroastrians among many others, and in this respect few would challenge Arnold Toynbee's characterisation of this civilisation as one displaying a "manifest tendency towards an outlook that is predominantly religious." In the light of this fact the emergence of India as a secular State in the mid-twentieth century must be regarded as a significant social, political and religious phenomenon.[2]

The problem of Independent India as a secular State is a complex one. The rich diversity of religious life, the legacy of the British rule, the struggle for independence, the communalism that spread in its wake, and finally the partition of the country —— all of these factors and many others are a part of the complex pattern.

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1. A.J. Dastoor, "Secularism and National Integration", G.L. Chandavarkar et al., ed., Law, Society and Education, (Bom., Somaiya, 1973), 100-14, at 100.
2. D.E.Smith, India as a Secular State, (Princeton, Univ. Press, 1963), Preface, at vii.

The British having established their suzeranity in India, then made efforts to introduce in the country a systematic and modern legal framework. Contractual transactions, commercial affairs, family relations, and transfer and succession of property were all regulated by the so-called religious laws and customs of the parties approaching a court. The law or custom of one or the other religion thus formed the Rule of Decision in every case. To the British rulers the system appeared complicated and anachronistic. This they set out to change.The religion-based criminal laws of India were reformed piecemeal,which process eventually culminated in the enactment of the Code of Civil Procedure in 1859, and the Indian Penal Code and Code of Criminal Procedure in 1860 and 1861 respectively. Along similar lines was also enacted the Indian Evidence Act of 1872.

Likewise the British could also have given to the country a civil code. This they did not do, for though they had often enough exercised their powers and responsibilities as rulers to tinker with, or to adjust the native personal laws of India before 1857, (the abolition of satī and female infanticide being the chief among them), the Mutiny was a severe shock from which British confidence never recovered. It was therefore determined that there should be no interferences with the religions of the subject peoples, and the principal personal laws were classified as "religious."[1] It must also be admitted that the adherence by the different religious communities to their respective personal laws was a device which the British used conveniently and dexterously, as indirectly tending to keep the subject peoples and the body politic of India divided. The result was the birth of a system of communal personal laws which has survived in the entire subcontinent to the present day.

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1. J.D.M. Derrett, The Death of a Marriage Law, (hereinafter referred to as DML), (New Delhi, Vikas, 1978), at 74.

However with the dawn of Independence a new spirit has set in, and the search for national integretion is on. In its Preamble, the Constitution of India has declared that the people of India has resolved to constitute India into a "Sovereign Socialist Secular Democratic Republic,"[1] and to secure to all her citizens justice - social, economic and political, liberty of thought, expression, belief, faith and worship, equality of status and opportunity ...[2] In substance these provisions involved a commitment to the ideal of creating a new social order based on social equality and political and economic justice. The aim of the Constitution being professedly secular, there is no place for the multiplicity of personal laws now prevalent, some of them "revealed", which constantly interfere in, and erode the ends by means of which a more just society may be achieved.

However, religious freedom as guaranteed by the Constitution under Articles 25-28 is confined in its application to personal matters like the individual's right to religious profession, his right to adhere to, and practise the tenets of his faith. But beyond that the State reserves to itself the right to interfere considerably in "regulating or restricting any economic, financial and political or other secular activity which may be associated with religious practice,"[3] and for "providing for social welfare and reform ...,"[4] thereby laying down the framework of Indian secularism which is a concept quite distinct from what it stands for in the West.

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1. S. 2 of The Constitution (Forty-Second Amendment) Act, 1976, provides: "In the Preamble to the Constitution, -

   (a) for the words "Sovereign Democratic Republic," the words "Sovereign Socialist Secular Democratic" shall be substituted;."

2. Preamble to the Constitution of India.

3. Art. 25 (2) (a).

4. Art. 25 (2) (b).

Rufus M. Jones defines secularism as "a way of life and an interpretation of life that include only the natural order of things, and that do not find God, or a realm of spiritual reality essential for life and thought."[1] This definition of secularism sums up in essence the prevalent assumption in the West that there exists a kind of antinomy between religion and secularism; certainly the emphasis on the separation of State and religion in the western countries is historically rooted in the conflict between the spiritual power as represented by the Christian Church, and the temporal power as represented by the king from time to time. Christianity itself set the tone in the now oft-quoted dictum "Render therefore unto Caesar the things that are Caesar's, and unto God the things that are God's,"[2] which in effect is generally believed to mean that it is not the function of the State to promote, regulate, direct or otherwise interfere in religion. Similarly political power is outside the scope of religion's legitimate aims.

However the secularism that is contemplated by the Indian Constitution does not postulate an inevitable and inexorable conflict between temporal and spiritual power, and in fact the scheme adopted by the Constitution is to evolve a rational synthesis between the legitimate claims of the spiritual and the temporal power, and the working definition of secularism by Smith might well sum up the nature of Indian secularism as embodied in the Constitution:

> "(T)he secular state is a state which guarantees individual and corporate freedom of religion, deals with the individual as a citizen irrespective of his religion, is not constitutionally connected to a particular religion, nor does it seek either to promote or interfere with religion." 3

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1. Cited in V.P. Luthera, The Concept of the Secular State in India, (Cal, O.U.P., 1974), at 154.
2. Matt. 22. 21.
3. Smith, op. cit., at 6

Religion then becomes each man's ultimate concern, thereby bringing under the roof of religion even those most eager to abolish it, and religious liberty is founded on the idea of rights: every citizen, wherever he lives, has the right to believe or not to believe as he chooses, to practise the faith he wishes to practise or to practise none, and the secular state is one that makes no pretence to competence in religious matters, and remains scrupulously neutral in weighing the merits of competing religious bodies. In brief then, in the words of Maritain the birth of such a secular faith occurs when:

> "(M)en possessing quite different, even opposite metaphysical and religious outlooks, can converge, not by virtue of any identity of doctrine, but by virtue of analogical similitude in practical principles, towards the same practical conclusions, and can share in the same practical secular faith, provided they similarly revere, perhaps for quite diverse reasons, truth and intelligence, human dignity, freedom, brotherly love and the absolute value of moral good." 1

Based on such a premise Mr Justice Gajendragadkar states authoritatively,"... the Indian Constitution is not anti-god or anti-religion; it treats all religions alike and requires all of them to function within their legitimate bounds,"[2] and quotes with approval Dr. Radhakrishnan, who as the then Vice President of India affirmed "I want to state authoritatively that secularism does not mean irreligion. It means we respect all faiths and religions. Our State does not identify itself with any particular religion."[3]

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1. J. Maritain, Man and the State, (Chicago, Univ. Press, 1951), at 111.
2. P.B. Gajendragadkar, Secularism and the Constitution of India, (Bom, Univ. Press, 1971), at 58.
3. Ibid.

To this end Art. 25 of the Constitution guarantees freedom of conscience and free profession, practice and propagation of religion, while Art. 26 deals with the freedom to manage religious affairs, subject however to public order, morality and health. In other words should the State feel that the practice of any form of religion is detrimental to public welfare, and violates any existing secular law, such rights as guaranteed by these two Articles are to be subject to modification.

The Indian Constitution therefore insists that while the pursuit of religion in the abstract - "philosophy, ethics or morality if you like - religion which is inspired by the spirit of human inquiry into the Unknown, the cause of the Universe and the eternal verities,"[1] for moral and spiritual development, is a quest, peculiarly the individual's own, yet the laws that govern his personal life is a secular matter, social in character, and all persons should be governed by the same principles of personal law, based on reason, justice, equity and good conscience.

In a symposium in memory of Pandit Jawaharlal Nehru entitled Socialism, Democracy and Secularism, Dr. Abu Sayeed Ayyub, the Muslim editor of Quest, had the following revealing remarks to make:

> "(I)t is just as well that it (India) is not secular in the Western sense of complete separation between Church and State, for it reserves to itself the right to intervene in the interest of necessary social reform in matters which customarily come under the pursuit of religion, ... Whatever ancient scriptures might say, bigamy (not to say polygamy) shocks the moral sense of modern man. Ancient scriptures hardly kept the balance even as between man and woman, Brahmin and Śūdra, Momin (Muslim) and Kafir (Non-Muslim), Christian and Heathen. No modern state can permit the perpetuation of such inequalities." 2

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1. Gajendragadkar, op. cit., at 42.

2. Cited in Derrett, Religion, Law and the State in India, (hereinafter referred to as RLSI), (Lond, Faber and Faber, 1968), at 516.

2. The Argument In Favour Of Codification

In a country like India therefore, where her peoples are faced with such inconsistencies and injustices as are bound to occur due to a rigid adherence to antiquated and obsolete rules and customs, it is essential then for the law to provide for legislation by means of which there would be a systematic and coherent system of personal law embracing the entire body of citizens alike.

The dynamic role of law as an instrument of social change is now a well-accepted thesis, for there is no other peaceful persuasive means of bringing about the socio-economic Renaissance desired in a democratic set-up. The Constitution of India is the fundamental law and the source of all legislation - whether social or otherwise. The Fundamental Rights and Directive Principles of State Policy which are contained respectively in Parts III and IV of the Constitution constitute the basic core of it. The Fundamental Rights assure individual freedom, and the Directive Principles direct the State to bring in a social order in which justice - social, political and economic, prevails.[1]

The earlier view that in case of conflict between the Fundamental Rights and the Directive Principles, the latter have to conform to, and run subsidiary to the former,[2] was later amended, and the Court emphasized that both the Fundamental Rights and the Directive Principles are part of the Constitution, and they have to be so reconciled as to give effect to both.[3]

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1. K.D. Gangrade, Social Legislation in India, Vol. 1, (New Delhi, Concept, 1978), at 1.
2. The State of Madras v. Champakam Dorairajan, A.I.R. 1951 S.C. 226.
3. In re Kerala Education Bill, A.I.R. 1958 S.C. 916.

Rather the latest position is that the Courts seem inclined to give preferential treatment to the Directive Principles. In State of Kerala v. N.M. Thomas,[1] a service rule of the State of Kerala which allotted extended time to the clerical staff belonging to the Scheduled Castes and Scheduled Tribes for the passing of a qualifying test, was challenged by the staff belonging to other communities on the ground that such rule violated Art. 16 (1) which guarantees equality of opportunity in matters relating to employment, and also Art. 16 (2) which prohibits discrimination on the basis of caste, race, religion, etc. The State defended the rule on the ground that this was merely implementing the Directive Principle in Art. 45. The Supreme Court accepting the contention of the State upheld the rule.

However, in spite of the importance now being placed on the Directive Principles,[2] they still remain essentially a matter of State policy which is moulded and shaped according to the exigencies of the circumstances, and it is against this backdrop that we must examine Art. 44, which if implemented, would be in consonance with the secular character of the Constitution. The multifarious personal laws, with all their contradictions and anomalies [3] would be wiped away at one fell swoop, and in their place would appear a code of laws governing all impartially and alike.

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1. A.I.R. 1976 S.C. 490.

2. Art. 31 C now saves any law enacted to implement any or all the Directive Principles from being questioned in a court of law on the ground of inconsistency with any of the rights guaranteed by Arts. 14, 19, and 31. Vide the Forty-second Amendment to the Constitution of India.

3. For a comprehension account of such contradictions and anomalies which in itself provides a compelling case for codification see Derrett, RISI, op. cit., 542-4. See also T. Mahmood, "On Securing a Common Civil Code," T. Mahmood, An Indian Civil Code and Islamic Law, (Bom, Tripathi, 1976), at 10-11.

The tendency is towards codification in the modern world and India cannot afford to lag behind. Art. 13 of the Charter of the United Nations envisages the active encouragement and progressive development of the international law and its codification, and in the same field, we may well adapt for our own purposes the clear-sighted vision of Oppenheim to the effect that, lack of precision which is the natural to a large number of the rules of law on account of its slow growth must inevitably create a movement for its codification with a view to the systematisation and unification of agreed principles on the one hand, and the reconciling of hitherto divergent views on the other, as also consideration for those which are not adequately regulated.[1] In sum then, codification thus leads to a system of law that is simple, certain, lucid and uniform, incapable (one hopes) of giving rise to disputes, and easily intelligible.

In India however, this is a task fraught with many difficulties, for as we have already observed, it is a land of many faiths, of many racial and cultural minorities. The added difficulty is that these religions have many socio-religious obligations in respect of marriage, divorce, family life and succession. But while these races, linguistic groups, minorities and faiths have to be respected, a line must be drawn in favour of a Uniform Civil Code for the sake of the larger interest of the nation and the State. The sociological aspects of religions need to be separated so that:

> "(R)eligion in the Constitution should be interpreted to mean one's belief and faith ... Similarly, customary law, and such customs as are sociological need to be separated from religion in the context of the modern world. India must get rid of those shackles of the past which are a restriction on social freedom, social progress, and socio-economic awareness of the current times." 2

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1. L. Oppenheim, International Law, Vol. 1, 8th ed., H. Lauterpacht ed., (Lond, Longmans, Green, 1955), at 57 ff.

2. P.B. Mukharji, "Uniform Civil Code," N. Khodie ed., Readings in Uniform Civil Code, (Bom, Thacker, 1975), 3-9 at 7.

3. The Hostile Reaction Towards Codification

Opposition to such a step however, was naturally to be expected, specially from the more conservative sections of the intelligentsia. An avowedly metaphysical argument against the uniform civil code is that, family laws and personal laws of various communities in India are of divine origin, and therefore not to be tampered with, as they would naturally controvert certain religious doctrines. This in fact was the argument advanced most vocally on the floor of Parliament, when the Bills for the reform of the Hindu law were introduced in Parliament. Muslim members advanced the same argument in their opposition to the introduction of the uniform civil code.[1]

It is of course conveniently forgotten that although the Hindus and Muslims have claimed all their laws as of divine origin, for almost a century they have been governed by one single law of Crime, Contract, Tort, Evidence, Procedure and the like, which are neither the laws of the Muslims nor of the Hindus, and have no divine traces in them. They are essentially civil laws - laws, which as we have already seen,[2] our British rulers thought best to give us, and which are, barring the Criminal law in Pakistan, still the laws in the entire subcontinent. Carrying the argument forward, these vehement opponents of reform point out that no person is authorised to put such amendments into effect since no Hindu or Muslim as the case may be, may legislate contrary to the tenor of the Vedas or the Qur'an. Interpretation of these holy writs could only be done by those specially qualified in that science, and such persons are few, or not represented at all in Parliament. The

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1. Discussed below at 30-1.

2. Discussed above at 21.

argument runs on that even if authority could be conceded to a modern legislative body, it would be inexpedient in a secular state to legislate in such a way as to subvert religious tenets by making it either difficult to put such tenets into practice, or easy to evade them altogether.

It is also pointed out that, if the reformers insist upon a code of a comprehensive nature, they must have a residual law to rely on in the event of a casus omissus, that is to say, where a problem turns out to be incapable of solution by reference to the terms of the statute. In the absence of a residual law, undue confusion and absurd anomalies are bound to occur sooner or later, giving rise to increased litigation, for the law would hardly be more certain until the Supreme Court had pronounced on every ambiguous point in the Code.[1]

This attitude, and the apprehension on the part of Muslims in India that the law of the majority community would be foisted on them in the garb of a civil code, were the reasons for the vociferous protests in the Consitituent Assembly concerning the issue. Mohammed Ismail was of the view that a secular state should not interfere with the personal law of a people, which was part of their faith, their culture, their way of life. He claimed that the European countries, including Yugoslavia protected the Mussulmans in the matter of family law and personal status.[2] Naziruddin Ahmed pleaded that abrogation of personal law should not be treated as regulation of secular affairs surrounding religion, or as a measure of social welfare and reform. He pointed out that even the British who had enacted uniform Civil and Criminal codes nevertheless left the personal laws untouched.[3] Pocker Sahib felt that no community

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1. The arguments set forth above have been adapted for my purposes from Derrett, Hindu Law Past and Present, (hereinafter referred to as HLPP) (Cal, A. Mukherjee, 1957), 38 ff.

2. Constituent Assembly Debates, (1948-49), (hereinafter referred to as C.A.D.), Vol. VII at 540-1.

3. Ibid, at 541-3.

favoured uniformity of civil laws; organisations, both Hindu and Muslim, questioned the competence of the Constituent Assembly to interfere with religious laws. Art. 44 (35 as it was then) was thus antagonistic to religious freedom and hence "a tyrannous measure".[1] Hussain Imam wondered whether there could be "uniformity of civil law in a diverse country like ours ... when there are eleven or twelve legislative bodies (entitled to) legislate on subjects like marriage, divorce, succession according to the requirements of their own people and their own circumstances."[2]

A similar hostility was very much in evidence when the first step towards the codification of the Hindu law was taken in the codifying Acts of 1955-56, known as the "Hindu Code", which however is still a system of personal law applicable to people on the grounds of their religion.[3] The history of the relevant enactment shows that the masses belonging to the Hindu, Sikh, and other allied religious did not accept the new laws with any great pleasure. There was in fact, a great deal of resentment expressed in Parliament. In 1951, the Hindu Code Bill was subjected to severe criticism by some members as a measure which amounted to discrimination between different sections of citizens on the ground of religion, while during the debate on the Hindu Marriage Bill, J.B. Kripalani thundered:

> "(I)f we are a democratic State, we must make laws not for one community alone. Today the Hindu community is for monogamy... Will the Government introduce a bill for monogamy for the Muslim community... (for) every community in India?... I tell you this is the democratic way, for the other is the communal way...,"[4]

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1. Ibid., at 544-6.
2. Ibid., at 546.
3. Derrett, RISI, op. cit., at 321.
4. Lok Sabha Debates, (1955), Part II, Vol. I, Col. 7376.

to which Dr. Ambedkar's effective rejoinder was that since the Constitution permitted differential treatment of different communities, the Government could not be charged with practising discrimination.[1]

4. The Imperative Nature Of The Directive In Article 44

However, whatever differences of opinion there may be, and however vehement, there is no avoiding or ignoring the directive laid down in Art. 44 of the Constitution that,

> "(T)he State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India."

But like all other Directive Principles specified in the Constitution, the provision of Art. 44 too "shall not be enforceable by any court" but is "nevertheless fundamental in the governance of the country," and has to be applied by the State "in making laws."[2]

By virtue of the powers vested in it under List III Entry 5, in the Seventh Schedule to the Constitution, the Legislature could have enacted such a code straightaway, but taking into account that in the mandate of Art. 44, the accent is on the words endeavour to secure, it (the Legislature) has desisted from such a step. Rather Art. 44 envisages the Legislature and the Executive leading the nation at the end of an evolutionary process, to the era of uniformity in civil laws. Moreover if and when the State fulfils the duty imposed on it by Art. 44, its action will be constitutionally protected by Art. 25 (2) which empowers the State to regulate by law "secular activities associated with religious practice," and to embark upon programmes of "social welfare and reform."

On the other hand the more enlightened opinion is that codification of Indian Personal laws as laid down in the Constitution is an object of

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1. Ibid.
2. Art. 37 of the Constitution.

national policy (Art. 44), which when implemented would bring about the unification of all laws, leading to a unity which alone would satisfy national aspirations. The personal laws, they also point out, are overdue for reform in certain respects, which cry aloud for amendment in the face of undoubted political and social developments in the last more than half century. Thus the present complexity, uncertainty and rigidity, which is unique in the civilised world, profits none but the legal profession; it gives rise to unlimited injustice and fraud since the public often hestitate to enter upon litigation which may turn out to be not merely hazardous, but intolerably dilatory and expensive.

In short then, the results of the present situation are so distressing that there is no advantage in delay, and the implementation of Art. 44 should go forward without further ado, whereby the people would be subject to a more homogeneous, less anomalous and less self-contradictory set of laws.[1]

5. The Cautious Stance Towards the Implementation of Art. 44

An analysis of the various attitudes towards Art. 44 reveals that judicial opinion is in favour of the view that a uniform civil code is not necessarily to be enacted at a stretch. It may be enacted in fragments, either community-wise, or subject-wise. In State of Bombay v. Narasu Appa Mali,[2] Gajendragadkar J., had expressed just such views. In the same case Chagla C.J., (as he then was), also states clearly

> "(T)he scheme of the Constitution seems to be to leave personal law unaffected except where specific provision is made with regard to it, and leave it to the Legislatures in future to modify and improve it, and ultimately to put on the statute book a common and uniform Code." 3

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1. Derrett, HLPP, op. cit., at 41.
2. A.I.R. 1952 Bom. 84.
3. Ibid, at 89.

By implication then, the court seems to have expressed the opinion that since Muslims and other minorities were not prepared to accept and work social reform, the enactment of an all-embracing civil code may be lawfully deferred though not shelved altogether.

The same note of caution is struck by others who likewise believe that unseemly haste is unwarranted. Thus:

> "(O)f course, life - a nation's life - is complex, sensitive, explosive, and deserves careful creative steering. In such a perspective, as important as the goal, is the social strategy of attaining the goal. One wrong step forward may well be two forced steps backward." 1

Of the Orientalists it is well worth heeding a leading authority:

> "(T)he greatest need of the moment, as it seems to me, is to convince them (Indian Muslims) that their personal law, as this is at present administered in India, stands in urgent need of reform... Another crying need, at this juncture, is to convince the majority community that there is no urgency about the implementation of Art. 44 of the Directive Principles of the Constitution. These principles are not mandatory as such; and the impatience in this matter shown by Justice K.S. Hedge (cf. K.S. Hegde, "Directive Principles of the State Policy," in I.S.C.J. 50-72, (1971)), and many others seem to me misplaced. It has inevitably given rise to a marked feeling of insecurity in the Muslim community which is damaging to the best interests of the state." 2

In short therefore, "hasten slowly,"[3] but hasten surely, must in the end be the formula, for securing a common civil code can only temporarily be held up; it cannot be shelved forever.

6. The "Hindu Code"

The way had already been prepared by the slow trickle of legislative reforms enacted during the period of the British presence in India. The

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1. V.R. Krishna Iyer, "Foreword," T. Mahmood, An Indian Civil Code and Islamic Law, op. cit., at VII.
2. J.N.D. Anderson, "Muslim Personal Law in India," Readings in Uniform Civil Code, op. cit., 41-61, at 42.
3. J.D.M. Derrett "The Indian Civil Code or Code of Family Law," ibid 21-38, at 23.

Caste Disabilities Removal Act, 1850, the Hindu Widows' Remarriage Act, 1856, the Age of Consent Act, 1891, the Hindu Inheritance (Removal of Disabilities) Act, 1928, the Hindu Law of Inheritance (Amendment) Act, 1929, the Hindu Gains of Learning Act, 1930, the Hindu Women's Rights to Property Act, 1937 and the Hindu Women's Right to Separate Residence and Maintenance Act, 1946, were all departures from the śāstra and were merely intended to give relief to those who felt the inadequacies of the ancient law.

But these were erratic efforts at best, and in view of the guarantees in the Constitution to the citizens of India, of equality before the law,[1] of equal protection of the laws[2] and of the prohibition against discrimination "on grounds only of religion , race, caste, sex ...,[3] enlightened Hindu public opinion was committed to bringing the law into line with modern social developments. Thus immediately on Independence Parliament directed its attention to the needs of the majority community by reintroducing in the Legislature, a comprehensive measure covering the most important areas of the Hindu law, in the form of the long pending "Hindu Code" Bill with a view to reforming the personal law of the Hindus to suit the changing times. This in turn was to be followed by legislation affecting other communities so as to bring uniformity and certainty into Indian family law.

However, when the Hindu Code Bill did come up for consideration before Parliament in 1951, such was the violent opposition from the more orthodox sections of the Hindu community[4] that, eventually only four clauses were passed; Parliament was forced to shelve the project temporarily and resign itself to a period of further postponement of the implementation of the Directive contained in Art. 44 of the Constitution.[5]

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1. Art. 14
2. Ibid.
3. Art. 15(1).
4. See above at 31.
5. For the history of the Hindu Code Bill see Chapter Six.

But such stagnation was not to be for long, and the Special Marriage Act of 1954, enabling any two Indians wishing to marry, to adopt a common and secular law of marriage and inheritance, gave a fresh impetus to the reforming zeal already so much in evidence among the élite of the majority community, and this directly led to the enactment of what we have already referred to as the "Hindu Code." The passing of the Hindu Marriage Act in 1955 was followed in quick succession by the Hindu Succession Act, 1956, the Hindu Adoptions and Maintenance Act, 1956 and the Hindu Minority and Guardianship Act, 1956. Thus was taken the first pragmatic step towards achieving the greater target. It was a momentous step, "a great step forward in social legislation,"[1] which "for width of scope and boldness of innovation can be compared only with the Code Napoléon."[2] The technical aims of the codifications were to unify the law of the Hindus relating to marriage, succession, guardianship, minority, adoption and maintenance. Certainty of the law was another object, and (most importantly for our purposes), the equality of the sexes and the elimination of restrictive and antique rules.[3] We will now proceed to examine to what extent this last-named objective is fulfilled in the various fields which these enactments encompass.

(1) Marriage

With a view to ameliorating the lot of the Hindu wife, bound as she was by convention, tradition and ancient notions of subordination to the husband and the family, the Legislature taking its courage in both hands as it were, passed the Hindu Marriage Act, 1955 (hereinafter referred to

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1. C.C. Biswas, the then Law Minister, Hindustan Times, (New Delhi), July 29, 1952.
2. Derrett, RISI, op. cit., at 326
3. G-D Sontheimer, "Recent Developments in Hindu Law," ICLQ, Supplementary Publication No 8, 1964, 32-45 at 34.

as the HMA), and the changes that this, as amended by the Marriage Laws (Amendment) Act 1976 (hereinafter referred to as the ML(A)A), have brought about are fundamental and far-reaching in that they are significant departures from the traditional Hindu concept of marriage as evaluated in the śāstra.

(a) Registration

For all that it envisages an essentially Hindu marriage in conformity with the customary rites pertaining to either party,[1] in view of the difficulty of proving such marriages with any degree of precision, s. 8 makes a break with the past, and in providing for the registration of Hindu marriages is, it is submitted, an attempt at safeguarding the wife from such future matrimonial misdemeanour as may be in the contemplation of the Hindu husband.

(b) Monogamy

In laying down the principle of monogamy by prescribing that, a valid marriage may only be solemnised provided that neither party has a spouse living at the time of such marriage,[2] the HMA renders polygamous marriages null and void,[3] and bigamy punishable under ss. 494-5 of the Indian Penal Code.[4]

Laudatory as this measure might seem because in consonance with modern notions of justice and "fair play",

> "(Y)et a careful consideration of bigamy within the context of modern Indian law has revealed that the bigamously married Hindu woman lies in a legal no - man's land, so that she cannot claim any of the advantages to which a concubine was entitled under the old law: Narayanaswami v. Padmanabhan, A.I.R. 1966 Mad 394." [5]

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1. HMA, s. 7(1).
2. Ibid., s. 5(1).
3. Ibid., s. 11.
4. Ibid., s. 17.
5. Derrett, RLSI, op. cit., at 358, f.n. 2.

* It could well be argued that such a provision would be violative of Art. 15 (1) of the Constitution (supra, at 35), as being discriminatory on the ground of sex. But the question that invariably arises is: discrimination against which sex? Certainly not against the male as the qualified polygamy that it envisages, gives him the freedom to contract a second marriage, while the wife is simultaneously protected from the disgrace and ignominy that are reserved, upon divorce, for females in India. In fact, such a measure would, it is submitted, be in consonance with Art. 15 (3), infra, at 49, f.n. 4. Equally, should the polygamously married wife be dissatisfied with the union, the option of divorce - however distasteful - is always open to her under s. 13 (2) (1) of the HMA, 1955, infra, at 49.

Heed too should have been paid to Kane's warning that, as insistence on monogamy is opposed by many, some compromise might have been arrived at as regards classes to whom two wives are an advantage,[1] and

> "(S)hould not a carefully regulated polygamy in cases of infertility, mental instability and the like be a lesser evil than annulment directly leading to immorality or other abuses?" [2]

(c) Child-Marriages Discouraged

Since its amendment in 1976, the Act has, in theory at least, done away with the evil of child marriages, and stipulates as one of the desirable requisites of a Hindu marriage that, the bridegroom should have completed the age of twenty-one and the bride the age of eighteen years.[3] However non-observance of this clause does not render, nor is there any other provision in the Act which renders void or voidable, a marriage violative of this clause.

No doubt s. 18 (b) contemplates that the parties to a marriage in contravention of s. 5 (iii) are punishable with simple imprisonment which may extend to fifteen days or with a fine which may extend to Rs 1,000 or with both.[4] But such lenient penalisation, it is submitted, is no effective check,

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1. P.V. Kane, History of Dharmasāstra, (hereinafter referred to as HD), Vol. III, (Poona, BORI, 1973), at 824.

2. So J.D.M.Derrett rationalises; A Critique of Modern Hindu Law (hereinafter referred to as Critique), (Bom, Tripathi, 1970), at 309-10. (cont)*

3. HMA, s. 5 (iii), and this is in line with the requirements in the Child Marriage Restraint (Amendment) Act, 1978 applicable to all communities in India.

4. Although decisions in Palasetti v. Sriramulu A.I.R. 1968 A.P. 375, Suramma v. Ganpath A.I.R. 1975 A.P. 193, and Krishna v. Tulsan A.I.R. 1978 P. & H. 305 indicate the view that marriages in contravention of s. 5 (iii) are void ab initio, it is however submitted that the F.B. ruling of the A.P. High Court is more in keeping with the legislative intendment. It was held in Venkataramana v. State, A.I.R. 1977 A.P. 43 (F.B.), that though the parties concerned are liable to punishment under s. 18, and should the requirements of s. 13 (2) (iv) (to the effect that the wife repudiates the marriage contracted earlier, after she has reached the age of fifteen and before she has completed the age of eighteen years), be met with, a decree for divorce at the instance of the wife may be granted, barring these two consequences there are no other consequences from the contravention of s. 5 (iii). See also Durjyodhan v. Bangapati, A.I.R. 1977 Or. 36. Similarly the Punjab High Court has held in Mohinder Kaur v. Major Singh A.I.R. 1971 P. & H. 174 that, a marriage in violation of s. 5 (iii) not being a nullity, it cannot be pleaded in defence to a petition for restitution of conjugal rights.

and the reality is that such marriages, with attendant consequences, & their continue to be endemic in the country.

(d) Voidable Marriages

The Act also provides for a further alleviation from the miseries of an indissoluble marriage tie in that, so far as the wife is concerned, a marriage is voidable and may be annulled by a decree of mullity should she so desire on grounds of her husband's impotence,[1] insanity and epilepsy,[2] and that the consent to the marriage had been obtained by force or fraud.[3]

(e) Remarriage

As a necessary corollary to the right of divorce as contemplated in s. 13 (1), 13 (1-A) and 13 (2)[4], s. 15 of the HMA stipulates that, a woman whose marriage has been dissolved by a decree of divorce, may lawfully marry again[5] where there is no right of appeal against the decree,

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1. HMA, s. 12 (1) (a). Impotency signifies physical and incurable incapacity to consummate the marriage, Mathuram v. Vijayaram, (1979) 2 M.L.J. 301 (F.B.).
2. HMA, s. 2 (1) (b). For such unsoundness of mind as rendered the respondent incapable of giving valid assent to the marriage resulting in its dissolution, see Anima v. Probodh A.I.R. 1969 Cal. 304; Pronob Kumar v. Krishna, A.I.R. 1975 Cal. 109.
3. HMA, s. 12 (1) (c). Prior to the amendments of 1976, some decisions had taken the view that the term "fraud" was restricted to deception in relation to the marriage ceremonies or, to the identity of the party marrying. See Raghunath v. Vijaya, A.I.R. 1972 Bom. 132; Rajaram v. Deepabai, A.I.R. 1974 M.P. 52; Madhusadan v. Chandrika, A.I.R. 1975 M.P. 174; Padmaja v. Sivaraman, (1975) K.L.T. 213. An interesting illustration of this attitude is to be found in Ranibala v. Debnath (1969) 73 C.W.N. 751 which held that, where a woman marries without informing her husband of her previous unchastity, the fact that the husband would not have married her had he known of it, would not amount to "fraud" as contemplated in s. 12 (1) (c) so as to vitiate the marriage. This however cannot hold true anymore as, what is "fraud" is now expressly set out in the amended sub-s. as "fraud as to the nature of the ceremony or as to any material fact or circumstances concerning the respondent."
4. Discussed below.
5. The widow was granted such right under the HWRA, 1856.

or if there is one, the appeal time has expired without any appeal being preferred or, where any appeal is preferred, after it had been dismissed. The effect of the deletion by the ML(A)A of the Proviso stipulating a one-year waiting before remarriage is that the parties may remarry soon thereafter.

In regard however to the validity of a fresh marriage contracted before the expiry of the period of limitation for presenting an appeal, or where an appeal had been presented, during the pendency of the appeal, the observation in Lila Gupta v. Laxmi Narain[1] that, "... there is good ground for saying that a contention that a marriage solemnised in violation of the main provision in s. 15 is a nullity cannot be summarily rejected..."[2] is indicative that such marriage is indeed void ab initio.[3]

However, the rule contained in s. 15 inhibiting the remarriage of persons divorced under the HMA does not apply to divorced persons who have taken advantage of s. 29 (2) and been divorced by caste customary tribunal or under the provisions of a continued statute. It might be argued with some show of plausibility that the rule in s. 15 applies to all persons whose divorce has been obtained by decree, and that it is a rule about capacity to marry and not a rule relating to conditions of a divorce. The better view seems to be that s. 15 is an integral part of the divorce section of the HMA and its words are applicable only to the machinery of that Act, and to hold otherwise would be an unjustifiable discrimination against those whose marriages are dissolved by decree rather than by award or agreement.[4]

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1. A.I.R. 1978 S.C. 1351.
2. Ibid, at 1362 (Per Pathak, J.,).
3. Nagabhushanam v. Nagendramma, A.I.R. 1955 A.P. 181.
4. Derrett, Introduction to Modern Hindu Law, (hereinafter referred to as IMHL), (Bom., O.U.P., 1963), at 240.

(2) Matrimonial Reliefs

(a) Restitution of Conjugal Rights

As a safeguard against hasty decisions to divorce and so as to give the parties to a marriage time and opportunity to reconsider, s. 9 lays down that when either the husband or the wife has without reasonable excuse withdrawn from the society of the other, the aggrieved party may apply to the court for restitution of conjugal rights.

Normally withdrawing from the society of the spouse suggests separation and living apart with the intention not to come back. However it was held in Rameshchandra v. Premlata[1] that mere temporary withdrawal by the wife from the society of the husband did not amount to withdrawal when she had no animus to withdraw permanently from such society. Neither could it be said that the wife had withdrawn from the society of the husband if it is a case of enforced separation necessitated by the service conditions of the wife.[2]

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1. A.I.R. 1979 M.P. 15. See also Ratnaprabhabai v. Seshrao, A.I.R. 1972 Bom. 182.

2. Shanti v. Ramesh, (1971) All. L.J. 67; Pravinben v. Sureshbhai, A.I.R. 1975 Guj. 69; Mirchumal v. Devi Bai, A.I.R. 1977 Raj. 113. It is however submitted that the dicta in Garg v. Garg, A.I.R. 1978 Del. 296, requires careful reconsideration. Drawing amply from analogies of English law, the Delhi High Court was of the view that, if the dharmaśāstra preached that, the wife should always submit to the husband whatever the circumstances of each of them, that was only an ideal aimed at by the authors; that the basic principles on which the location of the matrimonial home is to be determined are based on the common conveniences of the spouses and balance of circumstances; that the principle that, the wife is not entitled to separate residence and maintenance except under justified circumstances, and otherwise the spouses are expected to live together in the matrimonial home, is only where the wife depends on the husband financially. Where the circumstances are equally balanced in favour of the wife and the husband, neither of them is entitled to sue the other for restitution of conjugal rights. It was further pointed out that any law which gave exclusive rights to the husband to decide upon the matrimonial home without considering the merits of the wife's claim would be contrary to Art. 14 of the Constitution. One need not have any great depth of understanding of the marriage law to approve Raghavachriar's observation that, "The Delhi decision overlooks the fact that the Hindu marriage is still not wholly secular and carries much religious significance. Relaxation of the ancient rule needed in the case of working wives who are better situated than their husbands to choose the matrimonial home, does not call for a repudiation of the rule itself... Nor is it useful to invoke the analogies of English law in this matter in view of the differences in the conditions and culture of this country." N.R. Raghavacharia's Hindu Law, Principles and Precedents, 7th ed., Vol. II, (Mad. M.L.J., Office 1980), 982.

But while this was one approach, the other viewpoint adopted by the courts was that, as a Hindu wife on marriage passed to her husband's family, it enjoined on her the duty of attendance, obedience to the husband and to live with him wherever he chose to reside,[1] and this is as much a rule today as it ever was. Taking into account the changed social and economic atmosphere where not infrequently the wife is as much the bread winner as the husband, the court nevertheless held in Surjit Kaur v. Ujjal Singh[2] that, the husband acting bona fide, is entitled to determine the locus of the matrimonial home in such cases.

A petition for restitution of conjugal rights is however not maintainable on the ground of withdrawal from the society of the petitioner unless it is shown that the withdrawal is without reasonable excuse. The grounds for judicial separation, nullity of marriage and divorce have been recognised by the courts to be valid grounds for separate living disentitling the other spouse to a decree for restitution of conjugal rights.

(b) Judicial Separation

It is also open to either of the spouses to apply for a decree of judicial separation on any of the grounds specified in s. 13 (1),[3] and additionally to the wife, on any of the grounds specified in s. 13 (2)[4].

This particular provision of the HMA, like that contained in s. 9 is a measure aimed at reconciliation, and valuable in India even without reference to a possible petition for divorce, since it is the remedy appropriate to spouses in communities where divorce and remarriage are still disliked or are socially and economically impracticable.[5]

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1. Surinder v. Gurdeep, A.I.R. 1973 P. & H. 134, Radhakrishnan v. Dhanalakshmi, A.I.R. 1975 Mad. 331.
2. (1978) 80 Punj. L.R. 693.
3. Discussed below.
4. Ibid.
5. Derrett, IMHL, op. cit., at 206.

(c) Divorce

Hindus have, perhaps from the very beginning of their civilisation, regarded marriage as a sacrament, as a tie which once tied cannot be untied,[1] the intention of the sacrament being

> "(t)o make the husband and the wife one, physically and psychically, for secular and spiritual purposes, for this life and for after-lives." 2

The dharmaśāstra had thus established a high concept of marriage, and an orthodox marriage in the Brāhma form was final, the bride having entered her husband's family for good. She might be "superseded" by another wife on account of a few specified reasons but divorce as such was impossible. True, among certain communities of the lower castes women did possess more freedom, and customary divorce and remarriage were not unknown at any time in Indian history, but this was not the law according to Brāhmanical standards to which the others aspired.[3]

In modern times however, the growing realisation of the fallibility of human decisions, not least of all in their choice of marriage partners, had resulted in an ever growing awareness of divorce as a necessary though unhappy corollary to marriage, and despite injunctions of sacred scriptures to the contrary, divorce laws were passed in India in 1947 and 1949 in Bombay and Madras respectively. The HMA as amended by the ML(A)A 1976, merely consolidates that position and extends its jurisdiction to the whole of India,[4] so that both husband and wife may now petition a court for divorce on specified grounds. S. 13 HMA is therefore, it is submitted, a shift from the sacramental to the contractual concept of marriage, a bold

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1. P. Diwan, "Evolution of the Hindu Law of Marriage: From Sacramental Marriage to Breakdown-Divorce," Sontheimer and Aithal ed., Indology and Law: Studies in Honour of Professor J. Duncan M. Derrett (hereinafter referred to as IL), (Wiesbaden, Franz Steiner Verlag, 1982), 248-70, at 248.
2. Derrett, Critique, op. cit., at 287.
3. Sontheimer, "Recent Developments in Hindu Law", op. cit., at 35.
4. Except the State of Jammu and Kashmir. S. 1 (2), HMA.

declaration that the Hindu marriage is in effect nothing else if not a civil contract,[1] a legal rather than a sacramental union which may be terminated by a decree of dissolution by the Court.

The wife (and likewise the husband), may now present a petition for divorce on the ground of her husband's "voluntary sexual intercourse" with any person other than herself.[2] It is significant that the word "adultery" has been removed from the amended clause and judicial construction has been that even a single act of sexual intercourse subsequent to the marriage with a person other than the spouse will be enough to sustain a case.[3]

Cruelty[4] which in the unamended Act was a ground for judicial separation has been incorporated by the amendment of 1976 as a reason for divorce, and though it is difficult to define exactly what constitutes cruelty in all cases, the conduct complained of must be much higher than the ordinary wear and tear of married life.[5] In Abraham v. Abraham,[6] it was held that any conduct which causes disgrace to the wife, and annoyance and indignity amounts to legal cruelty; and the courts must determine not whether the petitioner has proved the charge of cruelty having regard to English law, but whether the respondent has treated the petitioner with such cruelty as to cause a reasonable apprehension in that person's mind that it will be harmful or injurious for that person to live with the respondent.[7] It may include cases other than those of injury and harm to

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1. It is noteworthy that, while in Harbhajan v. Smt. Brij Balab, A.I.R. 1964 Punj. 359, marriage was still held to be a sacrament under the HMA, the M.P. High Court, in defining the general character of a Hindu marriage stressed that, whatever else it is, it is also undoubtedly a contract with coequal rights. See Dhedu v. Mst. Malhanbai, A.I.R. 1966 M.P. 252.
2. HMA, s. 13 (1) (i).
3. Mahalingam v. Amsavalli (1956) 2 M.L.J. 289. Subramaniyam v. Ponnakshiammal A.I.R. 1958 Mys. 41. Valliammal v. Singaram, (1966) 2 M.L.J. 425.
4. HMA, s. 13 (1) (i-a).
5. Parihar v. Parihar, A.I.R. 1978 Raj. 140.
6. A.I.R. 1959 Ker. 75.
7. Dastane v. Dastane, A.I.R. 1975 S.C. 1534. Followed in Suresh Kumar v. Smt. Suman, A.I.R. 1983 All. 225; Mrs. Suresh Bala v. Major Gurmohinder, A.I.R. 1983 Del. 230.

one's body, limb or health.[1] It may be physical or mental. It may be by words, gestures or mere silence , violence or non-violence.[2] Thus while incompatibility of temperament will not amount to cruelty,[3] neglect and coldness leading to melancholia in the wife would.[4] Demand by the husband for excessive sexual intercourse leading to impairment of the wife's health, has been construed as cruelty in Kusum Lata v. Kamla Prasad,[5] and though mere refusal of sexual intercourse is not cruelty per se, persistent refusal would amount to cruelty.[6] Cruelty may also be construed if harm is done to reputation or social position.[7] Where the husband brings false charges of immorality against the wife, accuses her of adultery and persists in such accusations, such behaviour would undermine the health of any decent woman and would support her claim for relief.[8] In sum then, in construing cruelty, the economic position of the parties, culture, temperament, status in life are factors to be considered, and must be judged on the basis of the evidence on record and the totality of the circumstances of the case.[9]

What constitutes "desertion" which has also been added to the grounds for divorce under s. 13 (1) (1-b) is a course of conduct and may either be actual or constructive.[10] It is in essence a repudiation of the duties

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1. In Jagannadhan v. Savithramma, A.I.R. 1972 A.P. 377, it was held that cruelty does not lie in merely beating the spouse!
2. Dr. Narayan v. Mrs. Sucheta, A.I.R. 1970 Bom. 312.
3. Dastane v. Dastane, A.I.R. 1975 S.C. 1534. See also Ramesh v. Nandita, (1979) 1 C.W.R. 17.
4. Kaushalya v. Vijay Singh A.I.R. 1973 Raj. 269.
5. A.I.R. 1965 All. 280.
6. Nighawan v. Nighawan, A.I.R. 1973 Del. 200.
7. Susheela v. Gopalkrishna, (1975) K.L.T. 72.
8. Kuppuswami v. Alagammal, A.I.R. 1961 Mad. 391; Iqbal Kaur v. Pritam Singh, A.I.R. 1963 Punj. 242; Umribai v. Chittar, A.I.R. 1966 M.P. 205; Smt. Bhago v. Bant Singh, (1972) 74 Punj. L.R. 71.
9. Jia Lal v. Sarla Devi, A.I.R. 1978 J. & K. 69. See also Sreepadachar v. Vasantha Bai, A.I.R. 1970 Mys. 232; Neera v. Kishan, A.I.R. 1975 All. 337.
10. Derrett, IMHL, op. cit., at 207.

inherent in marriage, or a determination to put an end to the matrimonial relationship as a living reality.[1] The Supreme Court has explained that,

> "(F)or the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, viz (i) the factum of separation and (ii) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned: (i) the absence of consent, and (ii) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid." 2

Once therefore the animus or intention never to return to conjugal society is established, the offence of desertion de facto commences, and it is immaterial that the parties are under the same roof, for desertion is a withdrawal not from a place but from a state of things.[3] Constructive desertion on the other hand, includes conduct of such a character that the spouse is either forced to depart or forced to remain without enjoyment of a constituent right to which he or she is entitled by virtue of the marriage.[4] If one spouse by his words and conduct compels the other spouse to leave the matrimonial home, the former would be guilty of desertion though it is the latter who physically separates from the other and leaves the marital home.[5] In sum then, in deciding the question of desertion, the Court has to look at the conduct of both the spouses and it must be remembered that there is no substantial difference between a husband leaving his wife animus deserendi, and a husband who by his conduct with like intention brings cohabitation to an end by compelling his wife to depart from the matrimonial home.[6] Where however the wife is living apart with

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1. This in essence is the definition of the term in Rangaswami v. Aravindammal, A.I.R. 1957 Mad. 243; Lachman v. Meena, A.I.R. 1964 S.C. 40; Mallappa v. Neelawwa, A.I.R. 1970 Mys. 59; Chakradhar v. Kumudini, (1971) 1 C.W.R. 737; Labh Kaur v. Narain Singh, A.I.R. 1978 P. & H. 317.
2. Bepinchandra v. Prabhavati, A.I.R. 1957 S.C. 176 at 183.
3. Guha v. Guha, A.I.R. 1970 Cal. 266.
4. Derrett, IMHL, op. cit., 207-8.
5. Rangaswami v. Aravindammal, A.I.R. 1957 Mad. 243; Rohini v. Narendra, A.I.R. 1972 S.C. 459; Tara Chand v. Narain Devi, A.I.R. 1976 P. & H. 390.
6. Shrivastava v. Shrivastava, A.I.R. 1959 M.P. 349.

her hushand's consent, this would not amount to desertion.[1]

Further reasons for the dissolution of marriage are: ceasing to be a Hindu by conversion,[2] incurable insanity in its wider implication,[3] leprosy in a virulent and incurable form,[4] venereal disease in a communicable form,[5] renunciation of the world by entering a religious order,[6] of not having been heard of as being alive for a period of seven years or more,[7] non-resumption of co-habitation for a period of one year or more after the passing of a decree for judicial separation,[8] and non-restitution of conjugal rights for a period of one year or more after the passing of a decree for such restitution.[9]

In taking cognizance of the two last-named grounds, we must however beware of the pitfalls that the Indian wife faces when we consider the application of s. 23 (1) (a) to s. 13 (1-A). S. 23 (1) (a) HMA, inhibits the Court from granting a divorce to a petitioner who has successfully proved his "grounds," if the petitioner is in any way taking advantage of his own wrong or disability for the purpose of such relief.[10]

A certain pedestrian approach and a quite singular lack of imagination and compassion is nowhere more evident than in decisions[11] - not least

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1. Suresh Kumar v. Smt. Suman, A.I.R. 1983 All. 225.
2. HMA, s. 13 (1) (ii). The judgement in Vilayat Raj v. Smt. Sunila, A.I.R. 1983 Del. 351, confirms this.
3. Ibid., s. 13 (1) (iii).
4. Ibid., s. 13 (1) (iv).
5. Ibid., s. 13 (1) (v).
6. Ibid., s. 13 (1) (vi).
7. Ibid., s. 13 (1) (vii).
8. Ibid., s. 13 (1-A) (i).
9. Ibid., s. 13 (1-A) (ii).
10. J.D.M. Derrett, "When is an 'Own Wrong' Not a Wrong?" (1981) 1 M.L.J(J), 1-4, at 1.
11. See for instance, Bulaq Kaur v. Gurdev Singh, A.I.R. 1963 Punj. 493; Ramkali v. Gopal Dass, (1971) I.L.R. 1 Del. 6 (F.B.); Suryakantam v. Ranga Rao, (1973) 1 An. W.R. 158; Madhulkar v. Sarla, A.I.R. 1973 Bom. 55; Bimla Devi v. Singh Raj, A.I.R. 1977 P. & H. 167; Bimla v. Bakhtawar, A.I.R. 1977 P. & H. 69 (F.B.); Smt. Gajna Devi v. Purushotam A.I.R. 1977 Del. 178; Anil v. Sudhaben, A.I.R. 1978 Guj. 74; Bai Mani v. Jayanti Lal, A.I.R. 1979 Guj. 209. Gurmeet Kaur v. Harbans Singh, A.I.R. 1981 P. & H. 161.

in the Supreme Court's[1] — that, a "wrong" which had in the first place caused the breakdown of the marriage, is not a "wrong" within the meaning of s. 23 (1) (a). For the application of the section, the petitioner under s. 13 (1-A) (invariably the husband, Indian wives placing too high a premium on their marriages, however nominal, seldom petition for divorce, whatever their sufferings),[2] must be disabled by his conduct subsequent to the decree,[3] or in other words

> "(t)o be a "wrong" it must be located between the first decree and the instant petition and the suggestion was that if the wrong constituted a ground upon which the wife originally obtained relief it was, as it were, expended by the decree granting that relief." 4

Such a retrograde view is specially to the disadvantage of wives and, it is submitted, entirely inequitable and a misinterpretation of s. 13 (1-A) which

> "(a)dds a further remedy to ss. 9 and 10, a further consequence to those remedies, and must be judged not merely as an additional ground for divorce but also as part of the conception of matrimonial relief by stages, instead of by precipitate action." 5

The opposite, and by far the more acceptable view, because in consonance with justice, is based on the eminently equitable principle that, the Court must not grant relief to a party taking advantage of his own wrong. This view is indicated in a number of rulings[6] not least in that of a single bench decision of the Madras High Court in Soundarammal v. Sundara.[7]

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1. Dharmendra v. Usha, A.I.R. 1977 S.C. 2218.
2. Derrett, "When is an 'Own Wrong'...," op. cit., at 2
3. Emphasis mine.
4. Derrett, "When is an "Own Wrong...," op. cit., at 2.
5. Derrett, Critique, op. cit., at 360.
6. See Chaman Lal v. Mohinder Devi, A.I.R. 1968 P. & H. 237; Syal v. Syal, A.I.R. 1968 P. & H. 489; Laxmibai v. Laxmi Chand, A.I.R. 1968 Bom. 332; Someshwaru v. Leelavathi A.I.R. 1968 Mys. 274. Where however the petitioner husband is not guilty of creating obstruction and is, in fact found willing to take back the respondent and resume marital relations, s. 23 (1) (a) can have no application. See Rameshwari v. Kirpashankar, A.I.R. 1975 Raj. 28.
7. A.I.R. 1980 Mad. 294. See also Raghubai v. Satpal, A.I.R. 1973 P. & H. 117.

* That the signs are promising is evident in that the lead provided by the Madras High Court was subsequently endorsed in Geeta Lakshmi v. Sareswara Rao, A.I.R. 1983 A.P. 111; Murahari v. Vasantha, A.I.R. 1984 A.P. 54; O.P. Mehta v. Smt. Saroj, A.I.R. 1984 Delhi 159; Veena v. Avinash, A.I.R.

The husband having allowed his wife to depart, contracted a bigamous marriage and subsequently petitioned for divorce. In turning down the petition, Sathiadev J., was quite clear that where the husband's "wrong" originating before the judicial relief that founds the petition under s. 13 (1-A), continues unabated during that year, so that resumption of cohabitation is prevented by him (with or without specific intention on his part to that end), he cannot turn that judicial relief into the first stage of divorce in his own interest.[1]

Divorce by mutual consent has also been incorporated in the Act by the Amendment of 1976, provided that the parties have been living separately for a year or more, that they have not been able to live together, and that they have agreed that the marriage should be terminated.[2] Under this section no other ground is necessary for it would not be a reasonable and practical construction of the provision apart from being contrary to its clear meaning.[3]

Further grounds in the HMA for termination of the marriage, available to the wife alone[4], are that under s. 13 (2) (i) the pre-Act polygamous marriage of the husband entitles any wife to sue for divorce provided that the other wife (or wives) is alive at the time of the filing of the petition.[5] For the offences of rape, sodomy and bestiality on the husband's part, the wife is entitled to claim relief under s. 13 (2) (ii).

The ML(A)A additionally provides that if a maintenance order has been passed in favour of the wife under s. 18, Hindu Adoptions and Maintenance Act 1956 (hereinafter referred to as HAMA), or under s. 125 of the Cr.P.C. 1973,

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1. Summarised at Derrett, "When is An 'Own Wrong'...", op. cit., at 3. (cont.)*
2. HMA, s. 13 - B, provided however that such consent has not been procured by force, fraud or undue influence.
3. So it was held in Ravishankar v. Sharda, A.I.R. 1978 M.P. 44.
4. This, it is submitted, is in consonance with Art. 15 (3) of the Constitution to the effect that, "Nothing in this article shall prevent the State from making special provision for women and children."
5. HMA, s. 13 (2) (i). The reason for this rule is obvious. Since the Act cannot pronounce as invalid polygamous marriages contracted prior to its enactment, this section nevertheless offers relief to such wives as may desire escape from the miseries of such union. It was held in Lalitamma v. Kannan, (A.I.R. 1966 Mys. 178), that where the first wife sues for divorce under this section, it is not open to the husband to plead any conduct or disability on her part to bar the suit.

and since then cohabitation has not been resumed for one year or upward, the wife may sue for divorce.[1] So too, a wife may repudiate a marriage contracted earlier once she has completed fifteen years of age, but before she has attained the age of eighteen, whether or not the marriage was consummated.[2]

However as we review the quite extensive provisions of the HMA, there is no escaping the fact that the statute derives much of its inspiration from the English matrimonial laws[3] notwithstanding the assertion that,

> "(i)n our reforms of matrimonial law we display a unique conservation; the feeling, the psychosis is that Hindus are still a very conservative people and would not tolerate any rapid or radical reform." [4]

The provisions for divorce were without doubt introduced as a counter-balance to the introduction of monogamy. If a man might not marry a second wife in the lifetime of the first, it was obvious that, he must in some circumstances of hardship be able to divorce his first wife, and in keeping with the changing times, similar rights had to be conceded to the wife.[5] In the westernised societies this makes sense, for the monogamous marriage regime, with its complicated law of marriage and divorce was built upon the hypothesis that the union was due to the choice of the parties, and this always creates expectations and mutual reliance which may turn out to be ill-founded.[6]

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1. HMA, s. 13 (2) (iii).
2. Ibid, s. 13 (2) (iv), analogous to the "Option of Puberty"in Islamic law.
3. In its 71st Report of 1980, the Law Commission has proposed a further ground for divorce, i.e. the theory of irretrievable break-down of marriage modelled on s. 2, English Matrimonial Causes Act 1973. This recommendation has been accepted by the Government, and is soon to be passed as law. See Diwan, "Evolution of the Hindu Law of Marriage:...", IL, op. cit., at 267.
4. Ibid, at 258.
5. J.D.M. Derrett, "A Coparcener's Wife's Jeopardy," (1974) 76 Bom. L.R.(J), 9-11, at 9.
6. J.D.M. Derrett, "A Round-Up of Bigamous Marriages," (1967) 69 Bom. L.R.(J), 84-93 at 85.

In India on the other hand, they are not resorted to, either for considerations of financial settlement by the erring husband, given the problems of female remarriage, or more importantly, because they would defeat the very purpose for which such marriages are in the first place arranged, i.e. for the social advancement and prestige of the family. Conversely, in those instances where the law is resorted to, it is this very collapse of the prestige-structure, the insult to the family, rather than the husband's infidelity to his first wife which motivates such litigation.[1]

In this amorphous state

> "(t)he problem, so far as we are concerned, is what is the law doing towards the easing of the matrimonial tensions caused by the betrothal system, and what, if anything, does it do to prevent bigamous marriages which society itself would condemn? It is interesting to see how society is adjusting itself to the new laws, and still more interesting to see how the Courts are facing up to their unenviable responsibility." 2

(3) Succession

The Hindu Succession Act 1956, (hereinafter referred to as the HSA), "an Act to amend and codify the law relating to intestate succession among Hindus,"[3] is of particular significance in that the break with the traditional law is nowhere more violent than in the provisions of s. 14 which regulates women's rights of inheritance to a Hindu dying intestate.[4]

Since the main scheme of the Act was to improve the legal status of Hindu women, and to establish equality as between the sexes with regard to property rights, the effect of s. 14 is to abolish the old legal "limited" estate,[5] and to give to the Hindu female absolute rights over any property

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1. Ibid, at 86.
2. Ibid, at 86-7.
3. Preamble.
4. For a detailed discussion of the effects of s. 14 and the incidents thereof, see Chapter Six.
5. For an assessment of the "limited estate" see Chapter Three.

acquired either before or after the Act, provided she is "possessed"[1] of it, and this regardless of the school of law under which she is governed. The result for the widow has been that, such limited estate as she became entitled to under the Hindu Women's Rights to Property Act, 1937 (hereinafter referred to as the HWRPA), is now converted to an absolute tenure under s. 14 (1) HSA.

At one time the question which agitated the judicial mind was as to the effect of s. 14 on a grant of land to a female in lieu of her maintenance. The conservative stance that a bare right of maintenance not being a right to property, it is not a pre-existing right as such and therefore beyond the pale of s. 14 (1), may now in the face of the authoritative ruling of the Supreme Court,[2] be regarded as effectively quashed. The present position is that where the female was given lands by settlement or agreement or compromise, such grants for maintenance when made to widows of the family or unmarried daughters or widowed daughters in special circumstances are prima facie in recognition of a right previously acquired, and notwithstanding any restrictions in the instrument, come under s. 14 (1).

A question now remains whether s. 14 (1) will apply to grants made to females by will, or by settlement inter vivos on the part of persons who are under an obligation to maintain them, or whose estates would, in the ordinary way, be liable for their maintenance under the HAMA.[3] In view of the conflict of decisions, it has to be kept in mind that, the intention of Parliament was to abolish the legal limited estate, while preserving to anyone who had the right to convey property to the woman the natural and obvious right of conveying it subject to a limitation of his own choice.[4]

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1. For the judicial interpretation of the word in its wider implication see infra, at 468 ff.
2. Tulasamma v. Sesha Reddi, A.I.R. 1977 S.C. 1944, infra at 602 ff.
3. J.D.M. Derrett, "Landmarks in Family Law in 1977," (1978) K.L.T. (J), 13. at 13.
4. J.D.M. Derrett, "Section 14 (2) of the HSA: A Disturbing Decision from A.P., (1969) 71 Bom. L.R.(J), 62-72, at 64.

As the testator or settlor can discriminate against males, and give them limited estates, even when they are dependants, he can equally discriminate against females, provided that their rights of maintenance are not jeopardised thereby.[1]

The sensible way out of this impasse is, it is submitted, that where the female has a subsisting right of maintenance, as for instance the widow out of the joint stock, she takes absolutely under s. 14 (1). On the other hand, where the testator had full disposing power, she must take subject to any limitations written in the will, and her estate will then be the "restricted" estate envisaged in s. 14 (2).

In regard to the order of succession to males, s. 8 provides for simultaneous succession which is now confined to the inner family, and those to inherit preferentially under class I of the Schedule are daughter, widow, mother, son, son's survivors and son's surviving widow including the predeceased grandson's widow as well as daughter's children if the daughter is dead. Widows (if many as could be the case in marriages performed before 1954) all take jointly one share, and all other heirs who are survivors of dead sons and daughters take one share between them. This has meant in effect that the widow, mother and daughter now take a share each, equal to that of the son. It is noteworthy that amongst the twelve of what one may call the first or the primary heirs, no less than eight are females.

Because s. 14 (1) envisages an absolute tenure after 17th June 1956, the Hindu female now constitutes a fresh stock of descent, and devolution of her property after her death, as distinct from her father's or husband's as the case may be, is governed by s. 15.

As we have already noted, the share that a female heir takes becomes her absolute property under s. 14. As a special provision however, s. 23 of the HSA specifies that, despite the female heir's right of residence, the family dwelling - house may not be partitioned at their volition except

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1. Derrett, "Landmarks in Family Law ...," op. cit., at 13.

when the male heirs choose to divide their respective shares therein.

This might at first glance seem a violation of that independence of decision which is of the essence of absolute ownership. But as Derrett points out,[1] s. 23 is soundly based on Hindu psychology; while a female sharer cannot be ousted from her rightful share however inconvenient it might be for the male sharers to give it to her, it would also be wrong to allow the female heirs to demand partition of the house (for them to occupy or sell) before the male heirs actually divide the property.[2] The purpose of the section, not to intrude a stranger into a family dwelling-house is clear and a wide interpretation is consistent with its purpose.

This restriction apart, the right of residence is assured to all female heirs of class I except daughters unless they are unmarried, widowed, deserted by, or separated from their husbands. This confining of the rule to daughters only is difficult to understand, for the same reasoning would apply perhaps with greater force to a mother, to a son's daughter, or a daughter's daughter.[3]

Unchastity on the part of the wife, and, except to the extent as provided in s. 24, the remarriage of the widow after the coming into effect of the HSA, does not disentitle such females from inheriting. S. 24 on the other hand removes from the list of intestate heirs appearing in the Schedule certain widows of close relations, e.g. the son's widow, or brother's widow, if she has married again before the intestate dies. The fundamental

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1. See Derrett, Critique, op. cit., at 251 where he also draws our attention to Raghunandan v. Rambalak, A.I.R. 1964 Pat. 206, and Katara v. Smt. Hoshiari, (1967) All. L.J. 1031, where the meaning and purpose of the section are usefully investigated.

2. It must however be kept in mind that the restriction imposed by this section has no application to widows who inherited under the HWRPA 1937; and to that effect it was held in Upendranath v. Chintamani, A.I.R. 1963 Cal. 22, that since under such circumstances, the succession to the intestates' estate, would be governed by the HWRPA 1937, the widow was entitled to claim partition of the family dwelling house, as the right which had already accrued to her had not been abrogated by s. 4 of the HSA.

3. Derrett, Critique, op. cit., at 252. The same author further suggests that "If the Act is to be amended this may be reconsidered."

rule is that a female who, though a widow, if one of the family, is entitled to consideration as a possible heiress. But if she has already married again by the time the propositus dies, she is no longer a member of the family.[1]

A significant omission in s. 24 is the father's widow, and this, it is submitted, is inequitable, for by the parity of reasoning applicable to the son's or brother's widow, the step-mother on her remarriage must also forfeit the right to inherit from the family to which she no longer belongs.[2]

The provisions in regard to women in the HSA are thus most salutary, despite certain obvious faults and weaknesses, a step, it is submitted, towards the greater goal of equality, and when at last the Uniform Civil Code is drawn up, there can be no doubt but that s. 14 will have a part to play.

(4) Maintenance

The categories and degrees of female relatives who are entitled to maintenance under the HAMA is an indication of the care that the Legislature took to provide for the maintenance of all women who are intimately connected with the joint-family by reason of birth or marriage, and is again an instance of the great divide that exists between the śāstric injunctions and the modern law as envisaged in the Hindu Code.

(a) The Hindu's liability to maintain:

(i) The wife

The wife, whatever her conduct is entitled to claim maintenance from her husband, irrespective of whether he possesses property of any particular kind[3] and independently of any distinct demand for it.[4] The problem arises

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1. Derrett, Critique, op. cit., at 253.
2. Ibid.
3. Kandswami v. Angammal, A.I.R. 1960 Mad. 248.
4. Nagendramma v. Ramakotayya, A.I.R. 1954 Mad. 713.

where a woman lives separately from her husband. Normally she is under an obligation to live wherever he chooses, within reason[1], and pre-nuptial agreement to a different effect is not binding upon him.[2]

However, s. 18 (2) of the HAMA now provides for cases where for a number of specified[3] and non-specified reasons[4], the wife-provided that she is not unchaste or has ceased to be a Hindu[5] — is entitled to live separately from her husband without forfeiting her claim to maintenance.

(ii) The widowed daughter-in-law

Formerly the rights of the daughter-in-law extended, if at all, to the separate as well as the copacenary property of the deceased father-in-law. It was unenforceable during the father-in-law's lifetime (being treated as a moral obligation), but upon his death it attached to his property as a legal liability.[6] With the aid of the Pious Obligation[7] maintenance for the three years prior to the father-in-law's death might be recovered from his male issue.[8]

Under s. 19 of the HAMA however, the maintenance of the daughter-in-law is a statutory liability, and after her husband's death, the father-in-law

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1. Derrett, IMHL, op. cit., at 172.
2. Takait v. Basanta, I.L.R. (1901) 28 Cal. 751.
3. HAMA, s. 18 (2) (a)-(f), the grounds being the husband's desertion, or cruelty, or if he suffers from virulent leprosy, or if there is any other wife living, or if he habitually resides with, or keeps a concubine in the house, or has ceased to be a Hindu.
4. Ibid., s. 18 (2) (g), i.e. "if there is any other cause justifying her living separately."
5. Ibid., s. 18 (3).
6. Derrett, IMHL, op. cit., at 174.
7. Derrett explains the concept in ibid, at 310-11 as the sons', sons' sons', and sons' sons' sons' (usually for convenience called the "male issue"), liability to pay to the extent of their interest in Mitāksarā joint-family property, the private, untainted pre-partition debts of their male lineal ancestors. The word 'debt' expresses the Sanskrit ṛṇam, which includes failure to pay a sum morally due but undetermined (because irrecoverable) during the lifetime of the father: Nachimuthu v. Balasubramania, A.I.R. 1939 Mad. 450; Rupa v. Sriyabati A.I.R. 1955 Or. 28.
8. Rupa v. Sriyabati cited above.

is under a legal obligation to maintain her[1] if she has no property or earnings,[2] and neither her husband's estate nor the estate of her deceased parents[3] nor the means of her living children nor their estates when they are dead,[4] can maintain her. But the obligation extends only to coparcenary property out of which the daughter-in-law has not obtained a share, and ceases on her remarriage.[5] Where the father-in-law is possessed of both ancestral and self-acquired property, it was held in Jal v. Pala[6] that, if the father-in-law could well maintain his other dependants and himself out of his self-acquired property, the whole income, if necessary, of the ancestral property may be allotted to the daughter-in-law for her maintenance.

(iii) Children and aged parents

Under s. 20 (1) of the HAMA, a Hindu[7] is under a legal obligation during his or her lifetime to maintain his or her legitimate or illegitimate children, as also his or her aged or infirm parents whether he or she possesses any property or not, for the obligation to maintain these relations is personal and legal in character and arises from the very existence of the relationship between the parties.[8]

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1. HAMA, s. 19 (1).
2. Ibid, Proviso, s. 19 (1).
3. Ibid, s. 19 (1) (a).
4. Ibid, s. 19 (1) (b).
5. Ibid, s. 19 (2). This was explained by Ramaswami J., in Animuthu v. Gandhiammal A.I.R. 1977 Mad. 372, at 374 thus: "... where there is no factual obtaining of a share in the coparcenary property a widow could claim maintenance against the coparcenary property from her father-in-law ... Though her right to a share both in the separate and self-acquired property as well as the interest in the coparcenary property of her deceased husband is not liable to be divested on the ground of remarriage, her right to maintenance under ss. 19 and 22 will cease on such remarriage."
6. A.I.R. 1961 Punj. 391.
7. It must be noted that the HAMA, by providing that "a Hindu is bound during his or her lifetime ..." equally extends the scope of this particular obligation to mothers and daughters as to fathers and sons.
8. Nanak Chand v. Chandra Kishore, A.I.R. 1969 Del. 235 at 245. Bal Satva v. Varalakshmi, A.I.R. 1976 A.P. 365 at 368.

(iii-a) Children

Formerly the legitimate minor child and major unmarried daughter were entitled to maintenance from the father and the right extended to his separate property and to his interest in joint family property. The illegitimate daughter was confined to her remedy under the Cr. P.C. This prevented her from enjoying the ampler rights available at Hindu law to the major unmarried daughter, for under the Code the putative father is not liable to maintain a child beyond majority, nor has the daughter any right through the father, against his joint-family property for any purpose, including marriage expenses or dowry.[1]

Under s. 20 (1) HAMA however, both parents are liable to maintain minor[2] legitimate and illegitimate children provided the latter are not converted from Hinduism,[3] but in the case of an unmarried daughter, this obligation extends only in so far as she is unable to maintain herself out of her own earnings or other property.[4] There are some doubts as to whether in view of the expression "unmarried daughter" in s. 20 (3), a major unmarried daughter's entitlement to maintenance under the traditional law remains intact, but since such rights have not been expressly abrogated, the better view appears to be that they still subsist.[5]

(iii-b) Aged Parents

S. 20 (1) includes within its purview the maintenance of aged parents and is a departure from the traditional law in that it imposes on the Hindu, be it son or daughter, the duty of maintaining his or her aged or infirm

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1. Derrett, IMHL, op. cit., at 41.
2. HAMA, s. 20 (2).
3. S. 24, ibid, lays down: "no person shall be entitled to claim maintenance under this Chapter if he or she has ceased to be a Hindu by conversion to another religion."
4. Ibid, s. 20 (3).
5. Derrett, IMHL, op. cit., at 40-1. If the term "unmarried daughter" includes a major unmarried daughter, it must likewise include divorced and widowed daughters, and in Khanta v. Shyam, A.I.R. 1973 Cal. 112. it was held that where on her husband's death she was left destitute, the daughter was an "unmarried daughter" within the meaning of s. 20 (3).

parents.

The obligation is personal and does not depend on the inheritance of any property. As the only condition superadded to this obligation is the condition in s. 20 (3) that, the parents must be unable to maintain themselves out of their earnings or other properties respectively,[1] it would follow that even an unchaste mother may have to be maintained by her son "for the statute lays down no condition and the former law insisted upon none."[2]

Though the Explanation to s. 20 specifies that "parent" includes a childless step-mother, step-mothers are not entitled to be maintained by step-sons when their own sons are capable of maintaining them.[3] But where provision has been made for maintenance and it has been lost or squandered, there seems to be no rule of law which would prevent the parent having recourse to the child for maintenance, and all agreements are open to review under s. 25 HAMA if there has been a material change of circumstances.[4]

(b) Maintenance of Dependants of the Deceased

Formerly maintenance out of the estate of a deceased male fell into two categories; firstly came those who were maintained by him during his lifetime as a matter of obligation. Secondly came those whom he was morally but not legally obliged to maintain during his lifetime, but whose maintenance became a legal obligation upon his estate after his death, and the

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1. It has been rightly pointed out in Mst. Samu v. Shahji, A.I.R. 1961 Raj. 207, at 209 that, "The Court will, as under the former law refuse maintenance to a mother or a step-mother who has already inherited a son's share or taken a share at partition," for this is violative of the condition in s. 20 (3). On the other hand, "There is nothing therein (in the HAMA) which would militate against the mother to claim a share at a partition between the sons ... if it is available to her under the ordinary Hindu law," at 208.
2. Derrett, IMHL, op. cit., at 43.
3. Hemangini v. Kedar, (1889) L.R. 16 I.A. 115.
4. Derrett, IMHL, op. cit., at 43-4.

heirs could not, under the old system evade the moral duties which the propositus himself might evade.[1]

December, 1956 saw significant changes, and under the HAMA those who claim to be dependants and who are not disqualified, may be entitled to be maintained for life or until forfeiture or until the limit specified in the statute as the case may be[2] out of the net estate, at the expense of the heirs and legatees, provided that the latter are not themselves dependants, and provided that such claims would not reduce the incomes of the latter below the amount which the Court would award them if the situation were reversed.[3]

S. 22 of the HAMA thus provides that the heirs[4] of a deceased Hindu are liable to maintain dependants who have not obtained by testamentary or intestate succession any share in the estate of a Hindu,[5] and where the deceased died after the HAMA had come into force.[6] The female dependants as enumerated in the Act are the mother[7] who, in order to be maintained out of her deceased child's estate does not have to be old and infirm which is a condition under s. 20; the widow so long as she does not remarry,[8] the unmarried daughter,[9] grand-daughter and great-grand-daughter provided and to

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1. Derrett, IMHL, op. cit., at 420-1.
2. HAMA, ss. 21, 24.
3. Ibid, s. 22 (4).
4. In Gulzara Singh v. Smt. Tej Kaur, A.I.R. 1961 Punj. 288, it was held that the expression "heir" used in s. 22 includes all those on whom the estate of the deceased devolves whether on intestacy or by means of a testamentary instrument like a will. The principle is that whoever gets the estate of the deceased or a part of it must, in proportion get along with it a corresponding obligation or burden of maintaining the dependants of the deceased.
5. HAMA, s. 22 (2)
6. Ibid.
7. Ibid, s. 21 (ii).
8. Ibid, s. 21 (iii).
9. An unmarried daughter who has taken a share in the deceased father's property as an heir under the HSA 1956, cannot claim any further right as against the other heirs for her maintenance and marriage expenses. See Kapur Kaur v. Kishen Singh, A.I.R. 1970 Punj. 270; Lalithamba v. Venkatalaxmi (1970) 1 An. W.R. 245.

the extent that she is unable to obtain maintenance, in the case of a grand-daughter from her father's or mother's estate, and in the case of a great-grand-daughter from the estate of the father or mother or the paternal grandparents.[1] In the case of a male propositus, the widowed daughter[2] provided and to the extent that she is unable to obtain maintenance from her husband's estate,[3] from her son or daughter or the estate of either of them[4] or from her father-in-law, or his father or the estate of either of them,[5] is additionally an heir, as also the son's widow or the widow of a predeceased son so long as she does not remarry provided and to the extent that she is unable to obtain maintenance from her husband's estate, or from her son or daughter or their estate, and in the case of the grandson's widow, also from the father-in-law's estate;[6] and the illegitimate daughter so long as she remains unmarried.[7]

(c) Inconsistencies and Omissions

The list of female dependants is thus long though not exhaustive as we shall presently see, and despite the generally favourable trend that the HAMA sets, certain inconsistencies and omissions are at once evident to which we must now turn our attention.

(i) Daughters

The term 'unmarried' in s. 21 (v) must connote both widowed and divorced daughters as well, but while special provision is made for the widowed daughter in s. 21 (vi), we are left wondering whether equity does

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1. HAMA, s. 21 (v).
2. Ibid, s. 21 (vi).
3. Ibid, s. 21 (vi) (a).
4. Ibid, s. 21 (vi) (b).
5. Ibid, s. 21 (vi) (c).
6. Ibid, s. 21 (vii).
7. Ibid, s. 21 (ix).

not demand that a divorced daughter deprived of her alimony be also included in the list of dependants. Moreoever in the commendable recognition of the rights of the illegitimate daughter, it is again baffling that a distinction should be made and her dependancy restricted to "so long as she remains unmarried,"[1] which would naturally suggest "until her (first) marriage." Not everyone would agree that, in the contemplation of these revised rules, there should be a distinction between a legitimate and an illegitimate daughter,[2] and it is submitted that, in construing the relevant provisions, the Courts should extend the latitude of the interpretation to give a wider definition than the literal and narrow construction of the sub-sections would suggest.

Attention must also be drawn to the wording of s. 21 (vi) according to which the widowed daughter of the male propositus only has a claim.[3] The omission of the word "her" can only be regarded as a slip of the pen when we consider the scheme of the HAMA in its entirety, and it is to be hoped that in considering such amendments as may be necessary, Parliament will amend the phrase to include "his or her" and thus bring it in line with the general scope of the Act which envisages the liability of both males and females towards the new class of dependants.

(ii) Paternal Grandmother

The Hindu Code has considerably weakened the structure of the joint-family, and with nuclear families on the increase, a source of considerable anxiety is the omission of the paternal grandmother[4] from the list of

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1. HAMA, s. 21 (ix).
2. Derrett, Critique, op. cit., 267.
3. Contrast this with the wording of s. 21 (vii) where however the word "his" is correct, as the rights of the widowed daughter-in-law can figure only in the patrilineal joint-family or in a social context analogous to it: Derrett, Critique, op. cit., at 267.
4. The plea does not include the maternal grandmother as the patrilineal character of the family, whether joint or nuclear, is bound to continue.

dependants in the HAMA. As her position now stands, she is not an heir either, and all that survives is her right of maintenance; but unless such right is made a charge on the estate which the heirs or legatees take, there will not infrequently be indigent grandmothers whose maintenance is not actually a charge on the estate in the hands of their grandchildren.

It is to be devoutly hoped that this omission be rectified, and paternal grandparents be given their due and recognised as dependants in such future amendments of the Act as may be in the contemplation of Parliament.

(iii) Concubines

The absence of the concubine from the list of dependants also requires careful reconsideration, for the legal right which she had heretofore enjoyed has been thoughtlessly diminished under the HAMA. At traditional law, the concubine faithful to her deceased paramour, could obtain maintenance out of his interest in the joint-family property for her life so long as she remained faithful.[1]

After 1956 the combined effect of the new succession and maintenance laws has been to cut down her claims drastically. She has no right as a dependant; there is no obligation which the law directly acknowledges binding upon the sons to maintain their father's concubine. The paramour must provide, if at all, for her by his will, but all testamentary bequests are liable to be cut down by the claims of the dependants whom the law acknowledges,[2] and in any event if the deceased fails to leave such a legacy there is normally no remedy. In the event of a legacy, the concubine must, in the normal course of events, contend against the machinations of the legitimate family.[3]

In a Supreme Court ruling,[4] it was held that a permanently kept

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1. Derrett, IMHL, op. cit., at 422.
2. Derrett, "A Round-up..." op. cit., at 91.
3. Derrett, Critique, op. cit., at 81.
4. Gopala Rao v. Sitharam Amma, A.I.R. 1965 S.C. 1970.

concubine whose paramour had died before the Act, is entitled to claim maintenance for herself and her children out of the paramour's estate, for the HAMA could not interfere with her vested rights.[1] And by parity of reasoning her rights against joint-family property will remain unaffected if her paramour's interest passes by survivorship under s. 6 of the HSA which lays down:

> "(W)here 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 specified in Class 1 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."

However those will be comparatively rare cases after 1956 where the paramour dies joint with any coparcener or owner of an interest in coparcenary property but leaves no surviving female relative in class I of the Schedule to the HSA and no daughter's son,[2] and in any case in view of the rights of the large number of persons who can legitimately claim to be dependants, claims by concubines would prima facie be a waste of time.[3]

It has been persuasively pleaded that the way out of this problem may be for the heirs and legatees to show, as against the claims of the dependants, that there is a concubine of the deceased who must somehow be maintained unless the whole family is to lose face,[4] and it would then not be inequitable for a sympathetic judge to allocate some property to her as

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1. And this is in accord with the decision in Gowardan v. Gangabai, A.I.R. 1964 M.P. 168, to the effect that, while s. 21 read with s. 22 of the HAMA creates new rights and liabilities relating to maintenance, it does not affect the old Hindu law regarding the right to maintenance in respect of coparcenary property.
2. The list of heirs in class 1 of the Schedule to the HSA who oust the concubine's rights are daughter, widow, mother, and the son of a predeceased daughter.
3. Derrett, IMHL, op. cit., at 422.
4. See Derrett at ibid.

a creditor of the estate even in the absence of proof of any legacy or testamentary contract.[1]

Were this to happen in every case, we could all heave a sigh of relief and consider the problem settled. But this solution is based on the hypothesis of congeniality and good-will as between the parties, and the reality as we all know, could well be a different story. A far more simple expedient, it is submitted, is to carry on the traditional spirit of the ancient law and amend s.22 so as to include the concubine in the list of dependants, and thus make her rights more realistic and definitive.

(5) Adoption

In so far as adoption is concerned, the HAMA is more an amending than a codifying Act,[2] for the whole concept of adoption has undergone radical changes with far-reaching consequences.

Adoptions according to traditional Hindu principles take place in order to provide a male Hindu with an heir who will perform his śrāddha ceremonies after his death. However in actual practice many adoptions took place among Hindus for other reasons besides the technical one. Kindness to friends or relatives with many sons but small assets, the desire to keep a particular branch of the extended family alive and to prevent a failure of lineal succession to a particular estate, the desire on the part of the widow to be supported in her old age, and especially in the case of widow-adopters, a desire to deprive relations of a share of the family property — these motives were associated with the religious motive,[3] and it was only

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1. The observations of Iravati Karve are pertinent here for as she points out, "A concubine is a woman who lives with a man for the whole of his life and one would expect that he should be made to provide for her... This omission (of her rights in the Hindu Code), goes against natural justice, serves no moral purpose and unnecessarily restricts the law only to one community:" Hindu Society - An Interpretation, (Poona, Deccan College, 1961), at 150.

2. S.V. Gupte, Hindu Law of Adoption, Maintenance, Minority and Guardianship, (Bom. Tripathi, 1970), at 223.

3. Derrett, Critique, op. cit., at 124.

in 1933 that the Privy Council in Amarendra v. Santan Singh[1] finally laid down that adoption was essentially a spiritual affair, the secular motive being only secondary.[2]

The fiction of "relation back" at Mitākṣarā law, i.e. the notion that the adoption must relate back to the death of the adoptive father,[3] is also an indication that, in the end, adoption is for the Hindu nothing, if not a spiritual sacramental affair. Carried to its logical conclusion the inconvenience and injustice it caused might well be imagined, and the Supreme Court in Shrinivas v. Narayan[4] at last authoritatively determined that the claim of the adopted son to divest a vested estate rests on a legal fiction and the legal fiction must not be extended so as to lead to unjust results.

The HAMA departs in certain essential aspects from the traditional Hindu law, and while like the HSA, the notion of equality as between the sexes has been extended by the HAMA in certain areas of adoption, it is nevertheless submitted that a certain male bias is evident in some of its provisions which stress the Hindu male's rights over and above those of the female's.

(a) The Female's Capacity in Regard to Giving in Adoption

The HAMA provides that the father, the mother, the guardian with the Court's permission can alone give a child in adoption.[5]

The father's capacity to give is absolute,[6] provided that he is not of

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1. A.I.R. 1933 P.C. 155.
2. The Supreme Court in Chandrasekhara v. Kulandaivalu, A.I.R. 1963 S.C. 185, confirms the view that the object of adoption was principally religious and not material.
3. This theory has resulted in grave difficulties, for the spiritual needs of the father being paramount, the adoption of a son by the widow had the effect of disturbing titles to already vested separate and joint-family properties.
4. A.I.R. 1954 S.C. 379. The rule is further developed and confirmed in Krishnamurthi v. Dhruwaraj, A.I.R. 1962 S.C. 59.
5. HAMA, s. 9 (1).
6. Ibid., s. 9 (2).

unsound mind, or has renounced the world.[1] But this absolute right is subject to one condition, namely that the mother must give her consent where she is not incapacitated by reason of insanity, renunciation of the world or by ceasing to be a Hindu.[2]

Apart from this, the right accorded to the mother under s. 9 (3) is to the effect that a mother may give her legitimate or illegitimate child in adoption if the father (of the legitimate child) is dead, or has renounced the world, or has ceased to be a Hindu. In effect then, the Act deprives a married woman to give in adoption in her own right, and the living, undisqualified, father's consent does not validate a gift in adoption by the mother.[3] On the other hand, a mother may give her illegitimate child in adoption irrespective of the existence or qualification of the putative father, since "father" in the relevant section of the Act cannot include a putative father.[4]

Explanation (i) to s. 9 makes clear that the expression "mother" does not include adoptive mother, and in view of this explanation it was held in Dhanraj v. Suraj Bai[5] that neither can the term "mother" be held to include by implication the step-mother. The result of this is that where the husband has died or is disqualified, while the natural mother may give her child in adoption under s. 9 (3), the adoptive mother is deprived of any such right, and in view of the Supreme Court reasoning,[6] neither can a step-mother her step-child.

(b) The Female's Capacity in Regard to Taking in Adoption

The respective capacities of a male and of a female Hindu to take in adoption vary, and as in the case of the capacity to give, so the capacity

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1. Ibid, s. 9 (3). He must also not have ceased to be a Hindu.
2. Ibid, s. 9 (2).
3. Derrett, IMHL, op. cit., at 97-8.
4. Ibid, at 98.
5. A.I.R. 1975 S.C. 1103.
6. Ibid.

to take is essential to the adoption's validity.[1]

The husband may of course take a child in adoption.[2] However whereas, under the former law, the husband could adopt without the consent of the wife or wives and even against her wishes, the consent of the wife under the HAMA[3] is a pre-requisite for the validity of the husband's adoption. Such consent may be dispensed with if she has ceased to be a Hindu or has renounced the world, or has been judicially declared of unsound mind.

It is interesting to contrast that, while essentially it is only the wife's consent that validates the adoption of the husband, the HAMA in laying down that it is only the female Hindu who is of sound mind,[4] who is not a minor,[5] who is single,[6] or if married the marriage has been dissolved by divorce, the husband's death or his renunciation of the world, his ceasing to be a Hindu, or of being of unsound mind,[7] distinctly makes clear that it is not within the jurisdiction of the married woman to adopt even with the consent of her husband.

No doubt by her husband's adoption, a female Hindu "adopts" by becoming the adoptive mother of a child adopted by her husband.[8] But in the end the adoption is not hers: it is her husband's.

(c) Adoption by a Single Woman

Parliament has now made it possible for a single woman, be she unmarried, divorced or widowed to adopt[9] provided she is of sound mind[10] and

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1. Derrett, IMHL, op. cit., at 101.
2. HAMA, s. 7.
3. Ibid, expl. to s. 7.
4. Ibid, s. 8 (a).
5. Ibid, s. 8 (b).
6. Ibid, s. 8 (c).
7. Derrett, IMHL, op. cit., at 104.
8. Ibid.
9. HAMA, s. 8 (c).
10. Ibid, s. 8 (a).

not a minor.[1] She may adopt not only a son but a daughter as well, and this new right is both revolutionary and fundamentally opposed to the genius of the Hindu law where the adoption of a girl, serving no sacramental purpose, is an unheard-of concept.[2]

Should the unmarried, divorced or widowed woman wish to adopt, she will not adopt to anyone else, and where she marries or remarries, as the case may be, the husband becomes the step-father of the adopted child. The child's entitlement to be maintained attaches to the new mother only, and it is not open to the step-father to adopt him or her to himself, as the adoptive mother is barred from giving in adoption.[3]

All such adoptions, by women capable of independent adoption under the provisions of the HAMA are legal, but only those by widows within the śāstric conception of such adoptions can also be sacramental.[4] This is reinforced when we consider that, though the new law allows all widows to adopt, nevertheless if the mother-in-law adopts after the daughter-in-law, her adoption will still[5] be void as offending against the principle that a woman with a son's son cannot adopt, and this is in effect the triumph of the sacramental principle over the principle that "law must enable rather than disenable."[6]

(d) The Doctrine of "Relation Back" and the HAMA

The doctrine of "relation back" in Anglo-Hindu jurisprudence refers to the system where the adopted son was considered as having been born on the

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1. Ibid, s. 8 (b).
2. Raghavachariar, op. cit., at 1166-7.
3. HAMA, s. 9 Expl. (1).
4. Derrett, Critique, op. cit., at 131.
5. It has long been settled that, once extinguished, a widow's capacity to adopt could not be revived, and in Gurunath v. Kamalabai, A.I.R. 1955 S.C. 206, the Supreme Court relying on Bhooban v. Ram, (1865) 10 M.I.A. 279, and Pudma v. Ct. of Wards, (1881) L.R. 8 I.A. 229, established that "The power of a widow to adopt comes to an end by the interposition of a grandson or son's widow competent to adopt." See also Venkalakshmi v. Jagannatha, A.I.R. 1963 Mad. 316.
6. Derrett, Critique, op. cit., at 133.

date of the adoptive father's death where the widow adopted to her deceased husband. The consequence of this was that all those properties which had vested in others but which belonged to the adoptive father at the time of his death, were recoverable by the adoptive son, except such of those properties which had been alienated by the intermediate owner for legal purposes, i.e. for legal necessity or for the benefit of the estate.

As can well be imagined, this gave rise to endless difficulties. Everyone was agreed that the chaos caused in respect of property rights was a disgrace and should be stopped,[1] and s, 12 proviso (c) of the HAMA by laying down that

> "(t)he adopted child shall not divest any person of any estate which vested in him or her before the adoption,"

appeared to have done precisely that, and to this effect it was held in Arumugha v. Valliammal,[2] that, as the widow adopts only to herself, such adoption in no way affects the devolution or enjoyment of property by others.

As against this provision however, one has to take into account the effect of s. 12 of the HAMA which unambiguously states that,

> "... from the date of the adoption ... all the ties of the child 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."

The inevitable contradiction of these provisions had the effect of puzzling the judiciary severely. On the one hand it was thought that an adoption made after the Act came into force could give the adoptee no rights at all; while on the other hand it was felt that he was a member of his adoptive father's family and could participate in its property. The technical meaning of 'vested' came into view, and the unresolved question was whether property owned but not vested in the owner, e.g. an interest in Mitākṣarā coparcenary property came within s. 12, prov. (c).[3] That

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1. J.D.M. Derrett, "Adoption and Relation Back: The Position in 1971," (1971) 73 Bom. L.R. (J), 31-35 at 31.
2. A.I.R. 1969 Mad. 72. See also Hanumantha v. Hanumayya, (1964) 1 An.W.R. 156.
3. Derrett, "Adoption and Relation Back...," op. cit., at 32.

"relation-back" is still alive albeit in residual form in view of proviso (c) to s. 12, is now confirmed by the Supreme Court,[1] and the widow's adoptee, provided he is adopted in the Anglo-Hindu sense of a dattaka adoption, may "divest" the sole surviving coparcener, with all the old ancillary reliefs,[2] as he could an alienee of property improperly alienated by the widow prior to 1956. However, where the widow becomes full owner under s. 14 of the HSA, she is saved from the operation of relation back on the principle that an estate once vested cannot be divested.[3]

(6) Guardianship and Custody

The Hindu Code has made comprehensive provisions for the guardianship and custody of minor children, and in this aspect too, women have their part to play.

(a) Guardianship under the HAMA

The term "guardian" in the Explanation (1)(a) to s9 of the HAMA would include a female having the care of the person of a child, or of both his person and his property who has been appointed as such by the will of the child's father or mother,[4] or by the Court[5] where both the parents are dead, or have renounced the world, or abandoned the child, or are of unsound mind, or the parentage of the child is not known.[6]

(b) Guardianship under the Hindu Minority and Guardianship Act, 1956[7]

The HMGA further regulates the guardianship of a "minor", which according

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1. See Sawan Ram v. Kalawanti, A.I.R. 1967 S.C. 1761; Sitabai V. Ramchandra, A.I.R. 1970 S.C. 343.
2. J.D.M. Derrett, "Adoption: The Whole Hog," (1971) 74 Bom. L.R. (J), 97-9, at 99.
3. For a detailed discussion of the effects of "relation back" in the light of the HSA and the HAMA, see Chapter Six, at 517 ff.
4. HAMA, s. 9, Expl. (1) (a).
5. Ibid, s. 9, Expl. (1) (b).
6. Ibid, s. 9 (4).
7. Hereinafter referred to as the HMGA.

to the Act means a person who has not completed the age of eighteen years,[1] while the guardian is "a person having the care of the person of a minor or of his property or of both his person and property,"[2] and these may be either natural guardians,[3] or testamentary guardians,[4] or guardians appointed or declared by a Court.[5]

(i) Natural Guardians

Under ss. 6 and 7 of the HMGA, the natural guardians in respect of the person as well as the property (excluding the undivided interest in joint-family property if any), are, in the case of a legitimate boy (incluidng an adopted son),[6] and a legitimate unmarried girl[7] (including an adopted daughter),[8] is first the father and after him the mother,[9] and remarriage as such does not operate as a disqualification to guardianship.[10]

Custody (which is granted specifically by the court on terms, usually as a concomitant to matrimonial relief decreed to a parent),[11] would normally be with the mother until the minor reaches the age of five.[12] Yet should the mother neglect the child, custody will be given to the father at his application.[13]

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1. Ibid., s. 4 (a).
2. Ibid., s. 4 (b).
3. Ibid., s. 4 (i).
4. Ibid., s. 4 (ii).
5. Ibid., s. 4 (iii).
6. Ibid., s. 7.
7. Ibid., s. 6 (a).
8. "The provisions of the HMGA, (which refers only to a 'son') must not be read in too narrow a sense": Derrett, IMHL, op. cit., at 116-7.
9. HMGA, s. 6 (a). Matrilineal families are now equally bound by the rule. See Raghavan v. Lakshmikutty, A.I.R. 1961 Ker. 193.
10. See Bakshi Ram v. Mst. Shula Devi, A.I.R. 1960 Punj. 304; Kusa v. Baishnab, A.I.R. 1966 Or. 60.
11. Derrett, IMHL, op. cit., at 48.
12. HMGA, s. 6 (a).
13. Vasudevan v. Viswalakshmi, A.I.R. 1959 Ker. 403.

In the case of an illegitimate (unadopted) boy, or an illegitimate, unmarried (unadopted) girl, the mother is the first natural guardian,[1] and after her the father,[2] assuming his paternity can be established; provided however that neither the mother nor the father has ceased to be a Hindu,[3] or has renounced the world by becoming an ascetic.[4] The Explanation to s. 6 also makes clear that for the purposes of guardianship, a step-mother or a step-father may not be considered.

(ii) Testamentary Guardianship

Though the statute gives the father, entitled to act as the natural guardian of his minor legitimate children, the right to appoint by will, a guardian in respect of the minor's person or property or both,[5] nevertheless such testamentary guardianship shall not commence during the mother's life-time, but may operate after her death.[6]

The mother, if not disqualified, has the right to appoint a guardian by will in respect of the child's person or property or both if the child is her legitimate child and she is a widow, or the father is disqualified from acting as guardian.[7] In the event that a father appoints a guardian to take over guardianship after the mother's death, and she in her turn makes a valid testamentary appointment of a guardian to the same child, the father's appointment must be presumed to be extinguished.

As the natural guardian of her minor illegitimate children, the mother has a similar right to appoint a guardian by will in respect of the minor's

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1. See Kanwal Singh v. N.K. Singh, A.I.R. 1961 Punj. 331.
2. HMGA, s. 6 (b).
3. Ibid, Proviso (a) to s. 6.
4. Ibid, Proviso (b) to s. 6.
5. Ibid, s. 9 (1).
6. Ibid, s. 9 (2).
7. Ibid, s. 9 (3).

person or property or both.[1]

It is noteworthy that though the fundamental proposition common to both the modern and former systems embodied in s. 13 is that, in the appointment of any person as guardian "the welfare of the minor shall be of paramount consideration,"[2] and if the court is satisfied that his or her guardianship will not be for the welfare of the minor, such person shall not be entitled to the guardianship,[3] nevertheless

> "(I)t is well to remember that though in all cases of custody and guardianship the welfare of the minor is the paramount consideration, it is not the only consideration: the claims of an unimpeachable parent for example, must be given due weight."[4]

From the foregoing it is clear that the "Hindu Code" is in many ways a clear break from tradition, and despite numerous inconsistencies and anomalies that are inevitably the result of piecemeal legislation, it anticipates the dawn of an era of uniformity and egalitarianism in the personal law of the Hindus.

7. Muslim 'Intransigence' towards Codification

The Hindu Code has thus given, by and large, uniform laws of marriage, divorce, minority, guardianship, adoption, maintenance and succession to all those Indians not professing Islam, Christianity, Judaism or the Zorastrian faith. These enactments have changed the face of its personal law to such an extent that the majority community has little concern at present about either reform of its personal law, or of its replacement by a common civil code. The Christians and Parsis have taken no noticeable objection to the merger of their personal laws into a common civil code

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1. Ibid, s. 9 (4).
2. Ibid, s. 13 (1).
3. Ibid, s. 13 (2), and this provision has been amply vindicated in several well-testified judgments. See for instance, Balaram v. Rajani, A.I.R. 1964 Pat. 505; Kusa v. Baishnab, A.I.R. 1966 Or. 60; Subramanyam v. Santa, A.I.R. 1967 A.P. 294; Santha v. Cherukutty, A.I.R. 1972 Ker. 71; C.S. Reddy v. Yamuna Reddy, A.I.R. 1975 Kant. 134; Mohini v. Virender, A.I.R. 1977 S.C. 1359.
4. Derrett, IMHL op. cit., at 50, who then cites English decisions to support this rule of equity: Re O. (Infants), (1962) 2 All E.R. 10; In Re L. (1962) 3 All. E.R. 1 (CA) the adulterous mother failing to obtain custody of her two young daughters in the latter decision.

either. The fast dwindling Jewish minority too, it is commonly assumed, would not present any major obstacle to the idea of reforming their religious law or, of its replacement by a unified personal law, as Israel has already taken the lead in this matter and set the example for Indian Jews to follow in their own country.

The stumbling-block is the Muslim citizen whose intractability in regard to the question of the reform, much less abolition, of his personal law, is perhaps the only impediment in achieving the ideal laid down in Article 44. Speaking of Muslim law, Lord Macmillan points out that "Obedience to the law is still for the Mohamedan (sic) not a matter of ethical duty or social expediency, but a matter of religion."[1] To what extent such a statement is true, we will duly examine, but certainly the Muslims in India continue to urge that a great deal of their personal law has religious sanction behind it. An irrational objection is so much more serious than a rational one because one cannot convince anyone of its falsity. If Muslims think their law is religious, it is religious.[2] To adapt a comment from D.E. Smith, most scholars would hold that if for a thousand years Muslims have regarded a particular social practice as part of their religion, it is a part of religion, and we are wasting our breath if we try to tell them otherwise.[3]

The pertinent question however is : Does amendment or abrogation of the Muslim law violate the religious and cultural rights of the Muslims as guaranteed by Art. 25 (1) of the Constitution? Muslim law purports to be based on the commandments of God in His revelations through the Prophet Mohammed in the Qur'an and the Sunnah, the precepts of the Prophet, which together form the Shariah (Shariat in Urdu) or fiqh, the jurisprudence of

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1. Law and Other Things, (Camb.,Univ. Press, 1937), at 59.
2. Derrett, RISI, op. cit., at 535.
3. Ibid.

Islam. It is therefore, on the face of it, sacrosanct for the true believer, and the Shariat Convention held in Bombay in December, 1979 gave voice to the view that Muslim Personal law in India being divine, it is immutable, so that any attempt by the Government to reform it by direct or indirect legislation would be considered by the Muslims as interference in religion which they would not tolerate under any circumstances.[1]

It is submitted however that, the Shariah as we know it today was never an integral part of Islam as preached by Mohammed and followed by the early Muslims. It was the outcome of a complex historical evolution extending over a period of three centuries,[2] which had assimilated in itself a considerable amount of Pre-Islamic customary tribal law, and inevitably, elements from other established ancient laws as well. It was not until the 10th century that Shariah law was cast in a rigid mould. It remained practically unchanged for nearly a thousand years, till legal developments during the present century in countries of West Asia completely dispelled the notion of the Shariah as a rigid and immutable system. Similarly in India too, Islamic law proper, that is, the Shariah or fiqh in its pristine purity, has never really been known.

With the takeover of India by the British, for all that it became a matter of policy for the rulers to adjudicate on the basis of the various personal religious laws of the subject people,[3] nevertheless as the courts of the East India Company gave place to the Crown, English judges presiding over the Indian Courts were instructed that where no specific rules were laid down they were to act according to "equity and good conscience,

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1. See T. Mahmood, Muslim Personal Law, (New Dehli, Vikas, 1977), at 153.
2. N.J. Coulson, A History of Islamic Law, (Edinburgh, Univ. Press, 1964), at 4.
3. Art. XXIII of the Regulation of 1772 expressly provided that "(i)n suits regarding inheritance, marriage, caste, and other religious usages and institutions, the laws of the Koran, with respect to the Mahomedans, and those of the Shaster with respect to the Gentoos, and where only one of the parties shall be a Mahomedan or Gentoo, the laws and usages of the defendants shall invariably be adhered to."

* See references to A.A.A. Fyzee given by Derrett at RISI, op. cit., at 513, f.n.2.

(which was) generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances."[1]

Thus the system known as "Muhammadan Law" in India, Pakistan and Bangladesh, is the Shariah as modified by English law, both common and statutory, and Equity in the varying social and cultural conditions of the subcontinent. "Muhammadan Law," an expression introduced by European scholars and lawyers is therefore a convenient expression for that portion of the Islamic civil law which is applied in the subcontinent to the adherents of Islam as a personal law.

It is therefore clear that what is now known in India as the Muslim personal law, has in its fabric much more man-made than scriptural rules.[2] However, whatever the true state of the Muslim personal law, reform as such, is anathema to the Indian Muslims at large. Muslims continue to consider their family law as based on the Shariah, as something synonymous with their physical and spiritual identity, something which maintains them as a distinct community. They find in every suggestion for reform, an organised effort, if not a conspiracy to wipe out their culture from the soil of India rather than a device to bring about social change. This is an emotion expressive of their feeling of insecurity and desire for self-preservation which has increased since the partition of the country, because they consider themselves left out and leaderless. Whether justified or not these feelings cannot be lightly brushed aside.[3]

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1. Waghela v. Sheikh Masludin, (1887) L.R. 14 I.A. 89 at 96.
2. In fact the process of corruption of the law was evident much earlier in the Islamic world itself. The precepts of the Prophet were manipulated by the ecclesiastics who were not infrequently stooges of sovereigns and despots and "canons were invented, theories started, traditions discovered and glosses put upon his (Mohammed's) words utterly at variance with their spirit..." See S. Ameer Ali, The Spirit of Islam, (Cal. S.K. Lahiri, 1902), at 163. Humayun Kabir confirms this view. See Changes in Muslim Personal Law, (New Dehli, XXVI International Congress of Orientalists, 1964) "Foreword," at V. (cont.)*
3. R. Agarwal, "Uniform Civil Code: A Formula Not a Solution," T. Mahmood ed., Family Law and Social Change: A Festschrift for A.A.A. Fyzee (Bom., Tripathi, 1975), 110-44 at 116-7. It would be idle to speculate that this merely reflects Muslim male thinking, that the Muslim female would fain break free of the system which in not a few instances is in derogation of the egalitarianism which modern times demand. The illiterate and unenlightened apart, naturally prone

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The reasons for this are to be found in various heterogeneous factors naive beliefs and nebulous ideas of the nature of Muslim personal law, widespread ignorance of the Islamic sociology itself, the mischief done by irreverent criticism of traditional Muslim usages (supposedly based on religion) made by irresponsible ultra-progressive modernists,[1] the generally hostile attitude of the Hindu masses - and even the intelligentsia[2] - towards the Islamic philosophy, and above all religious sentiments, invariably misguided by short-sighted maulvis. The ulema threatened as they must surely feel at

as they are to confuse faith with baseless superstitions and fancies, among the more progressive sections too, a certain ambivalence of attitude is perceptible, and reform, per se, of their law is not an altogether acceptable proposition. The reasons for this are not far to seek. In the vitiated atmosphere of communalism which surfaces every so often, in the discriminations, real or imagined, that they must contend with, in the general indifference towards the language to which the overwhelming majority owe allegience, (if only because it is the principal vehicle for Muslim religious thought in India) they, like their menfolk, feel threatened, and their priority as they see it is the preservation and perpetuation of their cultural identity as distinct from the majority community - a goal for which they are often enough prepared to sacrifice their aspirations as females for what they believe to be the larger interest of the community. Superadded to this is the indoctrinated faith that Muslim personal law is sacrosanct because divinely ordained. An illuminating instance of this is the unwillingness of Begum Zeenat Kauser, editor of Bano (New Delhi), a leading Urdu monthly for women, to endorse the civil marriage law as it "violates the sanctity of nikah", her insistence that Muslims must marry within the community - and this from a woman journalist known for her strong support of women's causes. See T. Mahmood, Civil Marriage Law, (Bom., Tripathi, 1978), at 45.

1. See for instance the comment of Khalid, J., in Mohammed Hanifa v. Pathuma Beevi, (1972) K.L.T. 512 at 514, where in expressing his sharp disapproval of the High Court's earlier judgment in Pathayi v Moideen, (1968) K.L.T. 763, in which the enforceability of a divorce, unilaterally pronounced by a husband under compulsion, or in jest or in anger was upheld, the learned Judge indicts Muslim personal law as a "monstrosity".

2. P.B. Ganjendragadkar in his Convocation Address in 1969 chose to tell students of the Aligarh Muslim University that, "I know that your personal law is part of the Qur'an but what the Qur'an says is today irrelevant. Therefore you must come forward and accept a Uniform Civil Code." In the same vein, K.S. Hegde in his Address to the Seminar on Islamic law held at the Indian Law Institute in 1972, requested a visiting foreign scholar of Islamic Jurisprudence (Prof. J.N.D. Anderson of London University), to explain to the seminar the "unsuitability (of Muslim law) for a society like ours." See "Welcome Address," T. Mahmood ed., Islamic Law in Modern India, (Bom., Tripathi, 1972), at 4.

what to them might seem an upheaval of a tradition and a social system from which, after all, they derive their not inconsiderable power and prestige, are invariably intolerant of any alternative system, irrespective of its merits. As such, they encourage the common Muslim to believe that it will be a major sin (Gunah-e-Kabira) to adhere to any principles of marriage, divorce and succession other than those laid down in the Qur'an and Sunnah or by their interpreters. Generally ignorant of what Muslim personal law is, or what a uniform civil code would mean, the common Muslim believes simply and firmly, that enforcement of such a code would mean the abandonment of a very essential part of the faith, making him liable to divine punishment on and after the Day of Judgment. And the influence of these ideas are so deep-rooted that they ridicule and dismiss as chicanery the arguments that the planned civil code would derive its most progressive, its most commendable elements from Islamic jurisprudence, and would in fact be much nearer the Islamic legal system than to any other classical personal law.[1]

Sadly this attitude of rigidity is given greater credibility when in the context of Indian Islam and reform, an eminent authority asserts that he "totally admits the position of Maulana Ihtisham ul Haq who wrote 'In Islam the provision of the Holy Koran and the Sunnah, be they in the form of basic principles or individual laws, are authoritative and final for all epochs between the time of revelation and doomsday.'"[2] It is submitted that in

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1. T. Mahmood, "Family Law Reform: Perspectives in Modern India," in Family Law and Social Change, op. cit., 93-109 at 103.

2. Derrett, RISI, op. cit., at 535-6. From whatever obscure realms of Islamic theology the good Maulana may have surfaced, it is pertinent to contrast sharply with this attitude the view of Mr. Justice Ameer Ali (member of the Privy Council and himself a Maulvi to boot), the undoubted veracity of whose authority on matters Islamic may not be put to doubt. He pleads that for anyone to suppose that the man who extolled the sovereignity of Reason as the highest of virtues should "ever (have) contemplated that even those injunctions which were called forth by the passing necessities of a semi-civilised people should become immutable to the end of the world, is doing an injustice to the Prophet of Islam;": The Spirit of Islam, op. cit. at 161; so that "the present stagnation of the Mussalman communities is principally due to the notion which has fixed itself on the minds of the generality of Moslems that, the right to the exercise of private judgment ceased with the early legists, that its exercise in modern times is sinful, ... and (to) abandon (their) judgment absolutely to the interpretations of men who lived in the ninth century and could have no conception of the necessities of the nineteenth," (ibid, at 162), and now the tail-end of the twentieth century, it is submitted.

Islam yes, (and that too is a moot question in the light of changes in West Asian Islamic countries), in the context of Indian Islam with its many admixtures, no. For as we have already seen, Muslim personal law in India is "by no means to be equated with the Sharia," and that the true position is that "in the case of Muslim litigants a few rules of law drawn from the Sharia with an admixture of English law are applied, provided they are not against justice and equity,"[1] so that to name the present system of Muslim personal law as Shariah is political euphemism, not scientific nomenclature, since rules tempered by non-Islamic jurisprudence and administered under non-Islamic laws cannot be termed Shariah by any elasticity of interpretation.

There is thus no, or at least, there should not be any valid reason why the Muslim personal law should not be amended[2] in favour of the uniform civil code. But Muslim intransigence being what it is at the moment, there is need for caution as we have already seen. Even those secularist Muslims, who are in favour of adopting the uniform civil code in place of personal laws, advise restraint. Their writings indicate that the strategy they favour as a first step towards the uniform civil code should be a progressive codification of the Muslim personal law itself, for, as they explain, a community which has, for several centuries, been used to such tremendous diversities inside its own separate law of personal status[3] may really find it difficult to switch on overnight to a common civil code shared by all Indians irrespective of caste and creed.[4]

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1. A.A.A. Fyzee, Times of India (Bom), Jan. 31, 1972.
2. Ameer Ali in anticipating the present pressing necessity for such reform had this to say as early as 1880: "To me it appears that great changes are due in the social institutions and the personal laws of the Mussalmans. How they will be achieved, whether by a general Synod of Moslem doctors or by the direct action of the Legislature it is impossible to say." ; Mahommedan Law, 5th ed., Vol II., (Cal, Thacker, Spink, 1929), Preface to the First Edition, at VIII.
3. This interpersonal conflict of laws is admirably brought out in D. Pearl, "Intersect Conflict of Laws amongst Muslims in the Indian Sub-Continent," Family Law and Social Change, op. cit., 47-60.
4. Pearl indicates a similar strategy. See ibid, at 60.

Amongst the various institutions of Muslim Law most frequently talked about are arbitrary polygamy, unilateral divorce, and iniquitous succession rights of men and women. It is not within the scope of this tract to discuss in detail as to how reform may be, and in fact, has been effected in certain other parts of the Islamic world. However contemporary legislation in W. Asia, N. Africa, and other Muslim regions (including Pakistan and Bangladesh) show quite clearly that Islam is fully aware of what one writer calls "juristic tricks"[1] or as another puts it, "it (Islam) provides remedies against its own injunctions should they prove irksome, and has authorised even utilization of subterfuges,"[2] while yet another suggests that

> "(t)he very fact that Muslim personal law prescribed certain methods and techniques for its development, suggest that it was never intended to be static. If some of these methods and techniques have become obsolete or impractical in the changed Constitutional set-up, they need to be supplemented by methods and techniques used to developing any other branch of law in this country, and/becomes necessary to allow the Muslim personal law in this country to receive its evolutionary growth consistent with the changing social, moral and economic values, by means of these methods and techniques." 3

Under such circumstances, it is but meet that Indian Muslims should sit up and take note of the fact that what has been done in other Islamic countries may well be done in India, and that the measure of reform in that part of the law that is still specifically Islamic which has been introduced in country after country over the last forty years, constitute at one and the same time, a most significant example of modernism in Islam, where theology and law always go hand in hand, and also a fascinating illustration of how a theoretically immutable law can in fact be amended in practice.[4]

The other great objection in the minds of the Muslim masses is, as we have noted above, their mistaken belief that the projected Code would be a replica of Hindu jurisprudence, in their eyes an abomination to which they

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1. Derrett, RISI, op. cit., at 536.
2. A. Hussain, Cited in T. Mahmood, Muslim Personal Law, op. cit., at 149.
3. M. Imam, "Muslim Law Reforms in India and Uniform Civil Code" M. Imam ed., Minorities and the Law, (Bom, Tripathi, 1972), 385-417, at 385.
4. J.N.D. Anderson, Islamic Law in the Modern World, (N.Y., N.Y. Univ. Press, 1959), at 18-9.

would never give in. This is a fallacious notion since a large number of the Hindu śāstric doctrines have been abandoned under modern Hindu law itself, and if the "civil code promised in Art. 44 of the Constitution will be like the Hindu Code,"[1] it will only be because of the secular nature of the Hindu Code. In fact the uniform civil code as contemplated by the Constitution visualises among other secular ideals, a contractual-cum-sacramental concept of marriage, complete freedom of both men and women in regard to marital choice, solemnization of marriage without any religious ceremonies, the independent status of the wife in her husband's home, facility of dissolution of marriage in special circumstances available to both spouses, and the unqualified validity of the marriage of a widow or divorcee - ideas all of which Islamic law, purged of its irrelevances and time-worn traditional interpretation, stands for. Krishna Iyer J., (as he then was), has also tried to dispel such doubts as Muslims entertain about the contents of the common civil code. In a thought provoking paper he explains

> "(A) family code embracing the whole nation, need not be an adaption of the Hindu system... but a synthesis of the good in our diverse personal law, an eclectic, not exotic product, a picking and choosing from many systems, so as to save our ethos and to express the genius of our culture." 2

In the light of the foregoing, that is, that the future civil code of India will not, in essence, be much different from an enlightened and liberal view of the Islamic legal principles and the conflicts between the two only minimal, it is time for Indian Muslims to wake up to the realities, to realise that, if Muslim personal law could, in the recent past, be reformed in a large number of Muslim countries, that, if so far they could have accepted what for lack of a better term may be called "Anglo-Muhammadan Law," that, if they could have accepted British intervention in the form of the Shariat Act 1937, and the Dissolution of Muslim Marriages Act 1939 as also numerous other

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1. Derrett, RISI, op. cit., at 546.
2. "Reform of the Muslim Personal Law," Islamic Law in Modern India, op. cit., 17-33 at 17.

indirect legislation,[1] then surely we must realise that changing social conditions must now give to the Indian government the same right that the British once exercised, i.e. the right to legislate so as to fulfil the promise of "justice, social and economic,"[2] so as to ensure the "dignity of the individual"[3] and to bring about the "unity of the nation,"[4] given by the makers of modern India, for the law not being immutable, as we have already seen, there can be no legitimate objection to intervention.

8 Towards the Unification of the Personal Laws

However despite Muslim intractability, and for all that the Muslim law as such remains untouched and the uniform civil code therefore a goal of the not too imminent future, attempts have been made to subjugate existing personal laws including Muslim law, to a common law for all in the greater interest of society as a whole.

(1) The Special Marriage Act, 1954[5]

Keeping in mind the sensibilities of the various religious groups, and without touching the personal laws, but mindful at the same time of the insistent nature of Article 44, Parliament turned its attention to putting on the statute book a common secular law of marriage, divorce and inheritance for all Indians irrespective of their religious affiliations, and the SMA which may well be said to form the core of the future unified family law in India, was passed in 1954.

Though not free from anomalies, the SMA is nevertheless a comprehensive piece of legislation, and marks the beginning of an era of significant social reform and change.

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1. As for instance, the Caste Diabilities Removal Act 1850, the rules relating to legitimacy contained in the Evidence Act 1872, the Majority Act 1875, the Guardians and Wards Act 1890, and the Child Marriage Restraint Act 1929.
2. Preamble to the Indian Constitution.
3. Ibid. 4. Ibid.
5. Hereinafter referred to as the SMA.

(a) Marriage

Essentially secular in character, the statute as amended in 1963, 1970 and by the ML(A)A in 1976, enables any two Indians except those living in the State of Jammu and Kashmir,[1] married to, or intending to marry each other, to take recourse to its provisions.[2]

(i) Registration

The SMA provides for the registration[3] of all marriages solemnised under the Act, and extends the scope of its application in that a marriage originally solemnised under any of the personal laws may, without regard to the time of its solemnisation, be registered by the parties under Chapter III provided that it satisfies the conditions laid down in s. 15[4].

The effect[5] of the registration is that such marriages would be deemed to have been solemnised under the SMA, and would extend to the parties to the registration such rights in matters relating to marriage, divorce and succession, as are denied to them under their personal laws.

(ii) Conditions of a Valid Marriage

Marriage being a solemn social contract based on secular principles under the SMA, the statute prescribes no religious ceremonies or rituals,[6] the conditions relating to it merely specifying that, neither party has a spouse living at the time; that neither party suffers from recurrent attacks of insanity or epilepsy[7] so as to render him or her incapable of

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1. SMA, s. 2.
2. The Foreign Marriage Act, 1969 took away the extra-territorial application of the SMA. Since then its provisions are applicable only to marriages solemnised in India.
3. SMA, s. 15.
4. The conditions being that (a) a ceremony of marriage has been performed between the parties, and that (b)-(e), neither of them has more than one spouse living, is an idiot or lunatic, is less than twenty-one years of age, or is within the degrees of prohibited relationship.
4. SMA, s. 18.
5. Ibid, s. 12 (2).
6. Ibid, s. 4 (a).
7. Ibid, s. 4 (b) (iii).

giving valid assent,[1] or unfit for marriage or the procreation of children,[2] that the male has completed the age of twenty-one years and the female the age of eighteen,[3] and that the parties are not within the degrees of prohibited relationship.[4]

The SMA thus envisages strict monogamy, and in making bigamy a penal offence[5] offers a welcome alternative to polygamous or potentially polygamous marriages. While strict monogamy is now the rule of law among the Hindus, Parsis and Christians, the Muslim personal law according to its traditional interpretation allows for a plurality of marriages, and the Muslim female seeking protection against the harsh regime of such unions, may now take recourse to the provisions of the SMA. It is also to be noted that, a polygamous marriage under Muslim law cannot afterwards be registered as a civil marriage under the SMA, unless at the time of the registration, the husband has only one spouse living.

(b) Matrimonial Reliefs

The rapidly changing socio-economic conditions of society, the wider literacy among women, their newly acquired economic independence and the

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1. Ibid, s. 4 (b) (i).
2. Ibid, s. 4 (b) (ii).
3. Ibid, s. 4 (c).
4. Ibid, s. 4 (d). Parts I and II of the First Schedule of the Act enumerate the degrees of "prohibited relationship", and most of those "prohibited" in the SMA, are not "allowed" relationship in any of the personal laws either. The exception is that while first cousins — paternal and maternal — are within the degree of prohibited relationship under the SMA, Hindu law apart, this is wholly opposed to other personal laws. Among the Muslims of India such marriages are very common, as Muslim law allows marriage with all first cousins on the paternal as well as the maternal side. The resulting anomaly has been pointed out by T. Mahmood, Civil Marriage Law: Perspectives and Prospects, op. cit. at 28, to the effect that, "The SMA, thus leans towards the traditional Hindu law in putting restrictions on marriage with a first cousin, while it contravenes the same in allowing free marital relationship with all second cousins," so that "whereas a Hindu man who cannot lawfully marry his second (paternal) cousin under the HMA... can straightaway take the same girl as his wife under the SMA, a Muslim whose personal law allows him to marry his first cousin (paternal or maternal), is denied the facility of contracting a civil marriage with her."
5. Ibid, s. 44.

freedom which emanates from it — all these have done much to erode the traditional attitude towards marriage, and the SMA in envisaging it in modern contractual terms also provides for matrimonial reliefs to both husband and wife in consonance with the guarantees of equality enshrined in the Constitution.

(i) Restitution of Conjugal Rights

S. 22 of the SMA provides for a decree for the restitution of conjugal rights to either spouse where the other has withdrawn from his or her society without resonable cause.

Though it has been suggested that the Act be amended to do away with this provision altogether,[1] and there is undoubtedly always the possibility that the party in the wrong may merely by not complying with the decree make it a ground for divorce, it is nevertheless submitted that, like the relief for judicial separation, this provision might well in cases, provide the parties concerned with time for sober reflection, and thus prevent hasty and ill-considered divorces.

(ii) Judicial Separation

A decree for judicial separation may be obtained by either party[2] on any of the grounds for divorce under s. 27 (1) and (1A) of the SMA[3] as also on the ground of failure to comply with a decree for the restitution of conjugal rights.[4]

(iii) Void Marriages

The contravention of any of the conditions laid down for a valid

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1. See P. Diwan, "Restitution of Conjugal Rights and the Law Commission's Recommendation for Reform," V. Bagga ed., Studies in the Hindu Marriage and the Special Marriage Acts, (Bom., Tripathi, 1978), 138-49; and S.G. Bhatt, "Restitution of Conjugal Rights — Should It Continue?" 150-7, ibid.
2. SMA, s. 23 (1).
3. Ibid, s. 23 (1) (a).
4. Ibid, s. 23 (1) (b).

marriage renders such marriage null and void.[1] The impotence of the respondent at the time of the marriage and thereafter, is also a ground for nullity,[2] and it is open to either party to present a petition for a declaration of such nullity.[3]

(iv) Voidable Marriages

A marriage is, under the Act voidable at the option of the aggrieved party and may, in the case of a woman, be annulled by a decree of nullity[4] on the grounds of wilful non-consummation of the marriage,[5] or that consent for the marriage was obtained by force or coercion,[6] provided that the petition has been presented within one year after the coercion had ceased or the fraud discovered,[7] and that there had been no married life together since the cessation of the coercion or the discovery of the fraud as the case may be.[8]

(v) Divorce

The SMA also provides for the dissolution of marriages, for all that divorce is not a concept unknown in the various personal laws prevalent in India. As indicated earlier, even among the Hindus, despite the emphasis that the śāstra places on the sacramental nature of marriage, it was sanctioned in certain communities either by caste custom or by statute.

However the laws regulating divorce in other communities are not without their own peculiarly uneven and erratic features. In the study of the Indian Divorce Act, 1869 (hereinafter referred to as IDA), applicable to

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1. SMA, s. 24 (1) (i).
2. Ibid., s. 24 (1) (ii)
3. Ibid., s. 24 (1).
4. Ibid., s. 25.
5. Ibid., s. 25 (i)
6. Ibid., s. 25 (ii)
7. Ibid., s. 25, Proviso (a)
8. Ibid., s. 25, Proviso (b)

Christians, there is evidence in certain of its provisions, of a definite bias in favour of men. Under s. 10 for instance, whereas a single isolated act of adultery on the wife's part is a valid ground for the granting of a divorce, a wife on the other hand, may sue only if the husband's adultery is coupled with an additional ground such as bigamy, incest, desertion or cruelty for a period of at least two years,[1] though the Act does give her the edge over men in that additional grounds available to the wife is the husband's offence of rape, sodomy and bestiality.[2]

Moreoever, a significant omission in the IDA, in terms of modern needs is that it does not envisage the grant of a divorce "on collusion," i.e. merely on grounds of mutual consent.[3]

There is a similar lack of this provision in the Parsi Marriage and Divorce Act, 1936, though in the contemplation of an equal right of divorce on grounds of adultery, it has removed the invidious distinction that existed between husband and wife in the old Act.[4]

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1. IDA, s. 10.
2. Ibid.
3. Ibid, ss. 12, 14. Dr. J. Minattur's comments are relevant in this respect. He pleads "This Act (the IDA) was modelled after English enactments for matrimonial reliefs adopted about the middle of the last century. Over a hundred years later the United Kingdom prescribed by legislation a single valid ground for divorce, i.e. irretrievable break-down of marriage. If in 1869 the idea was that Indian Christians would do well to follow in the footsteps of the British in obtaining matrimonial reliefs, is there any valid reason to assume that they should be governed by rules different from those applicable to the British after the passage of a century? If irretrievable break-down of marriage is made the only ground for judicial declaration of divorce applicable to all communities and religious groups in India, there will be equality of treatment not only between men and women but also between various religious groups": "Women and the Law: Constitutional Rights and Continuing Inequality," A.de Souza ed., Women in Contemporary India, (New Delhi, Manohar, 1975), 96-109 at 99. This was in 1975, and in 1976 the ML(A)A amended both the SMA and the HMA to include the concept of divorce by mutual consent.
4. The Parsi Marriage and Divorce Act, 1865 "served the needs of Parsis satisfactorily for more than seventy years, when it was revised to remove some anomalies revealed by experience and to bring it more in line with the changing views and circumstances of the community.": P.K. Irani, "The Personal Law of the Parsis of India," J.N.D. Anderson ed., Family Law in Asia and Africa, (Lond., George Allen and Unwin, 1968), 273-300 at 288.

The Muslim practices in regard to divorce are perhaps the most iniquitous of all. Comparatively rare as its occurance is among the Muslims of India, wives are nevertheless always under the threat of the possibility of repudiation by divorce at the unilateral declaration of their husbands for any or for no reason at all. It is true that Muslims are agreed that to divorce the wife for an inadequate reason is sinful, but the divorce, if pronounced, is nonetheless regarded as legally valid and binding. And the ridiculously wide scope of validity given to the triple formulae of repudiation[1] which brings the marriage relationship to an abrupt end even where this is not really desired by either party, is further reinforced when we consider that, in the classical Hanafi law — the dominant Sunni School in India — divorces pronounced under compulsion, intoxication, or such anger as to make the husband temporarily insane, are nevertheless valid and binding.

No such latitude is however accorded to the wife in the traditional law whether in the indulgence of polyandry or in any right to repudiate her husband.[2] True there is the Khiyar-ul-Bulugh or "option of puberty," that is, the right vested in the minor — male and female — to ratify or rescind, on attaining puberty, the marriage contracted on his or her behalf during minority by any person other than his or her father or paternal grandfather, and in the case of the female minor, this option of repudiation must be exercised immediately on attaining puberty.

There is also the system of Khul under which the wife may, should the husband prove amenable, indemnify him with money or valuables to obtain her release from the marriage; and in the tiny community of Muslims in the Laccadives Island, there is prevalent the system of fasaq whereby under certain circumstances, a Muslim wife is accorded the legal right to sever the

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1. "Talaq," "Talaq," "Talaq;" "itself an innovation not dreamed of by the founder of Islam...": J.N.D. Anderson, "The Eclipse of the Patriarchal Family in Contemporary Islamic Law," Family Law.., op. cit., 221-34 at 227. It may be mentioned here that the triple talaq formulae has no validity in Shia Islam.

2. Anderson, above, 221 ff.

marital tie by uttering the formula of divorce dictated by the Qadi.[1]

But these are marginal instances at best, and it was only after the passing of the Dissolution of Muslim Marriages Act, 1939 (hereinafter referred to as the DMMA), that Muslim women in India came to benefit from a more contemporary approach to divorce. Under the Act, Muslim wives are accorded the right to seek judicial divorce in a court of law on the grounds specified therein, to initiate divorce proceedings and obtain a valid divorce without the husband's consent.[2]

Commendable as these provisions are, other aspects of the Act leave much to be desired. Thus while it secures the wife's mahr or dower, it makes no provisions for her maintenance, and neither is she awarded custody of non-minor children. Most objectionable, however because most restrictive, is the stipulation that, provided that the marriage has not been consummated, grounds available to the wife for divorce are the husband's interference with her right to own and control property,[3] to practise her own religion[4] and to regulate her own moral life.[5] In effect, the consummation of the marriage being the condonation of the husband's misbehaviour, cases would be rare indeed where the wife could in practice resort to the benefits available to her under this section.

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1. A.R. Kutty, Marriage and Kinship in an Island Society, (New Delhi, National, 1972), at 184. See also L.Dubey, Matriliny and Islam, (New Delhi, National, 1969), at 72. Dr. Minattur is of the opinion that an opportunity for the judicial recognition of the doctrine of fasaq was lost in 1975 when the Kerala High Court ruled in Moyin v. Nafeesa, (1972) K.L.T. 785, that the right of Muslim women to obtain divorce is exclusively governed by the DMMA, 1939. See his "Women and the Law...," op. cit., at 100.
2. A.J. Almenas-Lipowsky, The Position of Indian Women in the Light of Legal Reform, (Wiesbaden, Franz Steiner Verlag, 1975), at 57-8.
3. DMMA, s. 2 (viii) (c).
4. Ibid, s. 2 (viii) (d).
5. Ibid, s. 2 (viii) (e).

In view of the foregoing, the grounds for divorce in the SMA — substantially the same as those in the HMA[1] — are particularly welcome, and in according her exactly similar rights to those of her husband, in this as in other areas, the Act does away with the iniquities of the personal systems of law. Such anomalies as have crept in, and such provisions which in the climate of social change may lose relevance need not now assume permanence or immutability, for having no divine saction behind it, the SMA will always be open to revision and amendment.

(c) Succession

The SMA, when originally enacted in 1954 provided that whenever two persons registered a marriage under its provisions, their respective personal laws (which could be either the same or different), would cease to regulate succession to their and their descendant's property, and they would thenceforth be governed by the provisions of the Indian Succession Act, 1925 (hereinafter referred to as ISA). This had the effect of establishing a measure of equality in matters of succession and inheritance as between males and females[2] although the rights of the heirs could also be regulated by will.

(i) The Effect of the ML(A)A on Non-Hindu Intra-, and Inter-Communal Marriages

As the position now stands after the amendments of the ML(A)A, in all cases, parties to marriages contracted under the SMA, whether intra-communal (except in the case of Hindus), or inter-communal will be governed by the provisions of the ISA as of old. The ML(A)A effects no changes at all.

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1. Except that conversion to another faith is not a ground for dissolution of marriage under the SMA, religion having no part to play in the scheme of the statute.
2. The ISA gives equal rights to sons and daughters, and the same right over property to the surviving spouse. A widow under its provisions is entitled to $\frac{1}{3}$ of the property, and her share increases to sole ownership in the absence of lineal descendants and kindred.

(ii) The Effect of the ML(A)A on Hindu Intra-Communal Marriages

S. 21 (A) of the SMA now provides that so long as the parties contracting a civil marriage belong to the Hindu religion within the broad meaning of the term as understood in the Hindu Code of 1950-56, they will not be subject to the provisions of the ISA for purposes of succession and inheritance, but to their own personal law. The reason for this is obvious. The HSA has had the effect of radicalising the Hindu law of succession, and the inclusion of nearer heirs in Class I of the Schedule who take equally, and of remoter heirs in Class II who likewise share equally after the Class I heirs, and s. 14 which contemplates absoluteness of ownership by a Hindu female of any property possessed and acquired by her whether before or after the commencement of the HSA — all this renders unnecessary and even retrogade, any deviation from the personal law.

Similarly s. 19 of the SMA effecting severance from the joint-family so as to subject the coparcener's interest to the ISA, is restricted in its application to cases of inter-religious marriages.

(d) Maintenance

S. 36 of the SMA contemplates the payment of alimony pendente lite to the indigent wife having regard to the husband's income, while s. 37 provides for the payment to the divorced wife, of permanent alimony and maintenance by making it a charge on the husband's property if necessary.

The secular and egalitarian character of the Act is thus comprehensively set forth; what it aims to achieve is the type of the "secular" Indian woman free from religious conventions of subordination to the husband and the family, one who occupies pride of place as equal to men in society and in the family.[1] That such a woman does not in reality exist as yet, anyone remotely familiar with Indian conditions will know. But if the SMA

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1. Almenas-Lipowsky, op. cit., at 45.

is a step forward towards the ideal of equality to which the Constitution aspires, a major break-through towards the achieving of the uniform civil code, we may yet look forward to the day when the social and legal position accorded to her in the statute book is translated into reality.

(2) The Dowry Prohibition Act, 1961

The Dowry Prohibition Act, 1961 (hereinafter referred to as the DPA), is applicable to the whole of India except the State of Jammu and Kashmir,[1] and is an attempt towards the amelioration of an evil which shows no signs of abating, rooted as it is in a social set-up where marriages of mutual choice result in disrepute and loss of social standing, and in particular where parents are under the burden of moral and religous responsibilities to marry their daughters cost what it may.

The Act makes it an offence to give, take, or demand a dowry, or to abet the giving or taking of a dowry, and anyone found guilty of this offence shall be punishable with imprisonment which may extend to six months, or with fine which may extend to Rs. 5000, or with both.[2] Where a dowry is in fact given (for under the maxim factum valet the transfer though prohibited, is valid)[3] the woman in connection with whose marriage it is given is herself entitled to it,[4] but should she die before receiving it, her heirs are entitled to claim it from the person holding it for the time being.[5] Agreements for giving or taking dowries have been declared void,[6] but where in contravention of the Act, a dowry is paid and then the marriage fails to take place, the dowry cannot be recovered by way of suit, for it was an illegal contract and the parties are in pari delicto.[7]

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1. DPA, s. 1 (2). 2. Ibid, ss. 3 and 4.
3. Derrett, IMHL, op. cit., at 145. The maxim is explained at 242, f. n. 3.
4. DPA, s. 6 (1).
5. Ibid, s. 6 (3).
6. Ibid, s. 5.
7. Ramekbal v. Harihari, A.I.R. 1962 Pat. 343.

In the definition of "dowry" in s. 2 as "consideration of the marriage,"[1] wedding presents have been expressly excluded,[1a] and expectedly, gifts of sums of money and costly and lavish "presents" to the bridegroom are now by no means rare and the circumvention of the law is thereby achieved. However the definition does exclude from its purview the Muslim system of mahr or dower,[2] and rightly so, it is submitted as dowry and mahr are concepts worlds apart.

The force of the Act is also considerably weakened in that the offences under the Act are non-cognizable,[3] and prosecutions may be instituted only with the consent of the State Government in the case of the offence of demanding a dowry.[4] This would imply that the demanding of dowry is a greater offence than the giving of it. But for any tangible result, it is submitted that such differentiations are best not made for one is in the end as contributory a cause as the other.

That deeply religious attitudes and the fear of social stigma on the part of parents play their part in the spread of this pernicious system, we have already seen. As against this, there is the greed on the other side the desire for gain, for now that marriage is compulsorily monogamous, the power of parents of an unmarried man of good earning-capacity to hold out for a high "dowry" is great.[5]

But if the HMA's insistence on monogamy has resulted in a dearth of acceptable bridegrooms, another provision of the same statute projects new hope for the future. Now that the HMA has dispensed with the notion of guardianship in marriage once the girl reaches the age of eighteen years, the time seems to be imminent when, parental orthodoxy and opposition notwithstanding, marriages of mutual choice will be the norm rather than the

1. DPA, s. 2.

1a. This is confirmed in Vinod Kumar v. State of Punjab, A.I.R. 1982 P. & H. 372 at 388. But as against this see S. Shah selected and introduced, "Indian Women Speak Out Against Dowry," Third World-Second Sex, M. Davies compiled, (Lond., Zed Press, 1983), 201-13.

2. Ibid., s. 2 (b).

3. Ibid., s. 8.

4. Ibid., s. 4.

5. Derrett, IMHL, op. cit., at 146.

exception, and freed then from the strangulating grip of avarice from which parents in arranged marriages suffer no less than their hapless female offspring,[1] we may hopefully look forward to the day when the Indian bride is cherished for her personal accomplishments of charm and character rather than for the wealth she brings to her new home.

(3) The Cr. P.C., 1973

The wife's right to be maintained by her husband is an important consequence of marriage and has been given statutory recognition in the personal laws of the Hindu,[2] Christian,[3] Jewish[4] and Parsi[5] communities in cases of nullity, judicial separation, or divorce. In the Muslim personal law however, and whatever codification of it is to be found in the DMMA, though the husband is under an obligation to maintain his wife during coverture,[6] in the event of the termination of the marriage, this obligation extends only to the period of iddat[7] and thereafter his liability is over. This is in addition to her entitlement to mahr which is immediately payable on divorce.

In view of this, s. 488 (3) of the old Cr. P.C. empowering criminal courts to pass orders for maintenance of wives (including Muslim wives), whose husbands had neglected to provide the same, was the object of much agitation and dissension among Muslims who claimed that the remedy for such a wife was restricted to the Islamic provisions to the exclusion of s. 488(3).

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1. The DPA has been in action for well over two decades, and yet gruesome reporting of bride-burning in the homes of dissatisfied "in-laws"-not uncommon to this day-in Indian newspapers is indicative of the true state of affairs.
2. HMA, ss. 24-25; HAMA, s. 18.
3. IDA, ss. 36-37.
4. Ibid.
5. SS. 39-41 Parsi Marriage and Divorce Act, 1936.
6. Failure by the husband to provide maintenance to the wife for a period of two years is a ground of divorce under the provisions of the DMMA.
7. The period of waiting incumbent on the wife after the dissolution of the marriage either by death or divorce to determine her pregnancy or otherwise.

Generally unsympathetic to the Muslim attitude of rigid adherence to the personal law, Hegde's J's, (as he then was) characteristic note of impatience is struck when, in dimissing such claims he laid down in Syed Ahmed v. Nagath Taj Begum[1] that

> "(T)he plea of personal law makes no appeal to me. The Cr. P.C. is the law of the land, and not of any community. If there is a conflict between the law enacted by the legislature and the personal law, then the former prevails... There is no constitutional guarantee to respect the personal law of any community... It is true that the personal law of the Muslims as such has not been changed. But if they come within the mischief of s. 488 Cr. P.C. they shall be governed by its provisions notwithstanding their personal law." 2

Neither was Krishna Iyer J., (as he then was), amenable to such pleas, and in emphasising the constitutionality of s. 488 (3) pointed out that,

> "(T)he Indian Constitution directs that the State should endeavour to have a Uniform Civil Code applicable to the entire Indian community, and indeed when motivated by a high public policy s. 488 has made such a law. It would be improper for an Indian Court to exclude any section of the community born and bred on Indian soil from the benefit of that law." 3

In 1974 however, the revised Cr. P.C. of 1973 came into effect with, for our purposes, rather noteworthy changes. The old s. 488 was replaced by s. 125 in the new Code. It enacts that if

> "(a)ny person having sufficient means, neglects or refuses to maintain (a) his wife... a magistrate of the first class may, upon proof of such neglect or refusal order such person to make a monthly allowance for the maintenance of his wife..."

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1. A.I.R. 1958 Mys. 128.
2. Ibid, at 131. See also Badruddin v. Aisha Begum (1957) 55 All. L.J. 300 where Oak J., laid down that if the wife applies for maintenance the Criminal Court is bound to follow the provisions of s. 488 Cr. P.C. though the Civil Court may not accept the principle of the section.
3. Shahulameedu v. Subaida Beevi, (1970) K.L.T. 4 at 6.

and goes on to elaborate in Expl. (b) that

> "(a) wife includes a woman who has been divorced by, or has obtained a divorce from, her husband, and has not remarried." 1

It is thus clear that while under the old Code, the wife could claim maintenance even if she was able to maintain herself, s. 125 of the new Code specifies that she may claim maintenance only if she is "unable to maintain herself." While there is no doubt that this particular section was legislated with a view to social justice and equity, it is submitted that the wording is not free from ambiguity. Would a "wife" who is able-bodied and capable of earning be exempt from the benefits of s. 125? This question was cursorily glanced at in Kunhi Moyin v. Pathumma,[2] where the enactment was taken at its face value, but was the subject of more thorough examination in a Gujarat case,[3] where Mehta, J., rightly pointed out that merely because a person is found to be able-bodied and capable of earning, it cannot be said that he or she is able to earn. It requires, in addition, education or experience, finance, push and pull, and in particular in a country where female illiteracy and general unemployment are rampant, and in a society where economic independence of females is still a rarity, if a wife is presumed to be able to maintain herself merely because she is sound

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1. It was held in Mushaque Mondal v. Joysum Bibi, (1976) 2 C.L.J. 27, that when a woman has been divorced and has not remarried, there is no bar to her applying for maintenance if she has been divorced by the respondent husband prior to the coming into operation of the new Code. To the same effect are the rulings in Razakhan v. Mumtaz Khatoon, (1976) 1 An. W.R. 1, and Mohamad Khan v. Mehrunnisa, 1.L.R. (1977) 1 Kant. 459, Lal, J., elaborating in the latter that, the expression "who has been divorced by," along with the other expression "has obtained a divorce from," clearly means that both the contingencies were contemplated, viz. the wife having been given a divorce before the commencement of s. 125 of the Code, as well as the wife who has obtained a divorce after such commencement.

2. (1976) K.L.T. 87.

3. Nirmala Bhanji v. Jayantilal, (1976) 17 Guj. L.R. 457.

of body and mind, then

> "(t)he whole purpose of preventing vagrancy which is contemplated in s. 125 would be lost, and there would be husbands who would be encouraged to neglect to maintain their wives at a mature age, when in spite of having an able body, they would be totally incapable of earning their livelihood... Such a situation would obviously become intolerable, and could never have been desired by the legislature which enacted s. 125 of the Cr. P.C. in its pursuit of an enlightened policy of preventing vagrancy." 1

However the most revolutionary change is the definition of the word "wife" in s. 125 as distinct from its meaning under the old s. 488. For whereas under the latter, a wife had the right of maintenance, but a divorced wife did not, for the first time that right is conferred on the divorced wife under s. 125 which is in accord with social justice, for, it is submitted, it imports from the West — and in this it harmonises with the SMA — the concept of alimony for the wife alone in Indian matrimonial proceedings. Explaining this Raju and Rao JJ., pointed out that the section being "both remedial and beneficial in character ... It is the duty of the judge to construe the statute in such a manner as to suppress the mischief and advance the remedy."[2]

Referring to the social nature of the enactment Khalid, J., elucidated:

> "(T)his departure from the earlier law is a milestone in social legislation, conferring benefits to a particular group of women in need of it... What the legislature has done is to import a legal fiction to create an artificial status, for the only purpose of enabling the wife who is divorced and has not remarried, to claim maintenance, so as to prevent vagrancy and to protect such women from poverty and starvation... This provision is a highly salutory one, and is meant to alleviate the sufferings of divorced woman, and to cause a little deterrent to erring and callous husbands." 3

The Supreme Court confirms this position and in a recent decision

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1. Ibid, at 460-1.
2. Reza Khan v. Mumtaz Khatoon, (1976) 1 An. W.R.1, at 4.
3. Kunhi Moyin v. Pathumma, (1976) K.L.T. 87, at 92-3.

Krishna Iyer C.J. (as he then was) stressed that,

> "(A)rt. 15 (3) has compelling, compassionate relevance in the context of s. 125... (and) Parliament in keeping with Art. 15 (4)... made a special provision (in s. 125) to help women in distress, cast away by divorce. Protection against moral and material abandonment manifest in Art. 39 is part of social and economic justice specificated in Art. 38, fulfilment of which is fundamental to the governance of the country (Art. 37)." 1

So much then for the explanation. It now remains for us to examine judicial opinion in regard to the interpretation of the section and see how far it is in consonance with the intention of the legislative body. What for instance, would be the solution should s. 125 clash with the personal or customary law of the parties? Keeping in mind the nature and express purpose of the enactment, the courts were unanimous in holding that s. 125 is indeed above and beyond any personal law.

In the Kunhi Moyin case[2] where the contention was that the definition of "wife" in the Code is an invasion of Muslim personal law, for according to it, a husband is liable to maintain his wife after divorce only during the period of iddat, and not beyond, the court in refusing to countenance this maintained that, "the new definition of wife does not violate the Fundamental Rights guaranteed under Art. 25 (1) of the Constitution." The definition of s. 125 (1) comes within "the providing for social welfare and reform" legislation contained in Art. 25 (2), and hence the challenge under Art. 25 is not available to the petitioners, as "the Cr. P.C. transcends the personal law of the parties."

In the same vein the Bombay H.C. in Khurshid Khan v. Husnabanu,[3] laid down that the principlesof Muslim law relating to iddat are not relevant

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1. Bai Tahira v. Ali Hussain Chothia, A.I.R. 1979 S.C. 362, at 365. Where the wife herself on just grounds refuses to live with her husband, as for example on grounds of his impotence, Fazl Ali J., held in Sirajmohmedkhan v. Hafizunnisa, A.I.R. 1981 S.C. 1972, that as this was tantamount to mental and legal cruelty, she was entitled to live apart, and the husband was bound to pay her maintenance according to his means, under s. 125, Cr. P.C.

2. (1976) K.L.T. 87.

3. (1976) 78 Bom., L.R. 240.

when considering the provisions of s. 125 of the Code of Cr. P.C. 73, for

> "(t)here is nothing in s. 125 or Chapter IX[1] of the Cr. P.C. 73 which excludes Muslim women from the benefits of s. 125... The enactment is consistent with Art. 44 of the Constitution contemplating the uniform civil code," 2

and therefore

> "(t)here is nothing in Muslim law or culture to prevent Parliament from making or conferring a right on the divorced Muslim wife to claim maintenance against her quondom husband, so long as she remained unmarried, even after the iddat period." 3

It is however submitted, that the learned judges in the foregoing cases, overlooked the provisions of s. 127 (3) in ruling that s. 125 transcends the personal law of the parties. To say as it was said in the Khurshid Khan case[4] that there is nothing in Chapter IX which excludes Muslim women from the benefits of s. 125, is an erroneous notion and their Lordships would have done well to have kept in mind the provisions of s. 127 (3) in the same Chapter IX which provides that,

> "(W)here any order has been made under s. 125 in favour of a woman who has been divorced by, or has obtained a divorce from, her husband, the Magistrate shall, if he is satisfied that
>
> (a) ...
>
> (b) the woman has been divorced by her husband and that she has received... the whole of the sum which under any customary or personal law applicable to the parties, was payable to the parties on such divorce, cancel such order..."

That s. 127 (3) (b) is therefore clearly a limitation of the right of the wife as envisaged in s. 125,[5] is the literal interpretation of the section in Aluri Sambiah v. Shaikh Zahirabi,[6] where the ruling however was that s. 127 (3) could come into operation only if at the time of divorce, the divorced woman is paid the whole of her unpaid dower, prompt and deferred,

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1. Emphasis mine. A grave error, as is pointed out immediately below.
2. Khurshid Khan v. Husnabanu, (1976) 78 Bom. L.R. 24, at 241.
3. Ibid, at 242.
4. Cited above.
5. Doubtless motivated by the majority community's anxiety to secure Muslim votes. See J.D.M. Derrett, "Muslim Ex-Wives: A Note of Caution," (1976) K.L.T. (J.), 33-35 who notes at 35, that "I cannot conceal my opinion that Parliament made this strange exception in order to quiet Muslim agitation against the whole prospect."
6. (1977) 2 An.W.R. 418.

failing which s. 125 would still be in operation.

A fuller exposition of this attitude is to be found in Rukhasana Parvin v. Shaikh Mohamed Hussein[1] where it was explained at some length that, though the divorced Muslim wife was certainly not exempt from the purview of s. 125, that is only part of the whole scheme contemplated by the new Cr. P.C. regulating right of maintenance. The court held that while s. 125 is a provision of general application, cl. (b) of sub-sec (3) of s. 127 is the only provision in which reference to customary or personal law is found. Therefore though no words of restriction of the right to claim maintenance are to be found in s. 125 itself, if what was due to her under the personal law has been paid to her, and the requirements of sub-sec (3) are satisfied, there can be no order made under s. 125. In the event that a divorced Muslim wife is paid the amount of maintenance due during the period of iddat together with mahr, she is not entitled to an order for further maintenance under s. 125. The F.B. in Kamalashi Kumar v. Sankaran Sadasivan,[2] concurred with the above judgment, and in fact relying heavily on it, pointed out that while there are no words restricting the right to entertain an application for maintenance in s. 127 itself, the rule of harmonious construction required that s. 127 (3) (b) must be read and understood as a proviso to s. 125. It was further elaborated that in s. 127 (3) (b), a sum under the customary or personal law payable on divorce would surely not mean "maintenance" which could certainly have been done, if such was the legislative intent in plainer, simpler and more direct language. Thus the sum referred to in s. 127 (3) (b) need not be restricted to maintenance in the well understood sense of the term, but may cover any sum or amount payable on divorce under the customary or personal law of the parties.

Khalid J. dissenting from the above view in Mohammed v. Sainabi,[3]

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1. (1977) 79 Bom. L.R. 123. See also Hamid Khan v. Jammi Bai, 1.L.R. (1978) M.P. 595.
2. A.I.R. 1979 Ker. 116 (FB).
3. (1976) K.L.T. 711.

interpreted the new enactment in a more equitable spirit to rule that a Muslim husband could successfully resist his ex-wife's claim for maintenance after iddat, only if he establishes a custom that certain customary dues, if paid at the time of divorce, would disentitle the wife from claiming maintenance. The payment of mahr would not however affect a discharge of a claim for maintenance, because the claim for mahr is a valuable right available to the wife, and this claim is a charge over the properties of the husband. Therefore payment of mahr will not operate as payment of customary dues in discharge of the claim for maintenance.

However by far the most balanced interpretation, because in consonance with the spirit of equity and natural justice, is the remarkable Supreme Court decision in Bai Tahira v. Ali Hussain Chothia[1], where Krishna Iyer, J., accepting that proof of payment of a sum stipulated by customary or personal law would operate as a bar to the wife's claim for maintenance under s. 127 (3) (b), nevertheless carried the equitable principle to its logical conclusion to maintain that, the quantum of such sum must be more or less sufficient to do duty for maintenance allowance. Stressing the inherently social nature of the enactment, the learned Judge was firmly of the view that though the payment of illusory amounts by way of customary or personal law requirement would have to be considered in the reduction of maintenance rate, nevertheless such amounts would not annihilate that rate unless it is a reasonable substitute. For, his Lordship explained, the purposes of the payment under any customary or personal law must be to obviate the destitution of the divorcee, and to provide her with the wherewithal to maintain herself.

What therefore emerges from the foregoing is that, where s. 125 of the Cr. P.C. is a step forward towards the achieving of the uniform civil code in that, in its remedial purview it includes all wives and ex-wives,

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1. A.I.R. 1979 S.C. 362, above at 99.

the hostility of the Muslims towards the enactment on the basis that it is in conflict with Islamic principles under which a husband is bound to maintain the divorced wife only during the period of iddat, together with the political expediency of appeasement by the majority of the minority, has resulted in the incorporation of s. 127 (3) (b). The effect of the two sections read together and the judicial interpretation thereto is that, though the courts could grant maintenance to the divorced wife, at the time of so doing they should give due consideration as to whether she had already realised from her husband in full, her post-divorce entitlement under the personal law of the parties, and so as not to defeat the social purpose of s. 125, this amount must, according to the Supreme Court, be adequate for her maintenance.[1]

Muslim obscurantists should have done well to have understood, in connection with iddat, that what was specified by the law-giver of Islam as the minimum incumbent, could only be erroneously regarded as an immutable principle by the critics of the provision. It is steps like these that come in the way of social legislation - Muslim sensitiveness to the point of suspicious touchiness. Alienated from the mainstream of life, backward-looking and steeped in orthodoxy, they are themselves much to blame for the predicament that they find themselves in.

9. Is There Any Justification for the Muslim Attitude?

But it is submitted, a great deal of their uncertainty, their inward-looking attitude is also the result of the much vaunted secularism of India.

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1. A point of view followed in Hajuben v. Ibrahin, (1977) 18 Guj. L.R. 133, (Cri. Rev.) and happily reaffirmed by the Supreme Court in Fazlumbi v. Khader, A.I.R. 1980 S.C. 1730, Krishna Iyer J., reiterating at 1735: "... Section 125-127 is a secular code deliberately designed to protect destitute women who are victims of neglect during marriage and after divorce. It is rooted in the State's responsibility for the welfare of the weaker sections of women and children and is not confined to members of one religion or region but the whole community of womanhood."

Is the Constitution really secular? They ask themselves, and do the lofty ideals of justice, liberty, equality and fraternity really prevail? Or do Hindu feelings and sentiments take precedence in the Constitution over those of other communities? Hindus constitute the majority community, and yet Hinduism is not the religion of India, nor are Hindus entitled to any preferential treatment, or the rights and obligations attached thereto. No doubt there can be no nobler document than the Indian Constitution, but as one studies its provisions closely, one cannot help but be aware that Hindu sentiments and feelings have in fact been given voice to in what is professedly a secular Constitution.

(1) Article 25, Explanation 1

Art. 25, for instance promises to all citizens freedom of conscience, and free profession, practice, and propagation of religion, and then goes on in Explanation 1 to make special provisions for the Sikhs, i.e.

> "(T)he wearing and carrying of kirpans (daggers) shall be deemed to be included in the profession of the Sikh religion."

It may of course be argued that the carrying of kirpans is deemed by the Sikhs to be an essential part of their religion, but we must keep in mind that this freedom is qualified in Art. 25 in that it must be "subject to public order, morality and health," and "to the other provisions of this Part." It is submitted that in the potentially volatile communal atmosphere that has marred the scene from time to time in Independent India, the wearing of kirpans could well have been prohibited on the basis of public order, specially where another provision in Part II stipulates the right to "assemble peacefully and without arms."[1] This is therefore an unnecessary, and it is submitted, a wholly unwarranted concession to Sikh religious sentiments.[2]

1. Emphasis mine. It is submitted that recent events in the Punjab and the neighbouring Capital would bear out the veracity of this statement.

2. What may at first sight seem merely a theoretical concession considering that Sikhs in India are not given to wearing these vicious weapons on their persons, may well be insisted upon in abnormal circumstances, as a Constitutional guarantee.

(2) Article 290 (A)

There is also, in a secular Constitution, no justification for the inclusion of Art. 290(A) which runs as follows:

> "(A) sum of forty-six lakhs and fifty thousand rupees shall be charged on, and paid out of, the Consolidated Fund of the State of Kerala, every year to the Travancore Davaswom Fund; and a sum of thirteen lakhs and fifty thousand rupees shall be charged on, and paid out of, the Consolidated Fund of the State of Tamil Nadu every year to the Devaswom Fund established in the State for the maintenance of Hindu temples and shrines in the territories transferred to the State on the 1st of November 1956 from the state of Travancore-Cochin."

There is no explanation in the Constitution as to why this should be so; and in the face of this puzzling provision why, one is tempted to ask, is such a privilege accorded to merely Hindu temples and shrines? Why not to mosques, churches, synagogues and agiaris as well?

(3) Article 48

But above all, the Article that seems to have sparked off the most controversy, and roused the ire and suspicion of the minorities at large and that of Muslims in particular, and has led them to doubt the secular nature of the Constitution is Art. 48 of the Directive Principles. It reads:

> "(T)he State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines, and shall in particular take steps for preserving and improving the breeds, and prohibiting the slaughter of cows and calves, and other milch and drought cattle."

Quite clearly the Article prohibits the slaughter of, among others, the cow. The cow is, no doubt an animal of economic value, and is part of the cattle-wealth of a country. In India she has religious significance as well. Hindus in general regard the cow as "Mātā"; she is associated with the Lord Krishna, and was revered by the Hindu sages and ṛṣis as sacred. She is "a unifying sentiment" for Hindus, and "no higher dharma has been prescribed" for them "than her protection."[1] The same sentiments

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1. K.M. Munshi, P.D., (1951), Part II, Vol. VIII, at 3519-21.

were expressed in the Constituent Assembly

> "(G)reat importance has been attached to this question from the time of Lord Krishna... Cow protection is not only a matter of religion with us; it is also a cultural and economic question." 1

And again:

> "(T)he entire universe was treated as one and the cow is the symbol of that oneness of life and are we not going to maintain it? Brahma-Hatya and Go-Hatya - the killing of the learned man, the scientist, the philosopher or the sage, and the killing of a cow - are on a par. (Sic). If we do not allow the killing of a scientist or a sage in this land, it shall certainly be ordained by this House that no cow shall be killed." 2 (Sic)

And yet again:

> "(W)e want that India should declare today that the whole human world as well as the whole animal world is free today and will be protected. The cow is the representative of the animal kingdom... Our Hindu society, or our Indian society has included the cow in our fold. It is just like our mother," 3

and while a person may not run to kill a man who has killed his mother wife or children, he will certainly

> "(r)un at a man, if that man does not want to protect the cow or wants to kill her." 4 (Sic)

Strong sentiments these, and undoubtedly exaggerated, but revelatory nonetheless. Thus when the appeal was raised that cow breeding and preservation was necessary, not for milk supply alone, but also for economic purposes,[5] it stood suspect in the eyes of non-Hindus. Small wonder then that members of the minority communities in the Constituent Assembly held the view that the incorporation of the Article was a concession to

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1. S.G. Das, C.A.D., op. cit., at 571. It is worth noting that the statement acknowledges implicitly, the essentially religious nature of the sentiment.
2. R. Vira, ibid, 575-6.
3. R.V. Dhulekar, ibid, at 576-7. 4. Ibid.
5. Pandit T.D. Bhargava had this to say: "Therefore I submit we should consider it (the preservation of the cow) from an economic point of view... cattle which are regarded as useless are not really so... because we are in need of manure (and) it be a milch cow or not (it) is a moving manure factory." Ibid, at 570.

the religious sentiment of the majority, the Hindus, rather than a purely economic measure, and accused the Government of

> "(1)ending itself to a subterfuge and camouflouge legislation that is not prepared honestly to say that we wish to ban cow slaughter, yet they do it in an indirect, devious and dishonest manner." 1

This view is given greater credence, when we consider that there are a large number of useless cattle in the country including cows. They do not produce milk and are worthless for breeding and work purposes. Thus in a country where the quality of the cattle is in general very poor, where there is a great shortage of fodder even for useful cattle, and where the dire need is to improve the quality of the livestock, if it is in the

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1. Frank Anthony, representative of the Anglo-Indian community, P.D., op. cit., at 3495. It is interesting in this respect to compare Art. 25(A) of the Swiss Constitution: "The bleeding of slaughter animals which have not been previously stunned is expressly forbidden; this provision applies to all methods of slaughter and to all kinds of livestock," so that while the Swiss Constitution provides for a single compassionate rule to apply to all kinds of livestock, the Indian Constitution singles out "cow" for special protection. In the light of this, and despite assertions to the contrary, it can therefore reasonably be concluded that special emphasis has been laid on the cow, and which then leads us to the irrevocable conclusion that Art. 48 is indeed a concession to Hindu religious sentiment, an opinion with which K.S Hegde concurs. See his Directive Principles of State Policy, (New Delhi, National, 1972), at 49, as does Smith, op. cit., at 488 when in assessing the attitude of the Supreme Court in the M.H. Quareshi Case (A.I.R. 1958 S.C. 731), he declares that, "... there was more than a hint of criticism in the Court's passing allusion to the situation in which the Hindu sentiment for the divinity and sanctity attributed to the cow has to be propped up by legislative compulsion." It is also worth noting that though Gagendragadkar, J., was a member of the Supreme Court Bench which decided the 1958 cow slaughter case, on reconsideration he had this to say "If the advocates of a total ban on the slaughter of cows and all their progeny consider what the ultimate implications of their claim would be for non-Hindu citizens of India, they will realise that their claim, in substance, amounts to converting the secular democracy of India into a theocratic state," citing Gandhi to the effect that "'Just as Shariat cannot be imposed on the non-Muslims, the Hindu law cannot be imposed on the non-Hindus.'" (Secularism and the Constitution of India, op. cit., at 131). Pertinent to this observation is the pithy comment that "... the minority might well suffer from the thoughtless or perverse arrangements which the majority might think fit to enact as laws, and communal harmony is best achieved if each individual is not only free to practise his religion but is also... free from the religions of his fellow citizens, whether his own, or another community.: J.D.M. Derrett, "Examples of Freedom of Religion in Modern India," Contributions to Asian Studies, Vol. 10, 1977, 42-51, at 42.

general interest of the national economy that milch and drought cattle should be preserved, their breeds improved, and their slaughter prohibited, then surely it is equally in the interest of the economy that those useless cattle, which are an obstacle to economic growth, cease to be. Quite on the contrary, such cows are being kept and maintained in what are called Gosadans, at momumental public expenditure. It was estimated by the Supreme Court in 1958 that Rs 18 or 19 per head p.a. was being spent on their welfare, incongruous in a country which found it difficult to spend more than Rs 5 per capita p.a. on the education of its people.[1]

(a) Judicial interpretation of Article 48

Judicial interpretation of this important but sensitive issue indicates a certain ambivalence of attitude though it tends to tilt generally in favour of Hindu sentiment. In the now celebrated cow slaughter case,[2] the petitioners, Muslim butchers, questioned the constitutionality of certain legislative enactments banning the slaughter of certain animals including cows, passed by the States of Bihar, Uttar Pradesh and Madhya Pradesh, on the ground that they were violative of the economic and religious freedoms as guaranteed by Arts. 19 (1) (g)[3] and 25 (1)[4] of the Constitution. The Supreme Court however held that whereas the total prohibition of the slaughter of she-buffaloes, breeding and working bulls without prescribing any test as to their age and unfitness, as envisaged in

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1. M.H. Quareshi v. State of Bihar, A.I.R. 1958 S.C. 731, at 751.
2. M.H. Quareshi v. State of Bihar, A.I.R. 1958 S.C. 731. Followed in A.H. Quaraishi v. State of Bihar, A.I.R. 1961 S.C. 448.
3. "All citizens shall have the right to practise any profession, or to carry on any occupation, trade or business."
4. "Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion."

the provisions of those Acts was violative of Art. 19 (1) (g) of the Constitution, nevertheless in so far as the said Acts prohibited the slaughter of cows of all ages, such prohibition was valid and in consonance with Art. 48. In the event therefore, the sacrifice of a cow on the Idu'lazha festival not being an obligatory overt act for a Mussalman to exhibit his religious belief, they, Muslims, had to forego this one alternative in the general interest[1] so as to subserve the sentimental requirements of the majority community, "this from the Indian viewpoint not being a deprivation of any moment."[2] In sum then, we have here the peculiarly paradoxical situation where in a secular state there is, not to mince words, "the imposition of a religious and ethical belief by a majority on a minority."[3]

However, when the very same issue was again the subject of litigation in Mohd Faruk v. State of Madhya Pradesh,[4] the Supreme Court reversed its earlier dicta in the M.H. Quareshi case[5] to hold that a notification issued by the Governor of Madhya Pradesh under the Madhya Pradesh Act 1956, resulting in the prohibition of the slaughter of bulls and bullocks was indeed a subterfuge measure, and as such

> "(a) prohibition imposed on the exercise of a fundamental right to carry on an occupation, trade and business will not be regarded as reasonable (since) it is imposed not in the interest of the general public, but merely to respect the susceptibilities and sentiments of a section of people whose way of life, belief or thought is not the same as that of the claimant." 6

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1. Per Das C.J., A.I.R. 1958 S.C. 731 at 740.
2. Derrett, RLSI, op. cit., at 472. Note the undertone of irony here.
3. P.K. Irani, "Social Justice and the Constitution," Law, Society and Education, op. cit., 158-80, at 174.
4. A.I.R. 1970 S.C. 93.
5. A.I.R. 1958 S.C. 731.
6. Mohd. Faruk's Case, A.I.R. 1970 S.C. 93, at 96-97. (Per Shah J.,).

(b) Sample Survey of Hindu Ambivalence

This conflict of decisions is indicative of a certain dichotomy of thinking, a certain ambivalence of attitude, and one can only hope that, considering the number of weightier unresolved points of law that the courts are daily faced with, the cow-slaughter question is now, at least judicially, a closed chapter in view of the latest Supreme Court pronouncement in the Mohd. Faruk Case.[1]

Meanwhile educated, "liberal" Hindu opinion continues to be in a quandry. While fully receptive to the fact that, "India is a secular State formally declared as such by the Constitution,"[2] so that "cow slaughter cannot be totally banned without infringing the fundamental rights of Indian Muslims,"[3] the same author pleads eloquently and emotionally that, in an issue as sensitive and delicate as this, Hindu sentiments should be given due consideration by the Court[4] "as Hindus in general do respect cows as they do different gods,"[5] and "to most Hindus 'the cow is Heaven the cow is Earth, the cow is Vishnu Lord of Life,'"[6] for not to do so may lead to communal riots.[7]

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1. A.I.R. 1970 S.C. 93.
2. N.R. Chakrabarti, Contemporary Problems in Hindu Religious Endowments, Ph.D Dissertation, (Unpublished), London University, 1982, at 44.
3. Ibid.
4. Ibid, at 43.
5. Ibid.
6. Ibid, at 44.
7. Ibid, at 43. It is worth noting that in the State of West Bengal there is no law against cow-slaughter, and recently when the suggestion for such legislation was mooted to the Chief Minister, Mr. Jyoti Basu, he is reported to have retorted, "Over my dead body." And to the credit of the Bengalis it has to be admitted that for all their volatility, there has never, in the history of the State, been communal riots on grounds such as those Dr. Chakrabarti apprehends. Are the Hindus of West Bengal, one is tempted to ask, any less Hindus than those of the rest of the Gangā Valley? Or is it that, a long tradition of culture and learning frees — at least a sizeable number of them — from the rigid intolerance evident in the more backward regions of India?

(c) A Projected Solution

Inconclusive and inchoate as arguments such as these are, they do nothing to resolve this prickly issue, nothing to alleviate Muslim apprehension that, such rights as the Constitution does guarantee them are always subject to reinterpretation in favour of the majority community. Small wonder then at their intractability!

So as to strike a delicate balance between Hindu sensibilities on the one hand, and the undoubted right of Muslims and other minorities to whom beef is a legitimate item of diet on the other, it is submitted that, perhaps the ideal solution might be the enactment of a Central Act banning the slaughter of cows in public places only, while stringently safeguarding, at the same time, the constitutional rights of minorities to the two vital freedoms, those of religion and trade, free of every interference and harassment. A partial precedent for just such a legislation may be found in the dicta in Kitab v. Santi,[1] where Muslims having killed a cow in full view of protesting Hindus, the offenders (because their act was an insult to the Hindus and undertaken with that object), were convicted under s. 298 of the Indian Penal Code which lays down that,

> "(W)hoever with deliberate intention of wounding the religious feelings of any person... places any object in the sight of that person, shall be punished..."

To conclude, Art. 44 of the Directive Principles envisages, as we have already seen, a laudable and noble ideal, a truly secular society where all are subject to a uniform set of civil laws. The greatest impediment in its implementation, as we have also seen, is the rigidity of obscurantist Muslim opinion, born as it is of their fear of losing their identity as a community, of being submerged in the majority mainstream. The concessions to Hindu sentiment in the Constitution do nothing to alleviate such fears. It is essential therefore that to reassure them of

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1. A.I.R. 1965 Trip. 22.

the bona fides of the Constitution, and to restore their faith in it, a more careful study of the Constitution be made, and such concessions as have advertently or inadvertently been made in deference to the feelings of the majority community, be amended or abrogated altogether.

This would go a long way towards assuring the minorities that all are equal in the eye of the Constitution, the supreme law of the country, and the implementation of Art. 44 and the ushering in of an era of harmonious uniformity in the personal laws in India, would then not be the distant ideal as it seems now, practically speaking, but a living reality.

CHAPTER TWO

THE HINDU WIDOW IN TRADITION AND IN MODERNITY

"But I heard a reed of Coolaney say -
'When the wind has laughed and murmured and sung,
The lonely of heart is withered away.'"

W.B. Yeats
From "The Land of Heart's Desire"

1. Introduction

Widowhood, the natural and inevitable corollary of marriage, is the cessation of the interpersonal relations with the marital partner, and while the result of it may be the removal of specific sets of duties or restrictions on time or movement, and a greater degree of freedom and independence, in the couple based structure of a given society which stigmatises singleness, there is a corresponding loss of the social role of wife, and with it loss of status, of respect and consideration.[1]

This is properly indicated by the word "widow" itself, which is derived from the Sanskrit vidhavā meaning "empty",[2] a harsh and hurtful term, for while wifehood is the apotheosis of the fulfilment of the destiny traditionally offered to women by society, and the only means of their integration in the community, the woman in her single state is,

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1. And this is true as much of traditional cultures as of the countries of the West, and perhaps nowhere more so than in the advanced and aggressive, materially oriented American society. Thus the very revealing and perceptive observation that, "Because of the much married nature of American society, being a widow places many women in a rather stigmatic relation with others, self-consciousness modifying many interactions.": H.Z. Lapota, Widowhood in an American City, (Camb., Mass., Schenkman, 1973) at 91.

2. In folk etymology "void of a man."

socially viewed, so much wastage.[1]

This is specially true of cultures which derive their ethics from religious tenets, and any effort to comprehend the unique position of the widow and her lot in Hindu society must of necessity be based on the social status of the traditional Hindu wife in her own milieu.

2 The Hindu Wife in Tradition

Religion in general, and Hinduism perhaps more so than any other, emphasises the sanctity of marriage. It is for the Hindu one of the ten samskārs or sacraments necessary for the regeneration of men of the twice-born classes and the only sacrament for women and śūdras.[2]

The aims of a Hindu marriage being dharma (righteousness), prajā (progeny) and rati (pleasure) in that order, marriage was desired not so much for sex or even for progeny, as for obtaining a partner for the fulfilment of one's religious duties.[3]

Accordingly the Hindu is enjoined to enter gṛhasthāśrama, (householder's stage) and marriage assumed the greater importance, as it was only in his capacity as a married householder that he was capable, together with his wife, of fulfilling the obligation laid upon him to pay the three ṛṇas, deva ṛṇa (debt towards God), ṛṣi ṛṇa (debt towards the sages) and pitṛ ṛṇa (debt towards ancestors) and to beget sons. These duties achieved, he could only then turn his mind to the attainment of ultimate salvation (mokṣa).[4]

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1. S. de Beauvoir, op. cit., at 447.

2. Manu II. 67, G. Bühler, tr., The Laws of Manu, F. Max Müller, ed., S.B.E. Vol. XXV, (Oxon, Clarendon Press, 1880).

3. K.M. Kapadia, Marriage and Family in India, (Lond., O.U.P., 1955) at 159.

4. A. Avasthi, Hindu Marriage in Continuity and Change, (Luck., Pradeep Prakashan, 1979), Intro., at VII.

Thus to describe the Hindu marriage as a mere sociological factor[1] would be to miss its real significance, to do less than justice to its uniquely sacramental aspect. Nor is it merely a mechanical imitation of the cosmic union of the male and female principles. It is essentially a re-enactment of the myth of creation,[2] a metaphysical transformation of the mundane biological man-woman association into a celestial sacred relationship which transcends even the cycles of time. Of all the saṃskārs, marriage alone could therefore bring about the spiritual metamorphosis of man and lead him on to that ultimate aim of human life, the attainment of mokṣa.

Nor could the rôle of women be minimised when it came to fulfilling the second aim of marriage, prajā, the procreation of progeny for the perpetuation of the family. The birth of a son to carry on the household worship was for the Hindu a vital necessity. In popular belief, in the absence of a son, putra, a man goes to the hell called Put,[3] and his ancestors' spirits likewise suffer, for unable to be fed

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1. Consider and contrast in this respect the concept of marriage as being not merely an agency of sexual behaviour, but an economic institution which in various ways affects the proprietary rights of the parties, "a relation of one or more men to one or more women which is recognised by custom or law and involves certain rights and duties both in the case of parties and in case of children born of it." : E. Westermarck, The History of Human Marriage, Vol. I, (Lond., Macmillan, 1894), at 26.

2. S.P. Nagendra, 'Forward' at Avasthi, op.cit., who then goes on to quote the marriage formula, "I am Heaven, thou art Earth, I the Chant, thou the Verses; let us be one and bring forth offspring," and "Wherewith Agni grasped the right hand of this earth, therefore grasp I thy hand...," to indicate that in thus doing what the gods did, the Hindu participates in a life of fullness and immortality.

3. See Viṣṇu,XV.44-6, J. Jolly, tr., The Institutes of Visnu, F. Max Müller, ed., S.B.E. Vol. VII, (Oxon, Clarendon Press, 1880).
"Because he saves (trāyte) his father from the hell called Put therefore (a male child) is called putra (protector from Put, son) by Svayambhū himself.
"He (the father) throws his debt on him (the son) and the father
(continued on next page)

with the pindas (rice balls) at the rites in their honour, they are doomed to eternal hunger and misery.[1]

The perpetuation of the family and the desire for male progeny is rooted in the Rgveda and perfectly understandable for the Āryan invaders having colonised a rich and fertile land, held and owned by a powerful and infinitely more civilised race, were easily outnumbered by their enemies. They must have very often felt for, and deprecated the comparative dearth of men, and the Vedic father's longing for a male child[2] was the natural consequence of the desire for more warriors on whom would depend not merely the perpetuation but also the survival of the race.

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obtains immortality, if he sees the face of a living son. "Through a son he conquers the worlds, through a grandson he obtains immortality, and through the son's grandson he gains the world of the son."

1. An impressive legend meant to illustrate this is told more than once in the Mahābhārata, that of the great penitent Jaratkāru, who in the course of his wanderings comes across hunger-racked, emaciated, woeful beings hanging head down in a cave, clinging to the single root of a certain plant which itself holds on only by a thread, and which in turn is being greedily gnawed at by a mouse. Moved to compassion and ready to part with what his penances might have earned him to redeem the misery of those wretched creatures, the ascetic discovers to his dismay and amazement that they are none other than his own ancestors, ṛṣis of strict piety who are nevertheless doomed for the very asceticism practised by the last of their seeds. At this needless to say, Jaratkāru that "famous knower of the Vedas and Vedāṅgas", then sheds his continence, acquires a wife and begets a son and thus rescues his forbears from their dreadful torment. For a more detailed account of this and other stories from the Mahābhārata illustrating the same point see J.J. Meyer, Sexual Life in Ancient India, Vol. I, (Lond., George Routledge, 1930), at 147 ff.

2. This longing for male progeny is dwelt upon time and again in the Vedic hymns. Thus:
   (a) "To him who worships, Soma gives the milch-cow, a fleet steed and a man of active knowledge
   Skilled in home duties, meet for holy synod, for council meet, a glory to his father." : RV. 1. 91. 20, R.T. H.Griffith, tr., Hymns of the Rgveda, Vol I, (Benares, E.J.Lazarus, 1889).
   (b) "O Dawn enriched with holy rites bestow on us the wondrous gift

Not unnaturally therefore, with this emphasis on dharma as the chief object of a Hindu marriage, and the begetting of a son the paramount duty of a Hindu, the importance of the woman becomes singular, and the birth of a daughter as potential mother not altogether unwelcome. Add to this the fact that while the men were engrossed in the work of conquest and consolidation, women were constructively engaged in agriculture and the manufacture of cloth, bows and arrows and other war materials.[1] They were thus useful members of society whose co-operation was valuable in securing victory in war and prosperity in peace, and therefore not to be patronised or held in contempt.

That women were not the morally low creatures that they were to be regarded at a later date, is made abundantly clear by the frequent pronouncements in the Rgveda in praise of them. "Many a woman even more often is kindlier than a godless and miserly man,"[2] we are told.

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Wherewith we may support children and children's sons." : RV. 1. 92. 13, ibid.

(c)"As holy food, Agni, to thine invoker give wealth in cattle, lasting rich in marvels,
To us be born a son, and spreading off-spring, Agni be this thy gracious will to us-ward." : RV. III. I. 23, ibid.

(d)"Soma to the Gandharva, and to Agni the Gandharva gave
And Agni hath bestowed on me riches and sons and this my spouse." : RV. X. 85. 41, ibid., Vol. IV, (1892).

(e)"Be ye not parted; dwell ye here; reach the full time of human life. With sons and grandsons sport and play, rejoicing in our own abode." : RV. X. 85. 42, ibid.

(f)"O bounteous Indra, make this bride blest in her sons and fortunate
Vouchsafe to her ten sons, and make her husband the eleventh man.": RV. X. 85. 45, ibid.

1. A.S. Altekar, The Position of Women in Hindu Civilisation, 2nd ed., (Banaras, Motilal Banarasidass, 1956), at 342.

2. RV. 5. 61. 6, F. Max Müller, tr., Vedic Hymns, F. Max Müller, ed., S.B.E. Vol. XXXII, (Oxon, Clarendon Press, 1891).

It was well recognised that the wife was the ornament of the house,[1] nay, she was herself the home,[2] her husband's companion and friend,[3] and immediately after marriage, she is asked to shoulder her responsibilities as mistress of the house,[4] and just as the ocean rules over the rivers of the world, so must she as queen of the house, hold sway over her husband's father, mother, brothers and sisters.[5]

There is thus enough evidence to indicate that in the hoary antiquity of the period of the Vedas, the position of the wife was an exalted one. She was no slave, subject to the absolute dominion of her husband, but as his indispensable companion in the performance of ceremonies and sacrifices before the household fire, and as the mother of sons, the respect accorded to her is in some measure comparable to the status of the mater-familias of early Roman law.

However, while the husband protected and maintained his wife, she in turn owed a duty of obedience to him.[6] The Vedic word for the couple dampatī etymologically means the joint owners of the house. In actual practice however, as with all patriarchal societies, the Hindu husband as the senior partner was vested with the ultimate supreme authority, and under his general guidance the wife's position was one

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1. RV. 1. 66. 3, Griffith, op.cit.
2. RV. 3. 53. 4, ibid.
3. The union of marriage cements this bond of friendship. Thus :
   "Nigh they approached one-minded with their spouses, kneeling
   to him adorable paid worship
   Friend finding in his own friend's eye protection, they made
   their own the bodies which they chastened." : RV. 1. 72. 5, ibid.
4. RV. X. 85. 26, ibid.
5. RV. X. 85. 46, ibid.
6. This is disputed by Altekar, op.cit., who points out at 93 that, "The Vedic marriage ritual, however, does not enjoin the duty of obedience upon the wife. Both parties take the same vow."

of honourable subordination.[1]

However to assume that this ideal of equality prevailed universally in the Vedic age would be to idealise, and to attribute in some measure Utopian qualities to it, which in the light of the many utterances in derogation of women, the age ill deserves. While on the one hand, the Ṛgveda extols the virtues of women, on the other hand it is of the view that the mind of woman brooks no discipline, and neither is it worthy of any merit.[2] Urvaśī in describing the nature of her own sex confesses that with women there can be no lasting friendship, and likens their hearts to those of hyenas;[3] and, goes on the sacred text, even Indra has observed that women cannot control themselves.[4]

Thus we come across diametrically opposing views and the task of reconciling them so as to determine which of them was representative of the age as a whole is no easy task from this distance of time. However, it is submitted that what does seem to emerge is that the honour and reverence which women derived, emanated from their rôles as wives and mothers. Intrinsic merit as such seems not to have been a quality attributed to them, and with the spread of polygyny and the dissensions and disputes that must invariably accompany it, the less attractive - though perfectly understandable - traits of woman's

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1. Ibid., at 92-3. Thus the same author indisputably refutes his own suggestion that the duty of obedience was required of the Vedic not wife. It is a truism of universal application that whatever the position might theoretically be, society imposes and impresses upon each age its own chosen norms of behaviour and conduct.
2. RV. VIII. 3. 17, Griffith, op.cit.
3. RV. X. 95. 15, ibid.
4. RV. VIII. 33. 17, ibid.

nature seemed to have lent a certain veracity to the opprobrium heaped upon her.

It has often been observed, and certainly with truth, that the Āryans were by and large committed to the ideal of ekpatnītva (one wife),[1] and instances of polygyny where they did occur were regarded with disapproval. In one place a doubly wedded man smitten with anxiety is made to exclaim that biting cares devoured him as rival wives' (sapatnīs) enclosing ribs oppressed him from every side.[2] We are similarly treated to an entire hymn devoted to the rantings of a jealous wife and her fulminations against a more favoured rival.[3]

Confined in the earlier stages to the aristocratic classes only, for whom in imitation of the gods,[4] it was a matter of pride and status to acquire several wives, the practice seems to have gradually spread. The wife's barrenness or the birth of female children only, or the neglect on her part of religious observances so as to render her unfit for participation in religious yajñas (sacrifices), all these reasons together with the inspiration derived from the élite, inevitably opened the doors for a more widespread practice of polygyny in the light of which the more slanderous utterances against women are if not acceptable, at least understandable.

With the advent of the dharmaśāstric period, the Hindu way of life seems to have undergone a certain definite transformation and transmutation down the centuries. A mass of sacred literature grew up - the prototype of which may be said to be the laws of Manu - which

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1. Avasthi, op.cit., at 45.
2. RV. 1. 105. 8, Griffith, op.cit. 3. RV. X. 145. 1-4, ibid.
4. RV. VII. 26. 3, ibid., refers to Indra the king of gods as having taken and possessed spouses like so many castles. See also RV. VII. 18. 2. ibid.

while accepting the authority of the Vedas, reflected the course of change, and it is obvious now that whatever any revered scriptures may say, as in this case the Vedas, each age makes its own norms which are rationalised and institutionalised by individuals. This literature reflects both the sacred and secular aspects of contemporary life, and women, their position and status in society, the ideals held before them and the demanding standards expected of them, all of which emerge from a study of these texts.[1]

That women were the objects of respect even in ages following the Vedic period may be inferred from references even in the dharmaśāstra. Manu the great lawgiver, has many a good word for women side by side with his deprecatory comments. He unequivocally assigns to them the status of presiding deities in the house, and indeed wives who are destined to bear children, who secure many blessings, who are worthy of worship and irradiate their dwellings are in no wise less than the goddess of fortune who resides in the houses of men.[2] Likewise

> "(w)here women are honoured, there the gods are pleased; but where they are not honoured, no sacred rites yield rewards."[3]

According to the sage, as the first duty of the husband was to require and to obtain unreservedly her co-operation in all religious acts,

> "(L)et man and woman united in marriage constantly exert themselves that (they may not be) disunited (and) may not violate their mutual fidelity,"[4]

and this may be the summary of the highest law for husband and wife.[5]

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1. P. Mukherjee, Hindu Women, (Cal, Orient Longman, 1978), at 3.
2. Manu, IX. 26, op.cit.
3. Ibid., III. 56.
4. Ibid., IX. 102.
5. Ibid., IX. 101.

But, it may be noted, Manu also says that from food cooked in the evening the wife should offer balis but without mantras.[1] The process of the degradation of women had clearly begun, for the robbing her of her right to repeat the Vedic mantras soon gave way to an even firmer stricture that the wife is not authorised to perform religious acts independently of her husband[2] or without his consent. Kane draws our attention to Viṣṇu, 25. 15 which ordains that there is no separate yajña for women (independently of the husband), nor vrata (vows) nor fasts (without his consent). Similarly Kātyāyana propounds a sweeping rule: "Whatever a woman does to secure spiritual benefit after death without the consent of her father (when she is unmarried), or her husband or her son, becomes fruitless for the purpose intended."[3] Not only that

> "(B)ut for disloyalty to her husband, a wife is censured among men and (in her next life) she is born in the womb of a jackal and tormented by diseases, [the punishment of her sin]."[4]

and her perpetual tutelage declared,[5] the woman's subordination is complete. Nor, in the opinion of the renowned ṛsi, does she deserve any better, for from birth her character is tainted with a

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1. Ibid., III. 121.
2. P.V. Kane, History of the Dharmaśāstra (hereinafter referred to as H.D.), 2nd ed., Vol. II, Part I, (Poona, BORI, 1974) at 558.
3. Ibid., at 559.
4. Manu IX. 30, op.cit.
5. "Her father protects (her) in childhood, (her) husband protects her in youth, and (her) sons protect her in old age; a woman is never fit for independence." : Ibid., IX. 2. See also Ibid., V. 148. The same sentiment is echoed in numerous smṛtis among them, Baudh. II. 2. 44-6, G. Bühler, tr., The Sacred Laws of the Āryas, Part II, F. Max Müller, ed., S.B.E., Vol XIV, (Oxon, Clarendon Press, 1882); Vas. V. 2, ibid.; Vis. XXV. 13, op.cit.

love of bed, of seat and of ornament; impure desires, wrath, dishonesty, malice and bad conduct motivate her;[1] destitute of strength and of the knowledge of Vedic texts, she is as impure as falsehood itself and for one such "no sacramental rite is performed with sacred texts, thus the law is settled."[2]

Thus being the morally low and degraded creature that she is in the dharmaśāstra (none of which is attributed to an authoress), strict fidelity and devotion to the husband are stressed as the guiding principles of a woman's life for

> "(T)hough destitute of virtue, or seeking pleasure (elsewhere) or devoid of good qualities, yet the husband must be constantly worshipped as a god by a faithful wife."[3]

This ideal of pativratā, i.e. being devoted to the husband, not merely implied fidelity, but made service to him the only duty of the wife, her sole joy in life and the realisation of her innermost self (antarātmā); and while polygyny was given legitimacy, for the wife, because she was a satī ("true" wife), mores were evolved to commit her to be devoted to the husband even after his death. Thus Manu enjoins:

> "(A) faithful wife, who desires to dwell (after death) with her husband, must never do anything that might displease him who took her hand, whether he be alive or dead."[4]

The ideal of pativratā, and correspondingly, the notion of chastity, so insisted upon by the Brāhmanical tradition, naturally led to what in later ages was to become one of the greater evils of the

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1. Manu IX. 17, op.cit.
2. Ibid. IX. 18.
3. Manu V. 154, op.cit., an idea that was to have a profound impress upon the Hindu mind right down the ages, and as relevant today as when the notion was first propounded. See Fazal Ali, J.'s, summing up in Tulasamma v. Sesha Reddy, A.I.R. 1977 S.C. 1944, at 1954.
4. Manu V. 154, op. cit.

Hindu way of life, i.e. child marriages. Marriage, according to the sacred texts, is not only necessary, but it is also the sacramental birth anew of the woman, and it is the father's express and holy duty to find a husband for his daughter. The setting in of the menses brings with it not only the capacity for the full sexual life and the right thereto, but first and foremost the divine call to it, the unavoidable duty. For the woman is there for the bringing forth of progeny, and her calling must not be barred to her or made harder. Therefore during each ṛtu (those days after her period which are proper for conception) not only has she the urge for coition, but for her this is then also a holy right and command.[1] Thus each time an unwedded maiden has her courses, her parents and guardians are guilty of the heinous crime of slaying the embryo.[2]

The conjecture has been put forward that as a matter of fact this insistence on child marriage was based not so much on religious as on economic grounds, "on the heavy competition in the marriage market",[3] and the father burdened with the duty of finding his daughter a good husband, dared not wait long.[4] However, it is submitted that what

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1. Meyer, Vol. I, op.cit., at 216-7.

2. See Vas. XVII. 71, op.cit.; Baudh. IV. I. XII, op.cit.; Nār. XII. 25-7, J. Jolly, tr., The Minor Law Books, Part I, F. Max Müller, ed., S.B.E., Vol XXXIII, (Oxon, Clarendon Press, 1889). Disobedience of this rule incurs the wrath of the gods, and such punishment as is in store turns the stomach. Thus according to the Parāśara saṁhitā (VII. 5, cited at Meyer, Vol. I op.cit.,) if a girl has reached her twelfth year and has not been given away, then her forefathers in the other world are forever drinking the blood she sheds every month.

3. Meyer, Vol. I, op.cit , at 216, f.n. 2.

4. Ibid.

saving certain acts of household worship appropiated by custom to wives and daughters.

really emerges is the value put in the Hindu marriage on procreation as being of its essence; rati or sexual pleasure is subservient to it, and the pious rule of rightful copulation which enjoins the virtuous to the bringing forth of progeny, is thus the basis of the fear that lest otherwise, the ṛtu of the young woman be left unused, (an attitude that spills over in the Epics, as we shall presently see). Moreover in the rigidly patriarchal set-up of the dharmaśāstra society, it may not be too far-fetched a theory to assume that, considering the contempt of the law-givers for the moral worth of women, the early marriage of girls was a means by which the female honour was sought to be protected; weak and inclined to give in to their lesser instincts, their conduct in later years could not be relied upon, and measures could not be taken too early to prevent the calumny that they might otherwise heap upon their forbears!

In sum then, in the newly formed society of Manu and other like seers, she who had been the friend and companion of her husband in the period of the Veda, is debased and her fall from grace complete. The ceremony of marriage is recognised by legislators as taking the place, for women, of the sacrament of initiation prescribed by the Veda. There is no sacrifice, fast, or religious observance that concerns women in particular, no pious practice beyond devotion and reverence to her husband which alone may attain for her honours in heaven. Instead of sanctifying her by the worship of immutable perfection, she is debased by the exclusive adoration of a creature similar to herself and subject likewise to the weaknesses of humanity.[1]

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1. C. Bader, Women in Ancient India, (Lond., Kegan Paul-Trübner, 1925) at 17-8.

The two great Epics, the Rāmāyaṇa and the Mahābhārata present no less a fascinating study of the notions of womanhood, the concept of marriage, the ethics of sex, and their study assumes the greater significance in that those with a familiarity of Indian conditions will know that the epic literature even today exerts an influence over the mind and life of the Hindu, for what to others might merely appear as the brilliant inspiration of the poet's fancy, is for the devout, a sacred recounting of the deeds and heroic exploits of the gods whose precepts they must obey, and actions strive to emulate.

While the Rāmāyaṇa is the celebration of the ideal of pativratā, and its heroine the high-souled lady, the devoted consort of Rāma, Sītā of the spotless and unsullied character, the embodiment of every virtue, every grace, the Mahābhārata on the other hand, is a fascinating amalgam, which in shedding the yoke of its Brāhmanical past and the severely ascetic moral standards of the age of Buddha which succeeded it,[1] introduces the cult of Kṛṣṇa which symbolises a freer more tolerant spirit, a laxer morality which agrees but little with the rigid code of conduct prescribed by Manu.[2]

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1. For Meyer, the essentially different character of the two Epics lies in that while "The Rāmāyaṇa, indeed, is seen from the very beginning to be essentially soft, dreamy, fantastic and deeply religious - to be the work of Brāhmans, on the other hand, the poetry of the Mahābhārata is often quickened in its older parts by a mighty flame of fire, a manly, undaunted, passionate soul: it was the warrior that sung this heroic song...". See Meyer, Vol. I, op.cit., at 2.

2. For, as Bader, op.cit., points out at 18, the Epic poetry "will reveal women celebrating the sacred rites within the domestic sanctuary, retiring even with her husband to the forests, uniting the piety of the ascetic with the devotion of the wife and mother, and attaining at last by her holy conduct to swarga the Paradise of Indra."

The Rāmāyaṇa and the Mahaḅhārata[1] together present us with the most graphic and detailed picture that exists of the civilisation and culture, the social and political life, the religious and ethical concepts of the ancient Hindus. The Rāmāyaṇa, the authorship of which is popularly attributed to the great sage Vālmīki, is seen from the very beginning to be essentially soft, dreamy, fantastic and deeply religious, in a word, the work of Brāhmins.[2] The story, the broad strands of which are too well known to be repeated here is essentially the celebration of the life and noble exploits of its hero, Rāma prince of Ayodhyā, brave, accomplished, devoted to his duty, unfaltering in his truth. And yet woman plays a pivotal role, and so clearly does she appear as causing the deeds in this great Epic that in suppressing the feminine element, the spirit of the action would be destroyed.[3] The imagination of the poet is fired by all that is beauteous and fine in the female character, and beauty, tact, mildness, chastity, such are the gracious attributes of the women of Ayodhyā, and indeed the wives of King Daśaratha show in plenitude these exemplary traits of character, for which it was designated that Viṣṇu enter the three wives of Daśaratha.[4] Kauśalyā of the charming eyes, who as mother of Rāma shone as much as the mother of the gods[5] the modest Sumitrā, and even the brilliant Kaikeyī - all won by the virtues of Rāma's character, regard his proposed coronation with pride and

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1. The references to these two Epics which follow have been gleaned from various translations and are indicated at the appropriate places.
2. Meyer, Vol. I, op.cit., at 2.
3. Bader, op.cit., at 89.
4. Ibid., at 92.
5. Ibid., at 93.

pleasure. The heart of Kaikeyī is slow to open to feelings of hatred, and in resisting the machinations of the wicked Mantharā, she is well aware of the worth of Rāma, for not only is he the eldest son of the king and therefore deserving of his inheritance, but he is also full of justice, fond of the company of venerable men, his soul grateful, his word always the word of truth. In short he is pure.[1] However

> "(L)ike a slow but deadly poison worked the ancient nurse's tears,
> And a wife's undying impulse mingled with a mother's fears."[2]

Thus when she does succumb, it may perhaps be regarded more as the awakening jealousy of a mother for the welfare of her own child, rather than the wicked act of an intrinsically evil woman. Her later remorse redeems her, and after the fourteen years of travail are over, she is present with the other queens, to welcome back the son she had been instrumental in sending into exile. That Kaikeyī is not absolved from blame is clear, but neither is Dasaratha who might well have pondered the reminder in the Mahābhārata: "If a bad woman is treated well, she turns her back on you."[3]

However, it is Sītā who captures the imagination and as the animating spirit of the Epic, has come down the ages as the ideal of every wifely virtue. Sītā, princess of Videha, "child of Janaka, dearer unto him than life,"[4] used to every luxury, forsakes all comfort to follow her husband in his banishment and to share in the vicissitudes of his fortune for,

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1. Ibid., at 97.
2. R.C. Dutt, The Great Epics of Ancient India, 2nd ed., (New Delhi, Ess Ess Publications, 1976), at 186.
3. MBh. II. 64. 11, cited in Meyer, Vol. II, op.cit., at 494.
4. Ibid., at 12.

> "(M)y mother often taught me and my father often spake,
> That her home the wedded woman doth beside her husband make,
> As the shadow to the substance, to her lord is faithful wife
> And she parts not from her consort till she parts with fleeting life!"[1]

And resisting all Rāma's endeavours to dissuade her from such a course, she brings the curtain down on this part of the action by her plea that

> "(S)eparated from thee, I should not wish to dwell even in heaven. I swear to thee noble child of Raghu by thy love and by thy life! Thou art my lord, my guru, my way, my very divinity; with thee then shall I go; it is my final resolve,"[2]

for

> "(P)aradise without thee would be an abode odious to me, and even hell with thee cannot be otherwise than a favoured heaven."[3]

In exile, sorrow, suffering, trial and endurance, merely ennoble an already noble character, and Sītā emerges from all her tribulations pure and steadfast. Not even her abduction by the Rākṣasa king Rāvana can cast a blemish on her spotless chastity, and in the face of Rāma's doubts, incredulous and heartbroken she voluntarily undergoes the ordeal by fire to emerge pure and unscathed; Agni himself, the supreme Judge, assures Rāma of Sītā's inviolate chastity.

But alas for the noble Sītā! She must be justified in the eyes of the people before she can again be readmitted to the domestic hearth, and at Rāma's restoration, she is sent away to the forests once more

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1. Dutt, *op. cit.*, at 41.
2. Bader, op.cit., at 107.
3. Ibid., at 108.

to clear the dark cloud of suspicion which still hangs over her fair name.

Years later at the horse sacrifice when Rāma's heart yearns for Sītā, the noble lady, broken-hearted, her life darkened by unfounded suspicion, invokes the earth to take her back. And the earth which had given birth to her yawns, and the suffering child sinks into the bosom of her mother earth, true in death as she had been in life, and

> "(G)ods and men proclaim her virtue! But fair Sītā
> is no more,
> Lone is Rāma'a loveless bosom and his days of bliss o'er."[1]

Such then is the heroine of the Rāmayaṇa, the very ideal of pativratā - an ideal that is all pervasive in the Epic, and indeed one on which the entire story hinges. The poet encapsulates in Sītā's character the highest ideals of piety, endurance and devotion to the husband whom she refers to time and again as her living god.[2] The hand that has moulded her is undoubtedly that of a Brāhmin and the spirit that inspires him, that of Manu, for true to the tradition of the "twice-born", while the spouse of Rāma must be made to live up to the most exacting standards as befitted her honoured status, he who has spurned her is no common husband of a common wife,[3] and Brahmā himself enlightens him as to his worth. He is Nārāyaṇa the August, he is Viṣṇu the conch-shell Bearer, he is Kṛṣṇa Himself the Eternal One.

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1. Dutt, op.cit., at 178.
2. A recurrent theme in the Rāmāyaṇa, it is reiterated when Kauśalyā bitterly reprimands her husband for Rāmā's exile, but is soon enough struck with grief at having insulted the man who ought to be to her a god incarnate, and supplicates him to pardon her in view of what she has suffered. See Bader, op.cit., at 121.
3. Ibid., at 212.

He is much more besides,[1] he who is "the author of all things and has no end."[2]

Thus it comes as no surprise that the delineation of Sītā apart, there occur passages in the Rāmāyaṇa reviling women in general,[3] for it has truly been observed that however important woman is, her entry into the city of life is seldom hailed on this earth with hosannas and palm-strewn roads; nor is she met with the blare of trumpets that joyfully greet the warrior hero.[4]

The disposition of women, according to the Epic, is as whimsical as the leaves of a lotus flower, as sharp as the edge of a sword, and as unsettled as the blast of a storm.[5] The great anchorite Agastya observes that, to remain with her husband as long as fortune favours him, but to forsake him in misfortune, that is often the nature and character of woman. Fickle as lightning, swift as wind and flame, she is as sharp and deadly as the point of an arrow.[6] And Lakṣmaṇa, provoked into exasperated wrath at Sītā's unseemly suspicion of his motive in staying with her rather than heeding to what seemed to her, Rāma's call, indicts all womanhood as impious and inconsistent, who likes not the restraint of duty but is glad to sow division among

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1. For a full account of these attributes see ibid., at 213-4,
2. Ibid., at 213.
3. In fact this is made clear by the ṛṣi Agastya, who exempts Sītā from the derision that he reserves for women in general for "she (Sītā) only deserves praise; she is Arundhatī, near to the gods, a model to present before women.": Bader, op.cit., at 140.
4. Meyer, Vol. I, op.cit., at 6.
5. Indra, Prof. The Status of Women in Ancient India, 2nd ed., (Banaras, Motilal Banarasidass, 1955), at 15.
6. Bader, op.cit., at 140.

brothers.[1]

The Mahābhārata, in sharp contrast to the Rāmāyaṇa, is a rugged epic animated by the spirit of the proud warrior whose pride lies in the might of his strength and whose achievements of physical prowess add lustre to his name. The collective work of centuries, the later interpolations utterly remodelled much of it and sought to give the whole the tendentious coating of Brāhmanism.[2] The resulting contradictory views and attitudes in it thus become more understandable, and in the variations on the inexhaustible theme of woman, we come across similar contradictory utterances often flatly at variance with one another, for while on the one hand she is extolled in the most exalted of terms as a faithful wife and loving mother,[3] on the other, the most debasing references are made to her lack of moral worth.[4]

The Epic abounds in utterances in derogation of woman. She is

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1. Ibid. at 149.
2. Meyer, Vol. I, op.cit., at 2.
3. The mother is covered with much glory in Indian tradition, and her place in the epic literature assured. "The good women, the so glorious ones are deemed the mothers of the world...," sings the Mahābhārata, (MBh. XIII. 38-43 cited at Meyer, Vol. II, at 500), and indeed the Pāṇḍava brothers' tender regard towards their mother Kuntī which is sustained throughout the long narrative, is perhaps one of the most attractive and affecting aspects of the Epic. The story of Rāmā of the axe illustrates this as well. Renukā the wife of Jamadagni having longed for another, was robbed of her holy splendour, and at his father's behest, Rāma hewed off his mother's head with his axe. When the old man's rage had passed, and he asked of Rāma to wish for anything he desired, the filial heart asked for naught but that his mother be restored to life again without the memory of what had befallen her.
4. An intriguing theory attributes this to the nature of the Hindu in whose soul, according to it, dwells that twin pair, burning sensuality and stark renunciation of the world and of the flesh. 'What a delight and torment then must woman be to him who is at one and the same time the voluptuary and the ascetic!' See Meyer, Vol. I, op.cit., at 3-4.

guilty of every shortcoming particularly those of a sexual nature, and a man entering into wedlock must be "fully aware with himself that the woman is a wavering reed."[1] That they are the root of all evil, the sum and essence, the very embodiment of sensuality is amply illustrated by the legend of Nārada, who desirous of a thorough instruction on the character of woman betakes himself to Pañcacūḍā the lovely but profligate Apsara, who on being persuaded by the holy ṛṣi, enlightens him that "there is nought worse than woman."[2] She knows no moral bars, and "so soon as a woman sees a handsome man, her vulva becomes moist;"[3] nay, such is the lust of women that there is no man in this world that they would not go to, be he hunchback, blind, simpleton, dwarf or cripple, "and when they cannot come to a man at all, then they even fall on one another."[4] In fact, the instruction continues,

> "(T)he fire has never too many logs, the great sea never too many rivers, death never too many beings of all kinds, and lovely eyed woman has never too many men."[5]

This, the secret of all women, is the essence of her innermost being. Besides which

> "(T)he god of death, the wind, death, the underworld, the ever burning entrance to hell, the knife-edge, poison, snake and fire - women are all these in one."[6]

To enumerate on this litany of disparaging attributes, we may add here those of one who reveals her identity to the sage Aṣṭāvakra as "the protecting goddess of the northern quarter of the heavens."[7]

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1. Ibid., at 136.
2. Ibid., Vol. II, at 497.
3. Ibid., at 498.
4. Ibid. 5. Ibid. 6. Ibid.
7. Ibid., Vol. I, at 136.

She informs the holy man of the fickleness of woman's nature, for

> "(A)mong thousands of women, nay among hundreds of thousands, there is to be found only one that is faithful to her husband, if indeed, one at all. They know not father, family, mother, brothers, husband or brothers-in-law; given up to their pleasure, they destroy families, as great rivers destroy their banks."[1]

Indeed, such is the intensity of their carnal desires that even old women are plagued by the feverish longing for man.[2]

However, it is a curious comment upon the nature of the age that while women in general are reviled and regarded as debased, the brāhmanical imprint is perhaps nowhere in greater evidence than in the depiction of women as the ideal of the pativratā. Pārvatī who with Sītā, is in the Hindu eye, the embodiment of this ideal, explains that ideal womanhood constituted in the fulfilment of the duties of a faithful wife; and reiterates that as for the woman there is no other god than her husband, her only means of achieving salvation lay in fidelity and service to him and his family. Righteous, contented, good-natured, charming, sweet-tongued, cheerful in disposition, disciplined in her habits and faithful to her husband, the woman must ever perform religious rites like agnihotra and vrata for the welfare of her husband, and be he never so unkind or bad-tempered, she must nevertheless obey him and not cast eyes even upon a tree bearing the name of her husband.[3]

Equally ennobling and elevating is the conduct of Sāvitrī, the third of the triumvirate of ideal womanhood in the Hindu mythology.

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1. Ibid., at 134.
2. Ibid., at 136. These instances apart, both the Epics abound in numerous derogatory references to women. See Meyer, Vol. II, op. cit, at 499 ff.
3. Mukherjee, op.cit., at 13.

Her selection of Satyavān for a husband is not met with favour as he is destined to die young, and she is told to choose another. In Sāvitrī's answer is the consecration of the sacrament so dear to the hearts of Hindus then and since. Unfaltering in her resolve she proclaims,

> "(O)nly once can we submit to destiny; a young girl marries only once; only once can her father say to her 'I give thee'! Those are the three 'only once' in the life of good people. Let him have a long life or short one, let him be gifted with virtues, or let him be devoid of them, once I have chosen a husband I do not choose a second time."[1]

When the time finally does come, and Yama, the god of death detaches Satyavān's soul from his body, Sāvitrī is undaunted and follows them in the journey to the kingdom of darkness for,

> "(W)here my husband goes, there must I also go; that is my eternal duty. Whither thou takest my husband, thither too lies my road."[2]

And as without her husband there is no joy for her, nor even the wish for heaven or the desire to live,[3] her supplications are heard and the husband restored to life - the reward of her piety, constancy and devotion.

The fiery Draupadī who has none of the gentle patience of a Sītā, is nevertheless the embodiment of every wifely virtue, and in the discourse with Kṛṣṇa's wife Satyabhāmā, she enters into a catena of qualities which the wife must cultivate in order to attain fame in this life and heaven in the next,[4] but above all it is service to the husband, unquestioning loyalty and total subordination to his every

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1. Bader, op.cit., at 288.
2. Ibid., at 293.
3. Ibid., at 295.
4. See Meyer, Vol. II, op.cit., at 537-9. See also Mukherjee, op.cit., at 29-33.

whim, besides attending to the household duties that makes the woman the dharmapatnī, yajñapatnī and mahiṣī of her husband, just as she herself is to such splendid heroes as the five Pāṇḍava brothers.

However, it must be borne in mind that the Epic is essentially the product of an age where the rigid and austere doctrines of the earlier Brāhmanical period had given way to a livelier and more relaxed atmosphere, and accordingly and not infrequently, the Mahābhārata bears the stamp of a moral code which violates the strict regime set out by Manu and his ilk.

The Mamatā-Bṛhaspati episode is an instance which is illustrative of a period where the rigid hold of the lawgivers had given way to a comparatively greater freedom of sex behaviour regulated more by the social customs of the age than by older precepts. The pregnant Mamatā is approached by Bṛhaspati, her husband's younger brother, and this we might notice, despite the very strict injunction against such a relationship by Manu.[1] This sexual union has none of the characteristics of niyoga,[2] yet Mamatā's objection, as that of her unborn child's, is not so much on the ground of sexual morality as it is based on the wastage of a man's, in particular, a Brāhmin's

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1. Manu expressly lays down that the elder brother's wife is to the younger brother the wife of his teacher, while the younger brother's wife must be in the eyes of the elder brother, his daughter-in-law, and if either of them approaches the wife of the other, both fall from grace. See Manu, IX. 57-8, op.cit.

2. Niyoga literally "appointment", (and discussed below at greater length), is permitted by the lawgivers in exceptional circumstances only, i.e. the procreation of a son for the continuity of the line in the event of the husband's death or absence. In our episode, Uthathaya, Mamatā's husband, disappears before she is approached by Bṛhaspati, yet even so the niyoga relationship is not established, for years of waiting must precede it. (See Gaut. II. 9. 17, G. Bühler, tr., The Sacred Laws of the Āryas, Part I, F. Max Müller, ed., S.B.E., Vol. II, (Oxon, Clarendon Press, 1882), and Vas. XVII., 75-8, op.cit.). Besides, as Mamatā is already pregnant with a male child, there is no emergency either, to ratify the act.

semen.[1] Neither are there signs of any contrition on the part of Bṛhaspati. He is not called a patitā (sinner) nor does he make any attempt at atonement.[2] Thus these are clear indications that, for the narrator, and by implication for his contemporaries, cohabitation with the wife of an elder brother was perhaps not an uncommon occurrence so as to incur any degree of moral indignation or sense of sin.

That the ṛtu of a girl must not be wasted we have already noted, and the story of Yayāti and Śarmiṣṭhā is illustrative of this well-known code of social ethics that we come across every so often in the Mahābhārata. In Yayāti's view not to have responded to Śarmiṣṭhā's invitation to have sexual union with her during the period of her ṛtu would have been tantamount to embryo-killing, an act of adharma on his part, and significantly enough, Śukra who is well versed in the prevailing social ethics of the time, is offended not at the act[3] but for breach of the vow undertaken by Yayāti never to touch Sarmiṣṭha in view of the bitter feud between her and Devayānī, Yayāti's wife and the beloved daughter of Śukra.[4]

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1. B. Dutta, Sexual Ethics in the Mahābhārata in the Light of Dharmaśāstra Rulings, (Lond., Asia Publications, 1979), at 16.
2. Ibid., at 22. The same writer indicates at ibid. that had Bṛhaspati's guilt been established, Yājñavalkya prescribes a method of rehabilitation, i.e. "One going to his brother's wife without being appointed (for sexual purposes) should perform a cāndrāyaṇa." (Yāj. III. 287).
3. The prevailing social practice whereby the girl who has not been given in marriage within the prescribed period, has the option of sexual union at the period of ṛtu. This is within the bounds of dharma as propounded by Manu, IX. 90-1 and IX. 93, Yāj. 1. 64, and particularly Gaut. II. 9. 20, and Vas. XVII. 67-8. : Ibid., at 106.
4. Ibid., at 50-1.

However that other forces were at work is evident from the later versions of the same legend, and the recasting of the story in the Rāmāyaṇa, and the Southern recension of the Mahābhārata is of special interest, for whereas in the one, the story is narrated from a completely different orientation, the building up of an innocent legend of a king and his two queens, the eternal triangle where the king favours the younger queen more than the elder, in the other, we are told of Śármiṣṭha's marriage to Yayāti so as to legitimise Puru, the son born of the union, the eponymous ancestors of the Pauravas.

The basic core of the Yayāti - Śármiṣṭhā legend is thus strictly within the bounds of dharma, but the modifications in the later interpolations reflect clearly enough the shift in moral values, and the imposition and ascendancy of brāhmanical ideals; the emergent sexual ethics is marked by an unyielding stringency of conduct, possibly as a reaction against the laxer postures of the age.

This growing awareness of the desirability of chastity as an ideal is also reflected in the story of Śvetaketu. King Pāṇḍu prohibited by a curse to cohabit with his wives, pleads with his wife Kuntī to beget for him a son through another and thereby save him from the terrors of hell; in his efforts to persuade her, he refers to alleged ancient customs and narrates the story of Śvetaketu.[1]

According to legend, Śvetaketu incensed by the ugly memory of his mother's abduction by a brāhmin and the calm acceptance of this by his father as a practice sanctioned by antiquity, was later on to become the first among the sages to voice his disapproval of the existing practices and to establish the concept of absolute fidelity

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1. Ibid., at 65.

in the institution of marriage. The new morality proclaimed that

> "(F)rom today onwards, there will arise for a woman transgressing against her husband a deadly sin (pātakaṃ pāpaṃ) as by the killing of an an embryo, bringing unhappiness to her."[1]

Similarly

> "(E)ven when (a husband) offends against his wife (by having sexual intercourse outside wedlock) ... there will arise for him the same deadly sin (as for the woman who has offended against her husband) on the earth."[2]

However what is intriguing is that, despite this insistence on conjugal fidelity, the practice of niyoga is in express terms endorsed by Śvetaketu,[3] an indication perhaps of the transitional character of the period where despite the restrictions on sexual laxity, the older notions tended to persist,[4] and if the rules in the practice of niyoga differed from those set out by the lawgivers,[5]

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1. MBh., (Poona), I. 113. 17, cited at ibid., at 68.
2. MBh., (Poona), I. 113. 18, cited at ibid.
3. MBh., (Poona), I. 113. 19, cited at ibid.
4. This is perhaps best illustrated by the Pāṇḍu - Kuntī legend. Kuntī as the chaste wife who has place for no man other than her husband even in her thoughts, who chafes at the thought of having to submit to niyoga, is representative of the emerging sex-ethics of a stricter moral code, while Pāṇḍu on the other hand, voices the older view on sexual ethics by his insistence on the sanctity of niyoga by citing examples from the past including his own birth. Kuntī finally submits to Paṇḍu's wishes not because his arguments had convinced her, but, as Dutta, op.cit., points out at 109, because as the ideal of the obedient wife it is her duty to please her husband.
5. A clear example of this is Pāṇḍu who while accepting and approving of niyoga, nevertheless violates the sūtra and smṛti injunctions in its practice in that he a) appoints an outsider who is neither a brother nor a close relative, b) desires for more sons and thus exceeds the limits set by the niyoga rules, c) appoints a number of persons to raise issue for him.: Dutta, op.cit., at 108.

this was due, fairly certainly, to the influence of prevailing customs which invariably leave their impress upon the habits and beliefs of a particular age.

To this new morality a further dimension is added by the precepts of the blind sage Dīrghatamas. Driven to rage and frustration at the action of his wife who no longer desires to support him, Dīrghatamas retaliates by proclaiming his decree of maryādā or the limitations of behaviour for women:

> "... only one husband is the resort of a woman throughout her life: whether he is dead or alive, she must not get another man; having gone to another she will fall (into deadly sin) ..."[1]

Thus is established an entirely new moral standard, and the code of Śvetaketu which postulates strict sex ethics for both the sexes is finally replaced by the maryādā ruling of Dīrghatamas which brings brāhmanical sex ethics to a climax. Sexual relationship outside marriage is forbidden to a woman, niyoga as a system is disavowed, and remarriage ousted. The evolution of brāhmanic ideals apparent in all four of the legends under discussion despite their sharply conflicting attitudes, is now complete in the story of Dīrghatamas. The rule of the brāhmin holds sway, and henceforth the demands made on women are those of chastity, constancy and fidelity.[2] In short the ideal of the

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1. Dutta, op.cit., at 90-1.

2. Ironically enough it is the self-same propounder of this strict moral regime for women, "the virtuous and great-souled Dīrghatamas, the sage, well versed in the Vedas and the Aṅgas", who is himself guilty of "the practice of cattle", and by his promiscuity and general shamelessness so enrages the ṛṣis with whom he dwells in the hermitage, that they eventually drive him away from their midst. Another version has it that as punishment for his incestuous crime with his son's wife, he is packed in a wooden crate and thrown in the river Gaṅgā, thence to be rescued by King Bali who recognising him "chose him for the sake of sons." See Datta, op. cit., at 84-9. The double standards so apparent in this story survive to this day in India, and while the most exacting

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pativratā is reinforced and reinstated as the only ideal for women, the sole means of their salvation, and there is hardly a chapter or religious discourse in the great Epic that does not refer to woman's infidelity as a breach of dharma.[1] In other words the mores had been set not just for the age but for generations to come, and the rigid demands on women are as much in evidence in India today as they were those thousands of years ago in the days of Epic grandeur.

3. The Hindu Widow in Tradition

What then of the widow? In the early stages, the prehistoric rite of suttee, later to be revived, hardly seems to have raised its ugly head. The bereft wife could, if she so desired, lead a life of perpetual widowhood, and in the higher castes in the noble and brāhmanical circles, this was indeed what was demanded. Evidence as to the existence of widows is warranted by a few passages of the Ṛgveda, and these references, however few and far between, nevertheless do reflect a condition of society in which widows, however small their number, had a place. Thus the appeal "Kṛṣa and Śāya ye Aśvin twain : ye two assist the widow and the worshipper."[2] Yet another passage calls out to the widow who lies beside her dead husband in a symbolic gesture of self-immolation to

> "(R)ise come unto the world of life O woman : Come,
> he is lifeless by whose side thou liest
> Wifehood with this thy husband was thy portion who took
> thy hand and wooed thee as a lover."[3]

Learned Western scholars (not without Indian inspiration) have

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standards are expected, indeed demanded of and met with, in women, the male members escape all strictures in the sexual ethics which govern them.

1. Datta, op.cit., at 117. 2. RV.X.40.8, Griffith, Vol. IV, op.cit.
3. RV. X. 18. 8, ibid.

requisitioned these lines for the theory that they refer both to the practice of niyoga and suttee, but an eminent modern Indian discounts this altogether. In his view

> "(T)o impute to this verse an implication that the widow was asked to espouse her devara or that she was preparing to mount the funeral pyre is absurd."[1]

To lend support to his argument, he then enters into a brief but scholarly disquisition as to the correct interpretation of the original Sanskrit text which we have no reason to disregard.

Interpretations such as these tend to reinforce the view that widows, however small their number, did have a place in Vedic society and that suttee as an institution was rare if not altogether absent in it. This discouragement of suttee in the highly developed philosophy of the Vedic times is perhaps best explained by Manu:

> "(T)he Vedic action is of two sorts, such as are conducive to pleasure and success on the one hand and ultimate bliss on the other: the first is 'prolonging' - the second is 'cessation'."
>
> "(A)ction which is impelled by desire whether in this world or the next is declared to be 'prolonging'- But that which is accompanied by knowledge and is devoid of desire, that is 'cessation'."
>
> "(O)ne who practises the 'prolonging' ritual attains equality with the gods; one who practises 'cessation' passes beyond the five material substances."[2]

This means in effect that all the actions of a man are derived from desire, but the ultimate goal of man is absence of desire; religious injunctions are therefore of two sorts: those which apply to the individual in the wheel of social life, attached to observances

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1. N.C. Sen-Gupta, Evolution of Ancient Indian Law, (Lond.-Cal., Arthur Probsthain Eastern Law House, 1953), at 106.

2. Manu XII. J.D.M.Derrett, tr., Bhāruchi's Commentary on the Manusmṛti, Vol. II, (Wiesbaden, Franz Steiner, 1975), at 428.

on a social fact and not truly directed to the ultimate release of his personality from karma and from rebirth, and those on the other hand, directed to him who seeks mokṣa, nivṛtti, i.e. the cessation of striving and suffering and experience altogether. This is ultimate merit, and is subserved by injunctions suited to attaining it. The ability to distinguish between injunctions directed to a better rebirth and injunctions directed to avoiding rebirth is an ability which the śāstra would regard as supreme. The rule permitting a woman to commit suttee is a rule of the first kind; she will be reborn in an advantageous position, for her act is done out of a desire, perhaps a desire for merit. But to those who seek mokṣa, the duties of the household life as a widow, in patient self-abnegation, are appropriate.[1]

(1) Niyoga

However, apart from perpetual widowhood, the widow had other, and more generally prevalent options open to her as well. She could, if she chose, contract a loose alliance with her devara (husband's younger brother). That the younger brother had some sort of sexual intimacy with the wife of the elder brother is suggested by the marriage hymn of the Ṛgveda where the gods are supplicated to make the bride loving and dear to the devara,[2] and it appears to have been a not uncommon practice for the younger brother to live with his brother's wife after her husband's death,[3] and perhaps nowhere is this more clearly indicated in the Ṛgveda than where it is sung:

> "(W)here are ye Aśvins in the evening, where at morn?
> Where is your halting place, where rest ye for the night?

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1. Derrett, RLSI, op.cit., at 69.

2. RV. X. 85. 46, Griffith, op.cit.

3. A.K. Sur, Sex and Marriage in India, (Bom., Allied Publishers, 1973), at 35. Such arrangements notionally persist by custom even to this day in Northern India.

Who brings ye homeward, as the widow bedward draws
her husband's brother, as the bride attracts the groom."[1]

It seems however that the right of the devara was a quite distinct right from the right as indicated by the niyoga or levirate usage of later times. While the privilege of the younger brother-in-law in the Veda was cohabitation, niyoga on the other hand served a distinct purpose, that of procreation. The possession of a son to carry on the household worship was for the Hindu a vital necessity, the means of his salvation, and not unnaturally therefore niyoga, the deputation of the husband's conjugal rights to his brother or a near kinsman, either after his death or even before it, and the subsequent birth of a son unto him, was a device adopted and assimilated by the Āryans from various social groups where the practice was already widespread.[2] As to its antiquity there can be no doubt. It was prevailing in Sparta;[3] the Old Testament declares that if a woman becomes a widow "her husband's brother shall go unto her and take her to wife, and perform the duties of a husband's brother unto her,"[4] and in the Book of Ruth we find an instance of such a custom among the Hebrews.[5]

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1. RV X. 40. 2, Griffith, op.cit.
2. Westermarck concurs. See his The History of Human Marriage, Vol. III, op.cit., at 208 where he remarks "If the rule of fraternal succession to a deceased brother's widow or 'levirate' custom proved to be a survival of polyyandry, we should certainly be compelled to conclude that this form of marriage was at one time very common." Curiously enough, while levirate was a widespread enough practice in ancient India, polyyandry as an institution seems not to have been part of the scene. In the only instance of polyyandry in the Epics, the question of the acceptability of the situation whereby Draupadī had five husbands simultaneously is of course debated at great length in the Mahābhārata itself.
3. Altekar, op.cit., at 143.
4. Deuteronomy, 25.5.
5. Sen-Gupta, op.cit., at 108.

Likewise in the Code of Hammurabi levirate is a recognised institution.[1] As an established practice of antiquity therefore, it was but a matter of time for the Āryans as well to incorporate it as part of their way of life, of its acceptance among them as a necessary social and religious convention.

The Epic tradition too knows of niyoga. In the Rāmāyaṇa, that celebration of the monogamous union, there is an instance of the levirate practice in the episode of Tārā, where after her husband Vālin is killed by his brother Sugrīva, and despite her lamentations,[2] Tārā is soon thereafter seen seated on a golden throne with Sugrīva by her side, while in the Mahābhārata, the begetter by proxy has a very important role to play and the practice itself is virtually theoretically prescribed as it is practically exemplified by the heroes of the poem.[3]

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1. Ibid. For a comprehensive survey of a custom wellnigh universal in distribution see R.Briffaut, The Mothers, Vol. I, (Lond. - N.Y., Allen & Unwin-Macmillan, 1927), at 767, f.n. 2.

2. The sum total of these lamentations being that it is far better for wives to be struck themselves by death than to live and see death striking their husbands, for "in the lonely heart of a wife, neither son nor father holds the same position as a husband." : Bader, op.cit., at 166. The Rāmāyaṇa echoes this sentiment thus: "Without a string there is no lute, without a wheel no chariot, without a husband no woman is happy, even though she have a hundred sons." Ram. II. 39. 29-30 cited at Meyer, Vol. II, op. cit, at 352.

3. Apart from the numerous instances of the levirate practice in the Mahābhārata, as for instance the birth of the blind sage Dīrghatamas as a result of the union between Mamatā and Bṛhaspati, the appointment of Dīrghatamas himself by King Bali who entreats "For the carrying on of my line, do thou beget, with my wives, sons skilled in religious and worldly things," (see Meyer Vol. I, op.cit., at 160), it may be borne in mind that Pāṇḍu the founding father of the Pāṇḍava dynasty was himself the child of such a union. The renowned seer Vyāsa who is appointed to raise offspring to the dead King Vicitravīrya approaches by night, but his terrifying aspect and evil odour so overcome the dead king's wife that she turns quite pale (pāṇḍu) and the son she subsequently gives birth to bears the name Pāṇḍu. In like wise Pāṇḍu himself

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The smṛti texts do not altogether disavow niyoga either, and in fact Vasiṣṭha and Gautama do not join in the emerging crusade against the practice; they permit it to the widow at her option, with the only proviso that she should not choose a stranger if the husband's younger brother was available.[1] On the other hand, the custom began to be met with considerable opposition, and led by Āpastamba, Baudhāyana and Manu, there arose a school of reformers who condemned the practice unequivocally. Āpastamba declares the levirate no longer admissible on account of the degeneration of the people of the present day;[2] in his view the son belongs to the begetter, and while men of antiquity could commit acts of sin with impunity on account of the greatness of their lustre, such deeds were strictly forbidden to the mortals of "today",[3] and Baudhāyana concurs.[4] Bṛhaspati's

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prevented from the use of his manly powers, exhorts his wife Kuntī to raise up offspring for him, and so are born three of the Pāṇḍava brothers the result of Kuntī's union with the gods, while Mādrī her co-wife by calling up the Aśvins, gives birth to the twins Nakula and Sahadeva. "Of the father thus blessed, the pious and noble Vidura then said that he was not to be pitied, but to be praised.": Meyer, Vol. I, op.cit., at 165.

1. Thus Vas XVII. 56, op.cit.: "After the completion of six months she shall bathe, and after a funeral oblation to her husband, (then) her father and brother shall assemble the Gurus who taught or sacrificed (for the deceased) and his relatives, and shall appoint her (to raise issue to the deceased husband). Likewise Gaut. XVIII. 4, The Sacred Laws of the Āryas, G. Bühler tr., S.B.E. Vol. II (1879), Part I op.cit. : "A woman whose husband is dead and who desires offspring (may bear a son) to her brother-in-law," holding immediately thereafter at XVIII. 7, that, "Some (declare, that she shall cohabit) with nobody but a brother-in-law."Nārada is similarly opposed to any other than the brother-in-law for the purpose, declaring at XII. 48, op. cit., that "When a woman, on failure of brothers-in-law, is delivered by her relations to a sapiṇḍa of the same caste, she is termed the third (Punarbhū)."

2. Āp.II. 27. 2-7, The Sacred Laws of the Āryas, Part I, op.cit.

3. Āp. II. 13. 6ff., ibid.

4. Baudh. II. 2. 3. See also II. 2. 34-5, op.cit.

opposition to it is equally in evidence. He notes that "The niyoga (appointment of a widow to raise offspring to her deceased lord) has been declared by Manu, and again prohibited by the same";[1] and assigns a reason for likewise forbidding it himself: in former ages (Kṛta and Tretā) people practised tapas and were endowed with knowledge, while in the Dvāpara and Kali age men have lost the powers possessed by those of the past ages, and were therefore forbidden the practice of the custom.[2]

Interestingly enough however, the same writers who vehemently condemned the practice as disreputable, lay down at the same time, detailed rules about the niyoga procedure with all the fullness of detail of a living law. Manu in particular, immediately after recommending it,[3] condemns it as a bestial practice (paśu-dharma) which was in vogue only during the reign of King Veṇa, and limits its application to cases (not necessarily rare) where the girl's betrothed died before the marriage could be consummated.[4] On the other hand, he explains the detailed rules of the niyoga procedure and fixes the rights of the kṣetraja (field-born) son in succession to his pater.[5]

What therefore emerges from these texts is that the author of the Code of Manu was hostile to niyoga, as he was to the remarriage of widows, but he was confronted by customs too deeply rooted for

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1. Bṛh. XXIV. 12, The Minor Law Books, Part I, op.cit.
2. Bṛh. XXIV. 13, ibid.
3. "On failure of issue (by her husband) a woman who has been authorised may obtain (in the) proper (manner prescribed), the desired offspring by (cohabitation with) a brother-in-law or (with some other) Sapiṇḍa (of the husband).": Manu IX. 59, op.cit.
4. Manu IX. 64-70, ibid.
5. Manu IX. 120-1, ibid. See also IX. 191.

prohibition to be efficacious. All he could do was to try to discredit them and to limit their practice and their importance.[1]

A series of rigid conditions were now made incumbent (in theory) for the practice of niyoga. Thus while formerly three sons were allowed,[2] a few thinkers referred to by Manu restricted the number to two.[3] A woman who already had children was prohibited from having recourse to niyoga,[4] and if she was herself unwilling she was not compelled to submit to it.[5] A period of at least one year of waiting was prescribed after the husband's death before niyoga could be permitted, and intercourse between the appointed (niyukta) pair was to be discontinued so soon as the woman conceived; they were never to meet thereafter, sensual and carnal pleasures having no place in it.[6] Financial considerations or legacy-hunting were likewise frowned upon as motives for niyoga;[7] all this together with the observance of certain other rather numerous and detailed formalities were endeavours on the part of the lawgivers, if not to eradicate this obnoxious practice at one swoop, at least to curb its wide-spread prevalence by

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1. R. Lingat, The Classical Law of India, J.D.M. Derrett, tr., (Berkeley, Univ. of California Press, 1973), at 182.
2. Witness for instance Kuntī's anger at Pāṇḍu's yearning for even more sons after she had given birth to the first three of the five Pāṇḍava brothers: "More than three sons are not granted even in misfortune. If there were another the wife would become one that is unbridled (svairiṇī) and with a fifth she would be a worthless woman (bandhakī). How canst thou, a wise man, who has learned this law, now go beyond it and ask for offspring?" : Meyer, Vol. I, op.cit., at 164.
3. Manu IX. 61, op.cit.
4. Baudh. II. 2. 4-10, op.cit.
5. Ibid.
6. Nār. XII. 80-8, op.cit.
7. "No appointment (shall be made) through a desire to obtain the estate." : Vas. XXIV. 12, op.cit.

rendering it almost impossible to practise practically speaking.

But if the reformers of the period failed to stamp out the custom, they succeeded at least in restricting its scope and were instrumental in bringing about a change in attitude which led to its eventual désuetude. It has to be admitted that however objectionable it may appear to modern sociologists, the niyoga practice did serve a number of purposes. In the first place it was a substitute for widow remarriage, but by far the more important function that it performed was to allow the widow (otherwise then incapable of inheriting) to get her husband's share, if not directly as her husband's heir, at least indirectly as the guardian of his minor son. Gautama evidently contemplates that if the widow succeeded in bearing a kṣetraja son, the inheritance would go to him, but so long as she was about raising such a son, she could keep the heritage - as a sort of hereditas jacens.[1] What seems to have followed was inevitable: the abuse of the privilege in the prolongation of the niyoga practice without fruitful result, and Vasiṣṭha's dictum forbidding niyoga for securing the heritage[2] is an expression of the general anxiety at the prospect of the sonless widow procuring for herself her husband's property for life.

Perhaps this, besides other causes, dealt the death-blow to the institution of niyoga. The recognition of the sonless widow as preferential heir in her own right to her deceased husband's estate[3] was almost certainly an additional reason, and once this was achieved, the

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1. Gaut. XXVIII. 32, op.cit.

2. Cited above.

3. Bṛh. XXV. 46-8, op.cit. See also Vis. XVII. 4, op.cit., and Yāj. in Mit. II. 1. 2, H.T. Colebrooke tr., Hindu Law Books, W. Stokes ed., (Mad., Higginbotham, 1865).

incentive for the recognition of the practice, anathema to Vedic notions of chastity, received another blow and its popularity gradually waned. What might further have led to its extinction could well have been that, the sonless widow's desire for issue being as much for solace as for the fulfilment of religious purposes, Baudhāyana's declaration that where one brother gets a son, all other brothers become thereby blessed with a son, attempted to dispense altogether with the necessity for a kṣetraja son.[1] The later incorporation of adoption in the Ārya sacred law for which Baudhāyana lays down detailed rules,[2] further weakened the hold of niyoga, and with the revival of orthodoxy and the reinstating of the ancient Ārya ideals of constancy and chastity, there was a revulsion of feeling against the institution, and its subsequent demise inevitable.

(2) Attitudes Towards Widow Remarriage

With the expulsion of niyoga, widow remarriage too began to be looked upon with aversion. Never a widespread occurrence, it was nevertheless tolerated when it did occur, and in the Vedic literature there are at least some texts capable of being interpreted as relating to the remarriage of widows.[3] Certain verses of the Ṛgveda and Atharva-Veda have given rise to various explanations and opinion is divided as to whether they refer to niyoga, or to the remarriage of widows or to the practice of the immolation of widows.[4] The funeral hymn of the Ṛgveda[5] is one such instance and though it has been under-

1. Sen-Gupta, EAIL at 109-10, op.cit.
2. Baudh. VII. 5. 1ff.
3. Kane, H.D. Vol. II, Part I, op.cit., at 619.
4. Ibid.
5. RV. X. 18. 8, supra at 143-4.

stood as an invitation by the husband's brother to the wife of the departed to marry him, Kane dismisses this as a "far-fetched" interpretation.[1]

However certain other passages in the Atharva-Veda indicate clearly enough that widow remarriage did indeed have a place in Vedic society. We are told that when a woman has at first even ten husbands, if a brāhmin eventually marries her, he alone is her real husband.[2] Similarly

> "(w)hatever woman, having first married one husband, marries another, if they (two) offer a goat with five rice dishes, they would not be separated (from each other). The second husband secures the same world with his remarried wife, when he offers a goat accompanied with five rice dishes and with the light of fees."[3]

The fact that on remarriage sacrifices are contemplated in the passage to sanctify it indicates in itself that the notion of sin was not entirely absent; nevertheless it is also clear that no prohibition of it as such was envisaged in the times of the Atharva-Veda; and if references in the Vedic literature to the remarriage of widows are few, one can only assume that niyoga, a popular enough alternative, practically amounted to a remarriage[4] and for the Vedic woman at least, the resumption of cohabitation with the devara was, presumably, a preferable choice to the contracting of a regular marriage with a stranger.

To the smṛti texts too the notion of remarriage is not altogether unknown. Viṣṇu recognises the marriage of a widow who is still a

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1. Kane, H.D. Vol. II. Part I, op.cit. at 619.
2. Atharva-Veda, V. 17. 8-9, cited at ibid., at 614.
3. Atharva-Veda, IX. 5. 27-8, cited at ibid., at 615.
4. Altekar, op.cit., at 151.

virgin[1] and even Manu expressly allows the saṃskāra of remarriage in the case of a girl whose first marriage has not been consummated.[2] The smṛtis also indicate that where a damsel has been abducted by force and not wedded with the recitation of the sacred texts, she may be lawfully given to another man for "she is as good as a maiden."[3] Gautama too prescribes remarriage for widows,[4] and we hear of the saṃskāra of remarriage in Baudhāyana, Vasiṣṭha and Yājñavalkyā as well.[5] Occasionally remarriage is virtually ordained. Thus Nārada:

> "(W)hen the husband is lost or dead, when he has become a religious ascetic, when he is impotent, and when he has been expelled from caste: these are the five cases of legal necessity in which a woman may be justified in taking another husband."[6]

Similarly several texts prescribe a period of waiting when the husband has gone abroad for many years. According to Nārada the brāhmana wife must wait for eight years, but only four years if she has not given birth to a child, (and lesser number of years are laid down for the kṣatriya and vaiśya wife) after which period she may resort to another man.[7]

However despite such allowances, the remarriage of widows never

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1. Viṣ. XV. 8, op.cit.
2. Manu IX. 176, op.cit.
3. Baudh. IV. 1. 15, op.cit.; Vas. XVII. 73, op.cit.
4. Gaut. XVIII. 4. 6.
5. Kane, H.D. Vol. II, Part I, op.cit. at 612 who draws our attention to Baudh. IV. 1. 18; Vas. XVII. 74 and Yāj. 1. 167.
6. Nār. XII. 97, op.cit.
7. Kane, H.D. Vol. II, Part I, op.cit., at 613. Manu (IX. 76) and Vasiṣṭha likewise prescribe periods of waiting, but as Kane points out, unlike Nārada neither of them states what the wife is to do after the years of waiting are over.

did become a popular practice, and the reasons for this are not far to seek. Even though the smṛtis did permit the widow to remarry under certain circumstances, for the lawgivers the insistence on virginity as a pre-condition for the sacramental nature of the marriage rites precluded their approval of widow remarriage, and we hear the remarried widow referred to time and again as a punarbhū.[1] Manu in particular is unequivocal in his declaration that "a girl is given in marriage only once,"[2] and that in the sacred texts which refer to marriage, the remarriage of widows is nowhere prescribed.[3] In the light of this, it is at once clear that where Manu is attributed as allowing remarriage, as with niyoga, it is more a grudging concession to popular usage than a definitive recommendation of the practice.

(3) Austerities Prescribed in the Śāstra

With the reimposition of the rigid rules of chastity, the union of marriage came to be looked upon as a union in this life and the hereafter, and at least so far as women were concerned, what little tolerance there had hitherto been of their re-saṃskāra now disappeared

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1. See Manu IX. 175, op.cit.; Nār. XII. 46, op.cit., Vas. XVII. 20, op.cit., Viṣ. XV. 8, op.cit. According to Nār. V. 45, op.cit., there are seven sorts of wives who have been previously married to another man; among them the punarbhū is of three kinds, and the svairiṇī (wanton or unbridled woman) is of four kinds. The three punarbhūs are (1) a maiden whose hand was taken in marriage but whose marriage was not consummated; in her case the marriage ceremony has to be performed once again; (2) a woman who first deserts the husband of her youth, betakes herself to another man and then returns to the house of her husband; (3) a woman who is given by the dead husband's relatives to a sapiṇḍa of the deceased or a person of the same caste, on failure of the brothers-in-law. For a more detailed learned disquisition see Kane H.D. Vol. II, Part I, op.cit. at 608ff.
2. Manu IX. 47, op.cit.
3. Manu IX. 65. See also V. 162, ibid.

altogether. With the remarriage of widows no longer permissible, one might have thought that they would have gained correspondingly in stature or status. But that was not to be, and quite on the contrary, wives do not seem to have reverted to the position of the honoured mater-familias of Vedic times. They continued to remain in subordination, as a result, possibly, of the introduction of the inferior forms of marriages founded upon the analogy of acquisition of ownership over women. The woman who was captured or bought, or perhaps chose to elope, would not, unless custom sanctioned such behaviour, be the woman whom the husband could look upon as the one who was, as it were, a gift of the gods, acquired by the magic of the marriage ritual,[1] and in Baudhāyana we hear it expressly stated that a woman who has been purchased for value is not a patnī; she is not eligible for pitrāya or daiva purposes: she is a dāsī, i.e. a female slave.[2]

The position of the widow deteriorated correspondingly. Levirate and remarriage both having fallen from grace and her perpetual tutelage declared,[3] Nārada classifies women with slaves and attendants as dependants,[4] and lays down that

> "(A)fter the death of her lord the relations of her husband shall be the guardians of a woman who has no son. They shall have full authority to control her, to regulate the mode of life and to maintain her,"[5]

and when the husband's family is extinct, or contains no male heir, or when it is reduced to poverty, or when no one related to it within the degree of sapiṇḍa is left, "the father's relations shall be the

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1. Sen-Gupta, EAIL, op.cit., at 120.
2. Baudh. I. 11.21-2.
3. Manu IX. 3, op.cit.
4. Nār. III. 36, op.cit.
5. Nār. XIII. 28, ibid.

guardians of the woman."[1]

If she chose to survive her husband, the only respectable alternative was to lead a life in accordance with the strict ideals of pativratā. The smṛtis enjoined on her the harshest austerities, and Manu in particular prescribes that she must emaciate her body by living on pure flowers, roots and fruits; she must never mention the name of another man after her husband has died, and until her own death, she must remain patient of hardships, self-controlled and chaste, performing such duties as are prescribed for wives who have one husband only.[2] Vyāsa likewise ordains that after her husband's death, a virtuous woman must observe strictly the duty of continence and constant abstemiousness; she must perform with devotion the worship of the gods, give alms and keep the various fasts, for it is only by the assiduous performance of such duties that she "conveys her husband (though abiding in another world) and herself to a region of bliss."[3]

Baudhāyana similarly decrees that the widow of the departed should give up for one year honey, meat, wine and salt, and sleep on the floor.[4] However the restriction of these austerities for a period of a year, stemmed not from compassion on the lawgiver's part to alleviate the miseries of the widow, but was a calculated move to grant her, after the period of mourning, permission to beget to her

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1. Nār. XIII. 29, ibid.

2. Manu V. 157-8, and the reward of the virtuous wife who remains constantly chaste after her husband's death is, we are told at V. 160, that she reaches heaven "though she have no son."

3. Dāya, XI. 1. 43, H.T. Colebrooke tr., Hindu Law Books W. Stokes ed., (Mad., Higginbotham, 1865), and in XI. 1. 44 it is explained that while by her good acts, she rescues her husband from hell, by her improper acts she causes him to fall to the region of terror.

4. Baudh. II. 2. 4-7 op.cit.

deceased husband offspring and thus reprieve him from the agonies of hell. Vasiṣṭha on the other hand, echoes Manu in laying down that, a widow who is engrossed in religious observances and fasts, who abides by the vow of celibacy, who is always bent on restraining her senses and making fasts, would go to heaven even though sonless.[1]

The smṛtis prescribe as well, every detail of the widow's day-to-day demeanour and appearance. She must, according to Vṛddha-Hārita, give up adorning her hair, chewing betel-nut, wearing perfumes, flowers, ornaments and dyed clothes. She must not take food from a vessel of brass or eat two meals a day. Nor might she apply collyrium to her eyes but must always wear a white garment. Free from sleep and laziness, she should be pure and of good conduct and engrossed in the worship of Hari. She should sleep on the floor at night on a mat of kuśa grass; she should in short "be intent on concentration of mind and on the company of the good."[2] The same notions of rigid piety are elsewhere prescribed as well. Thus

> "(T)he use of tambula, dress, and feeding off vessels of tutenague is forbidden to the Yati, the Brāhmachari and the widow." (Prachetes)
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> "(T)he widow shall never exceed one meal a day, nor sleep on a bed; if she do so her husband falls from Swarga
>
> "She shall eat no other than simple food (if she has no male descendants) shall daily offer the tarpana of kusa, tila and water
>
> "In Vaisākha, Kārthika and Māgha, she shall exceed the usual duties of ablutions, alms and pilgrimage, and often use the name of God (in prayer)."
> (The Smṛti)[3]

And as if texts such as the foregoing had not already filled her

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1. Vas. XVII. 55, op.cit.

2. See H.D. Vol. II, Part I, op.cit., at 584.

3. Quoted in H.T. Colebrooke, "On the Duties of a Faithful Hindu Widow," Miscellaneous Essays, Vol. II, (Lond., Trübner, 1873) at 133.

cup of misery to the brim, not long thereafter we hear of her as a person to be shunned, the very embodiment of ill-luck and inauspiciousness. "All widows are in sorrow even if they have many sons"[1] says the Mahābhārata, and as he surveys the scene of slaughter at the epic battle, Duryodhana exclaims

> "(I) can just as little enjoy the earth whose precious stones are gone, and whose kṣatriya heroes are slain, as can a widowed woman."[2]

The Rāmāyaṇa too proclaims that among all horrors, widowhood is the greatest stroke of evil.[3] Any wonder then that the Skandapurāṇa elaborates:

> "(T)he widow is more inauspicious than all inauspicious things; at the sight of a widow no success can be had in any undertaking; excepting one's widowed mother, all widows are void of auspiciousness; a wise man should avoid even their blessings like the poison of a snake,"[4]

an attitude which persists and as much overtly demonstrated today in the Hindu social etiquette as in the misty recesses of centuries past.

4. The Hindu Widow in Modernity

(1) The Rigours of Her Bleak Existence

The Brāhmins had done their work well, and with the passage of time so ingrained did the precepts of sacred literature become in the pattern of social behaviour that the injunctions of the smṛtis were no doubt the reason, if not at least a testimony to the miserable and unenviable lot of the Hindu widow, then and since. Unwanted, and for

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1. Quoted at H.D. Vol. II, Part I, op.cit., at 585.
2. Meyer, Vol. II, op.cit., at 410.
3. Ibid., at 412.
4. See H.D. Vol. II, Part I, op.cit., at 585.

most part ignored, the Hindu widow's fate was one of unmitigated hardship and misery. Condemned to a dreary life of enforced celibacy and having to practise the most stringent asceticisms, the simplest pleasures were denied to her, and the most harrowing accounts have been documented of the tragic barrenness and utter desolation of such lives[1] - creatures of innate guilt and evil portent who must suffer for the enormity of their sins in a former incarnation.

While the ceremonials of widowhood might vary from place to place in their minuter aspects and in their more basic details, the rites are uniformly of a pattern the country over. Jewellery in India symbolises prosperity and life, and lack of it sorrow and poverty.[2] Attesting to this ancient tradition is the custom of the Hindu bride to be decorated with jewellery and receive at least a token ornament on her wedding so that throughout the country bangles, toe-rings and marriage necklaces worn by women signify the married state.[3] The tinkling and jangling of the ornament-laden bride or young wife remains the happy symbol of prosperity and well-being; while bathing at the tank or well she may not remove her jewellery: it is a sign of ill-omen since after the death of the husband, the widow ceremoniously removes them at the well or tank and bathes there.[4] Thus the usual procedure for the sorrowing widow at the death of her husband is to

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1. For one such graphic though vividly moving account by a German writer married to an Indian, an outsider to Hindu society, see F. Hauswirth, Purdah: The Status of Indian Women, (Lond., Trübner, 1932), at 77 ff.

2. D. Jacobson, "Women and Jewelry in Rural India," G.R.Gupta, ed., Family and Social Change in Modern India, (New Delhi, Vikas, 1976), 136-77, at 156.

3. Ibid., at 139.

4. Ibid., at 154.

break off her bangles, strip her feet of ornaments and leave her feet bare as signs of her ill-fate.[1]

Henceforward the Hindu widow might wear no clothing other than a plain white sari without the adornment of even a simple border. She must sleep on the hardest surface, frequently on a stone floor, eat but one meal a day of the most frugal kind, and twice a month keep a strict twenty-four hour fast during which not even water may pass her lips. To add to the pathos of her existence, as her presence is considered inauspicious or accursed, she is often enough an outcast on festive occasions and even debarred from attending the marriages of her own children. Looked upon as the virtual destroyer of her husband who would have lived but for her karma[2] (action done out of desire seen as involving retribution in the form of transcendental or occult effects) she had to drudge day and night, and was subject to the bitterest taunts and insults by the other women of the household including the servants.[3] Thus cowed and wholly dependent, she was not infrequently an early sexual prey to her male relatives, and in this impossible situation, was faced with three alternatives resorted to by no means rarely - the secret murder of her infant

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1. Ibid.
2. That the death of the husband was taken as proof of the widow's sin manifests itself in many regions in India in a curious system of routine persecution whereby the unfortunate woman so as to expiate her sins is, soon after her husband's death, forced by barber women who are paid to drag her to a tank or pond, there to be given a ducking to the accompaniment of blows and violent language. This treatment is believed to elevate the soul of the widow and prepare her body and mind for the training in misery that was thereafter to be her lot. See P. Thomas, Indian Women Through the Ages, (Lond., Asia Publications, 1964) at 297.
3. Ibid.

child, suicide or escape to the sole possible refuge, prostitution.[1] Still others sought sanctuary in religious pilgrimages, and sacred cities such as Benares and Brindaban harbour a large number of such pilgrim widows[2] who prefer to make a living by begging and vice rather than face return to the dreaded empty house.[3]

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1. Hauswirth, op.cit., at 77. That sexual harassment by male in-laws has a part to play in driving widows to prostitution has been brought out clearly in P. Kapur, The Life and World of Call Girls in India, (New Delhi, Vikas 1978), at 177-94.

2. An article in an Indian paper The Sunday Standard (May 11, 1975), describes the wretched existence of the 7,000 widows in the town of Brindaban, "the living spectres whose lives have been eroded by another's death." Shaven-headed and with a single white cloth draped over their bare bodies, these poverty-stricken creatures indulge in the now all too familiar chant of praise, "Hare Rāma, Hare Kṛṣṇa," for four hours in order to get a small bowl of rice. In mid-afternoon they must chant for four more hours so as to obtain the price of a glass of tea. A not unusual case is that of a sixty-nine year old widow who was married at the age of nine and widowed at eleven, and has since been waiting for the "day of deliverance." Mary Daly in her work Gyn/Ecology, 2nd ed., (Lond., The Women's Press, 1981), which might otherwise be dismissed as so much biased radical-feminist ranting, nevertheless puts her finger on the pulse at 114, by drawing attention to "Surveys carried out by an Indian Committee on the Status of Women (which) revealed that a large percentage of the Indian population still approves of such oppression of widows." And the present writer was herself nonplussed by this attitude of complacency when, in conversation with an American female who espouses Hinduism and has been an eye-witness to the practices at Brindaban, she was told that they (the widows) themselves seemed happy enough!

3. Bleak as the picture is, there were sometimes mitigating circumstances as well, for the mother of sons, widowed in later life, remained the honoured head of the house whose advice was sought in a surprising number of matters, and under whose hands the whole household prospered. According to Hauswirth (op.cit., at 79), it is difficult to praise too highly "the Indian widow's gentle grace of unselfish service to all around her; she is the untiring nurse of the sick and of children, the willing and uncomplaining helper, and in innumerable homes instead of being persecuted, she was cherished and those around her did their best to soften her lot. But their belief in karma did not permit them to exonerate the widow from her penances, nor did the high-caste widow herself wish to escape these - she found her greatest solace in pious observances, and under the grip of inherited thought and custom would usually have been the one to resent most bitterly any suggestion of remarriage."

(2) Tonsure

As if the tribulations of the Hindu widow were not already enough, an added indignity was the custom of tonsure. How and exactly when this practice - ugly and unfortunate as it was - arose cannot be ascertained with any degree of accuracy, but that it was generally in vogue may be inferred from the many scattered references to her as munda, a reproachful term meaning "shorn head".[1] Certainly there is no express Vedic authority for it. The gṛhya and dharma sūtras do not refer to it, nor do important smṛtis like those of Manu and Yājñavalkya. If one or two smṛti verses of doubtful import seem to indicate it, others like those of Vṛddha-Hārīta are to an opposite effect.[2] Those that do refer to it, if at all, refer to one shaving at the husband's death. The only passage prescribing continual tonsure, and on which the medieval writers relied in prescribing the practice which gradually evolved after the tenth or eleventh century, is the passage in the Skandapurāṇa (Kāśikhaṇḍa, 4. 72), which lays down that

> "(t)he tying up into a braid of the
> hair of the widow leads to the bondage of the husband;
> therefore a widow should always shave her head."[3]

Since the motive underlying tonsure was to harmonise the outward appearance of the widow with the ideals of renunciation that she was

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1. Abbé J.A. Dubois, Hindu Manners, Customs and Ceremonies, 3rd ed., H.K. Beauchamp tr., (Oxon, Clarendon Press, 1906), at 352.

2. Kane, H.D. Vol. II, Part I, op.cit., at 588, and in fact the same author by drawing attention to the various passages in the smṛtis and Epic literature whereby the widow is specifically prohibited from decking her hair gives the lie to any argument that the practice had its origins in sacred literature. Altekar op.cit., is similarly of the view at 160 that, epigraphic evidence indicates that widows were in fact permitted to keep their hair; the prohibition was against the oiling or decorating of the tresses.

3. Kane, H.D., Vol. II, Part I, op.cit., at 592.

expected to follow, it might have been from the example of the Buddhist and Jaina nuns who shaved their heads as a sign of retirement from worldly affairs, that this cruel custom came into existence. In any event it gained ascendancy during the medieval ages undoubtedly due to the precepts of Mādhava and Anantadeva who recommended it.[1] Confined at first to the brāhmaṇa caste, it was gradually extended to the rest of society, though its appeal in the initial stages was greater in Southern than in Northern India where despite the opposition of their preceptors who declared that a woman who shaved her head would be born a Chaṇḍālī (i.e. an outcast), or go to the most horrible hell, the Vaiṣṇavas endorsed the practice, and it flourished.[2]

Calculated to destroy her womanliness, making her more an object of aversion than desire, it was moreover thought that tonsure would incidentally afford the widow a greater degree of protection against the unwanted attentions of unscrupulous characters, as it would also induce in her a measure of the strength and fortitude so necessary for the rigours of the celibate life expected of her. At any rate it was quite common till the end of the last century and was an additional affliction, for so long as the widow did not have her head tonsured, she was regarded as ineligible for association with religious rites and functions; nor would the more orthodox deign to take any food or water touched by her. However thanks to the efforts of Hindu reformers who launched a most determined attack against the custom in the latter half of the last century, the realisation soon began to grow that, far from protecting widows, it merely exposed them to the most ruthless and perfidious designs, and the custom began to disappear

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1. Altekar, op.cit., at 160.
2. Ibid., at 161.

rapidly in the first half of the twentieth century. At present it has practically died in towns and cities, and though it still tends to linger in rural areas, there too its days are numbered.

(3) Child Widows

What made widowhood even more tragic was the high incidence of child widows who were expected to, and forced to conform with, the stringent deprivations that had become a way of life for widows in general. The monthly loss of unfertilised menstrual blood so abhorrent to the śāstra, and Manu's declaration of the perpetual tutelage of women set a trend in favour of the marriage of girls the moment they reached puberty; and once virginity was established as the badge of respectability, and its extolling a sign of the élite and an index to high caste, the brāhmaṇic tendency towards pre-puberty marriages acquired social prestige, which with the passing of time became so compelling that a departure from it was a matter of social disapproval and even of social disgrace. On the other hand, it was a sign of one's affluence, influence and status,[1] a matter of family prestige and honour to fulfil one's obligation and see the daughter safely married long before any breath of scandal could even faintly touch her.[2] Among the peasantry and those belonging to the lower

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1. Kapadia, op.cit., at 137-8.

2. That the apprehension of such scandal was never too far away once the girl was past infancy, and the blame for it laid squarely on her shoulders is evident even from the observations of Western scholars who lent their own considerable weight of opinion to such pernicious views. Thus the Abbé Dubois, op.cit., at 210: "Experience has taught that young Hindu women do not possess sufficient firmness, and sufficient regard for their own honour, to resist the ardent solicitations of a seducer"; and it is not to be thought that such baseless reasoning is restricted to the Christian

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castes where in contrast women enjoyed a relatively greater degree of self-expression, the practice of child marriage did not initially prevail. But their attempts towards "sanskritisation", and the adoption of Brāhmanical conventions invariably led to the lowering of the age of marriage for girls, and in imitation of the customs of the "twice-born" the remarriage of widows strictly prohibited.[1]

The result of course, can well be imagined. The ranks of widows swelled, and there were numerous instances of girl widows only just past infancy doomed for the rest of their dreary lives to humiliation and deprivation courageously borne in the hope of absolving their sins of past lives and of attaining a better future after death. Census statistics bear out the rise in the incidence of child widows, and the figures in 1891 indicated that out of a total female population of 140,196,135, as many as 22,657,429 were widows. Of these 13,878 were under four years of age, 64,040 between five and nine, 17,532 between ten and fourteen and 4,160,548 between fifteen and thirty-four years of age.[2] The Census Reports of 1921 and 1931 indicate similar figures. In 1931 in the country as a whole there were 83,920 widows between the ages of five and ten, 145,449 between eleven and fifteen, 404,167 between sixteen and twenty.[3] As the figures included those castes which permitted their widows to remarry,

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priesthood of a bygone century, for in more recent times David and Vera Mace, commenting upon the Abbé's interpretation in their work Marriage: East and West, (N.Y., Doubleday, 1960), appear to accept this as a matter of course stating at 70 that, "from an early age, girls in the East were accustomed to the idea that they could not be trusted to guard their own virtue."

1. V. Agnew, Élite Women in Indian Politics, (New Delhi, Vikas, 1979), at 18.
2. Kane, H.D., Vol. II, Part I, op.cit., at 24-5.
3. Ibid., at 616.

the sheer enormity of the numbers is an index to the generally prevailing social aversion to the notion of widow remarriage.

The poignancy of widowhood is all the more reinforced when we consider that

> "(t)he terrible thing - the fact that tears one's very heart-strings - is that the younger and therefore the more unprotected and helpless the widow is, the more it proved how vile her sin must have been. When an older woman loses her husband, her sin cannot have been so black as that of a little clinging child of six or seven,"[1]

and so Ānandabai, a child widow who was later to become the second wife of Maharsi D.K. Karve, (social reformer and pioneer of women's education in Western India) was to learn to her cost. A widow at the age of eight years, she recounts that according to custom her head was shaved, "and it was only when I lost my hair and had to wear a red sari[2] that I realised for the first time what it was to be a widow."[3] Then follows the documentation of the usual dreary details, the pattern of which never varied. From then onwards she was condemned to the life of an ascetic, observing several fasts a month, keeping various vows, eating frugally and showing special piety in the worship of God. As the sight of the widow was supposed to bring ill-luck, she had to be careful when she went out, and was always met with the same reproachful refrain:

> "(Y)ou must have sinned in your last birth. And this is the punishment meted out to you. Now if you behave well and worship God devotedly in this birth,

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1. S. Stevenson, The Rites of the Twice-Born, 2nd ed., (New Delhi, Oriental Books, 1971), at 204.
2. In Maharashtra the widow, as a sign of mourning, must wear a rust-coloured sari in contrast to the rest of India where she wears white.
3. A. Karve, "Autobiography", The New Brahmans: Five Maharashtrian Families, D.D. Karve tr. & ed., (Berkeley-Lond., Univ. of California Press - Camb. Univ. Press, 1963), 52-70, at 66.

he will reward you in the next birth."[1]

Thus doomed for the sins of a former incarnation, the child widow in India, from the moment of her husband's decease till the last hour of her own life, was made to expiate the impieties of her previous existence in shame, and suffering and self immolation, chained in every thought to the service of his soul;[2] and the fact that she was merely a child of three, or five or seven who knew nothing of the marriage that bound her, did not exonerate her: her sins were the blacker for it for "if the widow has a son", the proverb says, "her sari has only slipped from her head to her shoulders, but if she be widowed while young and childless, her sari has slipped right to the ground, and she is left naked and defenseless," revealed as the creature of sin,[3] herself convinced when she is old enough, of the justice of her fate.

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1. Ibid., at 66-7. In identical detail is M. Felton's narrative, A Child Widow's Story, (N.Y., Harcourt Brace & World, 1967). In the vast literature that intimate contact with India generated in the late nineteenth and early twentieth century, the Occidental mind was often enough taken aback, and in spite of "thirty years of matured experience in this land, living in constant touch with the people and studying with eagerness their life and thought," nevertheless "his (the writer's) pride of knowledge is chastened by the oft-recurring surprises which the Oriental nature and life still bring to him." : J.P. Jones, India, Its Life and Thought, (N.Y., Macmillan, 1908), Preface, at x; and nowhere does this bewilderment come out with greater emphasis than where the author notes at 263-4: "It is a strange comment upon the religious perversity of a people of the tender domestic nature of Hindus that they should deal with so much cruelty and such apparent indifference to the bereavement and suffering of the unfortunate widow who bears so tender a relationship to them. Religion has not wrought greater cruelty and injustice to anyone than to the Hindu widow, specially the child widow, and notwithstanding the fact that these suffering ones are a great host in this land, there are few of their people who raise their voice in their defence or strive for their relief."
2. K. Mayo, Mother India, (N.Y. Blue Ribbon Books, 1927), at 81.
3. Stevenson, op.cit., at 204.

(4) Satī

That suttee or satī to give it its proper name (the practice of immolating widows on the funeral pyres of their husbands), was by no means confined to India, there can be no doubt. The evidence of its antiquity as also of its widely reported occurrence is well established in all parts of the world extending from Europe to the Far East,[1] and its origins may be traced to the oldest religious beliefs and superstitious practices of mankind.[2]

Whether or not the rite was indigenous to India is a moot question. We are told on the authority of Kane that,

> "(t)here is no Vedic passage which can be cited as incontrovertibly referring to widow burning as then current, nor is there any mantra (religious chants) which could be said to have been repeated in very ancient times at such burning; nor do the ancient gṛhyasūtras contain any direction prescribing the procedure of widow burning."[3]

But we must bear in mind that as it was a practice known to the entire world, there does not seem to be any basis for the belief that it had found disfavour with the ancient Indians. What is more probable is that, as a consequence of a superior civilisation, the custom had been discontinued as barbarous in the Vedic times[4] only to be brought in again by the early immigrants from over the North-Western

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1. For an exhaustive account of the ubiquitousness of the practice in ancient times, see N.M. Penzer, "Widow Burning", C.H.Tawney, ed., Ocean of Story, 2nd ed., Vol IV, Appendix I, (New Delhi, Motilal Banarsidass, 1968), 255-72, at 255 ff.
2. For plausible theories as to its acceptability in antiquity, see Altekar, op.cit., at 115-6.
3. Kane, H.D., Vol. II, Part I, op.cit., at 625.
4. Sir Charles Eliot, Hinduism and Buddhism: An Historical Sketch, Vol. II, (Lond., E. Arnold, 1921), at 168.

Passes, from tribes in Central and Western Asia, and even Eastern Europe who may be called Scythians in a general way.[1] The date of its reintroduction must have been early, for by the fourth century B.C. Alexander the Great's soldiers found it as an established institution in "the half-foreign city of Taxila... and it also prevailed among the Kathaioi who dwelt on the banks of the Ravi."[2]

However what is certain is that, while with the passage of time it tended to fall into désuetude in the rest of the world, in India, paradoxically enough, it acquired religious sanctity and soon became embedded as a sacred rite despite the otherwise humane and tolerant character of the Hindu religion.

One view is that, satī as a rite fits quite well in the frame of the brāhmanical law of marriage as a sharpened form of the severe demands made by the brāhmanical law-givers on the matrimonial fidelity of the widow,[3] and while this is certainly true of later attitudes, there is in the śāstra a conflict of authorities for and against the rite. Of the Hindu legislators most favourably disposed towards it, Angiras proclaims:

> "(T)he wife who commits herself to the flames with her husband's corpse shall equal Arundhati and reside in Swarga.
>
> "Accompanying her husband she shall reside so long in Swarga as are the thirty-five millions of hairs on the human body.
>
> "As the snake catcher forcibly draws the serpent from his earth, so bearing her husband (from hell), with him she shall enjoy heavenly bliss.

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1. V. Smith, The Oxford History of India, 2nd ed., (Oxon., Clarendon Press, 1928), at 665.
2. Ibid.
3. J. Jolly, Hindu Law and Custom, B. Ghosh tr. (Cal., Greater India Society, 1928), at 147.

"Dying with her husband, she sanctifies her maternal and paternal ancestors, and the ancestry of him to whom she gave her virginity.

"Such a wife adoring her husband, in celestial felicity with him, greatest, most admired, with him shall enjoy the delights of heaven while fourteen Indras reign.

"Though her husband had killed a brāhmana, broken the ties of gratitude, or murdered his friend, she expiates the crime." [1]

and Hārīta no less:

"(S)he whose sympathy feels the pains and joys of her husband, who mourns and pines in his absence, and dies when he dies, is a good and loyal wife."[2]

Likewise the Brahma Purāṇa propounds:

"(W)hile the pile is preparing, tell the faithful wife of the greatest duty of woman; she is loyal and pure who burns herself with her husband's corpse."[3]

But as opposed to such injunctions, there are others which offer her an alternative. After the death of the husband, the widow must either preserve her chastity or ascend the pile after him.[4] So too Brhaspati:

"(A) wife is considered half the body (of her husband) equally sharing the result of his good or wicked deeds; whether she ascends the pile after him, or chooses to

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1. H.T. Colebrooke "On the Duties of a Faithful Hindu Widow," Miscellaneous Essays, Vol. II, (Lond., Trübner, 1873) at 135-6.

2. Ibid., at 137.

3. Ibid., at 136. It is also believed that Kṛṣṇa commanded the widow not to survive her husband, and indicated what preparations should precede the immolation. An English version of these fragments from the Purāṇas was published in the London Asiatic Journal (Oct. 1817) as follows: "I will now make known the supreme law regarding women. It is proper that a woman should accompany her husband in death; such a faithful wife shall with her husband attain the regions of truth; for the husband with respect to the wife, is endowed with all the qualities of the gods and all virtues of places of holy visitation. The husband with regard to the wife, is as Gangā to rivers, as Hari to celestials, as the supreme Brahma to saints..." See Bader, op.cit., at 65.

4. Viṣ. XXV. 1. 14, op.cit.

> survive him leading a virtuous life, she promotes the welfare of her husband."[1]

On the other hand, if after undertaking the duty of satī the woman recedes from the pile, she incurs the penalties of defilement and may only be purified by observing the fast called prajāpatya.[2] In certain other circumstances however, the smṛti writers exempt her entirely from its performance, and in Nārada's view, one who is the mother of an infant child, or one who is pregnant, or whose pregnancy is doubtful or who is unclean may not ascend the pile.[3] And in the event of a brāhmin dying in a distant country, his widow may not ascend a second pile,[4] though others are not precluded from this act of fidelity and

> "(T)he widow on the news of her husband's dying in a distant country, should expeditiously burn herself."[5]

a sentiment which is echoed in the Brahma Purāṇa:

> "(S)hould the husband die on a journey, holding his sandals to her breast, let her pass into the flames."[6]

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1. Bṛh. XXIV. 11, op.cit.
2. Āpastamba, quoted at Colebrooke "On the Duties of...," at 137.
3. Ibid., at 138. Colebrooke also quotes Bṛhaspati at 138, who likewise declares "The mother of an infant shall not relinquish the care of her child to ascend the pile, nor shall one who is unclean (from a periodical cause), or whose time for purification after child-birth is not passed, nor shall one who is pregnant, commit herself to the flames. But the mother of an infant may, if the care of the child be otherwise provided." It is noteworthy that even the Garuḍapurāṇa which waxes eloquent over the immolation of a wife on her husband's funeral pyre holding that the practice of satī is common to all women including chāṇḍāla (outcast) women, and that a woman does not become free from the liability to be born again and again as a woman until she becomes satī, is nevertheless of the view that pregnant women or those who have young children should not commit themselves to the flames. See Kane, H.D., Vol. IV, (1973), op.cit., at 237.
4. Gautama, cited at Colebrooke, "On the Duties of...", op.cit., at 138.
5. Ibid.
6. Cited at ibid.

- anumaraṇa as opposed to sahamaraṇa, i.e. burning along with the husband.

It is certain however that it was never in the contemplation of Manu, the great sage and lawgiver, to countenance satī, and the inferential prohibition of the rite may be garnered from the many detailed rules of chaste and frugal living that he lays down for the widow.[1] In Bhāruchi's interpretation of Manu XII. 88-90, satī is an instance of the Vedic action of "prolonging", but "cessation" wherein lies ultimate merit and whereby one passes beyond the five material substances, may only be achieved by the widow in tending to the household duties and living her life in accordance with the precepts laid down for brahmacharya,[2] for has not the Vedic text declared that, "One should not leave this world before one has finished one's allotted span of life."[3] Thus despite Aṅgiras' endorsement of the rite, the action of a woman who is hasty in her anxiety to secure heaven quickly for herself and her husband must be condemned as asāstrīya (i.e. not in accordance with the śāstra).[4] To the poet Bāṇa however, goes the credit of offering the most vehement and determined opposition to this inhuman institution. To die for one's beloved, in his view, serves no purpose, for the one who dies goes to the place determined by his own karma, while the one who accompanies him on the funeral pyre goes to the hell reserved for those who are guilty of the sin of suicide.[5]

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1. Supra, at 142.
2. Devaṇṇabhaṭṭa, a twelfth century writer from South India similarly maintains that satī is only a very inferior variety of dharma. See Altekar, op.cit., at 124, and Jolly, op.cit., at 149.
3. Kane, H.D., Vol. II, Part I, op.cit., at 632.
4. Medhātithi on Manu V. 157, cited at Jolly, op.cit., at 149.
5. Altekar, op.cit., at 124.

However, despite this overwhelming evidence against the usage, vested interests were at work, and accordingly the brāhmin priesthood who stood to gain considerably by the practice sought support for their view in a passage from the Ṛgveda which was said to clearly enjoin the rite. The text of the passage declares:

> "(O)m - let these women not to be widowed good wives adorned with collyrium, holding clarified butter, consign themselves to the fire; whose original element is water."[1]

The disputed passage in the verse is Anasravo namivah su-ratna a rohantu janayo agne (v. l. agre), i.e. "without tears, without sorrow, bedecked with jewels, let wives go up to the fire first."[2]

Notwithstanding this supposed authority, scholars both Indian and European reject the view that there is any passage in the Ṛgveda which can be said to countenance satī,[3] and H.H. Wilson, the great Sanskritist, is firmly of the opinion that in this particular passage, the word agreh was deliberately altered to agneh (fire), by Raghunandana in the middle of the fifteenth century, and by such forgery the required authority for satī established.[4] To reinforce his assertion, Wilson draws attention to the Vedic passage wherein the widow who lies beside her husband on the funeral pyre is exhorted to "come into the world of life."[5] Surely, argues the eminent scholar,

> "(i)t would be inconsistent with any intention of burning to enjoin her (the widow) to repair to the

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1. Colebrooke's translation, cited at "On the Duties of...," op.cit., at 135.
2. Ibid.
3. See Sen-Gupta's repudiation, supra, at 142.
4. H.H.Wilson, Works, Vol.II, (The Religion of the Hindus, Vol.11), "On the Supposed Vaidik Authority for the Burning of Widows," R. Rost ed., (Lond., Trübner, 1862), at 275.
5. Supra, at 141.

> world of living beings ... on the other hand it must be taken to imply an exhortation to the widow to return to her social duties, cherishing the recollection, but not sharing the death of her husband."[1]

Most authorities are now agreed that fraud did indeed play its part, and in Max Müller's view, it is "perhaps the most flagrant instance of what can be done by an unscrupulous priesthood."[2]

Authoritative as these views were, they could not stem the tide of controversy, and in fact Raja Dev Kanta Deva, whom we remember today chiefly for his determined opposition to Raja Ram Mohan Roy's efforts at reform, explains away the Vedic passage to which Wilson draws attention, by maintaining that it was merely a test of the widow's resolve:

> "(I)f the widow thus addressed has not made up her mind for her immolation, she obeys the call; but should she be firm in her resolve, she consoles her friends and relatives and enters the fire."[3]

On the other hand, in the Raja's view, Vedic authority for the burning of widows is established in two verses of the Aukhya Śākhā of the Taittirīya Saṃhitā:

(1) "(O)h Agni, of all Vratas thou art the vratapati. I will observe the vow (vrata) of following the husband. Do thou enable me to accomplish it!"

(2) "(H)ere in this rite, to thee Oh Agni, I offer salutations; to gain the heavenly mansion I enter into thee; (wherefore) oh Jatavedah, this day, satisfied with the clarified butter (offered by me), inspire me with courage (for sahagamaṇa) and take me to my lord."[4]

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1. Wilson, Vol. II, cited above, at 276.
2. F. Max Müller, Selected Essays on Language, Mythology and Religion, Vol. I, (Lond., Longmans Green, 1881), at 335.
3. Cited at Wilson, Vol. II, op.cit., at 297. It may be noted that even on the basis of this argument, satī is not incumbent but merely an alternative offered to the widow.
4. Ibid., at 296.

However, Kane gives no credence to these verses and refers to them as "the so-called Vedic texts" which "to say the least are of doubtful authenticity,"[1] though at the same time he is not willing to subscribe to the theory of fraud attributed to Raghunandana either. Centuries before the latter, he points out, the controversial passage in question was held in the same sense in the Brahma Purāṇa and Aparārka. Besides, had there indeed been such forgery, it would not have gone undiscovered for so long, "as in those days there were thousands of people who knew every syllable of the Ṛgveda by heart."[2] What therefore emerges from the foregoing is that, satī as an institution could not have been established by this change of text alone; and while there can be no doubt but that it was instrumental in encouraging and abetting it, the mere fact that the rite could be visualised to the extent that the widow lies on the funeral pile only to be called back to the world of the living, indicates clearly enough that the burning of widows was not an unfamiliar, though perhaps not a day-to-day occurrence.

Nor can we attribute widow burning as an institution as intrinsic to the Epics. Assertions that it is the duty of a good wife to follow her lord in death is found often enough in both poems, but they yield no proof since they might be referred to later revision. The only instance of actual satī in the Rāmāyaṇa is to be found in the seventh book, where a brāhmin woman consigns herself to the flames to be burnt along with her dead husband. But as the seventh book does not belong to the original poem, it is fairly certain that the legend is an interpolation of especially late date.[3]

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1. Kane, H.D., Vol. II, Part I, op.cit., at 625, f.n. 1462.
2. Ibid., at 625.
3. Meyer, Vol. II, op.cit., at 412.

In the Mahābhārata - which is much longer and thus offers greater opportunities for widow burning - it is undoubtedly ordained:

> "(T)hough the husband died unhappy by the disobedience of his wife, if from motives of love, disgust (of the world), fear (of living unprotected), or sorrow, she committed herself to the flames, she is entitled to veneration."[1]

Yet even here where so many husbands meet with death and only a very few widows follow them to the realms of darkness, actual instances of the true satī are rare. The memory of one of these remote sacrifices which the poem transmits to us, that of Mādrī's is hardly animated by the precepts of those who enjoined it. Pāṇḍu is struck at the moment of sexual union with her, and at his death, Mādrī is resolved not to be held back, for not only has she not yet enjoyed love to the full, but

> "(i)n the midst of pleasure's union he (Pāṇḍu) went away from love in death. How might I now cut off his longing in the abode of Yama?"[2]

The only true case of satī in the poem is the mounting onto the pyre of the four wives of Vāsudeva; generally however, the widows - so many of them - go on quietly living. Satyabhāmā, for example, after the death of Kṛṣṇa, that "Croesus in wives,"[3] goes off into the forest to live the life of a penitent, as does Kuntī who follows her mother-in-law Satyavatī, into the penitential wilderness, hoping by humble service and asceticism to earn her entry into the world of her husband.[4]

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1. Cited at Colebrooke, "On the Duties of...," op.cit., at 137.
2. Meyer, Vol. II, op.cit., at 414.
3. Ibid., at 415.
4. Ibid., f.n. 1. As opposed to sahamaraṇa, instances of anumaraṇa are however more frequent in the Epic. See ibid., at 415-6.

However, that which in primitive times had been the inspiration of isolated devotion, soon became a duty of unbending rigidity. Confined in the first instance to the nobility,[1] the practice of satī was a means among them whereby the vanquished in battle sought to protect their honour, and preferred their women to die rather than fall into the hands of the victors and the humiliations that were almost certainly in store for them. Gradually however, from kings and warriors, the practice spread among the brāhmins, for the latter community, accustomed as it was to priding itself on following the most ascetic and self-denying code of life, could not allow itself to be outdone by the kṣatriyas; despite several texts cited by Aparārka which apparently forbid self-immolation to brāhmin widows,[2] the authors of digests explain away these passages by holding that what these texts really amounted to was that she should not take the step merely under a temporary sense of overwhelming grief; on the contrary, it should be the result of full and mature deliberation; and thus a practice so opposed to the first law of nature, but made sacrosanct in India by the superaddition of religious merit, became engrafted on the custom of the Hindus.

Not a few reasons are put forward in an attempt to explain its wholehearted endorsement for centuries in India. Originally an appendage to regal and princely estate, satī was considered honourable in itself and reflected additional lustre on the family to which the hapless victim belonged. Those who actively lent support to it were

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1. It is generally agreed that almost certainly the earliest instance of satī is that of the wife of the Hindu general Ketius, who died in 316 B.C. while fighting against the Greek, Antigonos.

2. See Kane, H.D., Vol. II, Part I, op.cit., at 627.

invariably relatives of the deceased husband, and bound by none of the ties of consanguinity and having little or no feeling for her, made the widow the means of aggrandising the family honour, and the higher the number of such immolations, the greater the glory attributed to the clan.[1] Moreover the presence of widows, especially if still capable of sexual and reproductive activity, was clearly a problem for the husband's surviving male kin. That such widows - sometimes only children - might deviate from the path of virtue and bring dishonour to the family name, was undoubtedly an additional incentive in favour of satī. Add to these the pressure of the brāhmin priesthood who presided over the rite and for whom it had become a means of accumulating a not inconsiderable income, and it is then not difficult to understand why it became a social convention of such magnitude.

However, contributory as these causes might have been, they were certainly not the primary reasons for the hold that the rite had on Hindu minds. To arrive at its origins, we must retrace it to the recesses of mythology, where we hear that on the demise of the mortal part of Brahma, his wives, inconsolable in their misery, determined not to survive him and burnt themselves with his corpse. There is also the example of Satī, who to avenge an insult to Śiva in her own father's omission to ask her lord to an entertainment, consumes herself in the presence of the gods. With this act of fealty, the name of Dakṣa's daughter has been identified; and her regeneration and reunion with her husband as Umā or Pārvatī furnished the example for similar acts on the part of those for whom such stories were sacred truth. To add to this was the doctrine of retribution in Hindu theology, whereby the loss of her visible god was the just deserts of

1. Many sati-stones erected by proud relatives of the husband in medieval times serve to this day to witness this attitude.

a woman for the sins of a previous life. Widowhood then must in rigorous justice be an experience so desolate and fraught with misery that a preferable alternative was to perish in the flames that consumed her husband's corpse, and the early brāhmins - because they stood to gain - gave currency to the doctrine that the spirits of these valiant creatures, thus purged of their guilt, ceased from their transmigrations to live reunited with their lords in eternal bliss.

However that the rite was never meant as a universally binding precept is evident from the fact that, in the extreme south of India, satī was more an exception than a rule down to about 1000 A.D. Among the members of the Pallava, the Chola and the Pandya ruling families there is no evidence of satī till about 900 A.D.[1] In Malabar, the most primitive part of South India the rite was forbidden, probably because of the prevalence of the matriarchal system there, and though there are many unpublished satī stones both in the Deccan and Maharashtra, the Epigraphia Carnatika mentions only eleven cases of satī during the period 1000-1400 A.D., though the figure rises to forty-one for the period 1400-1600 A.D. Most of these satīs however relate to the Nayaka and Gauda classes which formed the main fighting community of southern India.[2] When the custom did penetrate into southern India, it is significant that it was prevalent chiefly in the strictly brāhmanical kingdom of Vijayanagar and "the most wholesale burnings on record were those perpetrated from the fourteenth to the sixteenth centuries on the obsequies of the Teluga Rajas of

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1. Altekar, op.cit., at 128.
2. Ibid., at 131.

Vijayanagar."[1] With the disintegration of the Vijayanagar empire, the practice was continued on a smaller scale by its chief fragment, the kindom of Madura, and at the deaths of two rulers in 1611, as many as four hundred and seven hundred women ascended the funeral pyres.[2]

In Western India among the Maharashtrians it gained only modified support, and there are remarkably few instances of satī at the deaths of those of higher rank. Only one wife of Shivaji became satī and one of Rajaram his son. The masterful wife of Raja Shahu was compelled to burn for political reasons,[3] while among the members of the Peshwa family, only Ramabai, the widow of Madhavarao I, consigned herself to the flames.[4] Recorded cases of satī in the annals of the Maratha ruling families of Satara, Nagpur, Gwalior, Indore and Baroda are likewise very few. Towards the latter half of the eighteenth century, the Maratha distaste for satī grew, and by the close of the century two Maratha states, those of the Peshwa's personal dominions and Tanjore, prohibited satī.[5] That Tanjore later relapsed and became one of the few notorious centres, may have been due to the widespread prevalence of the rite in the surrounding areas, the pernicious influence of which the kingdom could hardly escape.

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1. Ibid. Nicolo Conti, an early traveller to the kingdom was informed that the king had 12,000 wives, and so that great honour be heaped upon him, two to three thousand of these were selected on condition that, at his death they should voluntarily burn themselves on his funeral pyre! See R. Sewell, A Forgotten Empire (Vijayanagar), (Lond., S. Sonnenschein, 1900), at 84.
2. Altekar, op.cit., at 131.
3. E. Thompson, A Historical and Philosophical Enquiry into the Hindu Rite of Widow Burning, (Lond., Allen and Unwin, 1928), at 29.
4. Altekar, op.cit., at 132.
5. Thompson, cited above, at 59.

However, as if to make up for the comparative dearth of the practice in the south, satī flourished unabated in Kashmir, the Punjab, Rajasthan, or Rajputana as it then was, and the Ganges valley including Bengal. Between 700 and 1100 A.D. Kashmir's history teems with cases of satī in royal families. So deep-rooted became the custom that not only wives but concubines and slaves would burn on the pile of their lords. An acceptable explanation for its widespread prevalence in this area would seem to be its proximity to Central Asia which was the home of the Scythians, among whom, as we have already indicated, the rite was customary.[1]

In the Punjab the practice of satī forms no part of the institutions of the Sikhs, and in the early stages was rare among them. In fact it is condemned in no uncertain terms in the Adhi Granth:

> "(T)hey are not satīs who perish in the flames O Nanak. Satīs are those who live of a broken heart."[2]

And Amar Das, the third Guru declares in a similar vein:

> "(T)hey are not satīs who burn themselves with the dead. The true satī is she who dieth from the shock of separation from her husband. They also ought to be considered satīs who abide in chastity and contentment, who serve, and when rising, ever remember their lord."[3]

Despite these injunctions against it, in course of time satī became an established ritual among the Sikhs, probably for the same reason that it took root among the Rajputs - as a safeguard of the honour of their women. Among the aristocracy specially, there were numerous cases of satī on an awesome scale. At Ranjit Singh's death, four of his queens

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1. Altekar, op.cit., at 127.
2. See "Suttee," in V.F. Balfour, ed., Cyclopaedia of India, 2nd ed., (Mad., Laurence and Adelphi, 1873), 647-52, at 650.
3. Cited at Penzer, op.cit., at 263.

and seven concubines ascended the funeral pyre. During the troublesome period that followed his death, princes and generals fell in quick succession, and almost every one of them was accompanied by his wives and concubines. Three women died with Maharaja Kharak Singh, five with Basant Singh, eleven with Kishori Singh, twenty-four with Hira Singh and three hundred and ten with Suchet Singh.[1]

The hold of satī among the ruling Rajput families was likewise formidable, and the women, members of warrior clans whose menfolk died so freely and readily in battle, were similarly impelled by an indomitable courage, and most willingly accompanied their husbands' remains to the funeral pile. Generally at the death of every Rajput raja or nobleman, those among his widows who were not with child or otherwise incapacitated for the rite, would ascend the funeral pyre, quite frequently in appallingly large numbers. At the death of Raja Ajit Singh of Marwar in 1724, sixty-four women ascended his funeral pyre, while eighty-four women became satīs when Raja Budh Singh of Bundi drowned.[2] To these may be added the memories of the jauhars, those of Chitor where the fabled Padmini and thousands of her women consigned themselves to the flames rather than submit to the maurader Alladin Khilji, that of Jaisalmer where two thousand and four hundred women are said to have perished,[3] and those of Udaipur, where the females of the household of the later Ranas, by burning added to the numbers, and we have some idea as to the extent of the holocaust claimed by the rite.

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1. Altekar, op.cit., at 132.
2. J. Todd, Annals and Antiquities of Rajasthan, 3rd ed., Vol. I, (Lond., George Routledge, 1920), at 837.
3. Thompson, op.cit., at 37.

Nor was this wholesale immolation of women confined to the palaces of Northern India only. In Bengal the rite was rampant with not even the excuse that the warriors of the North had - that of protecting their women from defilement at the hands of alien conquerors. Towards the end of the 18th century, the practice was widespread in the entire Bengal Presidency but particularly so in the Bengal Province itself. If we examine the returns of the four years between 1815 to 1818, the findings are that, of the total of 2,366 reported cases, 1,485 satīs occurred in the Calcutta Division alone, 343 in Benares, then as now the seat of Hindu orthodoxy, 155 in the densely populated but predominantly Muslim Division of Dacca, 155 in Patna, 105 in the Murshidabad Division and 60 in Bareilly.[1] In the statistics of 1828 the figures show that out of 463 cases of satī, 420 were reported from Bengal, Bihar and Orissa with the Calcutta Division leading in this group with a total of 287.[2]

The question that invariably comes to mind at this stage is that raised in 1818 by the Magistrate of the Hoogly District:

> "(T)he suttee is supposed by some to be an act enjoined by the religion of the Hindus; but if so, why does it prevail in one part more than another, and why in the immediate neighbourhood of the Presidency?"[3]

Why indeed? There does not seem to have been any one cause, and various reasons have been assigned. A plausible enough explanation seems to be the general distaste of the Moghul rulers towards the

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1. Ibid., at 71.
2. H.H. Wilson, The History of British India, Vol. III, (Lond., J. Madden, 1848), at 189.
3. Parliamentary Papers, Vol. IV, 1827, at 237, cited at J. Peggs, India's Cries to British Humanity Relative to the Suttee, Infanticide, 2nd ed., (Lond., Seely, 1830), at 11.

practice. Akbar, in particular, strongly discountenanced it, and on one occasion personally intervened by riding a hundred miles at top speed to prevent the Raja of Jodhpur's daughter-in-law from becoming an unwilling satī.[1] His son Jahangir was equally opposed to it, and seems to have forbidden on pain of death, any abetting of the performance. But the most that the Moghuls could do was to insist on its voluntary nature, and even this restriction could not obtain in the territories of the great Rajput chieftains. However the Moghul abhorrence of the custom did lead to its suppression to a considerable extent, at least within the areas directly controlled by Delhi, but the consequence of this was its spread, with even greater ferocity in states independent of Moghul suzerainty, and outlying semi-independent provinces such as Bengal.[2]

However, this only partly explains its spread, and not at all its hold over Bengali minds. Kane's theory, it is submitted, is likewise suspect. He attributes its widespread prevalence in Bengal to the system of inheritance as propounded in the Dāyabhāga. As he explain it:

> "(I)n the whole of India except Bengal, the widows of members of joint families are only entitled to maintenance and have no other right over the property of the family. In Bengal wherever the Dāyabhāga prevails, the widow of a sonless member even in a joint Hindu family is entitled to practically the same rights over

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1. In fact one can do no better than to quote the great Emperor himself to show his total lack of sympathy in an otherwise remarkably benign attitude towards the religion of his subjects: "It is a strange commentary on the magnanimity of men that they should seek their deliverance through the self-sacrifice of their wives." : Abu'l Fazal, Ain-i-Akbari (Institutes of Akbar), Vol. III, H.S. Jarrett tr., (Cal, RASB, 1894), at 398.

2. Thompson, op.cit., at 57-8.

> joint family property which her deceased husband must have had. This must have frequently induced the surviving members to get rid of the widow by appealing at a most distressing hour to her devotion and love for her husband."[1]

Though admittedly there is some truth - in theory at least - in this contention, we must pause awhile before accepting it unreservedly. The reality was quite another story, and Raja Rammohun Roy, the great Bengali reformer, whose disgust and horror of the rite was at least partly due to his having witnessed his own sister-in-law become an unwilling satī, exposes the non-existent nature of such inheritance rights in practice. While the lawgivers might have made provisions for the mother to have a share equal to that of the son in her deceased husband's property, yet, as the Raja points out, the ancient law has thus been explained away:

> "(a) widow ... can receive nothing when her husband has no issue by her, and in case he dies leaving only one son by his wife, or having had more sons, one of whom happened to die leaving issue, she shall, in these cases, also have no claim to the property; and again, should anyone leave more than one surviving son, and they, being unwilling to allow a share to the widow, keep the property undivided, the mother can claim nothing in this instance also. But when a person dies, leaving two or more sons, and all of them survive, and are inclined to allot a share to their mother, her right is in this case only, valid."[2]

The myth of inheritance thus shattered, Kane's conjecture cannot be given credence for widows in Bengal were in reality as destitute as elsewhere in India, and,

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1. Kane, H.D., Vol. II, Part I, op.cit., at 635.
2. Raja Rammohun Roy, "Brief Remarks Regarding Modern Encroachments on the Ancient Rights of Females," Dr. K. Nag and D. Burman, ed., The English Works of Raja Rammohun Roy, (Cal., Sadharan Brahmo Samaj, 1945), 1-9, at 3-4.

> "(t)he Hindu widows burn themselves on the piles of their deceased husbands ... from their witnessing the distress in which widows of the same rank in life are involved, and the insults and slights to which they are daily subjected (so much so) that they become in a great measure regardless of existence after the death of their husbands: and this indifference accompanied by hope of future reward held out to them, leads them to the horrible act of suicide."[1]

Besides, the mind at once leaps to the memorable sacrifices at Chitor, Jaipur, Udaipur and Jodhpur. Property rights had no part to play in these regions, and though undoubtedly the form that satī took was a means of escape for those thousands of courageous women from the indignities that almost certainly lay in wait for them at the hands of the conquerors, nevertheless the question we must ask ourselves is what impelled not only the high-born ladies of the palaces, but even the lowly - concubines, servants and slaves - for whom the point of honour surely did not assume such magnitude, to endorse the rite so wholeheartedly.

What really seems to link the two places, Rajasthan and Bengal, is the adherence in both these regions, to the Śākta cult, and the memory of the self-immolation of Satī to honour Śiva her husband, must certainly have played no mean part in inculcating the rite as an act of ultimate virtue, and while Vaiṣṇavism (devotion to Kṛṣṇa), tended to discourage the practice of satī, the Śākta philosophy enormously increased it in spite of the fact that the much abused Tantras forbade it.[2] Small wonder then that at Viṣṇupur, a strongly

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1. Ibid., at 4. Katherine Mayo writing years later, agrees with Ram Mohan Roy's view that in the 19th century as in her own time "She (the widow) has seen the fate of other widows. She is about to become a drudge, a slave, starved, tyrannised over, abused - and this is the sacred way out - "following the divine law." Committing a pious and meritorious act, in spite of all foreign made interdicts, she escapes a present hell and may hope for a happier birth in the next incarnation." : Mother India, op.cit., at 83.

2. Thompson, op.cit., at 73.

Vaiṣṇava district, there are at best only vague traditions of satī, while Calcutta, only a hundred miles away, its suburbs and the towns that cling to its outskirts - these areas have been the scenes of the most numerous and most horrifying instances of satī perpetrated anywhere in India. To link up this added incentive that these regions derived for the enormous popularity of the rite, their adherence to the Śākta cult and the worship of the dread goddess Kalī, may not be far off the mark, specially if we consider that this is a feature that Rajasthan shares with Bengal, that in Rajasthan the great Vaiṣṇava devotee, Queen Mira Bai was driven from Chitor, the stronghold of the Śākta tradition, to live and die in exile for her espousal of the god Kṛṣṇa.

But if the Śākta cult lent lustre to the practice, what further added numbers to the ranks of widows was the practice among the kulins, brāhmins of the highest status in Bengal, of polygamy on a formidable scale.[1] Indeed they made a profession of marriage, living off the dowries of their brides,[2] few of whom ever lived with their husbands or even saw them after marriage, except when they climbed their funeral pyres,[3] and there were not infrequent instances of the burning of scores of women with one quite unimportant man. We are told for instance, of a pyre kept alight for three days at the death of a kulin brāhmin in the Nadia District who had more than one hundred wives.

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1. Polygamy in Bengal took the form of hypergamy or "marrying up," a custom which forbids a woman of a particular group to marry a man of a group lower than her own in social standing. See Sir Herbert Risely, The People of India, 2nd ed., W. Crooke ed., (Cal. - Simla - Lond., Thacker Spink-W.Thacker, 1915), at 163.

2. Derrett, RLSI, op.cit., at 177. See also Risely, cited above, at 166-7.

3. Thompson, op.cit., at 37.

* The harrowing details of "suttee" often figured in European publications under the ambivalence of "newsworthiness", but there is a significant instance of an authentic account by an eye-witness of a case of Sept. 2, 1776, written in 1777, testifying to female loyalty to her husband and intrepid fortitude, reprinted at 432-4 of The Young Woman's Companion or, Female Instructor (new edition, improved) (Oxon., Bartlett and Hinton, N.D. (? 1826)), manifestly as not merely a piece of information for young English gentlewomen's education but also for their edification and admiration (the caveat concerning the desirability of India's being enlightened by the Christian religion does not diminish these effects).

Relays of these widows were fetched, and they ranged from about the age of forty to sixteen years. The first three had lived with the dead man; the others had hardly ever seen him.[1]

The woman who resolved to become satī was the object of the highest veneration, and having been given a ceremonial bath, and made to put on her person all the insignia of saubhāgya (i.e. the married state), she was then taken through the town to the cremation ground in a grand procession to the accompaniment of music. Having arrived at her dread destination, she would often enough distribute her ornaments and belongings to friends and relatives to whom they were sacred mementoes. This done, she would ascend the pile, and her placing of her husband's head on her lap was the signal for the funeral pyre to be lit.[2]

There is no doubt but that the great majority of such widows ascended the pile as free agents out of a genuine sense of devotion to the husbands they revered as gods, and a stern sense of duty, a stoical contempt of physical pain and the hope of eternal union sustained them through their terrible ordeal.[3] But there were as well, numerous instances of widows who much against their will, were forced to ascend the pile,[4] and accordingly the pyres were piled in deep pits specially

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1. Peggs, op.cit., at 8.

2. We have numerous documentations of such scenes, but see specially Altekar, op.cit., at 133-4.

3. Ibid., at 138. (cont) *

4. Very often such widows were rescued, sometimes for unscrupulous purposes, and in some instances even by European onlookers who subsequently married them. See ibid., at 135. The most famous instance of one such rescue is the saving from the flames of a young widow by Job Charnock the founder of Calcutta, who then settled with her in the city. Whether he subsequently embraced Hinduism as is popularly believed, is difficult to gauge, for while the temple he is believed to have built and dedicated to the

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1. Dr. Jörg Fisch in a broadcast over the West German radio demonstrated conclusively that Bentinck's hands were virtually forced by the fact that in the years immediately before 1829 the district officers were progressively rebellious at having to authorise suttee where, in each case, it proved impossible to dissuade the heroine/victim from her determined course. This was the major reason why the reform took effect so smoothly.

in the Deccan and Western India, so as to make escape virtually impossible for them and even for those who might at the last minute weaken in their resolve and recoil from the agony of the flames. In Gujarat and Northern India, a wooden structure, twelve feet square, was usually built for the same purpose, and the widow tied to one of its pillars. In Bengal the widow's feet were tied to posts fixed in the ground; she was thrice asked whether she really wished to go to heaven, and the funeral pyre was then lit.

The demise of satī was the result of the decision of one man alone, that of Lord William Bentinck, Governor General of Bengal. Though the reaction against it had already set in among the enlightened in India - and in this respect the efforts of Raja Rammohun Roy cannot be minimised - yet to the Governor General goes the credit of firmly resolving to take the step which was to sound its death-knell, and this despite the almost general opposition of his subordinate English officers,[1*] and even the hesitation of Raja Rammohun Roy, who for all his utter aversion of the rite, was of the view that its abolition at the time was a premature step. Nevertheless it must be acknowledged to his credit that, when Lord Bentinck's resolve took the shape of the Bengal Satī Regulation of 1829 whereby satī and its abetment was declared "a crime of culpable homicide punishable with fine, imprisonment or both", the Raja was the first to shed his reservations and to endorse the measure wholeheartedly.

Surprisingly, the outlawing of satī did not meet with much opposition. True it created a stir among the orthodox, and its journal,

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goddess Kali, still stands in Bowbazar Street, an active centre of worship for the devout, his remains lie buried in the cemetery of St. John's Church, along with other European contemporaries who never returned home from the colony.

* 1a. In contrast, the abolition of female infanticide, which was the extreme of male dominance, was never newsworthy, and stories of the abuse never had the ambivalence and 'entertainment' value that sati had.

the Chandrika wrote vehemently against it. But there were only eight hundred signatures to its appeal to the Privy Council to annul the Regulation.[1] On the other hand, there was a general sense of relief among the more liberal, and a memorandum presented to the Governor-General in appreciation of his action. Raja Rammohun Roy went to England to plead in person before the Privy Council for the confirmation of the measure, and strengthened by this advocacy, the authorities in England finally rejected the appeal of the orthodox in 1832. Soon thereafter the jurisdiction of the measure was extended to the other Presidencies, and thus was put the seal on satī, once and for all, in British India.[1a*] It was then merely a matter of time for its extinction in the Princely States, though in Rajputana the practice lingered long, and cases were reported as late as 1861.[2]

Though satī as a rite is a relic of bygone times, and today of academic interest only, this is not to suppose that once prohibited, it never reared its ugly head again. In fact time and again, cases of satī came to the notice of the law which to do it credit was always vigilant and took vigorous action against those responsible for aiding and abetting it. To this day there are reports - albeit infrequent - of such futile deaths.[3] And while it is to some extent pardonable in

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1. Altekar, op.cit., at 141.

2. Thomas, op.cit., at 296.

3. There was report of one such incident in Gujarat in 1931, and in the year 1950 two cases of satī were reported from Jodhpur, and in 1961, a case from Jaipur. See Thomas, op.cit., at 296. In 1958, in Tejsingh v. The State, A.I.R. 1958 Raj. 169, a case of satī came up before the Rajasthan High Court where the husband having died, the widow was instigated to become satī by the three brothers and two sons of the deceased. A crowd of about 1,500 people frenziedly shouting "Satī māta ki jai ho" (Long live mother satī) swelled to even larger numbers as the procession wore on, and once the widow had climbed the pile and the pyre lit "the whole thing was over in

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those who by a misguided sense of devotion actually become victims to it, one is constantly amazed at the lofty tone of admiration that some not inconsequential personages adopt in exalting the nobility of mind which opts for such a course. Kane feels that

> "(i)t is a warped mentality that rebukes modern Indians for expressing admiration and reverence for the cool and unfaltering courage of Indian women in becoming satīs or performing the jauhar and cherishing the ideals of womanly conduct."[1]

Witness too, the sense of quiet pride with which Altekar describes the self-immolation of his own sister:

> "(F)or his (Altekar's) own sister Mrs. Indirabai Madhav Udgaonkar showed an indescribable fortitude in carrying out her long-formed and oft-announced resolution not to survive her husband when on 17.1.46 she committed herself to flames within twenty-four hours of her husband's death..."[2]

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half an hour and the dead body as well as Mt. Saraswati were burnt" (at 170). In reversing the judgment of the Sessions Judge, their Lordships of the High Court held that, those persons who joined the procession were guilty of abetting the crime and therefore punishable under s. 307 of the I.P.C. and the five accused "as much guilty if not more under ss. 147, 342 and 306 of the I.P.C. Their Lordships were also extremely critical of the Session Judge's observation that "the custom of satī is a well-known custom and judicial notice can be taken of it" (at 172), for in their view, as the law invalidating satī had been in force for over a hundred years, "a sentence of five years rigorous imprisonment is the minimum that we can give to these accused" as against the "ridiculously lenient sentence" of the six months of rigorous imprisonment envisaged by the Sessions Judge.

1. Kane, H.D., Vol. II, Part I, op.cit., at 636.
2. Altekar, op.cit., at 137. Western writers too, tend occasionally to display a similar misguided admiration for such acts. Writing in 1960, David and Vera Mace declare that, "Although custom and duty left many widows in the East no alternative but to suffer and die ... in many, many cases the widow walked into the fire proudly and by deliberate choice. This was her way of showing the depth of her affection, her devotion, her fidelity ... and looking at the motive, dare we say that these women of the East knew less of true

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and this"despite the presence of a sucking child,"[1] and while the rest of the family were doubtless lost in wondrous admiration, the hapless infant was deprived at one stroke as it were, of both parents, and of the unique love and care that only parents are capable of lavishing on their offspring.

One's only comment is that, it is indeed a perverse mentality that condemns the institution as cruel but commends the act as courageous. It is such unqualified praise that, one feels, is the reason for the formation of the satī psychology - the feelings of exaltation and elevation - to curb which the remedy lies in outright condemnation. One might also add that, what may be attractive and admirable in myth, could, translated into reality, seem primitive and barbarous, and no modern student of law and society could tolerate the enforced satīs of the early nineteenth century.

However there is evidence enough that pious Hindu women believed the smṛtis set out above, as they believed in other means of acquiring puṇya (merit) and relieving themselves of pāpa (sin), e.g. penance and pilgrimage. The smṛtis could not be invalidated by Moghul emperor or British Governor-General. All the foregoing belies Kane's ingenious theory. Satī was not due to the law of inheritance and must be disregarded in our study of the "limited" estate, its rise and fall.

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love than their Western sisters?" See Marriage: East and West, op.cit., at 246-7. The natural and spontaneous answer that one is tempted to give to this is: "You may not dare to conjecture, let alone say any such thing." But that apart, neither is it appropriate to so applaud, and thereby indirectly encourage, acts which in the end merely amount to the dreadful and meaningless waste of human lives. It is in the context of comments like these that the full measure and worth of Mayo's Mother India, op.cit., comes out. The unvarnished truth at its least palatable is graphically presented with none of the befuddling of issues or attempts at romanticisation.

1. Altekar, op.cit., at 137.

(5) The Movement Towards Reform

By the start of the nineteenth century however, and with the dawn of the Bengali renaissance and the movement of social reform that it brought in its wake, the first to receive attention was the widow. We have already noted the contribution of Raja Rammohun Roy; other great names, those of Dwarkanath Tagore, Keshub Chandra Sen and Pandit Ishwar Chandra Vidyasagar figure prominently among those who crusaded just as fiercely and tirelessly to bring about a greater social awareness as to the indignities that it was the widow's lot to endure.

The Regulation of 1829 had not brought about any appreciable change; in itself the abolition of satī was a humanitarian act, but the widow herself was helpless against the forces set in motion against her. Traditionally brought up and inculcated with the ideal of pativratā, not to speak of her own unwillingness as a result of years of indoctrination against it, remarriage would have brought about social disgrace the enormity of which neither the widow nor her family could have endured. Moreover as each caste group with - until recently - the powerful sanction of excommunication at its command, insisted on the rigid observance of its cultural pattern, enforced widowhood was the norm from which the high-caste Hindu woman could hardly deviate. Consequently among the lower classes too, in their endeavour to reach the cultural plane of the higher castes, remarriage which had hitherto been freely practised, gradually lost its appeal, and thus family and caste, both combined together and operated as powerful reactionary forces against legislation in favour of widows.[1]

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1. Kapadia, op.cit., at 168.

The spiritual solace that satī had afforded had not been replaced by corresponding legislation whereby the widow could be set free from the desolation of her existence, and Margaret Cormack tells us that she heard an Indian woman wail, "And they (the British) took that privilege (satī) from us too," a sentiment which has meaning when understood in the context of the theory of reincarnation and that of the essential oneness of husband and wife.[1]

Meanwhile despite opposition, the reformers were at work, and in the same year that satī was abolished, the pioneering efforts of Vidyasagar bore fruit. Saddened at the spectacle of the frustrating humiliations of the lives of widows in general, he first turned his attention to child widows and started a determined campaign towards an older age for the marriage of girls, and as early as 1873 the Government had approved of a Bill fixing the minimum age of marriage. But this was met with strong opposition on the plausible argument that, as consummation of marriage took place only after the girl had reached puberty, the mere formalities of a ceremony of marriage earlier could not be objected to. The Government committed to a policy of non-intervention in the personal laws were reluctant to interfere immediately, and though individual states such as Baroda, Mysore and Indore were the first to introduce legal measures against child marriages, the Child Marriage Restraint Act for the whole of India, popularly known as the Sarada Act after Rai Bahadur Harbilas Sarada, its sponsor, was not passed till 1929.[2] The Act stipulated the minimum age of marriage as fifteen for girls and eighteen for boys, though as census

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1. The Hindu Woman, (N.Y., Columbia Univ., 1953), at 173.
2. P. SenGupta, The Story of Women of India, (New Delhi, Indian Book Co., 1974), at 155.

figures would bear out, the practice of infant marriages still continued in violation of the statute.

In the meantime the reformers continued to press that a natural consequence of the abolition of satī was the recognition of the right of the widow to remarry. But in this too the British were reluctant to take the initiative. The suffering of the living was less spectacular than the agony of the burning widow, and the then rulers of India were inclined to treat the question of widow-remarriage as a purely social matter to be decided by the Hindus themselves.[1]

Nevertheless undaunted by this lack of encouragement and despite the rigidly hostile orthodoxy of a section of the population, the social reformers continued their efforts. Prominent among them were Ishwar Chandra Vidyasagar, Keshub Chandra Sen and Maharṣi Karve. Of these, by far the most fearless and tireless in his efforts was Vidyasagar. In 1855, he published his major work, Remarriage of Hindu Widows, in which he wrote that, "a total disregard of the śāstras and a careful observance of mere usages and external forms is the source of the irresponsible stream of vice which overflows the country," and vehemently pleaded for legislation in favour of widow remarriage.[2] The pandits in their turn condemned the work and its author and maintained that the alleged permission for widow-remarriage - to which incidentally Vidyasagar had drawn attention - was meant for the bygone golden age, and not for the degenerate Kali Yuga of the present day with its evil men and impious women! But Vidyasagar was not to be intimidated and in 1855 he published his famous tract on widow re-

1. Thomas, op.cit., at 297.

2. B. Ghose, Iswar Chandra Vidyāsāgara, (New Delhi, Ministry of Information and Broadcasting, 1965), at 64.

marriage based on the interpretation of a popular śloka from the Parāśara Saṃhitā :

> "(O)n receiving no tidings of a husband, on his demise, on his turning an ascetic, on his being found impotent, or on his degradation - under any of these calamities it is canonical for women to take another husband."[1]

In Vidyasagar's interpretation of the śloka, the widow had three choices, those of satī, brahmacharya and remarriage. But as the practice of satī was illegal under the existing laws, the ideal of brahmacharya commendable, but the social condition of Kali Yuga made it impossible for a single woman to lead a chaste life, the only alternative open to her was remarriage.[2]

On October 4, 1885, Vidyasagar sent a petition to the Government of India signed by nine hundred and eighty-seven people requesting legislation in favour of widow remarriage. The petitioners were "pious and orthodox" Hindus, aware that their request offended the prejudice of a large section of people whose orthodox obstinacy was opposed to any deviation from the established practice. Such hostility notwithstanding, they suggested that denying widows the right to remarry was detrimental to Hindu interests and contrary to the proper interpretation of the śāstra.[3] When at last the bill proposing such remarriage was presented to the Legislature, 40 petitions signed by 60,000 against the proposed legislation as against only 25 bearing 6,000 signatures in its favour were submitted to Parliament, but despite this overwhelming opposition, the measure was adopted and passed on July 25, 1856, as the Hindu Widows' Remarriage Act.[4]

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1. Ibid.
2. Ibid.
3. Ibid., at 27.
4. Thomas, op.cit., at 298.

The Act itself merely legalised the marriage of Hindu widows, and legitimised the issue of such union. But such advantages were more or less nullified by the provision in s. 2 that

> "(A)ll rights and interests which any widow may have in her deceased husband's property by way of maintenance or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to remarry, only a limited interest ... shall upon her remarriage cease and determine as if she had then died,...."

S. 7 further enjoined that if the widow was a minor whose marriage had not been consummated, she could not remarry without the consent of the father or grandfather, mother, elder brother or next male kin. On the other hand, if she was of full age or her marriage had been consummated, her own consent was considered sufficient.

Clauses such as these severely curtailed the success of the legislation and the reform that it was meant to bring about. Besides, legal disabilities apart, as virtually no, or at best, minimal steps had been taken to change the traditional social structure, the statute was ahead of its time. Widows, either because of the deeply embedded ideal of pativratā, or more frequently, one would imagine, through social stricture - the fear of being ostracised by society and caste - were timid and hesitant, and till well into the twentieth century, the fate of the widow remained sad and tragic. History is not without its trenchant ironies, and it is a telling measure that the very steps which had been designed to protect widows and to safeguard them from exploitation led to practices that defeated their purpose.

Sporadic and occasional remarriages did undoubtedly take place with the influence and patronage of the reformers. Vidyasagar promoted a few such marriages, most significant among them the marriage

of his own son to a widow, and inspired by the example and precept of that noble son of Bengal, the Brahmo Samaj carried on the good work there. The Arya Samaj and the Prarthana Samaj encouraged widows to remarry in Northern India, while in the Maharashtra area, Mahārṣi Karve, who had lost his first wife in 1891, set the example to others by marrying again in 1893, a "virgin widow" when she was twenty-eight and he thirty-five years of age. A year later he established the Widow Marriage Association to carry on a public campaign in support of widow remarriage and to render such assistance as was necessary to those who in defiance of convention did seek remarriage. Other institutions also set up by the Maharṣi were the Hindu Widows' Home and the Deccan Education Society for the rehabilitation of destitute widows. Thus the forces of change had been set in motion, and by 1900 the Report of the Arya Samaj in particular indicates as having made considerable progress in that direction.[1]

But the movement did not gain momentum or widespread acceptance.[2] Thirty years after the enactment of the statute, only sixty remarriages were reported from all over India. The enlightened minority

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1. D. Pandey, The Arya Samaj and Indian Nationalism, (New Delhi, S. Chand, 1972), at 93.

2. In the same year that the Arya Samaj reported progress, that great expounder of Hinduism, Swami Vivekananda was on his tour of America, and at a lecture entitled "The People of India," delivered in Oaklands on March 19, 1900, lent credence to the orthodox view by explaining that child widows and women whose betrothed had died as children, might be pitied if marriage was the only real object in life, but according to the Hindu way of thinking, marriage is rather a duty than a privilege, and the denial of the right of child widows to remarry "no particular hardship." See The Complete Works of Swami Vivekananda, Vol. VIII, (Cal., Advaita Ashrama, 1971), at 243. Small wonder then that the impetus for reform met with such little success!

apart, widow remarriage continued to be regarded with abhorrence and normally gave rise to public incidents of outcasting, repression and direct and indirect social sanctions and even violence. Family members would watch their widowed mothers, sisters and daughters suffer physically and mentally, but fear of caste rules, excommunication and harassment from the community forced them to silent acquiescence to traditional norms. Though the usages associated with widowhood were to some extent modified in different provinces and castes, or by the love and compassion of the family, nevertheless they were generally observed, and the women themselves submitted in what was believed by them to be their destiny.[1] In brief, the Rāmāyaṇa's declaration that the greatest danger that could overcome a woman was widowhood,[2] was as true over the lapse of centuries as in the stages when it was initially propounded.

The impotency of the Act of 1856 was not lost on those determined to bring about a change in social attitudes, and in 1884 Behramji M. Malabari, a Zorastrian journalist published his Notes on Infant Marriage and Enforced Widowhood, but unlike the great pioneer of the movement, his arguments were based on humanitarianism and justice rather than on the interpretation of the smṛtis.[3] Sensing only too well the overpowering influence of caste in persecuting offenders and thereby rendering progressive legislation inadequate, Malabari wrote cogently and poignantly:

> "(S)uch are the results virtually of the abolition of satī by the British Government (that) had Mount Stuart

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1. Felton, op.cit., at 26.
2. Meyer, Vol. II, op.cit., at 412.
3. Kapadia, op.cit., at 139.

> Elphinstone and Lord William Bentinck anticipated them they would have paused before enforcing the law (abolishing satī) without legitimate corollary, for whereas satī was one single act of martyrdom or heroism, as the victim conceived it, and an act of religious merit popularly believed, the life that caste imposes on a widow is a perpetual agony, a burning to death by glowing fire without any chastening or elevating effect on the sufferer, or any moral advantage to the community at large."[1]

The Note also pointed out several cases of widows who had gone astray because of refusal on their male relatives' parts to consent to their remarriage, of infanticide and of excommunication of widows who had remarried.[2] Under such circumstances, it was imperative, Malabari felt, for the Government to ensure that no Hindu girl be condemned to life-long widowhood against her will, that all of them had the right to complain to the authorities of social ill-usage, and priests prevented from excommunicating either the parties contracting a second marriage or their relatives.[3]

But no more encouragement was forthcoming from the Government. The Uprising of 1856 had effectively halted any movement for further reform of the personal laws, and the Government's rejoinder reflects this reluctance:

> "... When caste or custom lays down a rule which deals with such matters as are usually left to the option of the citizens ... State interference is not considered either desirable or expedient ... hence this social reform should be left to the improving influence of time and to the gradual operation of the mental and moral development of the people by the spread of education. The Government of India do not desire to interfere .... until sufficient proof is forthcoming ... that such legislation has been asked for by a section important in influence or in number of the Hindu community itself."[4]

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1. Ibid., at 141.
2. Thomas, op.cit., at 300.
3. Ibid.
4. Kapadia, op.cit., at 142.

In tradition-bound India laws may be enacted, but if the customs against which they are directed are deeply entrenched, such legislation is apt to be quietly ignored and the practice continued. So it was with the HWRA. Deep-rooted social customs and the caste system, staunch orthodox reaction, and a lack of proper reformist zeal among the Hindus themselves, limited the scope of widow re-marriage. In most cases it was only the lust for monetary gain which had in the first place prompted the so-called liberals to marry widows, and as a result primarily of these fatal weaknesses, the widow remarriage movement practically died out, at least in Bengal, long before the death, in 1891, of the illustrious reformer who first set it on foot.

In the Census of 1881, the number of Hindu widows stood at the formidable figure of 2,100,000[1] and though the survey of 1901 indicated a shift among the upper classes and particularly in the big cities in favour, at least of the remarriage of virgin widows,[2] this was a short-lived phenomenon, and as late as 1926 we find Mahatma Gandhi railing against the practice of child marriages and the accompanying corollary of child widows. Vehemently critical, he thundered if "thundered" it can be called in the context of that deceptively gentle man:

> "(B)ut in the name of religion we force widowhood upon our girl widows who could not understand the import of the marriage ceremony. To force widowhood upon little girls is a brutal crime[3] for which we

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1. Thomas, op.cit., at 300.

2. Census of India, 1901, Vol. I, Part I, at 4.

3. About the same time that the Mahatma was making known his disgust and revulsion against such practices, the forces of regression were just as fiercely at work, and this is perhaps best exemplified by

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> Hindus are paying dearly.... And does not Hindu widowhood stink in one's nostrils when one thinks of old and deceased men of over fifty taking or rather purchasing, girl wives, sometimes one on top of the other? So long as we have thousands of widows in our midst, we are sitting on a mine which may explode at any moment."[1]

In any event it must be kept in mind that the agitation in favour of widow remarriage was never aimed at creating general adoption by Hindus of that practice. For the majority of the participants its real purpose was to gain social acceptance, or at least tolerance, for an individual deviation of an extreme and socially significant kind from the normal pattern of behaviour, and the efforts of the most zealous crusaders to give the Hindu widow the right to remarry, were viewed more as releasing her from an extremely humiliating and depressing situation rather than the granting of an ordinary human right to live a happy married life.[2]

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the opinion of one Sri Ramanana Saraswati Swamiah. A disciple of His Holiness Sri Jagadguru Sri Sankaracharya of Sringeri, he takes up the cudgels against deviation from accepted practices: "Life-long widowhood is only a mode of serious punishment inflicted on the widow for some grievous sin of hers committed in a previous life. When a man is by a judge sentenced to a long term of imprisonment, the lookers-on many of them feel sorry for the man, but they cannot prevent him from being handcuffed and taken to the jail. If they do attempt any such prevention, they would be themselves punished for the attempt. The reformers' attempt to relieve widows by advocating remarriage is just the same."(sic). See The Hindu Ideal, 2nd ed., (Mad., Ganesh, 1959), at 218.

1. Young India, Aug. 5, 1926, quoted at V. Mazumdar, "The Social Reform Movement in India-From Ranade to Nehru," B.R.Nanda, ed., Indian Women from Purdah to Modernity, (New Delhi, Vikas, 1976), 41-66, at 57.

2. W.J. Goode, World Revolution and Family Patterns, (N.Y.-London, Collier-Macmillan, 1968), at 264. That the Hindu mind at its most enlightened could not entirely free itself from the traditional connotations associated with widowhood, is evident even in Gandhi's attitude. He was not an advocate of widow remarriage "on a wholesale scale" (Young Idea, Sept. 2, 1926), for the word "widow" in Hinduism "has a sacred odour." (Ibid.) "My crusade," he declared

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On the other hand it cannot be gainsaid that there is probably no aspect of womanhood that has received greater sympathy than widowhood in India, and the majority of Indian reformers, men and women - for diverse motivation - have laboured tirelessly on their behalf. The emphasis has sometimes been on allowing their remarriage and for social acceptance of the practice, and sometimes on training them for positions so as to secure for them economic independence. It also has to be admitted that with the progressively growing education among women, the notion of widow remarriage is continually gaining foothold, and it may safely be assumed that in the last quarter of the twentieth century, the custom has become relatively common in certain small sections of the society. The measure of change in the social position of widows in Maharashtra for instance, may be gauged from the fact that during Maharşi Karve's hundredth birth anniversary celebrations in 1958, the Widow Marriage Association established by him in 1894, wound up its activities as they were no longer needed.[1] Recent Census figures would bear this out as well. In 1951 there were 22,000,000[2] widows, and the figure went up to 23,000,000 in 1961,[3] but the 1971 figures, estimated from a 1% sample data indicates a sharp decline with 231,406 widows only.[4] Of these, the figures of the last two decades are an index to the declining incidence of child widows, and consequently a higher age at widowhood. Thus the 1961 figures show

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"is not against real widowhood. It is against atrocious caricature!" See B.R. Dubey, "Gandhi's Views on Status of Woman of India," S.C.Biswas, ed., Gandhi: Theory and Practice, (Simla, I.I.A.S, 1969), 113-9 at 118-9.

1. T.N. Madan, "The Hindu Woman at Home," Indian Women from..., op. cit., 67-86, at 79-80.
2. Gupta, op.cit., at 62.
3. Census of India, 1961, at 21.
4. Census of India, 1971, at 118.

that there were 29,000 widows in the age group ten to fourteen, 90,000 in the age group fifteen to nineteen, 248,000 in the age group twenty-five to twenty-nine, the highest figures rising to almost 4,000,000 in the sixty to sixty-four age group.[1] This upward spiralling is even more marked in the 1971 figures with only 200 widows in the ten to fourteen age group, 752 in the fifteen to nineteen age group, 2,000 in the twenty to twenty-four age group, 4,000 in the twenty-five to twenty-nine age group, 7,000 in the thirty to thirty-four age group, and so on.[2] Based as these figures are on only a 1% sample date, their value lies in that they nevertheless indicate the trend, and what is particularly significant is that in both the Census tables, the number of widows in the age group nine and below, is nil.

(6) The Persistence of Traditional Attitudes in Women

However, that by and large traditional attitudes still persist, that the ideal of pativratā is as much alive today as when it was popularised, is indicated by the fact that for the average Hindu wife, her husband is for her, the pati-dev - an expression still current in India - her god on earth whom she must worship. Young or old, the Hindu wife's daily prayer, i.e. that she may die before her husband, is a peculiar death wish, and is perhaps an expression of a general phenomenon: the acceptance by the oppressed, of roles carved out for them by their oppressors; and despite the spread of education and the emergence of India as a rapidly developing nation, what never ceases to amaze is that the most emancipated, the most enlightened, the most

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1. Census of India, 1961, at 21.
2. Census of India, 1971, at 118.

accomplished Hindu woman is at heart the traditional Hindu wife who has raised her husband to the pedestal of god-head.

The most dramatic example that one can think of is that of the late Iravati Karve, distinguished anthropologist and eminent author. Brought up in an atmosphere surcharged with ideas of social reform and having received advanced education in India and Germany, she had travelled widely and had earned international repute as a scholar. A fierce champion of women's rights she also occupied the Chair for Anthropology at Poona University, and when at the age of fifty she wrote her famous treatise Kinship Organisation in India,[1] she dedicated it to her husband, a son of Maharşi Karve in the following terms:

> "(T)o my husband; while dedicating to you this book which would never have been either thought out or written but for you, let me express my feelings in the traditional Hindu manner: I place my head on your feet and ask for your blessing."[2]

Ved Mehta, in his work Portrait of India,[3] brings out the same god-like reverence that the renowned vocalist, M.S. Subbalaxmi had for her husband. In a meeting with her in Madras, she would not be drawn into speaking about herself and it was obvious that her husband was master of the house in the traditional Hindu manner. And he spoke to Mehta about her devotion to him:

> "(I)n 1954 when Subbalaxmi was awarded the title of Padma Bhushan at a public gathering, she became tearful and said 'How am I to deserve all this?' Then she somehow got the courage to speak up, and she said, 'My husband has been advising me throughout my career. He is my guru, so all the honour must go to him.' That

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1. I. Karve, Kinship Organisation in India, (Poona, Deccan College, 1954).
2. Ibid., Dedication.
3. Ved Mehta, Portrait of India, (Lond., Weidenfeld and Nicholson, 1971).

is Subbalaxmi. She is a good Hindu wife."[1]

Literature, it has been aptly observed, mirrors life, and nowhere perhaps is the reality more convincingly reflected than in Indo-Anglian writing where the deification of the husband is a constantly reiterated theme. Witness for instance the scene in He Who Rides a Tiger.[2] Slumped on the bare mud floor, her eyes swollen and her face marked with tears, the woman waits for the return of her husband, the picture of misery itself. But in the early hours of the morning as her drunken husband reels in

> "...life flooded back into her eyes at sight of him ...She crept over the floor and laid her face on his feet and wept."[3]

And it is not only in the settled housewife of mature age and status or the simple village-bred girl that one perceives this submissiveness. In the full flush of youth, the liberated city-bred girl is essentially no different. In Sasthi Brata's autobiography, where the author shocked the staid middle-class Bengali community to which he belongs by a frankness and directness of approach equalled perhaps by no other contemporary Indian writer of the 70s and 80s, Apu, the author's girl friend is young, educated and very modern, and bold enough to give herself to him just before her arranged marriage to another man. But even this girl Apu writes in a letter to her lover:

> "(F)or a woman to live happily with a man, she need not stand in awe of him. But the man must inspire her to look up to him as a superior when the occasion demands. Otherwise she is haunted by the sense of insecurity, for she is always subject to the limitations of being a woman."[4]

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1. Ibid., at 39.
2. B. Bhattacharya, He Who Rides a Tiger, (Bom., Jaico, 1955).
3. Ibid., at 188.
4. Sasthi Brata, My God Died Young, (Lond., Hutchinson, 1972), at 169.

Even more remarkably akin to an act of worship is the scene in The Serpent and the Rope.[1] Savitri, educated at Cambridge, is westernised and forward in her behaviour. She likes to smoke and dance, but at the decisive moment, she is like any other Indian woman, and Rama, the hero, recounts how she knelt before him and after removing his shoes and stockings, proceeded to the final gesture of self-abnegation by waving the flame of camphor before his face "once, twice, three times in arathi" (the culminating point of worship of the deity), after which

> "(S)he touched my feet with the water, and made aspersions of it over her head. Kneeling again and placing her head on my feet, she stayed there long, very long ...."[2]

These instances indicate clearly enough that not too far beneath the surface, the time-honoured notions of pativratā still persist; and with the husband securely perched on his pedestal of near divinity, small wonder then that there is so much ambivalence in the Hindu attitude towards widow remarriage, no less regrettably in the mind of the Hindu female - however educated and "modern" - as of the male.

In an effort to assess the actual attitude towards widow remarriage, researchers have from time to time conducted interviews with groups of women and in most cases they report the response as either negative, or at best dubious. In one report, of the fifty-three widows of the middle class who were questioned as to whether they were desirous of remarriage, not one of them gave an affirmative answer, and while forty-five widows gave a definitive "no", eight would not

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1. Raja Rao, The Serpent and the Rope, (New Delhi, Orient, 1960).
2. Ibid., at 213.

state their views.[1]

This was also the finding of Khanna and Varghese who report that in most cases they were told with much pride that, "A Hindu woman marries only once. It is a man who needs to marry repeatedly."[2] In some cases there was conditional acceptance of remarriage in favour of those widows only who were young and childless.[3]

Where however there is a positive response, the reasons are independent of any consideration for the personal happiness of the widowed woman. In an investigation conducted by M.S. Gore among the Aggarwal families of Northern India, "the reasons why respondents favoured remarriage were varied and not necessarily indicative of any change of attitudes to women's status."[4] It was not a decision that the widow could make for her own reasons; rather her youth, economic dependency and the moral danger that she might otherwise be exposed to were the circumstances which figured primarily in making widow remarriage an acceptable proposition to them.[5]

However, nowhere does the conflict between the old and the more progressive attitudes reveal itself with greater clarity than in the

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1. C. Haté, Changing Status of Woman, (Bom., Allied Publishers, 1969) at 70.
2. G. Khanna and M. Varghese, Indian Women Today, (New Delhi, Vikas, 1978), at 162-3. Rama Mehta met with the same response in a survey she carried out among divorced Hindu women. In spite of the breakdown of their marriages, the divorcees she interviewed were not prepared to countenance a second marriage and dismissed the idea as an immoral, unethical proposition. See Divorced Hindu Women, (New Delhi, Vikas, 1975), at 21-2; and we may safely assume that in the circumstance of widowhood, the response of these women would not have been dissimilar.
3. Khanna and Varghese, cited above, at 163.
4. M.S. Gore, Urbanization and Family Change, (Bom., Popular Prakashan, 1968), at 216.
5. Ibid.

study of Rama Mehta.[1] Of the fifty western-educated women she interviewed, all were in favour of widow remarriage and against the imposition of orthodox restrictions on them. But while on the one hand, they were of the view that the widow has every right to decide wherein her greatest fulfilment lies, on the other, they believed equally in the sanctity of marriage and admired widows who adhered to the traditional ideas of devotion to the husband.[2] These women were also aware that as widow remarriage was still not fully accepted, widows who did remarry, took a great risk in defying the rules of family and caste specially as these institutions still provided security for those who were not economically independent,[3] and in view of this "It was wrong to encourage a woman to give up known forms of security without providing her with an alternative."[4]

In other traditional societies where change and progress are the order of the day, a corresponding ambivalence is equally perceptible.[5] China for instance is an interesting example. The basic Confucian philosophy of ancient China underscored the superiority of man over woman. Under the principle of the three dependencies (a remarkable echo of Manu), a woman could never act autonomously. The husband's

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1. The Western Educated Hindu Woman, (Lond., Asia Publishing House, 1970).

2. Ibid., at 125-6.

3. Ibid., at 125.

4. Ibid., at 126. On the other hand in the survey carried out by Khanna and Varghese, op.cit., a more favourable trend is noticeable among educated women desirous of remarriage. Fear of loneliness and the need for companionship apart, the more forceful argument in favour of it was that, "If a man can remarry and forget the past, why should a woman sacrifice the rest of her life for a mere memory?" - a view consistent with progress, but still limited, one fears, to a small, a very small minority, as overwhelming evidence is to the contrary.

5. The two examples, those of China and Japan provide interesting parallels, where despite the political and technocratic revolutions in these countries, traditional behavioural patterns towards women persist.

authority replaced that of the father, and the son's that of the husband.[1] Of the three unfilial acts the greatest was the failure to produce sons. Thus girls from the day of birth were subjected to lifelong discrimination so well described by a popular verse from The Book of Odes written some three thousand years ago:

> "(W)hen a son is born he is laid down in couches, and is given a piece of jade to play with. When a daughter is born, she is laid on the floor, and is given a piece of tile to play with."[2]

Beginning with the ritual of foot binding by which women were grotesquely crippled from early childhood, the so-called "lotus hooks" were in reality a device by means of which the Chinese patriarchs made certain that their girls and women would never "run around".[3]

However the most difficult and degrading phase for woman was after marriage. The character fu "woman", is a combination of nu, "female" and chu, "broom", and the expressions chih chi chou, i.e. "to hold a broom",[4] and shih chin chieh meaning "to stand by with towels and combs", equally suggest the humble status of the woman vis-à-vis her husband. A wife had no identity separate from that of her husband.

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1. T.T. Ch'u, Law and Society in Traditional China, (Paris, Mouton, 1965), at 102-3.

2. A.K. Wong, "Women in China: Past and Present", C.J.Matthiasson, ed, Many Sisters,(N.Y.-Lond., The Free Press - Collier Macmillan, 1974), 229-54, at 231.

3. A. Dworkin, Woman Hating, (N.Y., E.P.Dutton, 1974), at 103, a view confirmed by Wong, op.cit., at 232-3: "Women with feet bound had to assume a gingerly gait (because of the pain of movement) which was said to be graceful, and the feet themselves were said to have great sexual appeal for men. However, there was no doubt that the bound feet had come to symbolise the subordination of the female sex, for the effect of the practice was to confine women ... to their own quarters. They could seldom venture outside except by being carried on sedan chairs. Thus the saying that 'the girl does not go beyond her boudoir' equates staying at home with feminine virtue."

4. Ch'u, op.cit., at 103.

She could own no property, and any activity over and above routine household matters had to meet with his approval.[1]

Remarriage for widows was as a rule frowned upon, though in some areas of China it was not an uncommon occurrence,[2] and in such cases the brother or cousin of the deceased married the widow.[3] Generally however, such remarriages were confined to the poor mainly because the widows or their families would settle for a much lower bride price.[4]

The cult of chastity demanded not only that a woman should be a virgin when she married,[5] or that she remain faithful to her husband, but also that she should remain chaste even after his death, and in fact there were not infrequent instances of women - believing that they had been defiled - committing suicide by dismembering themselves, while still others engaged in the practice of marrying the spirits of their deceased betrothed.[6] Practices such as these finally led to a feeling of revulsion and caused Confucianism to be denounced by the Chinese thinkers of the new culture movement of 1917 as a "man-eating religion."[7]

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1. Ibid., at 104. The same author details at 105-10, the inequalities in penalties for the husband and wife for similar offences, to demonstrate the latter's degraded status.

2. See J. Myrdal, Report from a Chinese Village, (N.Y., Signet, 1965), at 235-41.

3. Ch'u, op.cit., at 97.

4. Wong, op.cit., at 236.

5. On the second day of the traditional wedding, a female attendant would present to the bridegroom's parents a piece of white silk stained with blood as proof of the bride's virginity, while on the third day the bridegroom's family would send roast pigs to the bride's family in token appreciation of the bride's virginity. See Wong, op.cit., at 255, f.n. 16.

6. A somewhat similar practice, that of "ghost-marriages", i.e. of marrying the girl to the name of a dead relative may be quoted from Africa. See J.G.Gould and W.Kolb, ed., A Dictionary of the Social Sciences, (Lond., UNESCO, 1964), at 388.

7. Wong, op.cit., at 236.

The rôle and status of traditional Chinese women changed under the impact of industrialisation and modernisation. The Marriage Law passed in 1950 as the first major law of the Communist regime and one of the fundamental laws of the People's Republic, was the culmination of a series of earlier efforts made both by the social reformers and the Communist Party to bring about the socialist ideal of sex equality. The traditional systems of polygamy, concubinage, interference with the remarriage of widows and the payment of bride price were outlawed and the freedom of divorce guaranteed.[1]

However tradition dies hard, and though in its external propaganda, the People's Republic claims that it has already achieved the ideal of equality between men and women, reports of China observers tell us another story. In the early fifties, reports indicated that men continued to look down on women and more recent investigations reveal a widespread apathy towards women's welfare, and the persistence of the old notions of women as ignorant and useless.[2] Until 1952 there were official reports of female infanticide and of the selling and purchasing of daughters and wives, while till right into the sixties the practice of arranged marriages and betrothal gifts continued, and as late as the seventies there were still parents unwilling to send their daughters to school.[3]

Evidence also suggests that the bid for equality does not seem to have made a general appeal to women themselves, and the desire for

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1. Wong, ibid., at 242.
2. K.P. Gupta, "Emancipation and Enslavement - The Confucian and Communist Variations," U.Phadnis and I.Malani, ed., Women of the World(New Delhi, Vikas, 1978), 87-122, at 119-20.
3. Ibid., at 118-9.

family life and to run the household still take priority over the sacrificing of traditional values in an effort to reconstruct the nation. In 1972 many educated city girls expressed a desire to get married early,[1] while older women still think it "indecent and immoral and shocking that young people talk freely with each other," and they scold their daughters and daughters-in-law and granddaughters for not observing decent behaviour.[2] Significantly, with the Cultural Revolution's more radical approach towards women's roles, the chief editor of the journal of the Women's Association, Women of China, came under public attack for emphasising that the nurture of children and the care of the family were women's "natural duties", and for reactionary and feudal concepts such as respecting men but denigrating women and demanding obedience at the three levels, i.e. to father, husband and son.[3]

For those who are truly emancipated, their break with the past and with traditional values is complete. But these, a tiny minority, are a symbolic testimonial to the fact that for most women in modern China, real change has been far less substantial.[4]

In Japan too, the patriarchal traditions with only minor challenges survived till well into the twentieth century, and were reaffirmed by legal code and custom until the end of World War II. The feudal social order not only drew a line of distinction between men and women, but also laid down strict rules of female behaviour.

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1. Ibid., at 119.
2. Myrdal, op.cit., at 252.
3. K.A.Johnson, "Women in China", S.A.Chipp and J.J.Green, ed., Asian Women in Transition., (University Park - Lond., The Pennsylvania State Univ. Press, 1980), 62-103, at 93.
4. Ibid., at 100.

Women showed deference to men of their own as well as of higher classes by the use of polite language and honorific forms of address, by bowing more deeply than they and by walking behind their husbands. Ideally a new bride coming into the house was expected to acknowledge her status of inferiority[1] in a number of ritualised ways: getting up first in the morning, going to bed last at night, taking her bath only after all other members of the family had taken theirs, eating after other family members and taking the least choice servings of food.[2]

Men were deemed to be the natural leaders of society because of certain attributes like strength, independence of mind, imperturbability and stoicism. Women in contrast were believed to be weak and therefore dependent,[3] hence the husband's authority, not only in custom but in legal codes, over the wife. Upon marriage, a woman could act in legal matters only with the approval of her husband. In provisions relating to marriage, divorce, property rights and other matters coming under family law, the Civil Code consistently favoured the husband,[4] and the ideal of "good wives and wise mothers" became a justification for a great deal of discrimination against women in

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1. As in India and China, so too in Japan, the ethical standard set by the great Confucianist scholar Kaibara Ekken, demanded of every woman the "three obediences", i.e. obedience to her father in childhood, to her husband in married life and to her sons in old age. See P.A. Narasimha Murthy, "From Hakoiri Musume to a Free Individual - The Changing Position of Women in Japan," Women of the World, op.cit., 123-49, at 124.
2. J.S. Pharr, "The Japanese Woman: Evolving Views of Life and Role," Asian Women in Transition, op.cit., 36-59, at 39.
3. This distinction was reflected in the popular saying: Otoko wa matsu, onna wa fuji, i.e. "Man is pine, woman is wisteria." See Narasimha Murthy, op.cit., at 124.
4. Pharr, op.cit., at 40.

general.[1]

However World War II and the surrender of Japan in 1945, had drastic repercussions and set off a series of changes that have affected women at almost every level of Japanese life. The Constitution of 1947 explicitly forbade discrimination on the basis of sex. Through reform of the Civil Code, the Occupation forces attacked the basis of women's inferior status in the family by guaranteeing women free choice of a spouse, equal recourse to divorce, equal property rights[2] and inevitably as a consequence, a greater degree of opportunity for self-expression and fulfilment in areas other than the home. Japanese women are today found in numbers in fields previously considered beyond their intellectual attainments, and shoulder to shoulder with men the female influence is felt in areas such as education, administration, law, medicine, literature, public services, science, construction, engineering and the like.

However change-oriented the Japanese may be, they nevertheless retain a steadfast attachment to certain traditional values in the midst of change, and most Japanese men and women, for a very long time to come, will continue to feel that home-making and child-care are primarily women's responsibilities.[3] This apart, social values, including those bearing on woman's role and place generally, are in great flux today, and a great many women find themselves vacillating between views, unsure of what they want, undecided as to whether they are willing to undergo the great personal and psychological risks that people must face when they try to move in new

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1. Narasimha Murthy, op.cit., at 128.
2. Pharr, op.cit., at 41.
3. Ibid., at 56.

directions.[1]

However, that traditional attitudes in the end still triumph in modern Japan is indicated by an interview carried out among young office girls which revealed that even among those pursuing full-time promising careers, the goal is to become housewives and mothers to the exclusion of most other pursuits.[2] "I would rather stay at home and keep a perfect house. I'd prefer that life - waiting for my husband to come home,"[3] the interviewer was told, and with this end in mind, "I am improving myself so that I can find an ideal husband,"[4] for "Men are superior to women in every field. Women have a narrower mind, a more limited view."[5] Opinion Polls too confirm that Japanese women are happy enough to be designated as the "gentle sex", and readily accept the disadvantages that the definition connotes. That attitudes have not changed intrinsically, that Japan today is as much a male oriented society as in the past, is perhaps best summed up by the observation that in life a Japanese needs to know only three words to address his wife, i.e. food, bath and bed.[6]

In India time undoubtedly stands still as perhaps nowhere else in the world. At the tail end of the twentieth century our progressive instincts in a vitally crucial sphere have progressed no further than the crusading spirit of the nineteenth century. The trappings of widowhood may be on the wane but the essential notion remains. The Hindu widow may no longer have to submit to the rigorous indignities

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1. Ibid., at 54.
2. Ibid., at 42.
3. Ibid., at 43.
4. Ibid., at 42.
5. Ibid.
6. William Horsely, B.B.C. News Reporter in Japan talking to Colin Hamilton in the "Outlook" Programme of the B.B.C. World Service, Nov. 15, 1983, at 15.15 hours GMT.

that her less fortunate sisters were subject to a century ago, but she is no less free of the traditional shackles, and should she remarry as not infrequently she does now, she may do so not for the normal reasons of personal happiness and contentment, but because she must. Educated and earning her livelihood she may be, property she might possess (for has not the HSA, 1956 made her the absolute owner of her deceased husband's property along with his other heirs?) she is none the less a prisoner in the grip, as it were, of the ancient smṛtis.

Her own attitude no less than the male-oriented society she lives in, is the cause of the plight she finds herself in. No liberalising law, no reforming zeal on the part of others may come to her aid. It is therefore time for the women of India to arouse themselves from the stupor of centuries and heed the call of liberating forces, to defy primitive conventions if need be, so as to shed the chains of the past and to reinstate in their lives the pride and dignity that must surely be the birthright of every human individual, male or female. The Hindu widow would only then be truly liberated, free to marry or not to marry according to her own preferences, at par with the millions of widows the world over, and closer home to her more fortunate Muslim counterparts, ruled as they are by a far more humane set of rules, which permit, and even encourage the remarriage of widows in an attempt to reverse the misfortunes of widowhood by reinstating in such lives the measure of fulfilment that the married state connotes.[1]

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1. The remarriage of widows to which Islam takes no exception - indeed the example of the Prophet encourages it, for his first wife (and subsequent others as well), was the widow Khadija - is deprecated by certain Muslim sects of Hindu origin in India. See R. Levy, The Social Structure of Islam, 2nd ed., (Camb., Univ. Press, 1957),

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at 244. These are however isolated instances of the lingering vestiges of a pre-Islamic past, and generally the Muslims of India, like the rest of the Islamic world, lend overwhelming support to an institution ratified by both the precept and the example of their Lawgiver. In contrasting the attitudes towards divorce and the remarriage of widows among Muslims in India, M.E. Khan observes that though divorce is easily obtainable, it is viewed with disapproval, and social pressure forbids individuals to resort to it with any degree of frequency. Widow remarriage, on the other hand, "is quite prevalent and encouraged by all sections of Muslims." : Family Planning Among Muslims in India, (New Delhi, Manohar, 1979), at 33.

CHAPTER THREE

THE LEGAL "LIMITED ESTATE"

"And the gentle waves of the summer seas,
That raise their heads and wander singing,
Must murmur at last, 'Unjust, unjust;'"

W.B. Yeats
From "The Wanderings of Oisin"

1. The Evolution of the Widow's Right of Inheritance

The HSA has become the law of the land since 17th June, 1956, and is an important piece of social legislation in so far as the entire concept of the Hindu woman's (for our purposes widow's) rights in property has undergone radical transformation. From being at most a "limited" heir, she now becomes full owner of any property possessed by her whether acquired before or after the commencement of the Act by virtue of s. 14. This was however not achieved by one gigantic stride forward, but was the conscious result of an awareness of the inequalities and inequities that women were gradually recognised to have been subject to, specially in regard to inheritance from time immemorial.

As in the most ancient strata of Greek, Roman and Germanic laws, so too in the classical Hindu law, there was a total denial to women of all proprietary rights, and the bewildering profusion of conflicting smṛti texts testify to the protracted controversy extending over centuries in the progression from such a state of denial to a recognition of their rights to individual ownership and to inheritance.

In course of time, the usefulness of permitting women to own in their own right impressed itself upon Sanskrit jurists, and it was admitted that certain classes of presents, defined according to their sources and the times when they might be given, should belong to the donee in such a way that their abstraction by her husband or sons would be a conversion,

subject always to the former's right to take them in an emergency. In other words the strict theory of patriarchal Āryan law broke down in the face of demands of practical utility, and no doubt under the influence of pre-Āryan customs, some of which we know allowed substantial proprietoral rights to women.[1]

However this is not to suppose that this peculiar property of women, or more properly strīdhana,[2] to give it the name that it came to be known by, did not meet with some opposition, and for at least a millennium and a half it was a matter of acute controversy whether women might inherit property as opposed to their being donees of gifts inter vivos.[3] Conflicting attitudes seem to emerge. In the Ṛgvedic times for instance, the Gṛhya law indicates that the husband having been cremated, the domestic rituals terminate, and the sonless wife would then become dependent on his kinsmen. On the other hand quite an early tradition records the case of Yājñavalkya in the Upaniṣads of dividing his wealth equally between his two wives preliminary to his retirement to the woods. Though in the nature of a gift by the husband, this was a significant step forward, and it is not improbable that in some Āryan societies in India at any rate, the sonless wife's right to inherit may have developed out of such practice.[4]

However an alternative source to the wife's right to inherit may have been the text of Gautama whereby the sage lays down that, should the widow resort to niyoga, the offspring would then be entitled in place of

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1. J.D.M. Derrett, "A Strange Rule of Smṛti, And a Suggested Solution," ECMHL, Vol. 1, (Leiden, E.J. Brill, 1976), at 219.

2. According to Sir G. Banerjee, "The word strīdhana is derived from strī, woman, and dhana, property, and means literally woman's property. While declaring the perpetual tutelage of women and their general incapacity to hold property, the Hindu law concedes to them the privilege of holding of certain descriptions with absolute power of disposal." : The Hindu Law of Marriage and Strīdhana, 5th ed., (Cal., S.K. Lahiri, 1923), at 34.

3. Derrett, "A Strange Rule ...," cited above, at 219.

4. N.C. Sen-Gupta, The Evolution of Law, (Cal., Univ. Press, 1925), at 144-5.

the sapiṇḍas (agnate or cognate who shares in piṇḍa, defined differently in the Mitākṣarā and the Dāyābhaga), and the sagotras (member of the same agnatic lineage).[1] This in effect meant that the widow had custody of the heritage until such time as a son was born, and there were not infrequent cases where once having taken possession of the estate, she was loath to give it up resulting in Vasiṣṭha's famous dictum that, niyoga was not permitted for greed or a desire for inheritance.[2] Gradually though, as was to be expected, it became accepted for widows to continue to be in possession of the deceased husband's property, and in their being recognised as preferential heirs with or without niyoga.[3]

In the early extant texts, a certain conflict of attitudes is at once apparent. There is no mention of the sonless widow as heir in the text of Baudhāyana and Vasiṣṭha, and Āpastamba similarly excludes her, stating generally that, in default of a son the nearest sapiṇḍa succeeds.[4] Manu does not declare her as heir either, and there are certain passages where she is by implication excluded.[5]

On the other hand, side by side with these injunctions we also come across texts such as those of Viṣṇu[6] and Yājñavalkya[7] which give the

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1. "A legitimate son, a son begotten on the wife (by a kinsman) ... inherit the estate (of their fathers)." Gaut. XXVIII. 32, op. cit. So too Manu, IX. 146: "He who takes care of his deceased brother's estate and of his widow, shall, after raising up a son for his brother, give that property even to the son." In the same vein is ibid., IX. 190.
2. Vas. XXIV. 12, supra, at 148, f.n. 7.
3. Sen-Gupta, EAIL, op. cit., at 145.
4. Āp. II.6.14.2, The Sacred Laws of the Aryas, Part I, op. cit., and so complete is the widow's exclusion that, on failure of the sapiṇḍa, the inheritance, according to the sage, goes to the spiritual teacher, and on the latter's failure, to the daughter, and on failure of all relations, the estate escheats to the king.: Ibid., II.6.14.3-5.
5. "... the father shall take the inheritance of (a son) who leaves no male issue, and his brothers,": Manu, IV.185, op. cit., and , "(A) mother shall obtain the inheritance of a son (who dies without leaving male issue ...).": Ibid., IX.217.
6. "The wealth of a man who dies without male issue goes to his wife; on failure of her to ...,": Viṣ. XVII.4-13, op. cit.
7. "The wife and the daughters also, both parents, brothers likewise,

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widow not only first place in order of priority to the succession of her deceased husband's estate, but impose no restrictions either, on her right of enjoyment and disposal of such property. Bṛhaspati in the same vein emphasises in that most famous of texts, the essential oneness of husband and wife:

> "(O)f him whose wife is not dead, half his body survives. How should any one else take the property, while half (his) body lives?
>
> "Although Kinsmen (Sakulyas), although his father and mother, although uterine brothers be living, the wife of him who dies without leaving male issue shall succeed to his share.
>
> "... if the husband dies before the wife, she takes his property, if she has been faithful to him. This is an eternal law." 1

Appealing as this new theory in support of the widow's absolute right to inheritance was, it is perhaps not too far off the mark to suggest that its long-term effect in practical terms was in fact to retard the very right that it so persuasively pleaded for. For this notion of the essential oneness of husband and wife served as a means of protecting the joint-stock from dissipation; the wife faithful to the living husband's bed continued an abstemious life of piety and austerity as a widow, and at her death, the husband's immediate relatives with whom she had lived, would then step into the ownership of the property.

However with the passage of time these conditions changed; widows who had so far acquiesced began to adopt a bolder and more independent stance, and there were frequent instances of substantial gifts and sales of the ancestral property. Such disruption of the joint-stock could hardly be contemplated much less permitted, and on behalf of the kinsmen

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and their sons, gentiles, cognates, a pupil and a fellow student: on failure of the first among these, the next in order is indeed heir to the estate of one, who departed for heaven leaving no male issue. This rule extends to all persons and all classes," Yāj. 2. 136-7 quoted in Mit, II. I. 2. op. cit.

1. Bṛh. XXV. 47-9, op. cit.

whose expectations were thus baulked, the restrictions on the widow's powers of enjoyment and disposition which had hitherto been merely moral, now hardened into legal restraints, the most classic example being the text of Kātyāyana:

> "(A) sonless (widow) preserving the bed of her husband (unsullied) and residing with her elders and being self-controlled (or forbearing) should enjoy (her husband's property) till her death; after her the (other) heirs (of the husband) would get it (succeed to it)." 1

Also ascribed to Kātyāyana are similar texts which appear in the Vyavahāra Mayūkha:

> "(A)fter the death of the husband, the widow preserving (the honour of) the family, shall obtain the shares of her husband, so long as she lives: but she has not property (therein, to the extent of) gift, mortgage or sale." 2

And again:

> "(B)ut if her husband have departed for heaven, the wife obtains food and raiment: Or (too) if unseparated, she will receive a share of the wealth so long as she lives." 3

2. The Circumstances under which the Widow May Claim as Heir in the Joint and Separate Properties of Her Husband in the Mitākṣarā and the Dāyabhāga Systems

Her position as heir established, we must now turn our attention and examine under what circumstances the widow could claim such right of inheritance which depended essentially on the school of law by which the deceased husband was governed, whether he was a follower of one or the other of the two major treatises, the Mitākṣarā and the Dāyabhāga.

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1. Kātyāyanasmṛti, V. 921, tr. P.V. Kane, (Poona, Oriental, Date ?).
2. VIII. 4, tr. S.S. Setlur, A Complete Collection of Hindu Law Books on Inheritance, (Madras, K.K. Iyer, 1911).
3. Ibid., VIII. 7.

As is well-known under the Mitākṣarā which is followed with local variations in almost all parts of India with the exception of Bengal and Assam, there exists a marked distinction between property of which a person is exclusively possessed such as his self-acquired assets, and the interest which he may have in joint-family property as one who on his birth had become entitled to a share therein. On the death of a Hindu male possessing both such types of property, the law of inheritance operates regarding the former, while there is no such thing as succession in the case of the undivided share which simply lapses to the surviving sharers be they sons, grandsons or great grandsons, or else the collaterals by virtue of survivorship.[1]

The Dāyabhāga system however recognises only one mode of devolution, i.e. succession, and as a result of the absence of the notion of "birthright", a person acquires an interest in the joint estate only by and on the death of the father, and then he takes a fixed, absolute and invariable interest. The result is that on his own death, all his properties, self-acquired or joint, devolve by inheritance only on his heirs, and there is no such thing as survivorship. Thus while under the Dāyabhāga, all the properties of a person pass by inheritance on his death, under the Mitākṣarā the rules of inheritance apply only as regards property of which the deceased was the absolute owner. In default of male heirs at the time that succession opened, the widow was the heir of both joint-family and self-acquired property in the Dāyabhāga, and of the latter only in the Mitākṣarā and she took only if she had been chaste up to that time.

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1. In an important decision, Katama Natchier v. Raja of Shivagunga, (1863) 9 M.I.A. 543, this principle was explained thus at 615: "According to the principles of Hindu law, there is coparcenaryship between the different members of a united family, and survivorship following upon it. There is community of interest and unity of possession between all 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."

An important distinction to remember is that, whereas in the Mitākṣarā school female sharers are not entitled to initiate a partition, and their rights to a share arise for the first time when the coparceners separate the property by metes and bounds,[1] in the Dāyabhāga system, the widow in her capacity as heir to her husband's coparcenary interest may on her own volition call for a partition.[2]

3. The Mother's Entitlement at a Partition between the Sons in the Two Schools

The position of the widow when the sons separate is again the subject of controversy, and there are fundamental differences between the two major schools as to their entitlement.

Vijñāneśvara whose Mitākṣarā is a commentary on the text of Yājñavalkya is of the view that the latter's injunction that

> "(W)hen the father makes an equal partition among his sons, his wives must have equal shares with them, if they have received no share either from their lord or from his father," 3

means that when partition is made by the father, even the wife who has sons may claim a share.

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1. Pratapmull v. Dhanbati, A.I.R. 1936 P.C. 20. This case does not apply to the rights acquired by females in Mitākṣarā joint-family property under the HWRPA 1937, which gave her "the same right of claiming partition as a male owner," under s. 3 (3); while under the HSA, 1956 it has been held that the word "possessed" in s. 14 (1) must be given the widest possible connotation so as to include not only the share declared in a preliminary decree for partition (See Munnalal v. Rajkumar, A.I.R. 1962 S.C. 1493, discussed at 543ff), but also the share which a female acquires in undivided coparcenary property. (See Sukh Ram v. Gauri Shankar, A.I.R. 1968 S.C. 365, dicussed at 560 ff.
2. Derrett, IMHL, op. cit., at 348. This is confirmed in Kristo Bhabiney Dossee v. Ashutosh Bosu Mullick, I.L.R. (1886) 13 Cal. 39, where the widow's right as heir of her husband, to bring a suit for the partition of her late father-in-law's estate was implicitly acknowledged.
3. H.T. Colebrooke's rendering in A Digest of Hindu Law on Contracts and Succession, (hereinafter referred to as Cole. Dig.), Vol. III, a translation of Jagannātha Tarkapañcānana's Vivāda-bhangārnava, (Cal., Honourable Company's Press, 1798), at 97.

From this it would follow that the text of Vyāsa:

> "(B)ut the wives of the father who have no sons, are declared entitled to equal share with the sons of other wives," 1

and that of Bṛhaspati (LXXXV):

> "(O)n the death of the father the mother (jananī) has a claim to an equal share with her own sons; his mothers (mātaraḥ) take the same shares," 2

must be interpreted to mean that when partition is made by sons, a share must be allotted to the step-mother who has no male issue, for the particle "but" (in Vyāsa) has the sense of "also."[3]

Jīmūtavāhana, the author of the Dāyabhāga, refutes this contention for according to him the partition referred to in Vyāsa's text is not a partition between sons and accordingly

> "(I)t should not be argued that the construction of the text is 'the wives of the father,' and consequently when partition is made by sons after his death, the wives of their father who have no male issue, namely their step-mothers, shall have equal shares; and the text therefore relates to partition made by sons. When partition is made by sons, the law does not allot a share to the step-mother who has no male issue." 4

The text of Bṛhaspati is similarly dismissed on the reasoning that, though the words "his mother" might first suggest "son" for an answer because he is the most obvious agent in the sentence (leading to the assumption that "his mothers" then refer to his step-mothers), yet as the same sense has already been obtained from the former part of the sentence "on the death of the father the mother has a claim...," the reference is to the wives of the paternal grandfather who are entitled to take equal shares with his grandsons.[5]

In sum then, the position of the Dāyabhāga in the light of

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1. Ibid.
2. Ibid, at 98.
3. Ibid.
4. Ibid, at 97.
5. Ibid.

Jīmūtavāhana's interpretation of the smṛtis as commented upon by Jagannātha is that, when partition is made by a father, a share equal to that of a son must be given to the wife who has no son, not to her who has male issue; her son should be considered as alone entitled to share in the partition. But when partition is made by sons, no share need be allotted to the step-mother who has no male issue, but food and raiment must be assigned; for the late owner of property was bound to support her.[1] It would therefore follow that in the Dāyabhāga school, the widow is entitled to share equally with sons born of her, but she cannot receive a share from the children of another wife.[2]

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1. Ibid at 98. Jagannātha sums up (at 102), the differences between the two schools thus: "In this and other circumstances, there is much difference. Consequently the variance of these two opinions consists herein; according to Candeswara and the rest (including Vijñāneśvara) whether partition be made by the father or by his sons, equal shares must be allotted, conformably with the law, to the wives who have no male issue, as well as to those who have sons; according to Jīmūtavāhana and the rest when partition is made by a father, an equal share must be given to the wife who has no male issue, and when partition is made by sons, to the natural mother of those sons."

2. Judicial decisions are in accord with this view. Thus in Damoodur Misser v. Senabutty Misrain, I.L.R. (1882) 8 Cal. 537, it was held (at 542-3), that in a partition between sons by different wives, the respective mothers are only entitled to share equally with their own sons the aggregate of the shares which an equal division among the brothers allots to those sons, or in other words, the property must be first divided into as many shares as there are sons. Each widow then shares equally with each of her sons the portion allotted to her son. Likewise in Kristo Bhabiney Dossee v. Ashutosh Bosu Mullick, I.L.R. (1886) 13 Cal. 39, where the widow brought a suit against her husband's half-brother's son and her own mother-in-law for partition of the ancestral estate, it was held that the male defendant was entitled to a half share, the other half to be divided between the widows in equal shares. And in Srimati Hemangini Dasi v. Kedar Nath Choudhary, (1889) 16 I.A. 115 it was laid down at 124 that "(W)here there are several groups of sons, the maintenance of their mothers must, so long as the estate remains joint, be a charge upon the whole estate; but when a partition is made the law appears to be that their maintenance is distributed according to relationship, the sons of each mother being bound to maintain her. The step-sons are not under the same obligation."

In the Mitākṣarā school on the death of an unmarried son, his share of the joint property passes by survivorship at partition, but the question long in dispute in Calcutta as to whether or not a mother who inherits the undivided share of her deceased son as his sole heir under the Dāyabhāga law is entitled to a further share at a subsequent partition of the family estate was finally resolved in Milan Kumar Das v. Purnasashi Dassi.[1] In over-ruling the decision in Indu Bhushan Chatterjee v. Mritunjoy Pal,[2] to the effect that, as maintenance is the basis of her right to a share on partition, where the mother had already inherited the share of her deceased son which was sufficient for her maintenance, she was not entitled to any further share on a subsequent partition between her surviving sons, Dutt, J., delivering judgment on behalf of the Special Bench upheld the earlier Single Bench decisions in Jugomohan Haldar v. Sarodamoyee Dossee,[3] and Poorendra Nath Sen v. Srimati Hemangani Dassi,[4] and laid down that

> "(e)xcept in the case of a strīdhana which a mother might have received from her husband or father-in-law, no other strīdhana or property received by her from any other person or from any other source can be taken into consideration for the purpose of determining whether any share can be allotted to her when a partition takes place between the father and sons, or between the sons after the death of the father." [5]

4. The Nature of the Estate that the Widow Inherits in the Mītakṣarā and the Dāyabhāga Schools

The question that then arises is as to the nature of the property that the widow so takes. There is in fact a profusion of texts as well as divergence of opinion as to whether such property may indeed be

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1. A.I.R. 1974 Cal. 380 (S.B.).
2. I.L.R. (1946) 1 Cal. 128.
3. I.L.R. (1878) 3 Cal. 149.
4. I.L.R. (1909) 36 Cal. 75.
5. A.I.R. 1974 Cal. 380 (S.B.), at 386.

regarded as her stridhana over which she enjoys absolute powers of enjoyment and disposition, or whether she merely takes what for want of a better term is known as the "limited" estate.

The Mitakṣarā which is a commentary on the text of Yājñavalkya quotes the sage thus explaining the nature of woman's property:

> "... what was given to a woman by the father, the mother, the husband or a brother, or received by her at the nuptial fire, or presented to her on her husband's marriage to another wife, as also any other (separate acquisition) is denominated a woman's property," 1

and the gloss of Vijñāneśvara to this is

> "... and also property which she may have acquired by inheritance, partition, seizure or finding, are denominated by Manu and the rest 'woman's property'." 2

At a glance therefore, it would seem that so far as the authority of the Mitakṣarā goes, the widow is the absolute owner of whatsover property she acquires and howsover. The thought comes to mind that when Vijñāneśvara mentions "and also property," he is perhaps referring to merely moveables, although this is at best conjecture in view of the various other elaborations which we will now proceed to examine.

It is worth noting that in a further description of the separate property of woman the same treatise has this to say:

> "(I)t is said by Kātyāyana, 'What has been received by a woman from the family of her husband at a time posterior to her marriage, is called a gift subsequent,... It is celebrated as woman's property. ... Her kinsmen take it if she die without issue.'" 3

And as if to substantiate this, there is the unconditional declaration on the authority of Manu, Viṣṇu, Kātyāyana and Bṛhaspati that the chaste widow of a childless man takes his entire estate "notwithstanding kinsmen, a father, a mother, or uterine bretheren be present."[4] This view is

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1. Mit., II.XI.I. op. cit.
2. Ibid, II. XI. 2.
3. Ibid, II. XI. 7-8.
4. Ibid, II. I. 6. See also II. I. 2 and II. I. 30.

augmented by the further provision that

> "... whether partition be made in the owner's lifetime or after his decease, (that) the wife shall take a share equal to the son's... Such being the case it is a mere error to say that the wife takes nothing but a subsistence from the wealth of her husband, who died leaving no male issue." 1

In view of texts such as the foregoing, it would seem that so far as the authority of the Mitākṣarā is concerned, every description of property belonging to a woman (be it inherited from a male or obtained at a partition), becomes her strīdhana though it is not a necessary corollary that her power of alienation is the same over every variety of it. But then, it must be borne in mind, neither does a male member of a coparcenary have such unlimited powers of disposition over property of which he is undoubtedly the owner in a joint Hindu family. West J., very aptly pointed out that according to the Mitākṣarā, a woman's power of alienation over property inherited by her was subject to restrictions analogous to those imposed upon the power of a male owner as regards his ancestral property. The learned judge observes:

> "Vijñāneśwara like all the Hindu lawyers, denounces the appropriation of a woman's property by her husband except in cases of great pressure, and by the other kinsmen under any circumstances. But he lays down no rule as to the extent of the woman's own power over the property. The natural conclusion would seem to be, that he considered this already sufficiently provided for as to his immediate subject, inheritance, by other lawyers, and by the analogies to be drawn from his rules as to the estate of a male proprietor. Now in Chap. I, section I, pl. 27, 28, it is laid down that a man is "subject to the control of his sons and the rest (of those interested) in regard to the immoveable estate, whether acquired by himself or inherited," though he may make a gift or sale of it for the relief of family necessities or for pious purposes. It is clear therefore, that a right of absolute disposal did not enter into Vijñāneśwara's conception of the essentials of ownership. He admits (Mit. Chap. II, section I, pl. 25) the genuineness and the authority of the text of Nārada, which with so many others, proclaims the dependence of women, which, he says, does not disqualify them for proprietorship." 2

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1. Ibid, II. I. 31.

2. Vijiarangam v. Lakshmanan, (1871) Bom. H.C.R. (O.C.J.), 244 at 264-5.

If we now turn to the Vīramitrodaya, the other commentary held in high esteem in the Benares school, it is clear that like the Mitākṣarā it maintains that whatever is owned by a woman is her strīdhana, though it admits more clearly than the former that the quality of being freely alienable by her without her husband's consent, which generally attaches to strīdhana, may not attach to every kind of it. The question of strīdhana apart, the Vīramitrodaya, however, clearly takes into consideration the text of Kātyāyana[1] (of which there is no mention in the Mitākṣarā), in imposing restraints upon the widow's powers of enjoyment and disposition over property inherited by her from her husband.

Thus:

> "(W)hen the widow after having succeeded to the property of her husband dies, the residue of the property after her enjoyment would have devolved on (her heirs as such) ... - but it is prevented by the passage, - 'After her let the heirs take.' And the construction of the text (of Kātyāyana) is arrived at thus: on perusing 'let the heirs take' the question occurs, whose heirs? and the word 'bed' suggests itself and is construed with 'heirs'; accordingly the signification of the text is as follows, - "After her let the husband's heirs or dāyādas, i.e. those that are entitled to take his undivided property 'take' also what remains of the estate of a separated brother after the enjoyment thereof by his wife; and not the heirs to the estate of the wife, such as the daughters and the like...
>
> "(T)herefore, it is established that in making gifts for spiritual purpose as well as in making sale or mortgage for the purpose of performing what is necessary in a spiritual or temporal point of view, the widow's right does certainly extend to the entire estate of her husband; the restriction, however, is intended to prohibit gifts to players, dancers and the like, as well as sale or mortgage without necessity. Accordingly the term 'being moderate' is inserted; the meaning is, that on obtaining the property she shall not uselessly spend the property." 2

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1. Kātyāyanasmṛti, V. 921, op. cit. The author of the Vīramitrodaya refers to the text of Kātyāyana but does not quote it. However the influence of this most famous of injunctions, which is in fact the basis of the limited estate, is as much in evidence in the Vīramitrodaya as it is in the Dāyabhāga.

2. Vīramitrodaya, A Complete Collection..., op. cit., at 380.

The Vyavahāra Mayūkha, the authority that prevails with the Mitākṣarā in the Bombay school, assigns to the simple term strīdhana the same unlimited signification that it has in the Mitākṣarā except that it also enjoins that a woman possesses absolute power of disposal only over some kinds of strīdhana. Thus where she inherits from her husband, the treatise declares on the authority of Kātyāyana that she may alienate for religious or charitable purposes though not otherwise.[1]

The Vivāda Chintāmaṇi which is the dominant authority in the Mithilā school declares in no uncertain terms that

> "(t)he chaste wife is entitled to the property, in default (of heirs) down to the great-grandson of her husband." 2

The author then draws a distinction between moveables and immoveables, and holds that the widow's powers of disposal over the latter is absolute, but cites the Mahābhārata to the effect: "For women, the heritage of their husbands is declared applicable to use. But let women never make waste of their husband's wealth."[3] The gloss of the Vivāda Chintāmaṇi that waste means "giving or selling at their pleasure,"[4] has also been relied on in support of the doctrine of the qualified right of the widow in the property inherited by her from her husband.

In the Dravida school, the paramount jurisdiction is that of the Parāśara Mādhavīya and the Smṛti Chandrikā. Kane points out that Mādhava explains that "except immoveable wealth" in Bṛhaspati's dictum[5] means that the widow is prohibited from making a sale of immoveable property without the consent of the male kinsmen.[6]

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1. Vyavahāra Mayūkha, VIII. 4, op. cit.
2. Vivāda Chintāmaṇi, A Complete Collection..., op. cit., at 266.
3. Ibid, at 266-7.
4. Ibid, at 267.
5. "The husband being separated (in interests from his former coparceners) his wife shall take after his death a pledge and whatever else is recognised as property, except the immoveable wealth." : Bṛhaspati, XXV. 53, op. cit.
6. H.D., Vol. III, 2nd ed., (1973), op. cit., at 709.

The Smṛti Chandrikā is also explicit on the restrictions to the widow's power over property inherited from her husband, and makes a distinction between the sonless widow and an issueless widow. Thus:

> "(T)he right of a widow (patnī) to inherit arises only where the husband dies divided in estate. Accordingly Bṛhaspati:- 'Whatever property a man possesses of every kind after division, whether mortgaged or other, the wife (jāyā) shall take after the death of her husband, with the exception of immoveable property.'" 1

For

> "... immoveable property being the means of subsistence among the descendants of a Hindu family, is inheritable only by a widow that has got issue, and that, therefore a widow (patnī) having no issue has no title to inherit the property although she may be virtuous and the family divided." 2

Having come into inheritance however, the restraints on the widow's powers of alienation are made all too clear:

> "(T)he same author (Bṛhaspati) further says 'After the death of the husband, the widow preserving (the honour of) the family, shall obtain the share of her husband so long as she lives; but she has no property (therein to the extent of) gifts, mortgage or sale.'" 3

It is then explained that,

> "(T)he competency of a widow to make gifts for religious and charitable purposes, such as the maintenance of old and helpless persons, being sanctioned by law, the above passage must be held as contemplating the want of independence of a widow in making gifts etc for purposes not being religious or charitable, but purely temporal, such as gifts to dancers, and the like." 4

Some scholars suggest that the passage in the Smṛti Chandrikā to the effect that "whatever the mother takes, she takes for herself like the strīdhana called Adhyagni[5] and the like, and not for the benefit

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1. Smṛti Chandrikā, XI.I.23, A Complete Collection..., op. cit.
2. Ibid, XI.I.27.
3. Ibid, XI.I.28.
4. Ibid, XI.I.29.
5. The Adhyagni is that strīdhana which is given to the woman at the time of her marriage near the nuptial fire, and descends, according to the author of the Smṛti Chandrikā, to unmarried and unprovided daughters, and on failure of daughters, to their issue, the female issue taking before the male. See Smṛti Chandrikā, IX.II.17, "A Complete Collection...," op. cit.

of both herself and her husband,"[1] would seem to infer that inherited property is not strīdhana.[2] It is submitted that in fact it makes no such inference. The passage relates to the succession of the mother to the property of her son which, the text clearly states, is for her exclusive use, and reinforces the view that although the widow's inheritance from her husband is certainly not strīdhana in the accepted sense of the word, nevertheless like "Adhyagni and the like," she exercises control over it subject to the limitations discussed above.

Let us now consider the Dāyabhāga of Jīmūtavāhana, the most authoritative text in Bengal. As we have already seen, the Mitākṣarā recognises the widow's right to inherit only when her husband was separated from his kinsmen, but it says nothing expressly as to the extent of her interest in the estate inherited by her or the order of succession to it after her death. The Dāyabhāga on the other hand, allows her to succeed to her husband's estate in all cases on failure of sons, grandsons, and great-grandsons; but as if to counter-balance this concession made in her favour, it limits her interest to mere enjoyment with moderation, and declares that on her death the estate should devolve, not on the heirs who inherit her strīdhana but on the next heirs of her husband, in accordance with the text of Kātyāyana,[3] "for," says Jīmūtavāhana,

> "(T)he right of those (persons whose succession is declared under that head) is relative to the property of a woman (other than that which is inherited by her); Kātyāyana has propounded by separate texts the heirs of a woman's property; and his text (declaratory of the succession to heritage) would be tautology: (Consequently heritage is not ranked with woman's peculiar property)." 4

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1. Ibid, XI.III.8.
2. See for instance D.N. Mitter, The Position of Women in Hindu Law, (Cal., Univ. of Cal., 1913), at 611-2, and R.L. Choudhary, Hindu Woman's Right to Property, Past and Present (Cal., L.K. Mukhopadhyay, 1961), at 13.
3. Supra, at 222.
4. Dāya, XI.I.58, op. cit.

Thus the Dāyabhāga excludes in no uncertain terms inherited property from the denomination of strīdhana; and as if to set the seal on this dictum we are further told that,

> "(T)hat alone is her peculiar property which she has power to give, sell, or use independently of her husband's control." 1

It would seem at first glance that Jīmūtavāhana's doctrine is unduly harsh in so restricting the widow's rights over inherited property, specially when we compare it with Vijñāneśvara's interpretation of strīdhana in its unlimited literal sense which would also include inherited property. But if we consider that under the Mitākṣarā scheme of succession, it is only the widow of a separated coparcener who is heir to her deceased husband, it then becomes apparent that Yājñavalkya was probably reluctant to sanction a scheme of succession whereunder extensive property would have automatically and very frequently passed out of the family to female strīdhana heirs. On the other hand, Jīmūtavāhana, who allows the widow to inherit her husband's estate whether he was separated from, or joint with, his coparceners, is obliged, for the same reason, to qualify the simple rule of inheritance that property vested in any person passes to the heirs of such person, by providing that a female heir takes the inheritance merely as a tenant for life, and that after her the estate passes not to her heirs, but to the next heirs of the last male holder.[2]

This apparent conflict of opinion between the two great authorities was further aggravated by the fact that the various other commentaries and digests, with their various interpretations - each in its own sphere as authoritative as the next - tended to create a great deal of confusion

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1. Ibid, IV.I.18.
2. Banerjee, op. cit., at 351.

as to whether inherited property could indeed be regarded as strīdhana, and in fact

> "(I)t became a work of art to reconcile the conflicting texts, which were of equal authority. Some thought that the widow should[1] be understood tacitly to decline in favour of agnates; some that only a widow of special, and in some areas rare, qualifications might inherit: thus she must be free from potential as well as actual blemishes of character (!); she must be about to bear a son, or be willing to submit to niyoga, ... Viśvarūpa does not allow a non-pregnant widow to inherit, but if a daughter is born, she may hold the property in trust for the daughter.[2] That niyoga alone qualified the non-pregnant widow was the view of King Bhoja alias Dhāreśvara, whose opinion is immortalised in the Mitāksarā[3] though since niyoga was nominally obsolete in the current epoch the qualification was such as to remove the problem totally - and finally it was suggested[4] that she must have been married in the "approved" form. Alternatively others permitted her to inherit provided she accompanied her husband's corpse upon the funeral pyre! Others more rationally restricted her right to moveable property,[5] or to cases where the estate was very small and her right to maintenance in jeopardy."[6]

For all that the Mitākṣarā finally reconciled the texts by allowing her to inherit where her husband was "separate" that is to say, she might take his share in the joint estate if it had already been ascertained that no more harm could be done thereby,[7] there was still the authority of the Dāyabhāga to contend with, which as indicated earlier, advocated an entirely opposite viewpoint.

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1. Aparārka's commentary on Yāj. II.135-6
2. Viśvarūpa on Yaj. II.139, at 241.
3. Mit. II.1.8, op.cit.
4. An artifice of Devaṇṇa-bhaṭṭa in the Smṛti Chandrikā, at 290-1. As an Andhra or Tamilian he knew perfectly well that most marriages in his part of India were celebrated in the Āsura, an unapproved form.
5. Sarasvatī-vilāsa, ss. 512-5, (Foulkes edn.)
6. This was the view of Śrīkara and others, refuted in Mit. II.1.31. For the above passage and the references thereto, see Derrett, "A Strange Rule ...," op. cit., at 219-20.
7. Derrett, cited above.

5. The Limited Estate Established Under the Mitākṣarā System

In the early British period it was supposed as a matter of principle that all the dharmaśāstra must be applied to all Hindus, unless they could in each case prove a caste custom to the contrary, and then only to the extent that custom was strictly proved.[1] The major schools of Hindu law were recognised. But when it came to the problem of determining whether a woman could dispose of her inherited property as strīdhana and whether, if she could not, it would be taken after her death or surrender, not by her own heirs but by those of her deceased husband, there was the patent difficulty that whereas the Mitākṣarā, the leading authority, plainly stated that inherited property was strīdhana there were restrictions, according to the śāstra, upon her transfer of immoveable property inter vivos, and it followed that she could not dispose of inherited lands without the consent of the nearest agnates of the deceased husband, and it was to the next heirs of the husband (or the father or the son, as the case might be) that the property would pass on the female's death.[2]

The most obvious and logical solution would have been for the Courts to have regarded inherited property as strīdhana in areas governed by the Mitākṣarā, while in provinces where the influence of Jīmūtavāhana prevails, to have excluded it from the category of strīdhana. So far as the Bengal school is concerned, judicial decisions early established the principle that property inherited by a woman either from a male or

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1. The P.C. put it thus: "The duty therefore, of an European Judge who is under the obligation to administer Hindu law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to acertain whether it has been received by the particular school which governed 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...," : Collector of Madura v. Mootoo Ramalinga, (1868) 12 M.I.A. 397, at 435.

2. J.D.M. Derrett, "The Rights of Inheritance of Women," ECMHL, Vol. II, (1977), op. cit., at 348-9.

a female does not become her peculiar property,[1] and this is quite in accordance with the rule laid down in the Dāyabhāga. On the other hand, the course of decisions has been to hold, contrary to the decision of Vijñāneśvara that, according to the law of the Benares school, property inherited by a female is not her strīdhana. The Privy Council, the highest judicial authority, drastically limited the scope of strīdhana by insisting that the Mitākṣarā must be read in the light of the text of Kātyāyana[2] of which in fact, as we have already pointed out, there is no mention at all in the Mitākṣarā; assuming moreover the interpretation put on it by the Dāyabhāga to be its only true meaning and refusing to take the pandits' vyavasthās seriously (of which more presently), it was determined finally that even in Madras all the property, moveable and immoveable, inherited by a widow, daughter or mother must be held by her subject to the "women's limited estate."[3]

The French Court at Pondicherry appears to have wavered in a remarkable manner in its views upon this question. In 1766 and again in 1769 they decided in conformity with an opinion of the Vellāla caste, that no woman could dispose of any immoveable property or of any property which she had inherited. This opinion was founded on what was called the law of the Malabar people, which no doubt means the local usage.[4] In

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1. Sreenath v. Surbomongala, (1868) 10 W.R. 488.
2. Supra, at 222.
3. Derrett, "The Rights of Inheritance ...," op. cit., at 350.
4. That in the territory of Pondicherry the force of local usage clearly outweighs the written text of the law whether classical or statutory, has again been demonstrated in Ramalingam v. Manicka, (1980) 2 M.L.J. 350, where the question was as to how the law of intestate succession operates in that particular territory when a Hindu dies possessed of ancestral property and leaves both male and female issue. In his Lordship, Balasubrahmanyan J.'s view, the usual Mitākṣarā rule of succession by survivorship having yielded to a local variation wrought by custom and usage, it is to the father alone as juridical head of the family that the assets deriving from the ancestor belong and over which he has absolute powers of disposition. In view of this, the learned Judge ruled that, all properties

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1851 the French court, following the views which then prevailed in the Madras court, held that property which descended to a widow was her stridhana, and was absolutely at her disposal. In 1869 they accepted the doctrine finally established in Madras that such property was held on the tenure which is generally known as a widow's estate.[1]

The characteristics of the widow's estate in property inherited from males as they emerge under the Dāyabhāga, and applied so arbitarily to those governed by the Mitākṣarā are indications in themselves as to how far removed the concept of the limited estate is from woman's property as envisaged by the Mitākṣarā. Thus the widow has merely the right of enjoyment with moderation.[2] Should however the estate fall short of what is necessary for her legal enjoyment, she may alienate a part or even the whole of it, if necessary.[3] Save as aforesaid, her rights in both moveable and immoveable property are limited, and she cannot alienate them.[4] She is however entitled to dispose of the property with the express consent of the reversioners.[5] She is at the same time enjoined to maintain and to make gifts to poor relations of the husband,[6] and finally at her death, the reversioners, not her own heirs, are entitled to the residue of the estate and its accretions.[7]

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held by a father in the joint-family have to be regarded as his absolute properties under the customary law of Pondicherry, and on his death the devolution of such estate would be governed by the provisions of s. 8 of the HSA, s. 6 and its Proviso having no application.

1. J.D. Mayne, A Treatise of Hindu Law and Usage, 7th ed., (Mad., Higginbotham 1906), at 827.
2. Daya., XI.I.56, 61, op. cit.
3. Ibid., XI.I.62.
4. Ibid., XI.I.56.
5. Ibid., XI.I.64.
6. Ibid., XI.I.63.
7. Ibid., XI.I.59.

6. The Dissident Opinion of Eminent Authorities

This has meant, in effect, the abrogation of the simple definition of strīdhana in the Mitākṣarā and considering the high authority of the latter, and the clear language in which it declares that property inherited by a woman does constitute her strīdhana, scholars have not been slow to express their doubts as to the correctness of this approach. In Sir H.S. Maine's considered opinion, it was

> "(a) remarkable fact that the institution (of strīdhana) seems to have been developed among the Hindus at a period relatively much earlier than among Romans. But instead of being matured and improved, as it was in the Western society, there is reason to think that in the East, under various influences, which may partly be traced, it has gradually been reduced to dimensions and importance far inferior to those which at one time belonged to it; 1

and he wonders what the causes are "for the strong hostility of Hindoo Lawyers to the text of the Mitākṣarā of which the authority could not be wholly denied."[2]

On the face of it, the Dāyabhāga rules are rigidly restrictive of the widow's rights of inheritance, but eminent scholars are agreed that the explicitness of the Mitākṣarā apart, Hindu law nowhere prescribes any but the absolute estate for the widow.

One such authority is Jagannātha, the leading Indian interpreter of the ancient sources in the nineteenth century whose views assume the greater significance as he demonstrates that, even in the Dāyabhāga, such injunctions as do seemingly restrict the widow's absolute powers of disposal over her husband's property, be they

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1. Early History of Institutions, 7th ed., (Lond., J. Murray, 1897), at 321.
2. Ibid, at 325.

those of Jīmūtavāhana,[1] Kātyāyana,[2] Nārada[3] or the author of the Mahābhārata[4] merely underscore what the widow ought[5] not to do. To argue that texts such as these by reinforcing her declared incapacity and dependence render any alienation by her void, is to lose sight of perspective. For, reasons Jagannātha,

> "(t)he validity of a gift made by the owner should not be impugned while no special text pronounces it as void; the declared object of the text (that of Nārada) is only to show sin in not subjecting herself to the control of kinsmen on the husband's side." 6

In defence of this stance he points out that, as the daughter may validly alienate the paternal estate

> "(i)t does not seem congruous that a gift should be null and void made by a wife who succeeds in preference to a daughter, and who is declared by sacred ordinances to be half the body of her lord..." 7

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1. "A widow shall only enjoy the estate; she ought not to give it away, mortgage or sell it.": Cole. Dig. Vol. IV,(1798), op. cit., at 166.
2. "What a woman has received as a gift from her husband, she may dispose of at pleasure, after his death, if it be moveable; but as long as he lives let her preserve it with frugality: or she may commit it to his family.": Ibid, at 277-8, as also "The childless widow preserving inviolate the bed of her lord, and strictly obedient to her spiritual parents, may frugally enjoy the estate until she die; after her the legal heirs shall take it.": Ibid.
3. "After the death of her lord, the relations of the husband shall be the guardians of a woman who has no sons. They shall have full authority to control her, to regulate her mode of life, and to maintain her." Nārada, XIII. 28, The Minor Law Books, Part I, op. cit.
4. "Simple enjoyment is declared to be the fruit, which women gather from the heritage of their lords; on no account should they waste the estate of their husbands," Cole. Dig., Vol. IV, op. cit., at 169, and cited at Dāya, XI.I.60., op. cit.
5. Emphasis mine.
6. Cole. Dig., Vol. IV, op. cit, at 167.
7. Ibid, at 168.

To the objection that then might be raised that, as the daughter is permitted to make a donation, this would in itself suggest the inferiority of the wife, Jagannātha is firm in the view that, "the inferiority of a wife compared with her (the daughter), is not thereby suggested."[1] The widow herself being "the property of her lord as it were, for his sole service,"[2] is enjoined by sacred texts to

> "(l)ive in the practice of austerities, with extinguished passions refraining from pleasurable food, bed and other gratifications, which she may desire;" 3

and in like manner therefore she may not dispose of other property of her lord save for his benefit.

The injunctions against waste by the widow, however strongly worded, and in particular the words "may enjoy" strongly suggest that they are no more than explanatory precepts, and "in the case of an explanatory precept it does not appear that a different act is void,"[4] so that a gift or other alienation made by the wife, is therefore valid, though blameable,[5] and in view of all this, the irrevocable conclusion, according to Jagannātha, is that on failure of male descendants the widow is the first among heirs, and she being half the body of her husband, she must take exclusively and absolutely of his wealth.[6]

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1. Ibid.
2. Ibid.
3. Ibid.
4. Ibid, at 169.
5. Ibid, at 168.
6. The reason why the widow cannot take in the presence of male descendants has been ingeniously explained by Śaṅkha and Likhita "(T)he bodies of his ancestors are born again of her; let him figuratively address his own soul in the person of his child." : Cole. Dig., Vol. lV, op. cit., at 161. The arguments in support of the widow's claim is reiterated in Cole. Dig., Vol. III, op. cit., at 457-66. What is very interesting however is that Colebrooke himself does not subscribe to the views of Jagannātha, and in Cossinaut Bysack v. Hurroosoondry Dossi, (1819) 2 Mor. Dig. 198, East C.J., totally out of sympathy as he was with such as those who imposed limitations on the widow's rights where there were none points out (at 212) that Colebrooke in letters touching on this subject states: "(I)t appears, on inquiry and research, not to have

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The reasoning of H.H. Wilson, the great orientalist, is along the same lines. He examines the two ancient texts which bear positively on the widow's power over the property which she inherits as her husband's sole heir, the one of Kātyāyana,[1] and the other from the Mahābhārata,[2] and insists that, such ancient injunctions can scarcely be interpreted to mean that if a widow gives away or sells her estate, such gift or sale is invalid.[3] In fact, the eminent author asserts, all that Jīmūtavāhana ever said was that, "a widow shall only enjoy the estate; she ought not to give it away, mortgage or sell it."[4] He

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been sanctioned by any previous author of note, nor as is believed, by any writer whomsoever. It is, on the contrary, in opposition to the whole current of authorities, both in and out of Bengal," adding in support of his contention that, according to Jīmūtavāhana's doctrine, the restrictions on alienations extend equally to daughters and mothers as well as to wives. In refuting this argument, the learned Chief Justice draws attention to Dāya, XI.I.59, which clearly states that, "... the next heirs ... shall ... equally succeed to the residue of the estate remaining after use of it, upon the demise of the widow, in whom the succession had vested," and in his Lordship's opinion these words are remarkable as they clearly point out that "the next heir is to succeed, not to the estate generally, but to the residue of the estate remaining ater the use of it." : Ibid., at 213.

1. Supra, at 222.
2. Cited at Dāya., XI.I.60, op. cit.
3. J.D.M. Derrett, in a carefully researched article, poetically entitled "Factum Valet: The Adventures of a Maxim," ECMHL, Vol. III, (1977), op. cit., draws attention at 2, to the principle quod fieri non debuit factum valet: "What ought not to have been done is (often) valid when done," and it is precisely on the strength of this maxim that, the rationalisations of both Jagannatha and Wilson in regard to the widow's right of alienation are based. The origins of the maxim stem from the canon law through which it became part of the law of England and thus of India. Factum Valet which gives expression to the two principles viz. (i) that which is abhorrent to the "law of God" may yet be permitted by the law of Man, and (ii) many prohibitions of positive law do not invalidate civil acts done in apparent contravention of them, started upon its career in India almost at the commencement of the British period, and in Bengal in particular, it took firm root; and although Sanskrit texts accepted as legal authorities prohibited certain transfers of property, the medieval commentators interpreted the prohibition as applying only in conscience, the breach of them leading in appropriate cases to censure and outcasting, while the legal transaction would remain valid. See Derrett, ibid., at 1 ff.
4. Dāya., XI.I.62, op. cit.

allows her also, if unable to subsist otherwise, to mortgage or even to sell it, and to make presents to her husband's relatives and gifts or other alienations for the spiritual benefit of the deceased; and

> "(i)t is not till we come to the third generation of lawyers, the commentators on the commentators, that the restriction is positive, and Śrī Krishṇa Tarkālaṅkāra expounding Jīmūtavāhana's text declares, 'a widow shall use her husband's heritage for the support of life; and make donations, and give alms in a moderate degree for the benefit of her husband, but not dispose of it at her pleasure like her own peculiar property.'" 1

From this,

> "(t)he utmost that can be inferred... is that, originally the duty of the widow was only pointed out to her, and she was left in law as she was in reason, a free agent, to do what she pleased with that which was her own; but that in later times attempt of an indefinite nature have been made to limit her power." 2

Wilson is further of the opinion that until such time as "a new race of law-givers, with Jīmūtavahana at their head, chose to alter it,"[3]

> "(t)he spirit and the text of the original law... recognise(d) a widow's absolute right over property inherited from a husband, in default of male issue." 4

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1. H.H. Wilson, Essays in Sanskrit Literature, Vol. V., (Lond., Trubner, 1865), at 16-7.

2. Ibid, at 17. Wilson then goes on to comment: "The eagerness with which the latter doctrine is urged by the Scholiasts of the present day is ascribable in all probability to the contempt for the female sex which they (Hindus) have learned from their Mohammedan masters." Quite clearly the learned author is not referring here to the popular contemporary stereotype of the lecherous and lasvicious "Mohammedan," (a term, anathema incidently, to sensitive Muslim ears), intent solely on carnal indulgences. The reference is made in the particular context of inheritance and, one submits, denigrating comments without veracity such as these, ill befit the consistent and superior scholarship which is otherwise the great merit of our author's researches. Whatever contempt he may or may not have had for the female sex, the "Mohammedan" was — and still is — bound in matters of inheritance and succession by a system of inheritance proclaimed from the desert wastes of Arabia in the 7th century A.D., whereby the female members were declared heirs in varying degrees, the widow no less than the daughter, mother or sister.

3. Ibid, at 21.

4. Ibid, at 24.

He argues persuasively:

> "(T)he old lawyers have said, 'let a widow enjoy a husband's wealth, afterwards let the heirs take it.' What obligation does this involve that she must leave it? But she is told she should not waste it,- granted: but suppose she sells it, is that waste?" 1

In fact, in his opinion, even

> "(I)n Bengal the authorities that are universally received have altered this law and restrict a widow to the usufruct of her husband's property. They have not, however provided for its security, nor for its recovery if aliened, and by such neglect have virtually left the law as they found it, or the power if not the right of alienation with the widow: ..." 2

As to the injunction, 'The relations of her husband cannot dispossess her of that property, but they may control her in the use of it," the learned author's comment is that,

> "(I)f they cannot do the one they cannot do the other: if they cannot take the money from her, how is it possible they can prevent spending it? By an injunction of the Supreme Court indeed, and the consignment of the funds to the care of the Master, it may be, and has been done: this we know: but we have yet to learn that it is Hindu law." 3

What in fact Wilson stresses is that the unambiguous statement of the Mitākṣarā apart, the lawgivers in Bengal too never envisaged the women's estate as we know it today, hedged in as it is by limitations and restrictions, and which has given rise to endless complications leading to wasteful and tedious litigation.[4]

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1. Ibid, at 21.
2. Ibid, at 24. His point has not been borne out by the progress of case law.
3. Ibid, at 22.
4. In regard to the abundance of case law it is interesting to note that, "(T)he assertion can be made without rashness that the cases relating to the extent and nature of women's estate which come before our courts are more numerous than the other cases on Hindu law put together.": Mitter, op. cit., at 526, and more recently Derrett is quick to perceive that, "(T)he 'women's estate' was a topic of law of such magnitude that it occupied sixty pages in the current edition of Mayne on Hindu Law and Usage.": "A Strange Rule ..." op. cit., at 218 f.n.2.

Consideration must also be given to the opinion of those exceptionally gifted jurists who, despite the generally hostile attitude towards women's proprietary rights, nevertheless had the courage of their convictions to declare in no uncertain terms in their judgments that, on a correct interpretation of the smṛti texts, there could be no upholding of the denial of proprietary rights to women. If we examine the dicta of West J., in Vijiarangam v. Lakshmanam,[1] it is clear that, in his view the restrictions on the widow's power of alienation are not incompatible with her proprietary right, while East, C.J.'s judgment in Cossinaut Bysack v. Hurroosoondry Dossi,[2] is in effect a cogent and succinct plea in defence of the widow's rights of inheritance. He holds

> "(T)hat the widow should have the whole property of the husband, that is, the right of property, and not merely the use of the whole, or any aliquot part of it, vested in her, and yet that she should be enjoined by law not to commit waste of it, is altogether a consistent proposition... so far as relates the widow's power of disposition over the husband's estate being under the control of his kindred, as her guardians, it is consistent with the prohibition against waste by her..." 3

His Lordship further maintains that, the directions contained in the apparently contradictory texts

> "(W)hereby her use and enjoyment of her husband's estate, without waste of it, are taken out of her own control, and transferred, with her person, under the full power of her husband's kindred," 4

are merely monitory, not rules of law, and

> "(i)n order therefore, to avoid gross inconsistencies and contradictions, and yet to reconcile these doctrines with each other, I can find no better way than to consider her as having the entire right of property vested in her, both in the moveable and immoveable estate; for there is no distinction between them taken in the books in respect of the husband's estate devolving upon her as heir, as there is in the case of male succession to ancestral property..." 5

She may be legally prohibited from wasting; she may not make

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1. (1871) Bom. H.C.R. (O.C.J.) 244 at 264-5.
2. (1819) 2 Mor. Dig. 198.
3. Ibid, at 214.
4. Ibid, at 215.
5. Ibid.

away with it without the consent of her husband's kindred; she may even be religiously and morally enjoined to use moderation, but, the learned Chief Justice insists, she "is under no legal disability if she do not take or follow such advice."[1]

7. The Role of the Privy Council in Establishing the Limited Estate

Notwithstanding such dissident opinions, and such little evidence as the smṛti authorities indicate in support of the limited estate, the Privy Council, patently ignoring the authority of the Mitākṣarā, preferred the doctrine of the Dāyabhāga; and the result has been that females governed by the Benaras school have been subjected to the restrictions and limitations of the Bengal school, while the privileges enjoyed by the Bengal females of inheriting from their male relatives even when they were joint or reunited, were denied to the former, thus depriving them of their substantial rights without any compensation. As a result of this unfortunate interpretation, case law on the subject, as we have already indicated earlier, is formidable, and within the scope of this brief summary one can at best merely draw attention to some of those decisions in the Mitākṣarā territory which established the widow's estate as we know it today.

In Collector of Masulipatam v. Cavaly Vencata,[2] the contention was that the Hindu widow has an estate of inheritance, not a life-estate, the original estate devolving on her in a course of succession derived from the husband who had in him an estate of inheritance, which she takes as heir. However the Privy Council considered it "clear"[3] that under the Hindu law the widow, though she takes as heir, takes a special and qualified estate. Their Lordships took it as "admitted on all hands"[4] that the widow cannot of her own will alien the property

1. Ibid, at 216.
2. (1860) 8 M.I.A. 529.
3. Ibid, at 550.
4. Ibid.

except for religious and charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband. For such reasons, she has a larger power of disposition than that which she possesses for purely worldly purposes, and to support an alienation for the last, she must show necessity. The reason for the restriction on the widow's power is, in the opinion of their Lordships, not merely the protection of the material interests of her husband's relations, but the state of perpetual tutelage to which every woman is subject according to various authorities from Manu downwards.[1] This it is submitted, is in direct contravention of the Mitākṣarā authority by which the parties to the suit were governed where there is nothing by way of a distinction between the estate acquired by a male and that acquired by a female.

The Judicial Committee took the same view in Mst. Thakoor v. Rai Baluch Ram,[2] and ignoring the explicit direction of the Mitākṣarā to the contrary, was of the opinion that the texts of Nārada[3] and Kātyāyana[4] must prevail, and ruled that

> "(T)he result of the authorities seems to be that... she (the widow) is... restricted from alienating any immoveable property which she has so inherited, and that on her death the immoveable property and the moveable, if she has not otherwise disposed of it, pass to the next heirs of her husband." 5

Again in Bhugwandeen Doobey v. Myna Baee,[6] their Lordships

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1. No doubt texts in derogation of female rights, and attributed to Manu abound, but it is noteworthy at this stage to refer, also to the authority of Manu to the effect that, "(T)he enumeration of six sorts of woman's property by Manu (...) is intended not as a restriction of a greater number, but as a denial of a less.": Mit., II.XI.4, op. cit. It is also pointed out in the Mit. that, "(T)he text of Nārada, which declares the dependence of women ("A woman has no right to independence."), is not incompatible with their acceptance of property; even admitting their thraldom.": Mit., II.I.25, op. cit.
2. (1886) 11 M.I.A. 139.
3. "In the disposal of property by gifts or otherwise, she is subject to the control of her husband's family, after his decease, and in default of sons.": Cited at Dāya, XI.I.64.
4. Supra, at 222.
5. Mst. Thakoor v. Rai Baluch Ram, cited above, at 175.
6. (1867) 11 M.I.A. 487.

dismissed the argument that, according to the Mitākṣarā property inherited by a widow was her strīdhana by referring to the text of Kātyāyana, and further elaborated:

> "(T)he reasons for the restrictions which the Hindoo law imposes on the widow's dominion over her inheritance from her husband, whether founded on her natural dependence on others, her duty to lead an ascetic life, or on the impolicy of allowing the wealth of one family to pass to another, are as applicable to personal property invested so as to yield an income as they are to land." 1

Decisions such as these settled the issue, and in British India and even thereafter, the "limited" estate - the brain child of the Privy Council - had come to stay, and this despite numerous opinions of pandits learned in the śāstric lore to the contrary. One such particularly illuminating opinion, the Devara-suta-sapatnī-sutā-dhana-vivādah has recently come to light, and is revealing in so far as in dealing with the very general question of the estate which a widow takes in the property left by her divided husband and the connected question, who shall take it on her death, the scholar makes it clear that it was not the smṛti alone to which recourse must be had, but the smṛtis as a whole seen through the eyes of the superior commentators or, as he prefers to call them, "digesters" or codifiers.[2]

Of the many sources on which the author relies, the Mitākṣarā, the Smṛti Chandrikā etc, the most interesting is the little - known Dāya-daśa-ślokī-vyākhyā.[3] Compiled in the early British period, and influenced by Bengali works of dharmaśāstra its probable date is 1796 for that year very closely coincideswith the development of a real need in Madras Presidency for accurate short works on the Hindu law of inheritance.[4]

Our researcher assigns "with great diffidence" and only "tentatively" this opinion to an actual and well-known piece of

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1. Ibid., at 513.
2. Derrett, "The Rights of Inheritance...," op. cit., at 342.
3. For a transliterated version of the Sanskrit text see Derrett, ECMHL, Vol. II op. cit., at 353-83.
4. Derrett, "The Rights of Inheritance...," op. cit., at 347.

litigation, the very long-drawn-out case of Katama Natchier (known as the Shivagunga Case)[1] which involved a dispute between the widows and daughters of the donee of a Zamindari on the one hand, and his nephews on the other. The precise form of the Opinion, relating as it does to a state of facts after the death of the surviving widow which took place in 1849, and the fact that the Opinion was required, and that it was given and set out in the form in which we find it proves that it belongs to the British period in the first half of the 19th century, perhaps 1830-1850.

A work of consummate research and reflection, it also possessed an undoubtedly authoritative character of some kind for the author to have put that very late work first amongst his authorities, though admittedly this may partly be explained by the appropriateness of the text for his purposes.[2] The work starts by caricaturing the point of view of the opponent, who tries to make respectable the doctrine of the "limited estate" and the reversion of the estate through perhaps two female hands to the next heir of the propositus, going too far in that he asserts on this principle that even male heirs must take a limited estate, so that the inheritance will never come to rest, which is a reductio ad absurdum. It proceeds to demonstrate that only if inherited estates of women are taken to be strīdhana, exactly as the Mitākṣarā said, could a whole series of anomalies be avoided, a series arising from a failure of the opponent's theory to accord with actual practice. Having established that the property is strīdhana he proceeds to consider what right the co-wife's daughter would have compared with that of the husband's predeceased brother's son. The texts

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1. (1863) 9 M.I.A. 543.
2. Derrett, "The Rights of Inheritance... op. cit., at 343.
3. Ibid., p. 347.

which point to the latter as a claimant, seeing that the deceased widow is one of his "secondary" mothers are upheld. Texts pointing to the nearer heirs of the husband, in particular a "Brahmin" co-wife's daughter are carefully put to one side, ... Thus, obviating one objection after another, he demonstrates the seemingly paradoxical hypothesis, namely that the co-wife's daughter (who may have been treated as a daughter and was surely the nearest surviving relative of the propositus to whose family the deceased widow herself belonged by her marriage) is to be excluded by the deceased husband's divided brother's son!

As we know, our author's proposition was rejected;the Privy Council view prevailed, and the Madras judiciary with the rest of India were committed to the view that a woman inherited for a limited estate. The Privy Council piled error on error by making the inheritance taken even from a female proposita the subject of the limited estate. (Sheo Shanker v. Debi Sahai).[1] What was once stridhana could never pass as such, from one heir to the next.[2]

That such a state of affairs was never envisaged by the ancient rsis did not unduly perturb the British Indian Bench, and in fact apologists were not slow to reconcile the palpable anomaly by facile and apparently convincing logic. We are told that

> "(I)n assigning a motive for the ordinance that a widow should succeed to her husband, and at the same time that she should be deprived of the advantages enjoyed by a tenant for life even, it seems most consistent with probability that it originated in a desire to secure against all the contigencies, a provision for the helpless widow, and thereby prevent her from having recourse to practices by which the fame and honour of the family might be tarnished. By giving her nominal property, she acquires considerations and responsibility and by making her the depository of the wealth, she is guarded against the neglect and cruelty of her husband's relations. At the same time, by limiting her power, a barrier is raised against the effects of female improvidence and worldly experience. This opinion receives corroboration from the distinction which prevails in the Banares school which may be said to be the fountain and source of all Hindu law." 3

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1. I.L.R. (1903) 25 All. 468.
2. Derrett, "The Rights of Inheritance...," op. cit., at 351-2.
3. W.H. Macnaghten, Principles and Precedents of Hindu Law, Vol. I, (Cal. Baptist Mission Press, 1829) , at 19-20.

It is submitted with the greatest respect for the learned scholar's undoubted erudition that in fact the reverse is true, and such an opinion is in gross violation of the very spirit of the Benares school, which, in the author's own assertion, is "the fountain and source of all Hindu law." What is more, to maintain that, by securing for her the limited estate, provision is thereby made for the hapless widow, her chastity secured, and neglect and cruelty on the part of her husband's relatives debarred, is to attribute to this artificial institution a panoply of merits it hardly deserves. It must be borne in mind that when the widow is not an heir, the humane spirit of the Hindu law allows her an inherent right of maintenance, thereby already protecting her from destitution and its attendant evils, so far as such provision may be effective in the face of temptations that flesh is subject to, and the shortcomings and failures of human nature in general.

8. The Incidents of the Limited Estate as Established by Case-Law

There is a large body of case law which determines the precise nature of the limited estate, and what their Lordships of the Privy Council had to say as early as 1880[1] in regard to it, was reiterated

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1. In Moniram Kolita v. Kerry Kolitany, (1880) L.R. 7 I.A. 115, it was held at 154 that "(T)he whole estate is for the time vested in her absolutely for some purposes, though in some respects for only a qualified interest. Her estate is an anomalous one, and has been compared to that of a tenant-in-tail. It would perhaps be more correct to say that she holds an estate of inheritance to herself and the heirs of her husband.... The succession does not open to the heirs of the husband until the termination of the widow's estate. Upon the termination of the estate, the property descends to those who would have been heirs of the husband if he had lived up to and died at the moment of her death." To the same effect is the observation in Janki Ammal v. Narayanswami, (1916) L.R. 43 I.A. 207 at 209 "(H)er right is of the nature of the right of property; her possession is that of owner: her powers in that character are however limited;..."

by the Supreme Court in 1974:

> "(A) Hindu widow is entitled to the full beneficial enjoyment of the estate. So long as she is not guilty of wilful waste, 1 she is answerable to no one... Within the limits imposed upon her the female holder has the most absolute power of enjoyment and is accountable to no one. She fully represents the estate, and so long as she is alive, no one has any vested interest in the succession... She is in no sense a trustee for those who may come after her. She is not bound to save the income nor to invest the principal. 2 If she accumulated it separately from the estate itself it passed on her death as strīdhana. 3 During her lifetime she represents the whole inheritance and a decision by or against the widow as representing the estate is binding on the reversionary heirs. It is the death of the female owner that opens the inheritance to the reversioners, and the one most nearly related at the time to the last full owner becomes entitled to possession. In her lifetime however the reversionary

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1. Such waste must constitute danger to the corpus: Hurrydoss v. Sreemutty Uppoornah, (1856) 6 M.I.A. 433; Katama Natchiar v. Doraisingha (1875) L.R. 2 I.A. 169; Renuka v. Bhola Nath, 1.L.R. (1915) 37 All. 177; Janaki Ammal v. Narayanswami, cited above; Ramchandra v. Seeniathal, A.I.R. 1954 Mad. 1011. Mere unfounded charges of waste would not entitle the next presumptive reversioner to obtain an injunction to restrain waste: Smt. Lalti v. Hira Lal, A.I.R. 1963 All. 392 following Janaki Ammal v. Narayanswami, cited above. It has also been held that mere alienation is not waste and no injunction can be granted against a limited owner making an unauthorised alienation: Isri Dutt v. Hansbuti, (1884) L.R. 10 I.A. 150; Suraj Narain v. Ram Devi, A.I.R. 1930 Oudh 78; and the actual reversioner may sue the alienee for possession only when the estate has vested in him on the death of the limited owner: Bijoy Gopal v. Krishna, 1.L.R. (1907) 34 Cal. 329; Raghubir Singh v. Jethu, A.I.R. 1923 Pat. 130; Anant v. Ashtabhuja, (1957) 55 All. L.J. 55.

2. Grose v. Amritamayi, (1869) 4 Beng. L.R.1 (O.C.J.); Biswanath v. Khantomani, (1870) 6 Beng. L.R. 747; Sarat Chandra v. Charusila, 1.L.R. (1928) 55 Cal. 918; Kishan Lal v. Muhammad, 1.L.R. (1938) All. 761 (F.B.).

3. Where the widow manifested no intention separately to enjoy the accumulation, the Privy Council held in Nabakishore v. Upendrakishore, A.I.R. 1922 P.C. 39, that, it was incumbent on the strīdhana heirs to prove that she did not intend to merge the accumulations or to allow them to accure to the parent estate. See also Ram v. Krishna, A.I.R. 1939 Pat. 364; Bhagwan v. Bitton, A.I.R. 1945 All. 148. However, the contrary presumption — that the burden of showing that she had merged or blended it with the estate lay on the one who asserted it — was laid down in Venkatadri v. Parthasarathi, A.I.R. 1925 P.C. 105 at 108-9; on appeal from the F.B. decision in Parthasarathy v. Venkatadri, A.I.R. 1922 Mad. 457 (F.B.); Keshav v. Maruti, A.I.R. 1922 Bom. 144; Ayiswaryanandaji v. Sivaji, A.I.R. 1926 Mad. 84; Balasubramanya v. Subbayya, A.I.R. 1938 P.C. 34; Ganu v. Shriram, A.I.R. 1954 Nag. 353; Tustu v. Kali A.I.R. 1957 Cal. 122; and the dicta of the Supreme Court in Sitāji v.

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> right is a mere possibility or spes successionis.[1] It cannot be predicted who would be the nearest reversioner at the time of her death..." [2]

the subsisting reversioner has no transferable interest in the estate - for he may die before the estate falls to the reversion.

Decisions such as these establish that under the Hindu law, a widow takes a special and qualified estate with limited powers of disposition in her husband's estate. In fact it is of the very essence of such estate that her right of alienation over it is limited. So long as the estate endured the female owner could give a good and absolute title to a purchaser for value for a purpose coming within one of the following classes of justification:- (i) for necessity, i.e. her own needs,[3] (ii) for the benefit of the estate, i.e. to prevent its loss,

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Bijendra, A.I.R. 1954 S.C. 601 at 605, points in the same direction. The latter view, it is submitted, is eminently more logical, for as Derrett pinpoints, "If the other view were to be correct, reversioners could question a widow's alienation of accumulations of income from the estate if the alienee were unable to show that she had formed an intention to sever them from the estate prior to the disputed alienation - which can hardly be correct."; IMHL, op. cit., at 429.

1. This was also the Privy Council's ruling in Moniram Kolita v. Kerry Kolitany, (1880) L.R. 7 I.A. 115, at 154 where their Lordships were explicit that,"... whatever her estate is, it is clear that until the termination of it, it is impossible to say who are the persons who will be entitled to succeed as heirs to her husband." To the same effect are the observations in a host of decisions, among them: (Mahadeay Kooer v. Haruk Narain), 1.L.R. (1883) 9 Cal. 244, Anandibai v. Rajaram, 1.L.R (1898) 22 Bom. 984 Venkatanarayan v. Subbammal, (1915) L.R. 42 I.A. 125; Janaki Ammal v. Narayanswami, (1916) L.R. 43 I.A. 207; Amrit Narayan v. Gaya Singh, (1918) L.R. 45 I.A. 35; Rangaswami v. Nachiappa, (1919) L.R. 46 I.A. 72; Gangabai v. Hari Ganesh, 1.L.R. (1921) 45 Bom. 1167; Chhotey Singh v. Surat Singh, 1.L.R. (1930) 5 Luck. 691; Thakur Prasad v. Musammat Dipa Kuer, 1.L.R. (1931) 10 Pat. 352; Ram Krishna v. Kausalya, A.I.R. 1935 Cal. 689; Lakshmi v. Anantharama, A.I.R. 1937 Mad. 699; Subbareddi v. Govindareddi, A.I.R. 1955 A.P. 49.

2. Gurumurthy v. Ayyappa, A.I.R. 1974 S.C. 1702, at 1706.

3. Thus where the income be not sufficient for her maintenance, the alienation of the corpus by the widow has been held to be for legal necessity. See Sadashiv v. Dhakubai, 1.L.R. (1881) 5 Bom. 450; Venkataraju v. Kotayya, (1912) 23 M.L.J. 223; Ramsumran v. Shyam Kumari, A.I.R. 1922 P.C. 356; Darbari Lal v. Gobind, 1.L.R. (1924) 46 All. 822; Rajagopal Achariar v. Sami, A.I.R. 1926 Mad. 517. Legal necessity would also include alienation for pious purposes. Where the recipient of the endowment was a temple, it was held in Kothandaraja v. Piramadesam, (1981) 1 M.L.J. 344 that, notwithstanding the widow's reserving of the right to enjoy the income for her life, it was a present disposition, and being for pious and religious purposes, it was unimpeachable after her death.

destruction, diminution in value (though she was under no positive obligation to save it from ruin);[1] (iii) for the fulfilment of obligations which lay upon the last male holder, for example the duty to give his daughter and his son's daughter in marriage[2] or to pay the deceased husband's untainted debts, even if these had in fact become time-barred,[3] or to perform the funeral and śrāddha ceremonies of the deceased owner.[4]

For purposes such as these she may alienate the entire property if need be. Whether or not a particular alienation falls within such category depends on the merits of each case. All that can be said is that if she can establish that the alienation was made in accordance with such necessity then the alienation would be valid, not in form, perhaps in substance. The only entire safeguard enjoyed by a purchaser against later reversionary claims is that he had made

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1. Hunoomanpersaud's case, (1856) 6 M.I.A. 393; see also Kameswar Pershad v. Run Bahadur, (1882) L.R. 8 I.A.8.

2. Ramcoomar v. Ichamoyi, I.L.R. (1880) 6 Cal. 36; Debi Dayal v. Bhan Pertap, I.L.R. (1904) 31 Cal. 433; Makhan v. Gayan, I.L.R. (1911) 33 All. 255; Ganpat v. Tulsiram, I.L.R. (1912) 36 Bom. 88; Bhagwati v. Ram Jatan, I.L.R. (1923) 45 All. 297; Mahadeo Prasad v. Musammat Dhanraj, I.L.R. (1926) 1 Luck. 477; Kamla v. Bachulal, A.I.R. 1957 S.C. 434. However, the expenses incurred in giving a daughter's daughter in marriage does not come within the same category. Where the widow alienated property to meet the marriage expenses of her daughter's daughter, the M.P. High Court, following Narainbati v. Ramdhari, A.I.R. 1916 Pat. 178, upheld the contention of the next reversioner and laid down that, an alienation made by a widow for the marriage of her grand-daughter (daughter's daughter), cannot be regarded to be for legal necessity, for there is no obligation which the Hindu law imposes on a woman to get such grand-daughter married.: Lachan v. Mst. Fulkunwar, I.L.R. (1959) M.P. 970.

3. Chimnaji v. Dinkar, I.L.R. (1887) 11 Bom. 320; Kondappa v. Subba, I.L.R. (1890) 13 Mad. 189; Santu Ram v. Mt. Dodam Bai, I.L.R. (1928) 9 Lah. 85; Tulshi v. Jugmohanlal, A.I.R. 1934 All. 1048; Chandrika v. Bhagwan, A.I.R. 1940 Oudh 93 at 95; Rattan Devi v. Jagadhar, A.I.R. 1956 Punj. 46.

4. Lakshminarayana v. Dasu, I.L.R. (1888) 11 Mad. 288; Ratanchand v. Javherchand, I.L.R. (1898) 22 Bom. 818; Srimohan v. Brijbehary, I.L.R. (1908) 36 Cal. 753.

sufficient bona fide inquiry into the existence of justification of such alienation, and the burden of proof of justification lies on the alienee.[1] One might suppose that if the purchaser did not make sufficient bona fide inquiry that alone would disqualify him from retaining any interest in the estate after the limited owner's interest dropped. But the courts had to find some place in the scheme for the ancient customary practice whereby the alienations by females were authorised and consented to by near male relations: it was evident that parties relied in some sense upon these authorisations or consents, and this fact had to be harmonized with the equitable principle enunciated in Hunoomanpersaud's case[2] The result was that if the presumptive reversioner gave his consent, the latter was held to raise a presumption(!) that the alienation was justified,[3] and the burden of proof

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1. Hunoomanpersaud's case (1856) 6 M.I.A. 393.

2. Ibid. In this celebrated case the question was as to the extent of the power of the mother as manager of the estate of her minor son to alienate the estate. The Privy Council held at 423-4 that, "(T)he power of the manager for an infant heir to charge an estate not (her) own is under the Hindu law a limited and qualified power. It can only be exercised rightly in case of need or for the benefit of the estate. ... Their Lordships do not think that a bona fide creditor should suffer when he has acted honestly and with due caution but is himself deceived."

3. The notion current at one time was that consent itself validated an alienation and it was therefore not open to any reversioner, whether then in existence or not, and whether he had himself consented to it or not, to question the alienation. See for instance Varjiwan v. Ghelji, I.L.R. (1881) 5 Bom. 563; Bajrangi v. Manokarnika, I.L.R (1908) 30 All. 1; Rangappa v. Kamati, I.L.R. (1908) 31 Mad. 366. The view that consent does not give force per se was first tentatively put forward in Collector of Masulipatam v. Cavaly Venkata, (1860) 8 M.I.A. 529, where it was explained at 551 that, "... it may be taken as established that an alienation by her, (the widow), which will not otherwise be legitimate, may become so if made with the consent of her husband's kindred. But it surely is not the necessary or logical consequence of this latter proposition that, ... the fetter on the widow's power of alienation altogether drops." This attitude was corroborated subsequently in Raj Lukhee v. Gokool Chunder, (1869) 13 M.I.A. 209; Sham Sunder v. Achan Kunwar, (1898) L.R. 25 I.A. 183; Vinayak v. Govind, I.L.R. (1901) 25 Bom. 129; Debi Prosad v. Golap Bhagat, I.L.R. (1913) 40 Cal. 721; Bijoy Gopal v. Girindra Nath, I.L.R. (1914) 41 Cal. 793; Bhup Singh v. Jhamman Singh, I.L.R. (1921) 44 All. 95; Thakur Prasad v. Mst Dipa Kuer, I.L.R (1930)

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would then be placed on the actual reversioner when he came into his inheritance to show that the alienee had not acted bona fide, and that the alienation had in fact been for an improper purpose.[1] Collusion between the female owner and the next reversioner was indirectly encouraged, however.

It must be clearly emphasised at this stage that the limitations imposed on the widow's estate are in theory not imposed upon her for the benefit of reversioners. They are inseparable from her estate, so that even if there be no reversioners she cannot alienate the corpus of the property except for a legal necessity. If she does alienate it without legal necessity, and if there be no reversioners, the alienation may be set aside by the Government taking the property by escheat.[2]

Within the limits imposed upon her by law, the widow has the most absolute powers of enjoyment.[3] She can sell her life interest in the property, or mortgage it or make a gift of it to anyone she likes. She is entitled to the whole income of the property.[4] She may spend the income in any way she likes. She is not bound to pay her husband's debt out of such income, nor is she bound to maintain the members of

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10 Pat. 352. However the most authoritative pronouncement is that of the Privy Council in Rangaswami v. Nachiappa, (1919) L.R. 46 I.A. 72, Lord Dunedin stating at 81-2 that, "(C)onsent does not give force per se but is of evidential value — evidence that the alienation was under circumstances which rendered it lawful and valid."

1. Derrett, IMHL, op. cit., at 432. See also, Hunoomanpersaud's case, (1856) 6 M.I.A. 393; Cavaly Vencata v. Collector of Masulipatam, (1867) 11 M.I.A. 619; Rao Karun v. Nawab Mohamed, (1871) 14 M.I.A. 187; Lala Amarnath v. Achan Kuar, (1892) L.R. 19 I.A. 196; Ram Nayak v. Mst. Rup Kali, A.I.R. 1934 All. 557.

2. Collector of Masulipatam v. Cavaly Vencata, cited above.

3. Vasonji v. Chanda Bibi, A.I.R. 1915 P.C. 18. See also Gurumurthy v. Ayyappa, A.I.R. 1974 S.C. 1702.

4. Hurrydoss v. Uppoornah, (1856) 6 M.I.A. 433.

her husband's family or perform their marriage ceremonies out of the income. She can throw the burden of all these charges on the corpus of the property, and sell or mortgage the same to meet those expenses, such expenses being regarded in law as legal necessities.[1] If the income from the estate is insufficient for her own maintenance she is entitled to alienate the corpus by way of sale or mortgage.[2]

Similarly her powers of management over the property are unlimited in so far as she is entitled to manage it as any prudent owner of property, and like the manager of a family, must be allowed reasonable latitude in the exercise of her powers.[3] She fully represents the estate[4] for the time being, and this being so, she must in the nature of the circumstances, enter into transactions from time to time for the proper management of the estate. She may for instance incur debt for lawful purposes, or enter into transactions giving rise to pecuniary liabilities in respect of which she could validly create a charge upon the estate, and such debt or charge would be binding on the estate even in the hands of the reversioners.[5] A compromise[6] entered

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1. Devi Dayal v. Bhan Pertap, I.L.R. (1904) 31 Cal 433.
2. Ramsumran v. Shyam Kumari, A.I.R. 1922 P.C. 356. In Rangamma v. Chinnabbayi (1956)2 An.W.R 202, it was further held that when a widow succeeded to the separate property of her deceased husband who died a member of a joint-family, she could also claim maintenance from the income to the joint-family property in the hands of the husband's coparceners. She being in possession of her husband's separate property, she is bound to pay herself the pro rata maintenance exigible from the property and her claim would stand discharged to that extent. As a consequence, her husband's share in the joint estate in the hands of the surviving coparceners would be liable only for the balance of the maintenance.
3. Hunoomanpersaud's case, (1856) 6 M.I.A. 393; see also Venkaji v. Vishnu, I.L.R. (1894) 18 Bom. 534 at 536.
4. Radharani v. Brindarani, A.I.R. 1936 Cal. 392; Viraraju v. Venkataratnam, A.I.R. 1939 Mad. 98.
5. Bisheshwar Baksh v. Jang Bahadur, A.I.R. 1930 Oudh. 225.
6. Such compromise may be by way of a family arrangement which is an agreement between members of the same family intended to be

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into bona fide for the benefit of the estate is binding upon the reversioner if prudent and reasonable under the circumstances of the case.[1] An alienation which is the result of a compromise, will, if it be reasonable and prudent, fall within the power of the holder of the Hindu woman's estate, either as being an alienation which is to be deemed to be induced by necessity, or as being in a parallel position to an alienation induced by necessity.[2]

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generally and reasonably for the benefit of the family either by compromising doubtful and disputed rights, or by preserving the family property, or the peace and security of the family by avoiding litigation or by saving its honour. : Halsbury's Laws of England, Vol. 18, 4th ed., (Lond, Butterworths, 1979), at 135.

1. Khunni Lal v. Gobind Krishna, I.L.R. (1911) 33 All. 356; Hiran Bibi v. Sohan Bibi, (1914) 18 C.W.N. 929; Mohendranath v. Shamsunissa, (1914) 19 C.W.N. 1280; Bahadur Singh v. Ram Bahadur, I.L.R. (1923) 45 All. 277; Ramsumram Prasad v. Shyam Kumari, A.I.R. 1922 P.C. 356; Mata Prasad v. Nageshwar, A.I.R. 1925 P.C. 272; Sidh Gopal v. Behari Lal, A.I.R. 1928 All. 65; Raoji v. Kunjalal, A.I.R. 1930 P.C. 163; Joti Prasad v. Bahal Singh, I.L.R. (1946) All. 1.

2. Ramsumram Prasad v. Shyam Kumari, cited above; Babulal v. Maniklal, A.I.R. 1941 Nag. 79. However, there were not infrequent instances where, anxious to anticipate, the reversioner often came to terms with the widow. If he had not done so, the next reversioner might have survived him and come into the inheritance. By such an arrangement the widow too stood to gain, for it meant an enlargement of her interest from a limited to an absolute interest over that part of the property which fell to her as her share under such an arrangement. Only overtly intended to preserve the estate from ruinous litigation the equitable organ of the Family Arrangement thus became the means whereby Equity is called upon to endorse a fraud.: J.D.M. Derrett, "Family Arrangements in Developing Countries", "Family Law in Asia and Africa, op. cit., 156-181, at 168-9. However judicial decisions amply testify that as early as 1883 and 1884, the Judiciary could gauge with precision and exactness, how Equity was being prayed in aid for the practice of fraud, and held in unambiguous language that equitable principles may not override the personal law. Thus in Ramphal Rai v. Tula Kuari, I.L.R. (1883) 6 All. 116 (F.B.), the ruling was to the effect that there is nothing in the Hindu law to sanction the view that a Hindu widow possessed of limited rights, may by uniting with one of many others having identical interests in expectancy on the happening of a certain event, anticipate that event and convert such individual expectancy into an immediate absolute estate of full proprietorship. For, if this were possible, it would virtually confer upon a Hindu widow the right of directing the succession to her husband's property in her lifetime, when in law it is only upon her death. Similarly the fraud inherent in such arrangements was sharply pin-pointed in Nobokishore v. Hari Nath, I.L.R. (1884) 10 Cal. 1102 (F.B.), where Garth, C.J., in exposing the iniquitous designs associated with such

9. The Termination of the Limited Estate

As we have already noted earlier, the limited estate endures till the death of the widow after which it passes on, not to her heir but to the next heir of her husband, i.e. the nearest reversioner. However even during her lifetime contingencies may occur resulting in the termination of such estate. Where a posthumous son is born, or where the widow herself, or the widow of a predeceased coparcener adopts, or where she remarries, she is divested of such estate.

In addition to these, the widow's estate may also terminate by reason of the device of surrender, e.g., withdrawal from worldly affairs resulting in civil "death".[1] She accelerated, independently of any volition of the next reversioner,[2] the opening of the

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fraudulent practices pointed out that it often happens that a widow who is anxious to turn her husband's estate into money may arrange with the next heir of her husband for the time being to alienate the estate to some third person for their mutual benefit, and thereby deprive the next male heir of the deceased husband at the time of the widow's death. Such clear-sightedness, it is submitted, is laudatory, not only in the exposition of the law, but also in view of the fact that if the family arrangement is an organ of Equity for the general benefit of all concerned, it is but fair that it should not be misused for fraudulent purposes, and equally that equitable principles should be applied so as to protect the rights of those who might otherwise be defrauded. For decisions, where the family arrangement was held not binding on those whose claims arose on the expiry of the widow's limited estate, see Sheo Narain Singh v. Khurgo Koerry, (1882) 10 C.L.R. 337; Ram Sarup v. Ram Dei, I.L.R. (1907) 29 All. 239; Sashi Kanta v. Promode Chandra, A.I.R. 1932 Cal. 600; Angumuthu v. Sinnapennamal A.I.R. 1938 Mad. 364; Seetharamma v. Patta Reddi, A.I.R. 1940 Mad. 739; Ekkari v. Chitrarekha, A.I.R. 1958 Cal. 447.

1. Rangaswami v. Nachiappa, (1919) L.R. 46 I.A. 72; Santi Kumar v. Mukanda Lal, (1934) 39 C.W.N. 226, Kamlabai v. Sheo, A.I.R. 1958 S.C. 914.

2. Kamlabai v. Sheo, cited above. Of course, in fact she often "did a deal" with him and thus cheated the remainder of the reversion, and the Courts recognising this have held that the surrender must be a bona fide surrender, and not a device to divide the estate with the reversioner. See Behari Lal v. Madho Lal, I.L.R. (1891-2) 19 Cal 236; Rangappa v. Kamti, I.L.R. (1908) 31 Mad. 366; Thakur Prasad v. Mt. Dipa Kuer, A.I.R. 1931 Pat. 442; Ramayya v. Lakshmayya, I.L.R. (1943) Mad. 1 (P.C.); Ashalata v. Amiya Kumar, A.I.R. 1958 Cal. 71.

succession to that next heir. A surrender to be valid must be of the entire estate for there cannot be a widow who is partly effaced and partly not so.[1] Likewise a conditional surrender was impossible. A surrender arranged upon terms that parts of the estate were to pass to nominees of the limited owner were invalid as mere devices to divide the estate between the limited owner and the presumptive reversioner, to defraud the reversion as a whole.[2] Even when the surrender is not a device to divide the estate, but is one where the widow surrenders to her own nominee with the express consent of the presumptive reversioner, such surrender would be invalid: it would be tantamount to a gift unauthorised by law in which the consent of the presumptive reversioner would not preclude the impeaching of the transaction by the actual reversioner.[3]

10. The Abolition of the Limited Estate

The statutory demise of the limited estate was effected on 17 June, 1956, when the Legislature in pursuance of the express aim of the Constitution to accord equality of status and of opportunity to all[4] in

1. Rangaswami v. Nachiappa, (1919) L.R. 46 I.A. 72, at 80.

2. Krishnamurthi v. Seshayya, (1944) 1 M.L.J. 443. Mummareddi v. Durairaja, A.I.R. 1952 S.C. 109; Abbireddigari v. Atla, A.I.R. 1955 A.P. 232 (F.B.). In view of decisions such as these, the ruling in Challa v. Palury, I.L.R. (1908) 31 Mad. 446, that the validity of the widow's renunciation is independent of the validity of the agreement between her and the surrenderee as to the subsequent disposal of part of that property to a nominee of the widow, cannot be regarded as good law.

3. Derrett, IMHL, op. cit., at 442. See Manju Lal v. Jagnandan, A.I.R. 1953 All. 78, where a composite deed of surrender and gift of the entire property was executed by the widow to the nearest reversioner which was then gifted to the widow's nominee. The court rightly held that the second joint gift clearly indicated that the alleged surrender was not genuinely contemplated, but was merely a cloak considered necessary to validate the transfer of property to one in whom the widow was interested. It is however submitted that had the surrender and the gift not formed a composite deed, and the surrender followed by the gift, the validity of the gift could not be impeached, for the presumptive reversioner would be master of the estate after a valid surrender. The S.C. confirms this in Mummareddi v. Durairaja, A.I.R. 1952 S.C. 109.

4. Preamble.

the Sovereign Democratic Republic of India,[1] and in partial fulfilment of the promise of a uniform civil code in Article 44, enacted the HSA, 1956, s. 14 (1) of which proclaimed in ringing tones that "any" property in the female Hindu's possession, and whether acquired by her before or after the Act, would henceforth be her absolute property, free from the restrictions on her right of ownership which the traditional law — reinforced by judicial interpretation — had imposed upon her.

However, that is not to say that the problem was immediately resolved. The words "restricted estate" in sub-s. (2) of s. 14 came into play, and at one time there was a considerable body of opinion — in Madras in particular which, in any case, "has a record of ingenious constructions to women's disadvantage",[2] and its satellite State, Andhra Pradesh — where the view prevailed that a right to maintenance is not by itself a right to property, and as such, if any rights in the property of her husband, or in the joint-family property are acquired by a Hindu woman in lieu of her maintenance, she obtains property for the first time, and notwithstanding the fact that property is transferred to her in lieu of a pre-existing right, if the document under which she acquires the right restricts the estate which she would otherwise get under the Hindu law, she would get a "restricted estate" within the meaning of s. 14 (2). On the other hand, if the transfer is only in lieu of a pre-existing right of maintenance, and the terms and conditions imposed are consistent with that, she would get an absolute estate under s. 14 (1)[3]. In other words, this view, it is submitted,

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1. Ibid. It is to be noted that since 1950, and as a result of the amendment of 1976, the Preamble proclaims India to be a Sovereign Socialist Secular Democratic Republic.

2. J.D.M. Derrett, "S. 14 of the HSA: A Gratifying About-Face in Madras," (1976) . S.C. (J), 51-53, at 52.

3. Gopisetti v. Subbarayudu, (1968) 2 An.W.R. 455, at 468.

rests upon two false assumptions:(1) a right to be maintained is not a right to property, (2) the only estate to be up-graded to an absolute estate ("as full owner") by s. 14 (1) is the Hindu Woman's Estate, whereas if the estate sought to be enlarged is any other kind of estate short of full ownership capable of being called "restricted estate" in s. 14 (2), that estate remains subject to its restrictions and is not enlarged.[1]

It is submitted that the error in these assumptions lies in that the courts believed that the test, whether an estate is enlarged from a nominal restricted estate into an absolute estate, was not whether the woman acquired, contractually or consensually, the estate under the disposition relied upon, but whether the limitation chosen by the opposite parties was the old limited estate of Hindu females, or some other restriction incompatible with that. They implied that the limited estate stricto sensu was removed in favour of an absolute estate; but that only restricted estates, being restrictions unknown to the previous law would bring the matter within s. 14 (2).[2]

However, that such a technical construction of the expressions "limited owner" and "restricted estate" cannot possibly be warranted was not long thereafter evident in Madras itself in Muthu Bhattar v. Chokku Bhattar,[3] where his Lordship, Rao, J., felt himself unable to agree with the view that, unless the prior estate held by the female is either a limited estate or widow's estate within the meaning of the orthodox Hindu law, there cannot be an automatic enlargement of that estate by reason of s. 14 (1).[4]

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1. Derrett, "S. 14 of the HSA: A Gratifying... op. cit., at 52.
2. Derrett, "S. 14 of the HSA: "A Disturbing...," op. cit., at 68.
3. A.I.R. 1976 Mad. 8.
4. Ibid., at 13.

This, it is submitted, is the correct view, for if we keep in mind that sub-s. (2) of s. 14 is in the nature of an exception engrafted upon sub-s. (1), so as not to give the edge to women over men, then the true position must be this: where the female has a subsisting right in the property at the time when that grant is made to her in recognition of this right or otherwise, then the grant — despite any restrictions in it — must be construed as if it conveyed an absolute estate. But where at the time the grant is made she had no right in the estate, and she is given a limited or other restricted estate, the grant must be upheld and the restriction will stand.[1]

The Supreme Court in arriving at a similar construction of the two sub-sections in Tulasamma v. Sesha Reddi,[2] has now set the seal of its approval on this view,[3] and the death - knell of the limited estate finally sounded, it is to be hoped. That this happened as late as 1977, is indicative that the "limited" estate was indeed unconscionably long a-dying".[4]

11. An Overall View of the Limited Estate

At this stage in our assessement of the limited estate and the incidents attendant upon it, it would not be out of place to examine the degree of benefit that it actually conferred upon the female Hindu. Without digressing into undue repetition, it is clear that for all its apparent advantages, the limited estate is the assertion of man's superiority over woman, and a vindication of the obsolete notion of

1. Derrett, "S. 14 of the HSA, A Disturbing...," op. cit., at 67. Fazal Ali, J., confirms this in Tulasamma v. Sesha Reddi, A.I.R. 1977 S.C. 1944, at 1978.
2. A.I.R. 1977 S.C. 1944.
3. For a full discussion of decided cases taking one or the other view, see below at Chapter Six.
4. The dying apology of England's "Merry Monarch", Charles II.

the theory of her perpetual tutelage. What was once undoubtedly — at least in many communities in Central India and the Deccan —her stridhana to do with as she pleased, was effectively reduced to an obstructed heritage which, among other disqualifications, totally prevented her from ever becoming a fresh stock of descent. Arguments to the effect that a female's lack of experience, —repeated ad nauseam to justify the limitations imposed on her — specious and hackneyed to say the least, may be summarily dismissed.[1] The same could well apply to an improvident and feckless male heir, and in any case, the restrictions on alienations inherent in the estate that a male takes, could well have governed the female estate as well.[2]

One submits that the limited estate is, in the ultimate analysis, a contrived device to keep intact the patriarchal power and strength of the joint-family, and the august body of the Privy Council more than anything or anybody else, was instrumental in perpetrating an unfair system of female inheritance out of tune with the precepts of the sages of old, without any proof that such precepts had become obsolete.[3]

To the question as to why the Judicial Committee so insistently denied to the female Hindu the latitude that her own law so obviously gave her, the tentative submission is that, their

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1. That such arguments no longer have any relevance and must be rejected out of hand, not only because women are no longer fit objects of perpetual tutelage, but more importantly, because unless they are given responsibility they will never grow up emotionally or otherwise, and will never achieve the equality which some individual women have shown is potentially their due, is Derrett's perceptive comment in a rejection of the limited estate. See his "S. 14 (2) of the HSA: A Disturbing ...," op. cit., at 63.

2. For those readers whose interest might perhaps have been stimulated for a further insight into the doctrine of the "limited estate", and the undesirable consequences which flow from it in areas other than female property rights, attention is drawn to K.B. Gajendragadkar, "Limited Estate", A.I.R. 1942 (J), 46-8, a brief but telling indictment of an institution which Anglo-Hindu Jurisprudence had the dubious distinction of claiming as peculiarly its own.

3. See Rungamma v. Atchama, (1846) 4 M.I.A. 1, at 97-8, for a candid admission that their Lordships were indeed treading upon unfamiliar territory, and therefore bound to be out of their depth in administering the Hindu law.

Lordships of the Privy Council, (unaware that testamentary settlements were rare in peninsular India),[1] were conceivably influenced by the prevailing traditional pattern in their own country,[2] and therefore insensitive to a system more liberal and just.

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1. To the inquiring mind which may well wonder as to this lack of awareness on their Lordships' part when they undertook selves the cumbersome task of administering the law in so vast and diverse a country as the Indian subcontinent, this may well provide an area for further fascinating investigation.

2. "By the rules of common law, husband and wife were regarded as one person in that, during the marriage, the wife's legal existence was treated as incorporated or merged into that of the husband, and from this it followed that, in general a married woman was incapable of acquiring, enjoying or alienating, independently of her husband, any real or personal property.": Halsbury's Laws of England, Vol. 22, op. cit., at 628. And as late as the nineteenth century, the courts in England still denied the married woman a separate legal entity. Thus: "The husband may forfeit or dispose of the interest (his wife's) during her life.": Moody v. Matthews, (1802) 7 Ves. 174, at 183. Similarly it was held in Robertson v. Norris, (1848) 11 Q.B. 916, that by virtue of the marriage, the husband acquired at common law a freehold interest during the joint lives of himself and his wife in all estates of inheritance and life estates of which she was seised during the time of the marriage, or of which she became seised during the marriage. So too in Walrond v. Goldmann, (1885) 16 Q.B.D. 121, it was laid down that personal chattels and money belonging to the wife at the time of the marriage or acquired by her during it, vested in the husband absolutely and could be disposed by him accordingly; the wife on the other hand, could not dispose of them except by his assent, unless, before marriage, he had by deed renounced his marital right. In regard to the wife's lack of testamentary capacity, see Dye v. Dye (1884) 13 Q.B.D. 147 (C.A.) at 156: "... by the Statute of Wills of Henry VIII, married women are declared incapable of devising lands, and no difference has been made in this branch of the law by the statute of the Queen relative to wills. A feme coverte has, properly speaking, no testamentary capacity," and again at 157: "The effect of marriage on a woman is or was to give certain rights to the husband over her property, and to suspend during coverture the testamentary capacity which she previously possessed." The first statutory change to better her lot was made in 1857, but it was only after the passing of the Married Women's Property Act 1882, that under s. 1 (1), a married woman was capable of acquiring, holding and disposing by will or otherwise of any real or personal property as her separate property as if she were feme sole without the intervention of any trustee.. Four other Married Women's Property Acts - those of 1884, 1893, 1907, and 1908 — were passed to clear up a number of difficulties and ambiguities in the Act of 1882, but affecting no change of the principle embodied in the latter. By extending the equitable principle of the separate estate, the Married Women's Property Acts replaced the total incapacity of a married woman to hold property at common law by a rigid doctrine of separate property. In the well-known words of Dicey, "(t)he rules of equity, framed for the daughters of the rich, have at last been extended to the daughters of the poor.": P.M. Bromley, Family Law, 6th ed., (Lond., Butterworths, 1981), at 418.

CHAPTER FOUR

THE WIDOW'S RIGHT OF MAINTENANCE AT ANGLO HINDU LAW

"And that's the way I get my bread —
A trifle if you please."
Lewis Carroll
From Through the Looking Glass

1. Introduction

The rule of maintenance in the traditional Hindu law was a process of development from a situation in which women were denied all proprietary rights to the recognition of strīdhana as an accepted institution and its incorporation in the smṛti texts as a personal right. While the right of inheritance took a more convoluted turn, what is clearly noticeable at some stage is that, the patriarchal system having given way to the notion of the undivided family, it then became incumbent that strictures against individual enjoyment of the common property become its most characteristic feature.

We have already noted that the widow's right to inherit, in the absence of male issue, the separate property of her deceased husband in the Mitākṣarā school, and her claim to his separate property as well as to his interest in the ancestral estate under the Dāyabhāga system, was not inheritance in the modern sense of that term; it was, in effect, a means of protecting the property from dissipation, of securing it for the enjoyment of the male members after her death. Likewise, though the ancient lawgivers are insistent that where she is not an heir, the widow, if not unchaste, has an absolute right of maintenance from such property,[1] it is nevertheless submitted that the duty

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1. "It is a matter of special note that on the subject of maintenance there is singularly little difference between the Mitākṣarā and the Dāyabhāga schools." : S.V.Gupte, Hindu Law in British India, 2nd ed., (Bom., Tripathi, 1947), 1056.

that both the schools imposed upon a Hindu towards his dependants was arguably a duty as much for the preservation of the family property as for the welfare of the dependant, and the grant of maintenance — (of bilateral significance, for the intending alienor and his co-heirs mutually benefit from it) — essentially a device to achieve just such a purpose.

It may well be argued that if the widow was denied such individual enjoyment, the male members were similarly bound. However, it has to be borne in mind that their common right to maintenance apart, the coparceners had besides, certain inherent rights in the joint-family property that were altogether denied to the widow, for as the Privy Council put it:

> "(I)n an ordinary joint-family ruled by the Mitakṣarā law, the junior members down to three generations from the head of the family have a coparcenary interest accruing by birth in the ancestral property; (that) this coparcenary carries with it the inchoate right to raise an action of partition,[1] and until partition is de facto accomplished, these same persons have a right to maintenance,..."[2]

and since

> "(t)hose who are entitled to share in the bulk of the property are entitled to have their necessary expenses paid out of its income,"[3]

it follows that the right to maintenance, so far as founded on, and inseparable from, the right of coparcenary, begins where coparcenary begins and ceases where coparcenary ceases.[4]

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1. Female sharers were, however, not entitled to initiate a partition, and their rights to a share arose for the first time when the coparceners separated the property by metes and bounds. : Derrett, IMHL, op. cit., at 324, and confirmed in Pratapmull v. Dhanbati, A.I.R. 1936 P.C. 20, discussed below.
2. Rama Rao v. Raja of Pittapur, A.I.R. 1918 P.C. 81, at 82.
3. Mayne, op.cit., at 813.
4. Ibid.

Undoubtedly not all male members are so entitled. Mention must be made of a special category of persons within the joint-family who are prima facie entitled, but are (statute apart)[1] debarred from inheritance on account of personal disqualification; however, by virtue of the fact that they are members of the joint-family they are entitled to maintenance. Numerous smrtis make this patently clear. Thus Yājñavalkya:

> "(A)n impotent person, an outcaste and his issue, one lame, a madman, an idiot, a blind person, and a person afflicted with an incurable disease (as well as others similarly disqualified) must be maintained, excluding them, however, from participation." [2]

The widow is similarly excluded from "participation", seemingly by inferiority of sex. Equally the subject of special texts, she too has a right of maintenance with this difference, however, that, while the disqualified coparcener's right is dependent upon the possession of property, and in respect of which he is still entitled to become sole surviving coparcener[3] and to enjoy full coparcenary rights,

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1. The first of these was the Hindu Inheritance (Removal of Disabilities) Act, 1928, s. 2 of which lays down in regard to the Mitākṣarā coparcener that "Notwithstanding any rule of Hindu Law or custom to the contrary, no person governed by the Hindu Law, other than a person who is or has been from birth a lunatic or an idiot, shall be excluded from inheritance, or from any right to a share in joint-family property by reason only of any disease, deformity, or physical or mental defect." However, s. 28 of the HSA, 1956, extends its provisions to include male members of both the Mitākṣarā and the Dāyabhāga systems and in laying down that, "No person shall be disqualified from succeeding to any property on the ground of any disease defect or deformity, or save as provided in this Act, on any other ground whatsoever," does away altogether with the traditional notions of physical disqualifications.

2. Mit. II. X. 1, op.cit.; Dāya. V. 10, op.cit.

3. In Amirthammal v. Vallimayal, A.I.R. 1942 Mad. 693, it was laid down that the fact that the ancient texts recognise that the son of a disqualified coparcener has the right to share in the family estate, is itself indicative that he is a member of the coparcenary. Likewise, the same High Court held in Kesava v. Govinda, A.I.R. 1946 Mad. 287, that if a disqualified person is a member of the coparcenary, it would be unjust to hold that he is disqualified from enjoying the estate when he happens to be the sole surviving member of the family.

including the right to alienate undivided property, short of actual institution of partition, which right itself remains in abeyance until cure,[1] the widow's claim is not an obviously proprietary right, and derives from personal relationship.

Thus in conformity with a verse quoted in Medhātithi on Manu, III. 72 and IV. 251, and by the Mitākṣarā on Yāj. I. 224 and II. 175, and occurring in some manuscripts of the Manusmṛti after XI. 10, which provides that

> "(M)anu declares that one must maintain one's aged parents, a virtuous wife, and minor sons by doing even a hundred bad acts," [2]

under the Hindu law the maintenance of a wife by her husband is a matter of personal obligation arising from the very existence of the relationship and quite independent of the possession by the husband of any property, ancestral or self-acquired.[3]

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1. Derrett, IMHL, op.cit., at 251. See Krishna v. Sami, I.L.R. (1886) 9 Mad 64, (F.B.), which confirms this view in holding that the right of a disqualified member to maintenance is clearly related to his interest in the family property, and immediately on cessation of the disqualification, he becomes a fully-fledged member, entitled to full participation and to demand partition. More recently this position was endorsed by the Supreme Court in Kamalammal v. Venkatalakshmi, A.I.R. 1965 S.C. 1349, at 1358.

2. Kane, H.D. Vol. III, op.cit., at 803. This text of Manu is the authority on which their Lordships of the Full Bench relied in Savitribai v. Luximibai, I.L.R. (1878) 2 Bom. 573 (F.B.), to lay down the rule that, while in certain relationships, independently of the possession of property, maintenance is a legal and imperative obligation, in others it is merely a moral and optional duty.

3. Jayanti v. Alamelu, I.L.R. (1904) 27 Mad. 45, at 48, quoted with approval in numerous decisions. This rule applies equally to the obligation of the sons to maintain their widowed mother. In Satyanarayanmurthy v. Ram Subbamma, A.I.R. 1964 A.P. 105, the Court negatived the son's contention that, as he had separated from his father as far back as 1922, the obligation to maintain the mother fell solely on the younger brother who was born after the partition and had lived in coparcenary with the father and succeeded by survivorship to his estate, his Lordship, Ekbote, J., holding that, as the sons' liability to maintain their aged mother is a matter of personal obligation irrespective of the possession of ancestral property, where the income from the share of the husband in the hands of the surviving coparcener

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With her change of status from wife to widow, it is not to her own family of birth that the female must turn for support and maintenance, for the family being the cherished institution of the Hindus,[1] a woman on her marriage leaves her own gotra (i.e. paternal agnatic lineage), of birth to enter that of her husband's, and as herclosest connection thenceforward is with his family,

> "(I)t is upon that family that as a widow she has a claim to maintenance. It is in that family that in the strict contemplation of the law she ought to reside."[2]

It is thus settled law according to all the authorities that the widow's burden of maintenance falls upon those who take her husband's estate as heirs or by operation of the principle of survivorship in the coparcenary. So Yājñavalkya:

> "(A)nd their childless wives conducting themselves aright must be supported, but such as are unchaste should be expelled,..."[3]

and likewise Nārada:

> "(T)hey shall make provision for his women till they die, in case they remain faithful to the bed of their husband. Should the women not (remain chaste) they must cut off that allowance."[4]

2. The Nature of the Right of Maintenance

(1) The Notion That It is Not a Proprietary Right

Despite the sacramental nature of the Hindu marriage and its concept as

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(continued from previous page)

is not adequate to maintain her, the deficiency should be contributed by all the sons equally independently of their possession or not of coparcenary property. Mark, however, that this liability of the sons does not extend to the stepmother.

1. Bhyah Ram v. Bhyah Ugar, (1879) 3 M.I.A. 373, at 391.
2. Virada Pratapa v. Brozo Kishoro, I.L.R. (1876) 1 Mad. 69, at 81. See also Khetramani Dassi v. Kashinath Das, (1869) 2 Beng. L.R. 15 (F.B.) A.C.J., at 20.
3. Mit. II. I. 13, op.cit.; Dāya. V. 19, op.cit.
4. Nār. XIII. 26, op.cit.

> "(a) union of flesh with flesh, bone with bone and marrow with marrow, so as to constitute the husband and wife as one body, the right half representing the husband and the left half the wife,"[1]

a sizeable number of decisions take the view that, however imperative the nature of the right of maintenance may be, it is a purely personal right and not to be equated with a right to property. There are early indications of this view in Bhyrub Chunder v. Nubu Chunder,[2] where in answer to the strange contention that the property liable for the widow's maintenance in the hands of the son, might be sold in execution of a decree against her, the Court was at pains to underscore that the right of maintenance being a purely personal right, the lady had no right, title or interest in such peoperty so as to make it transferable to another in execution proceedings.[3]

It has similarly been suggested in the important Privy Council ruling in Pratapmull v. Dhanbati,[4] that it was really the widowed mother's right to be maintained which served as a reason why her ownership to a share accrued to her for the first time on a partition of the

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1. Per Iyengar, J., Ananthanarayana v. Sharadamma, (1943) 2 Mys. L.J. 237, at 241.

2. (1884) 5 W.R. 111.

3. Followed in Muthalammal v. Veeraghavalu, A.I.R. 1953 Mad. 202, where it was similarly held that, as the widow's right of maintenance against her husband's property is a personal claim, it is not capable of being transferred or assigned to her legal representative at her death during the pendency of the suit. See also Moniram Kolita v. Kerry Kolitani, (1880) L.R. 7 I.A. 115 at 151 , where Sir Barnes Peacock in drawing a distinction between Nārada's injunction in regard to maintenance (supra, at 270), and that of Kātyāyana's in regard to inheritance, (supra, at 222), remarked obiter, that, "the right to receive maintenance is very different from a vested interest in property,...," — a view that was to endure right down the years, and endorsed in a large body of case-law even after 1956, to distinguish between the widow's entitlement to property under the HWRPA, 1937, and the estate she held in lieu of her maintenance, so as to cut down the latter right and thus exclude the female from the enabling provisions of s. 14 (1) of the HSA, 1956.

4. A.I.R. 1936 P.C. 20.

family property by metes and bounds, and not (as the law then stood) earlier; as the mother or grandmother can never be recognised as the owner of a share until the division has actually been made,

> "(S)he has no pre-existing vested right in the estate except the right of maintenance. She may acquire the property by partition ... (B)ut partition in her case is the sole cause of her right to the property. It follows, therefore, that the effect cannot precede the cause."[1]

Thus as the share allotted to the wife or mother on partition does not become her stridhana so as to pass to her stridhana heirs at her death, but must revert back to the sons or their heirs,[2] this possession in lieu of maintenance is not a right of property as such, but the holding of the property for her lifetime for precisely the purpose for which it was in the first instance allotted to her.[3]

This view of maintenance as a purely personal right was to have far-reaching repercussions after the commencement of the HSA in 1956, for in determining the question of crucial importance as to whether property

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1. Per Mitter, J., Sheo Dayal v. Judoonath, (1868) 9 W.R. 61, at 62. For similar rulings see also Puddum Mookhee v. Rayee Monee, (1884) 12 W.R. 409; Sorolah v. Bhoobun, I.L.R. (1888) 15 Cal. 292; Srimati Hemangani Dasi v. Kedarnath Choudhary, (1889) L.R. 16 I.A. 115 (P.C.); Hridoy Kant v. Behari Lal, (1907) 11 C.W.N. 239; Sashi Bhusan v. Hari Narayan, A.I.R. 1921 Cal. 202; Hira Lal v. Sankar Lal, A.I.R. 1939 Cal 116. On the same basis it was held in Indu Bhusan Chatterjee v. Mrityunjoy Pal, I.L.R. (1946) 1 Cal. 128, that where the mother had already inherited the share of her deceased son which was sufficient for her maintenance, she was not entitled to a further share at a subsequent partition of the joint-family property. However, this view was not to gain ascendency and was over-ruled by a Special Bench of the same High Court in Milan Kumar Das v. Purnasashi Dassi, A.I.R. 1974 Cal. 380, supra, at 227.

2. Debi Mangal Prasad v. Mahadeo Prasad, (1912) L.R. 39 I.A. 121.

3. However, with the coming into force of the HSA, 1956, and the recognition in Munnalal v. Raj Kumar, A.I.R. 1962 S.C. 1493, (infra, at 543-547), that the share allotted to a female in even a preliminary decree for partition is property possessed by her within the meaning of s. 14 (1), and the specific over-ruling by the Supreme Court of dicta to the contrary in Pratapmull's case, A.I.R. 1936 P.C. 20, this view must now be held to have been abrogated.

held in lieu of maintenance is "property" within the meaning of s. 14 (1), the crux was the nature of such right in the Hindu law. A school of thought adhered — despite contemporaneous decisions to the contrary — to the notion that the right of maintenance not being a right over property, it was incapable of attracting the provisions of the sub-s.

In Gurunadham v. Navaneethamma,[1] for instance, the Court took the view that where the female's husband had died prior to the enactment of the HWRPA, her right to be maintained from out of the family properties was an indefinite right which

> "(b)y itself does not confer on her any possessory lien or proprietary right or title in the property of the family."[2]

The reinforcement of this latter view in Gopisetti Kondiah v. Gunda Subbarayudu,[3] and the assertion in it that,

> "(t)he pre-existing right of (a) Hindu female ... is in respect of property to which she would, under the Hindu law, obtain a limited estate," 4

was reiterated in Basdeo v. Director of Consolidation, U.P.,[5] and the view of maintenance as a right capable of a being proprietary right in the hands of the maintenance holder, on the analogy of the limited estate, negatived.[6]

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1. A.I.R. 1967 Mad. 429, infra, at 580.
2. Per Natesan, J., ibid., at 430.
3. (1968) 2 An. W.R. 455, at 460. See also Narayan Patra v. Tara Patra, A.I.R. 1970 Or. 131, at 134.
4. Per Reddy, C.J., (Gopisetti's case, cited above) at 462.
5. (1969) 67 All. L.J. 1027.
6. For similar rulings see also Dharma Udayar v. Ramchandra, (1969) 1 M.L.J. 181; Bindroo v. Munshi, A.I.R. 1971 J. & K. 142; Thayammal v. Salammal, A.I.R. 1972 Mad. 83. In Bai Parsan v. Bhagwandas, (1972) 13 Guj. L.R. 123, it was likewise held at 128 that, "A property in possession of a Hindu widow in exercise of her right of residence otherwise continues to belong to the joint family." In similar circumstances the S.C. arrived at the same decision in Naraini Devi v. Ramo Devi, A.I.R. 1976 S.C. 2198. See also Subba Naidu v. Rajammal, A.I.R. 1977

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In Santhanam K.Gurukkal v. Subramania Gurukkal[1] on the other hand, their Lordships seemed not unsympathetic to the notion of the wife's identity with her husband in proprietary right,[2] and with the view held by Mookerjee, J., that it is impossible to hold that a Hindu widow has no proprietary interest when she is given a share equal to that of a son at a partition at the instance of the male members.[3] Nevertheless, despite this in the view of the learned Judges, as the right to claim partition was accorded to women in Madras only with the coming into effect of the HWRPA, 1937, this dicta could have no bearing in the State, and the notion of maintenance as a pre-existing right of property ruled out. However, it is submitted that the entire reasoning rests on a fallacy; if the ladies in the Madras State could not call for partition, no more could any other female except in Bengal, and their rights to a share arose for the first time when partition took place at the instance of male members. This argument thus dismissed, one can only regard the decision as merely following the traditional pattern in the State.

(2) The Notion That It is in the Nature of a Proprietary Right

However, traditional Hindu law is familiar with the concept that the wife is half her husband's body,[4] and accordingly she acquired from the moment of her marriage, a co-ownership with the husband in his assets by reason of being his lawfully wedded wife. That this co-ownership was of a subordinate nature there

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Mad. 64, where Natarajan, J., held at 66 that, "At the time the lands were given to her, she had no pre-existing right to a share in the husband's properties, and the subsequent grant (for maintenance) could not have the effect of conferring on her a right which was non-existent." For a full discussion see below at 577 ff.

1. A.I.R. 1974 Mad. 279.

2. Ibid., at 281.

3. Srinath Das v. Probodh Chunder Das, (1910) 11 Cal L.J. 580, at 587.

4. Br. XXV. 47, supra, at 221.

can be no doubt,[1] and as a consequence it was not open for her to sever her share against the will of her husband, or after his death, against that of her sons.

On the other hand, there can be no doubt either that, the wife's or widow's entitlement to be maintained out of the property in the possession of her husband, or the share allotted to her at a partition of the ancestral estate, must be traced to this common ownership; and if by subsequent evolution, that ownership in the property had ceased to exist, and in its place a maintenance right substituted, the latter is nonetheless an interest in the nature of property. In other words,

> "(t)he widow's right of maintenance is a truncated right which still remains out of what was at one time a claim to a share in the family property."[2]

Thus the right of maintenance does not create any new right but proceeds upon the footing of a pre-existing right, and whereas the burden of maintenance is a personal obligation on the husband,

> "(U)nder the Hindu law, if a coparcener takes the property of another deceased coparcener by survivorship, he takes it with the burden of maintaining the widow and unmarried daughters of the deceased coparcener. It cannot be said that this right of maintenance is merely personal in the sense that it has no reference to the property which he gets by survivorship." [3]

Thus the clear divergence of opinion and the controversy as to

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1. Judicial recognition has been given to this ancient notion of the subordinate co-ownership of the wife. See Jamna v. Machul, I.L.R. (1879) 2 All. 315, at 317 ; Srinath v. Probodh, (1910) 11 C.L.J. 580, at 587; Savitri v. Savi, A.I.R. 1933 Pat. 306, at 347; Indu Bhusan Chatterjee v. Mrityunjoy Pal, I.L.R. (1946) 1 Cal. 128, at 132; Kamalabala v. Jiban Krishna, (1946) 50 C.W.N. 555, at 557; Muthalammal v. Veeraraghavalu, A.I.R. 1953 Mad. 202, at 202; Chellammal v. Nallammal, (1971) 1 M.L.J. 439, at 461; Milan Kumar Das v. Purnasashi Dassi, A.I.R. 1974 Cal. 380, at 384; Tulasamma v. Sesha Reddi, A.I.R. 1977 S.C. 1944, at 1960, infra, 602ff, and quoted in Bai Vajra v. Thakorbai, A.I.R. 1979 S.C. 993, at 996-7, infra, at 602.

2. Audemma v. Varadareddy, A.I.R. 1949 Mad. 31, at 39.

3. Secretary of State v. Ahalyabai, (1937) 40 Bom. L.R. 422, at 426. See also Mt. Sodhan v. Khushi Ram, A.I.R. 1950 Punj. 261, at 263.

whether the right of maintenance is a right to property assumed the greater significance after 1956, for whereas prior to the passing of the HSA, however adverse the retrograde stance might have been, the question of ownership rights per se in such property did not arise, under s. 14, however, the entire question was one of whether or not the widow could, in such property, claim absolute proprietary rights to the detriment of the coparceners and their right of survivorship. The period of protracted controversy over,[1] it is now settled law[2] that, however indefinite the right of maintenance may be, it is traceable to an antecedent right in property[3] so as to confer on the widow absolute rights of ownership in the property held by her in lieu of her maintenance, and in respect of which she constitutes a fresh stock of descent.

3. The Claim of Maintenance Arises Against Those Who Take the Estate of the Deceased by Succession

The natural and inevitable corollary of the ancient notion of the wife's co-ownership with her husband has led, in the law of maintenance, to the interesting proposition that the widow's claim to such right is not absolute either, and (leaving aside certain transfers inter vivos),

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1. For cases which take the view that the right to maintenance is a right in the nature of property, see infra 584 , ff.

2. For a detailed discussion of the Supreme Court authorities, and in particular, Tulasamma v. Sesha Reddi, A.I.R. 1977 S.C. 1944, settling the issue, see infra, 600ff.

3. The reader is in particular referred to the very appealing setting out of the nature of the widow's right to maintenance by their Lordships Untawala and Fazal Ali, JJ., in Sumeshwar Mishra v. Swami Nath, A.I.R. 1970 Pat. 348, and Tulasamma v. Sesha Reddi, A.I.R. 1977 S.C. 1944 infra, 593, f.n.2. See also Umakanta v. Satya Charan, A.I.R. 1965 Cal. 189, where this principle of charity was conversely interpreted, the Court holding that the widow must first look to her husband's estate and alienate it as a legal necessity for her maintenance, rather than rely on the charity of friends and relatives.

can only arise against those who take, either as heirs or by survivorship the interest of her deceased husband. This is, in effect, the direction of Nārada's oft-quoted text,[1] and the Courts have not been slow to adjudicate accordingly.

An early decision, that in Mst. Jaraon Koonwur v. Chandree Doosht[2] clarifies that while a Hindu widow holds, in the absence of sons, a life interest in the separate or self-acquired property of her husband, she is entitled to maintenance where the acenstral estate is held in joint tenancy.[3]

However, while this may merely be taken as a general statement of the law, it was endorsed and expanded further in Subramania v. Kaliani,[4] to the effect that where by the death of the one, the surviving brother's estate was enlarged, and the enlargement came to him by inheritance in the only sense in which the term is applicable in the law of the coparcenary, the widow's claim for maintenance was a charge[5] on the estate in the hands of the survivor.

Once the property had passed by survivorship, it was authoritatively stated in Mst. Lalti v. Gunga[6], that it was not open for the coparceners to

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1. Supra, at 270.
2. (1841) 7 S.D.A. 30.
3. There is an identical ruling by the same learned Judge, Smythe, J., in Mst. Lalchee Koonwur v. Sheoprasad Singh, (1841) 7 S.D.A. 26. More recently this view was reiterated in Jasoda v. Satyabhama, A.I.R. 1966 Or. 240, and in holding that a widow who does not succeed to the estate of her deceased husband as his heir, is entitled to maintenance out of the property in which he held a coparcenary interest at the time of his death, the Court explained that there is no provision made either in the HSA, 1956, or the HAMA, 1956, whereby this part of the old Hindu law has been in any way repealed or changed. See also Gowardhan v. Gangabai, A.I.R. 1964 M.P. 168, at 170.
4. (1873) 7 Mad. H.C.R. 226.
5. It must be emphasised that the word "charge" is used here in a non-technical sense.
6. (1875) 7 N.W.P.H.C. 261.

argue that the widow could claim no maintenance as the deceased husband had left no property for such purposes, for the position of the deceased coparcener's widow being on par with that of the disqualified coparcener's widow, both were equally entitled to be maintained out of their husband's interest in the hands of the surviving coparceners.

It follows, therefore, that the widow's claim for maintenance is not a personal obligation, but the duty that the law simultaneously imposes upon the taking of the estate, on the existing coparceners, the Full Bench explaining in Gangabai v. Sita Ram[1] that, the Hindu widow is not entitled under the Mitākṣarā system to be maintained by her husband's relatives merely because of the relationship between them and her husband, but that her right depended upon the existence in their hands of ancestral property. For, as his Lordship, Westropp, C.J., held obiter in Savitribai v. Luximibai,[2]

> "(I)t is well-settled Hindu law ... that the widow whose husband was, at his death, undivided in estate from his father, or the widow of one undivided, at his death, in estate from his brothers or nephews, or other relatives, would, in the first case, if there be sufficient ancestral estate in the hands of the surviving father,[3] or in the second case, if there be sufficient ancestral estate in the hands of the surviving brothers, nephews or other relatives, be entitled to a reasonable maintenance out of such estate," 4

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1. I.L.R. (1876) 1 All. 170 (F.B.).
2. I.L.R. (1878) 2 Bom.. 573 (F.B.).
3. This, it is submitted, is not a complete statement of the law, for as we shall presently see, the father's legal obligation apart, even where he is only possessed of separate or self-acquired property, the Hindu law imposes upon him a moral obligation of subsisting force to maintain his deceased son's widow.
4. Savitribai v. Luximibai, cited above, at 581. Thus, his Lordship ruled, as the husband and his father were, before their deaths, separated from the husband's uncle, and there was not in the possession or subject to

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and where the estate is sold without justifying necessity, the consideration received by the heir, of the sale of the deceased's property will, so far as the widow's right of recourse to it is concerned, take the place of the property sold.[1]

Nor is it open to the coparceners to take it upon themselves to fritter away the estate to the detriment of the claim for maintenance. In Chunilal v. Bai Saraswati,[2] where on the unproved contention that the proceeds realised from the sale of the deceased husband's interest had been utlised for the founding of a public reading room and a library in his name, it was rightly held that no doubt if a part of such proceeds had been spent for the needs of the family, the liability for maintenance would have been pro tanto reduced, but as equity certainly demands that some limit must be set[3] to the purpose for which, and the manner in which

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the disposition of the uncle, any ancestral estate, or the estate of the husband or his father, either one of these reasons independently of the other, was fatal to the widow's demand of a money allowance for maintenance from the uncle on whom the claim was made. Followed in Appaji v. Gangabai, I.L.R. (1878) 2 Bom. 632. So too it was held in Adhibai v. Cursandas, I.L.R. (1887) 11 Bom. 199, that where the widowed sister-in-law claimed maintenance from her husband's brother, the only question for the Court to consider was whether the latter had ancestral property in his hands. Banerjee, J., ruled likewise in Devi Prasad v. Gunwanti Koer, I.L.R. (1895) 22 Cal. 410 that, where at the death of the son, the father's estate is enlarged, "reason and justice" required that his liability to maintain his widowed daughter-in-law should not thereby be extinguished. See also Gowardan v. Gangabai, A.I.R. 1964 M. P. 168, at 170, where the surviving coparceners' liability of maintenance towards the dependant widow is similarly reiterated. This principle would apply equally where the property had devolved by succession on widows of the joint-family, and their liability to maintain the non-succeeding widow persist, despite the division of the estate between them at a partition by metes and bounds. See Jasoda v. Satyabhama, A.I.R. 1966 Or. 240. See also Muniammal v. Ranganatha, A.I.R. 1955 Mad. 571.

1. Bhagabati Dassi v. Kanailal Mitter, (1872) 8 Beng. L.R. 225, at 229.

2. A.I.R. 1943 Bom., 393.

3. This rule provides a valuable protection for non-coparcener members of the family, which will operate to save them from hostility or fraud, though not, of course, from incompetence. It was for this reason that a movement demanding absolute shares for persons previously entitled to maintenance culminated in the provisions of the "Hindu Code" : Derrett, IMHL, op.cit. at 247.

the assets are reduced or dissipated, the coparcener's liability to pay maintenance remains to the extent of the property to which he had succeeded.[1]

This leads us to the consideration of the established rule in the Hindu law that, the widow's entitlement of maintenance against the surviving coparcener or coparceners is "quoad the share or interest of her deceased husband in the joint-family property,"[2] and where the property is undivided, the amount required for her maintenance must of necessity be paid out of the estate as a whole,[3] but in no circumstances may she claim an allowance greater than the income of her husband's share in the estate.[4] This being so, it would follow that, where prior to the death of the husband, there had been a partition of the family property, there can be no right in the widow to claim to be maintained out of the shares that fall to the other members.[5]

However, where once the female's right to maintenance has been declared, defined and reduced to a certainty by a decree of Court, and a charge created over the entire joint estate, it was held in Subbarayalu

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1. This decision gives new life to the dicta in Lakshman v. Satyabhamabai I.L.R. (1877) 2 Bom. 494, at 519 that, as the Hindu widow rightfully belongs to her husband's family, "her right is not extinguished by any wilful or negligent diminution of the means of satisfying it."

2. Per Ayyanger, J., Jayanti v. Alamelu, I.L.R. (1904) 27 Mad. 45, at 48-9. Note also the stipulation of Fazal Ali, J., in Tulasamma v. Sesha Reddi, A.I.R. 1977 S.C. 1944, at 1960, that, "If the husband has property then the right of the widow to maintenance becomes an equitable charge on the property, and any person who succeeds to the property carries with it the legal obligation to maintain the widow."

3. This principle prevails notwithstanding that the widow may be possessed of other means of support. See below at 337 ff.

4. Jayanti v. Alamelu, I.L.R. (1904) 27 Mad. 45, at 49. Lakshmidevamma v. Veera Reddy, A.I.R. 1939 Mad. 781 (F.B.); at 782; Commissioner of Income Tax, Central and U.P. v. Bhagwati, A.I.R. 1947 P.C. 143, at 145.

5. Savitribai v. Luximibai, I.L.R. (1878) 2 Bom. 573; Lakshmidevamma v. Veera Reddy, cited above, and followed in Laxmibai v. Radhabai, A.I.R. 1944 Bom. 235.

v. Kamalavallithayaramma[1] that a suit for partition subsequent would not affect the widow's right as aforesaid, but would continue to subsist during the lifetime of the maintenance holder.[2]

4. The Right of Maintenance Persists Despite the Disposition of the Property by Gift or Devise

Where the widow is entitled to maintenance, her right cannot be defeated by a gift or devise of the entire property, and though the disposition may be entirely valid, the maintenance holder may nevertheless follow the property in the hands of the beneficiaries where her right is threatened.

Thus in Jamna v. Machul,[3] where the widow had instituted a suit for the declaration of her right to maintenance against the beneficiary of her husband's will who had acquired title even during the latter's lifetime, his Lordship, Pearson, J., refused to countenance the lower Court's ruling that the donee took the estate without exception, reservation and condition, and held on appeal that, as the wife is, under the Hindu law, a co-owner with her husband in a subordinate sense, the latter could not alienate his property or dispose of it by will in such

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1. I.L.R. (1912) 35 Mad. 147, the general ruling being that the estate at large is liable in the hands of the members of the family making a partition; and coparceners who desire to limit their responsibilities must obtain the assent of the persons interested. See R. West and J. G. Bühler, A Digest of the Hindu Law, 3rd ed., Vol II, (1884, Bom. Education Society Press) at 791.
2. See also Rangaiah v. Chinnaiah, A.I.R. 1970 A.P. 33, where following Basappa v. Mallamma, A.I.R. 1940 Mad. 458, it was held that notwithstanding that the step-son is under no legal obligation to maintain his step-mother, where the claim for maintenance had been charged upon the entire estate by a decree of Court, at a subsequent partition between father and son, it was not open for the step-son to plead that, unless a share of her husband is allotted to him, he is under no personal liability to maintain his step-mother out of the share that fell to him at the partition.
3. I.L.R. (1879) 2 All. 315.

a wholesale manner as to deprive her of maintenance. As such therefore, the donee of the entire estate must be deemed to have taken and to hold it subject to the female's maintenance.[1]

Nor may a gift of stridhana by the husband cut down this persisting right in the property by those who take it after his death?[2] In Narbadabai v. Mahadeo, the widow had been allotted, during her husband's lifetime separate property for her maintenance and residence, but soon thereafter the deceased had conveyed by an English deed of indenture, the house in fee to his sons by another wife. Later, after his death it was contended that the gift of the house being an absolute gift and not made subject to any charge on account of the widow's maintenance, the widow's claim to maintenance was extinguished particularly as she had been in receipt of valuable ornaments and other property from her deceased husband. West, J., in an exhaustive judgement, and taking into account many classical and legal authorities, pointed out the cardinal rule of Hindu law that even as to self-acquired property, it is

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1. Followed in Becha v. Mothina, I.L.R (1901) 23 All. 86. See also Sabitri v. Savi A.I.R. 1933 Pat. 306, where the widow's contention that she was entitled to avoid the will of her late husband having failed, it was nevertheless clarified at 395 that, "The wife's right to maintenance is a different matter from a right to avoid a gift of the entire property made by the husband. It will not be difficult to reconcile the wife's right to maintenance, ... with the factum valet view of a gift of his entire property by the husband. The gift may stand and the wife's maintenance charged on the property as in Jamna v. Machul, I.L.R. (1879) 2 All. 315." Similarly the Madras High Court held in Periambal v. Sundarammal, A.I.R. 1945 Mad. 193 that, while the right of maintenance may remain suspended during the period of the wife's refusal to comply with a decree for the restitution of conjugal rights, it revives at her husband's death, and notwithstanding that the entire property had been testamentarily disposed of, it nevertheless remains claimable against those who take the estate. To a like effect — i.e. that the will cannot defeat the widow's right of maintenance — is the obiter dicta in Audemma v. Varadareddy, A.I.R. 1949 Mad. 31, at 36.

2. As such, this is not a full statement of the law in view of the dicta in Varahalu v. Sithamma, A.I.R. 1961 A.P. 272 (F.B.), infra, at 344-5.

3. I.L.R. (1880) 5 Bom. 99.

prescribed that the acquirer shall not part with it so as to leave his family destitute. Thus as the right of a Hindu female is one peculiarly needing protection, the gift to the sons in this case, his Lordship concluded, was obviously intended to shut out any future claim of the wife. It could not therefore be regarded as an exercise in good faith of the husband's general authority and discretion, but was distinctly an endeavour to place the wife, should she survive her husband, in a state of destitution. In view of this, the learned Judge held, the general principle must be adhered to, and where a Hindu husband alienates by gift, the whole of his immoveable self-acquired property, to his sons by his first and second wives, without making for his third wife — who is destitute and has not forfeited her right to maintenance — a suitable provision to take effect after his death, she is entitled, as a widow, to follow such property in the hands of her step-sons to recover her maintenance,[1] her right to which is not affected by any agreement made by her with her husband in his lifetime.[2]

The question of maintenance was again considered in Promotha v. Nagendrabala,[3] and the Court made it clear that while the claim of the widow for maintenance from her husband's estate could not be defeated where she had been excluded from a Dāyabhāga will, neither was she entitled to question the will as a whole. As her right to ask for a construction of the will was limited to the extent that it affected her claim, she had therefore no locus standi to question bequests for

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1. See also Joytara v. Ramhari, I.L.R. (1884) 10 Cal. 638, for a similar judgement, though the further statement in it that such right would persist unless taken away by express language to that effect in the will, is, it is submitted, suspect.

2. We shall find this old rule to be of great significance in the current predicament of the law.

3. (1908) 12 C.W.N. 808.

religious purposes in view of the fact that the amount of maintenance fixed by the testator was not a nominal amount and not contrary to any provision of the Hindu law.[1]

However, where the widow's right is threatened, not even a bequest for religious purposes, exempts the devisee from the liability of maintenance.. Thus in Parwatibai v. Mariayya[2] where the testator had included in a bequest to a Math the house in which the widow resided, Mudholkar, J., rightly refuted the contention that, as provision for her maintenance had already been made in the will, the widow could not claim the family house, his Lordship holding that, as a claim for maintenance —— which includes the right of residence —— may not be defeated by a gift or devise of the property, it would follow that the right of residence in the family house —— dedicated property though it might be —— could be enforced against a volunteer or a person with notice of the right

> "(u)nless an alternative arrangement, equally satisfactory, is made for her residence." 3

But what where the widow —— herself the legatee along with other beneficiaries under her husband's will —— nevertheless claims maintenance on the grounds of insufficiency of the estate in her hands? On the well

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1. On the same principle it was held in Mahant Narsidasji v. Bai Jamna (1939) 41 Bom. L.R. 787 that where after having made adequate provisions for his wife, the Hindu husband of his own free will chooses to diminish his estate by giving away part of it for the creating of a trust for religious and charitable purposes, it is not open, later on, for the widow to demand maintenance in proportion to what the income was before the charitable gifts or bequests were made.

2. A.I.R. 1951, Nag. 346.

3. Ibid., at 347. This view, expressed as early as the close of the 19th century in Rachawa v. Shivayogapa, I.L.R. (1894) 18 Bom. 679, was to be the basis of the ruling in favour of the widowed daughter-in-law in Rani Bai v. Yadunandan, A.I.R. 1969 S.C. 1118, infra, at 601.

established principle that the right of maintenance cannot be defeated by the execution of a will, where the testator had bequeathed all his properties to his mother and wife, it was held on equitable grounds in Kamakshi v. Krishnammal[1] that under such circumstances, if the property gifted to the widow was insufficient to meet her needs, she could retain the property, and claim in addition, further maintenance from the other donees.[2]

5. The Widow's Right As Against a Bona Fide Purchaser for Valuable Consideration

The basic principles established, other questions come to mind. Should the joint-family property, including the deceased husband's interest, be transferred to a bona fide purchaser, would the widow's right to maintenance be affected? This query is linked to another vital question, i.e. whether the widow's right is a mere personal right against the heir or heirs, or is it a lien on the estate of her deceased husband, and remains claimable even after the property is alienated?

That she is entitled into whosoever's hands the property of her late husband passes for whatever reason apart for alienation for certain specified purposes, there can be no doubt. A few quite singular decisions make this apparent enough. In Mst. Gulab Koonwur v. The Collector of Benares,[3] a family of brothers in possession of large

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1. A.I.R. 1938 Mad. 340.

2. India has never resiled fromthis position. Likewise in Sitharatnamma v. Seshamma, (1939) 1 M.L.J. 456, a provision for maintenance in the husband's will was taken to be merely a suggestion as to what a reasonable amount might be, the Court further adding that it was within its jurisdiction to substitute a more reasonable sum in the event of an inadequate entitlement under the will. See also Sriramulu v. Anasuyamma, A.I.R. 1957 A.P. 21, at 23. This rule is confirmed in the HAMA, 1956, s. 28, laying down that, "Where a dependant has a right to receive maintenance out of an estate and such estate or any part thereof is transferred the right to receive maintenance may be enforced against the transferee... if the transfer is gratuitous;..."

3. (1847) 4 M.I.A. 246.

ancestral estates having become implicated in a rebellion against the State, the entire property was confiscated by the Government. At the widow mother's suit for maintenance, it was held that, notwithstanding that the confiscation was regular, the forfeiture by the family of the estates, could not affect the dependant female's claim for maintenance, which it was incumbent upon the Government to satisfy from out of that part of the property that was ancestral.[1]

This principle prevailed even where there were dissensions among the family members themselves. In Ramchandra Dikshit v. Savitribai[2], where the widow had, after the death of her father-in-law, obtained a decree against his eldest son, the Court while acknowledging that the Hindu widow's maintenance is a charge upon the entire estate, was nevertheless of the view that it was for the defendant to have this question resolved by suing his brothers for contribution.

However, these instances apart, the view that a not inconsiderable number of decisions take is that, as the right of maintenance, until it is fixed and charged upon the estate by a decree or agreement, is of an indefinite character[3], it is not enforceable, particularly so in the hands of a bona fide purchaser for value without notice of such claim.

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1. This principle of law is in keeping with the text of Nārada, XIII. 51, op.cit., to the effect that the wives of the deceased proprietor are entitled to maintenance out of his property, where for want of better heirs it escheats to the King. See also Commissioner of Income Tax, Central and U.P. v. Bhagwati, A.I.R. 1947 U.P. 143, where the Privy Council, emphasising on the absolute nature of such right, refused to countenance the claim of the Income Tax authorities that, where under a compromise the widow had agreed to a stipulated sum of money being charged on the ancestral estate for the purposes of her maintenance, it was in reality a surrender of her maintenance right, and being merely a payment of a money allowance, it was therefore taxable.

2. (1867) 4 Bom., H.C.R. 73 (A.C.J.).

3. This view takes statutory shape in that s. 27 of the HAMA lays down: "A dependant's claim for maintenance ... shall not be a charge on the estate ... unless one has been created by the will of the deceased, by a decree of court, by agreement between the dependant and the owner of the estate ... or otherwise."

The smṛti literature is silent on this vital issue, and it was but natural that the early jurists had, in the last resort, to turn to their own legal system for equitable remedies to resolve the conflicting claims that thus arose. Equity and — the ancestral estate being somewhat in the nature of a trust for maintenance holders — the law of trusts provided the answer. In discussing the position of a bona fide purchaser for value without notice, the question that invariably comes to mind is that, if the legal estate passes from one (the trustee) to another person, how is the conscience of the transferee affected? The question is then of determining as a matter of policy whether this new holder of the legal estate is bound by the trust. Any way in which an equitable ownership of a beneficiary is destroyed is of course a serious weakening of the position of the beneficiary, and as Equity always strives to protect him,

> "(a) trust is (thus) binding ... on a purchaser who bought (the property) if he knew or could by reasonable inquiries have found out about the existence of the trust. In short, the trust is binding on everyone coming to the land except the bona fide purchaser of a legal estate for value without notice actual, constructive or imputed." [1]

Such were the equitable principles which provided the guidelines for the Indian Courts as well, and there was a further insistence, in consonance with s. 39 of the Transfer of Property Act, 1882[2] (hereinafter

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1. R.H. Maudsley, ed., Hanbury's Modern Equity, 10th ed., (Lond., Stevens, 1976), at 21.

2. S. 39 of the Act of 1882 provides that, "Where a third person has a right to receive maintenance ... from the profits of immoveable property, and such property is transferred with the intention of defeating such right, the right may be enforced against the transferee if he has notice of such intention or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands." It is worth noting that while under this original section, the intention of defeating the right on the part of the

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referred to as the T.P. Act), on the existence of a charge actually created and binding the estate, or of proof of the transferor's intention to deliberately defeat the right of maintenance[1] for the widow's claim to be viable.

In Sm. Bhagabati Dassi v. Kanalailal Mitter,[2] the most noteworthy decision from Bengal, the widow contended that as she was entitled to be maintained out of the rents and profits of her deceased husband's estate, the latter in the hands of the purchasing defendants was subject to the charge for her maintenance. Phear, J., however, in ruling against

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transferor and the knowledge of such an intention on the part of the transferee were necessary, under the amended section, mere notice of the existence of the right would suffice. The amended section of the T.P. Act, 1929, lays down that, "where a third person has a right to receive maintenance ... from the profits of immoveable property, and such property is transferred, the right may be enforced against the transferee if he had notice thereof or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right nor against such property in his hands."

1. This rule — dispensed with in the amended section of the Act of 1929 — is well set out in Lakshman v. Satyabhamabai, I.L.R. (1877) 2 Bom. 494, where his Lordship, West, J., explained obiter at some length that, where the heir sought to defraud the maintenance holder, he could not, by any device by way of parting with the estate, or changing its form, get rid of the liability which had come to him along with the advantage derived from his survivorship. Similarly the vendee, taking from him with reason to suppose that the transaction was one originating not in an honest desire to pay off debts, or satisfy claims for which the estate was justly liable, but one which was in essence a design to shuffle off a moral or legal liability, would, as sharing in the proposed fraud, be prevented from gaining from it. On the other hand, if, despite his knowledge of the widow's claim upon the estate, the alienee bought upon a rational and honest opinion that the sale could be effected without any furtherance of wrong, he would, against the plaintiff widow, acquire a title free from the claim which still subsisted as against the recipient of the purchase money. In short, what was honestly purchased was free from her claim forever; what was purchased in furtherance of a fraud upon her, or with knowledge of a right which would thereby be prejudiced, is liable to her claim from the first. These principles were the basis of the decisions in Ramchurun v. Mst. Jasooda, (1867) 2 Agra H.C.R. 134; Beharilalji v. Bai Rajbai, I.L.R. (1899) 23 Bom. 342; Ram Kunwar v. Ram Dai, I.L.R. (1900) 22 All. 326; Manikyam v. Venkayamma, A.I.R. 1957 A.P. 710, at 713-4.

2. (1871) 8 Beng. L.R. 225.

this claim, was of the view that though the lady had a right to have a proper sum ascertained and made a charge on the property in the hands of the heir, and she may also doubtless follow the property for this purpose into the hands of a third party who takes it as a volunteer or with notice of her having set up a claim for maintenance, nevertheless in Bengal she does not have any lien over the property in respect of her maintenance against all the world irrespective of such notice. Lien for maintenance, his Lordship held, was a somewhat vague term so long as the amount of maintenance is undetermined, and until the proper amount is ascertained, maintenance as such does not acquire the character of a proprietary right.[1] Under these circumstances, therefore, it would be most unreasonable to subject the bona fide purchaser for valuable consideration to the possibility of a charge springing up any time though it had no definite existence at the time of purchase.[2]

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1. This theory was to have important consequences after 1956, and where the Courts were unwilling to acknowledge the right to maintenance as a subsisting right to property capable of attracting s. 14 (1) of the HSA, it was used to considerable effect to cut down that right. See for instance Veerabhadra Rao v. Lakshmi Devi, A.I.R. 1965 A.P. 367, infra at 609-10, his Lordship, Ekbote, J., stating at 371 that, "It seems, however, to be plain that neither the texts of Hindu law nor s. 39 (of the T.P. Act) creates any right or interest in immoveable property on the ground of maintenance"; Gopisetti's case, (1968) 2 An. W.R. 455, infra, 580ff , where it was likewise stated at 468 that, "Under the Hindu law, a Hindu female though she has a right to be maintained out of ... joint-family properties, it is not a case of acquiring in ... joint-family properties, but she has only a right to be paid out of the ... properties ... over which s. 39 of the T.P. Act imposes a charge." For further rulings to a like effect, see also Gurunadham v. Navaneethamma, A.I.R. 1967 Mad. 429, at 431; Narayan Patra v. Tara Patrani, A.I.R. 1970 Or. 131, at 134; Velmurugayya Pillai v. Lakshmana Perumal, (1974) 2 M.L.J. 295, at 297; Subbalakshmi Ammal v. Andiappa Pillai, (1977) 1 M.L.J. (NRC) 2, at 2, — all discussed below at 575ff.

2. For similar rulings see Adhiranee v. Shona Mali, I.L.R. (1876) 1 Cal. 365; Venkatammal v. Andiappa, I.L.R. (1882) 6 Mad. 130; Ram Kumar v. Ram Dai, I.L.R. (1900) 2 All. 326; The Bahratpur State v. Gopal Dei, I.L.R. (1902) 24 All. 160; Mohini Debi v. Purna Sashi, A.I.R. 1932 Cal 451; Kaveri v. Subba Ayyer, A.I.R. 1934 Mad. 374; Bayyapparaju v.

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In Sham Lal v. Banna[1] the question before the Full Bench was whether the maintenance of a Hindu widow is such a charge upon the ancestral immoveable property as to be enforceable, wholly or proportionately against the entirety or any part of such estate which had passed into the hands of a bona fide purchaser for value without notice of the liability of maintenance on it. In holding that the bona fide purchaser without notice will have unhampered enjoyment of the property, their Lordships decisively agreed with the Bengal decision that, notwithstanding the imperative nature of the right of maintenance, it is only enforceable if a charge to that effect had been created by a decree or by an agreement.

But there the consensus ends, for whereas the view expressed in Calcutta in Adhiranee v. Shola Mali[2] was that, where there was still sufficient of the duly charged property in the hands of the heir-at-law, the maintenance holder may not be allowed to recover her claim from the purchaser of a small portion of the family property without first attempting to reclaim it from the property in the hands of the heir-at-law,[3] in Allahabad, on the other hand, the converse view prevailed, their Lordships holding that as the purchaser took with knowledge of the charge, a portion of such property in their hands would be liable to

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Lakshammama, A.I.R. 1937 Mad. 193. Ambika Rai v. Mt Tetara, A.I.R. 1956 Pat. 293. This view was, however, not to achieve ascendancy, and the Supreme Court in Rani Bai v. Yadunandan, A.I.R. 1969 (confirmed) S.C. 1118, (infra, at 601) that the widow's right of maintenance is not liable to be defeated except by transfer to a bona fide purchaser for value without notice of her claim or even with notice of the claim unless the transfer was made with the intention of defeating her claim. Approved of in Tulasamma v. Sesha Reddi, A.I.R. 1977 S.C. 1944, at 1950.

1. I.L.R. (1882) 4 All. 297 (F.B.).

2. I.L.R. (1876) 1 Cal. 365.

3. Followed in Goluck Chunder v. Rani Ohilla, (1882) 25 W.R. 100.

such charge even if it be proved that the heirs had retained enough of it to meet the maintenance due on it.

Seemingly at odds, it could equally be argued that both these stances have in reality much to commend in them from the strictly equitable point of view, for where the portion of the alienated estate is small, the first liability must lie with those who retain the greater part of it. On the other hand, the Allahabad cannot be discounted either, for the mere sufficiency of property in the hands of the heirs cannot entirely exonerate the purchaser from the burden imposed on the charged estate of the widow's maintenance. Considering, however, that the charge existed over the totality of the estate, the quantum of property either way should not have been made the basis for the satisfaction of the claim for maintenance; rather a pro rata contribution towards the meeting of such obligation would, it is submitted, perhaps have been by far the most equitable solution in the circumstances.

But what where the alienated property is already burdened with the charge for the widow's maintenance? If as a consequence of obtaining the estate without knowledge, at the time of purchase, of a prior equitable right, the purchaser is entitled to priority in equity, it would follow that the vendee is equally bound in equity and in law where he takes subject to such notice, and under the express terms of s. 39 of the T.P. Act, the maintenance holder may enforce her right against the properties in the hands of the alienee with notice of her claim.[1]

In Heeralal v. Mst. Konsillah,[2] as at the alienation of the ancestral estate there was express mention in the sale deed of the widow's right of maintenance, it was rightly held that as the alienees took with notice

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1. This provision is retained in the HAMA, s. 28 laying down: "Where a dependant has a right to receive maintenance ... the right may be enforced against the transferee if the transferee has notice of the right,.... but not against the transferee for consideration and without notice of the right."

2. (1867) 2 Agra H.C.R. 42.

of such claim, they took it subject to that liability, unless the widow herself bargained to forego it.

Likewise in Koluda v. Jageshwar,[1] a part of the joint property having been made subject to a charge for the widow's maintenance, they were subsequently mortgaged. Later still when in execution of a decree for arrears of maintenance, the mortgaged property was put up for sale, the Court held that as the property in question had been specifically charged with the widow's maintenance by a decree, the mortgagee was as much bound as the mortgagor.[2] Neither, their Lordships held, could the latter be said to be transferees without notice of the right, as it did not appear that, before taking the mortgage they had made proper inquiries as to the existence of any such charge upon the property.

In other words their Lordships, in invoking the equitable doctrine of constructive notice, i.e. that a purchaser will be treated as having constructive notice of all that a reasonably prudent purchaser would have discovered,[3] took the view that, as the onus to make proper inquiries

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1. I.L.R. (1899) 27 Cal. 194.

2. Numerous decisions testify to this right of the widow over the bona fide purchaser who takes with notice of her right. For instances of more recent decisions see Malkarjun v. Annarao, A.I.R. 1943 Bom. 189, at 190-1; Dattaraya v. Tulsabai, A.I.R. 1943 Bom. 412, at 414; Bansidhar v. Mt. Champo, A.I.R. 1947 Oudh 150, at 155; Parwatibai v. Mariayya, A.I.R. 1951 Nag. 346, at 347; Chandramma v. Venkatareddi, A.I.R. 1958 A.P. 396, at 401; Smt. Saraswati v. Smt. Rupa, A.I.R. 1962 Or. 193, at 196; Ramaswamy v. Baghyammal, A.I.R. 1967 Mad. 457, at 459.

3. R. Megarry and P.V. Baker, e.d., Snell's Principles of Equity, (Lond., Sweet and Maxwell, 1973), at 39. It is further elaborated at 50-1 that, constructive notice may be imputed either where the purchaser has actual notice that the property was in some way encumbered, in which case he will be held to have constructive notice of all that he would have discovered if he had investigated the encumbrance, or where the purchaser has, whether deliberately or carelessly, abstained from making those inquiries that a prudent purchaser would have made.

lies with the alienee, and inasmuch as no such inquiry appeared to have been made, they were bound and the widow's right indefeasible.

The question of the rights of the bona fide purchaser apart, where the widow obtains a decree for her maintenance against the ancestral estate, it is not open for the legal representatives to plead that such decree would not bind the estate in their hands, for the claim which arises as a consequence of the female's exclusion from inheritance must follow the property, and the effect of the decree persist, despite that the representative may not be personally liable.

Thus in Karapakambal v. Ganapathi,[1] the question was whether a decree for maintenance against a Hindu, directing an annual payment to be made by him to the female decree holder for the rest of her life, could be executed after the death of the judgement debtor, against his sons. The Full Bench was of the view that the decree could be executed against the heirs for arrears which had accrued since their father's death but only as representatives of their father, and until his assets were exhausted.[2]

The Lucknow High Court followed this line of reasoning in Mt. Munni v. Radhey Shiam,[3] to hold the son liable where a maintenance decree had been executed against his father, for though no charge had been created on the entire property, his Lordship Bennet, J., rightly reasoned that it was not open for the son to plead that it was a personal decree against

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1. I.L.R. (1882) 5 Mad. 234 (F.B.).
2. An exactly similar decision was arrived at in Muttia v. Virammal, I.L.R. (1884) 10 Mad. 283 (F.B.). See also Minakshi v. Chinnappa, I.L.R. (1901) 24 Mad. 689. In identical circumstances the reverse view taken in Bhagirathi v. Anantha, I.L.R. (1894) 17 Mad. 268 that the sons and grandsons were not bound by the decree against their male ascendant, may no longer be regarded as good law.
3. A.I.R. 1943 Oudh. 190.

his father, for as the latter's legal representative, he could not escape the liability to the extent of the ancestral property in his hands, whether such maintenance was due at the time of his father's death or had become due since.

Decisions such as these establish the binding nature of the right of maintenance, and the better view that irrespective of whether or not there is a charge,[1] even a bare right of maintenance is capable of being enforced where the husband had left property, has been amply vindicated after 1956, typical of such decisions being Rani Bai v. Yadunandan,[2] and from this position there is now no resiling.

6. The Claim of Creditors as Against the Right of Maintenance

We must now turn our attention to the question of the widow's maintenance as against property burdened with the debt of her late husband. The cardinal principle to be borne in mind here is that, in the Hindu law the payment of the debts of the deceased takes precedence over every other claim over the property. Indeed when we consider the theory of spiritual benefit, the Pious Obligation on the part of the son to settle from the joint stock, the debts of his male ancestors up to three generations, provided they are not "tainted", i.e. avyāvahārika, it then becomes clear that the widow's right of maintenance (which includes the right of residence in the family house),[3] must of necessity

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1. See in this respect Derrett's pithy comment, infra, at 576.
2. A.I.R. 1969 S.C. 1118 infra, at 601.
3. That the right of residence is an integral part of the right of maintenance, is an established principle in the Hindu law and confirmed in numerous authoritative rulings, for as it was explained in Charandas v.

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be subordinate to the claims of the creditor. The same is true of debts contracted by the manager of the joint family, and where these are incurred for the benefit of the family, or in other words for justifiable legal necessity, the claim for maintenance is liable to be defeated on the principle that, those who are entitled to the benefits accruing to the joint assets must likewise share in its liabilities.

(1) The Effect of the Husband's Alienation

It is thus a well settled rule of Hindu law that the debts of the husband take precedence over the widow's claim for maintenance so long as the maintenance is not charged over the property. Where the husband had himself alienated the property during his lifetime in satisfaction of a debt incurred by him, no justifying circumstances are necessary, and in Bhikam v. Pura[1] in a suit brought against the mother and widow of the deceased for certain monies charged on, among other properties, the family dwelling house, the defence put up was that as the ladies had nowhere else to reside in, and in fact possessed the right

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Nagubai, A.I.R. 1929 Bom. 452, "subsistence" referred to in the texts, does not mean bare subsistence but also includes shelter. Under s. 14 (1) of the HSA, 1956, this principle was to have the effect of converting such right of residence to an absolute estate as a right held "in lieu of maintenance," where the female was actually prossessed of the dwelling house. See for instance Mst. Gaumata v. Shankar Lal, A.I.R. 1974 Raj. 147, infra at 590 fnl; Muthu Bhattar v. Chokku Bhattar, A.I.R. 1976 Mad. 8, infra, 598 , which render obsolete decisions such as those in Raja Rao v. Hastimal, A.I.R. 1972 Raj. 191, infra, at 577, f.n.1; Bai Parsan v. Bhagwandas, (1972) 2 Guj. L.R. 123, infra, at 577 f.n. 1; Naraini Devi v. Ramo Devi, A.I.R. 1976 S.C. 2198, infra, at 569 f.n.1, and the even more startling allegation in Janki v. Govinda, A.I.R. 1980 Ker. 218, (infra, at 648) at 219 that, "The right, (of maintenance) if at all, is only a monetary claim and not any right in Item No. I" (the house in question).

1. I.L.R. (1879) 2 All. 141.

of residence in the ancestral home, the mortgage could not be upheld. Pearson, J., however held that, in the absence of any rule specifying that the ancestral home could not be sold, since the house in question had been hypothecated prior to the accrual of the rights of the females —— arising out of the demise of the Hindu male —— the mortgage could be enforced.[1]

This last principle was explained more fully in Jayanti v. Alamelu.[2] The deceased husband had executed a promissory note as a surety, and after his death, on having obtained a decree against his widow on the promissory note, the decree-holder attached the house in which she was residing, brought it to sale and purchased it. On his endeavouring to obtain possession, the widow resisted on the ground that she had a right of residence in the house for the remainder of her life and could therefore not be ejected. Ayyangar, J., however, in ruling against such claim, was of the view that, though undoubtedly the female had during her husband's lifetime a right of maintenance against him, that was merely a personal obligation on her husband irrespective of whether or not he was possessed of any property, but it formed no charge on any part of the property. After his death, the estate devolved upon his widow by right of inheritance; she took it as heir and had to administer it/such. Under these circumstances, all debts that bound the husband (as were necessarily binding upon the widow in respect of all the assets which had come to her as his legal representative.

In view of this authoritative exposition of the underlying principles

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1. For similar rulings see also Ramzan v. Ram Daiya (1917) 42 I.C. 944; Gangabai v. Jankibai, A.I.R. 1921 Bom. 380; Jamiatara v. Mt. Mallan, A.I.R. 1931 Lah. 718; Mt. Mallan v. Parmatma, A.I.R. 1936 Lah 558. Manohari v. Sarab Singh, A.I.R. 1937 Pesh 46; Malkarjan v. Sarubai, A.I.R. 1943 Bom. 187, at 189; Bhagwandas v. Chapsey (1944) 46 Bom. L.R. 760, at 761-2; Satwati v. Kali Shankar, A.I.R. 1955 All. 4 (F.B.), at 6.

2. I.L.R. (1904) 27 Mad. 45.

as between the widow's right of maintenance on the one hand, and the claims of the husband's alienee on the other, the decision in Manilal v. Baitara[1] may not be countenanced. The husband had, during his life-time, mortgaged the house in question, and in execution of a decree enforcing such mortgage, it was sold and purchased by the mortgagee with knowledge that the mortagor's widow residing in it at the time of was the sale. Subsequently in a suit brought by the widow to establish her right to continue to reside in the house, her claim was negatived on the grounds that in the absence of any allegation that the mortgage effected by the deceased husband was not for the family advantage or was in any way in fraud of her rights,[2] the auction-purchaser took the house free from the widow's claim, notwithstanding that he had had notice of such claim. This view is, it is submitted, untenable, for no such considerations may be entertained, and the cardinal principle adhered to, i.e. that in all such instances, unless the property had already been charged with the female's maintenance and residence, debts take priority over every other claim.

(2) The Debts of the Deceased Take Precedence Over the Claim of His Widow for Maintenance

Unlike the wife's claim of maintenance and residence which is a personal liability against the husband, the right of the widow to such claim is based, as we have already established, upon her husband's right to a share in the family property, and those who take his assets by survivorship are under a legal obligation to maintain his widow out of

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1. I.L.R. (1893) 17 Bom. 398.

2. See in this respect the dissenting comment of Ayyangar, J., in Jayanti v. Alemalu, I.L.R. (1904) 27 Mad. 45, at 51.

that property in the same degree of comfort to which she was used during her lifetime. Where however, the property is taken burdened with the debts of the deceased, the principle that such debts take precedence over the claim of his widow to maintenance, applies perhaps with even greater vigour in view of the notion of the Pious Obligation.

Some of the earliest decisions bear out this fundamental rule. In Adhiranee v. Shona Mali,[1] where the surviving coparcener had sold the estate for the payment of the deceased's debts, Jackson, J., stressed on the principle of Hindu law that, debts contracted by the husband have priority over his widow's claim for maintenance, and semble that if a portion of his property is sold after his death to repay such debt, the widow cannot enforce her right against the property in the hands of the purchaser.[2]

Similarly, the absolute priority of the claim of the creditor as against a mere maintenance holder was emphasised in Lakshman v. Satyabhamabai.[3] In a suit for maintenance against the sole surviving coparcener and the bona fide purchasers for value of the ancestral property sold in satisfaction of an ancestral debt, it was held that, despite the general rule that a charge for maintenance accompanies the property as a burden annexed to it in the hands of the vendee with notice, nevertheless the bona fide purchaser is not affected despite the notice to him of such

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1. I.L.R. (1876) 1 Cal. 365.

2. This rule is equally binding on the daughter-in-law, where her husband's father alienates the unmoveable ancestral property in his hands. In Ganga Bai v. Sita Ram, (1876) 1 All. 170 (F.B.), it was held that as the father-in-law's alienation could not have been challenged by the son himself if alive, the satisfaction of an untainted debt took priority over the female's claim to be maintained out of the ancestral estate.

3. I.L.R. (1877) 2 Bom. 494.

charge, if the sale was in discharge of the untainted debts of the husband, his father or father's father.[1]

In Madras, however, this construction was rejected, and where the creditor, who had obtained a simple money decree against the assets of his deceased debtor, then brought the property to sale notwithstanding that he had notice of the existence of the charge in favour of the widow's maintenance, the question in Somasundaram v. Unnamalai[2] was whether the latter was ineffective as against binding debts on the family. In discussing the respective priorities of a charge for maintenance and the claims of a creditor, Ayyar, J., took the view that, the moment that a Court declares that its decree is to be discharged by the creation of a charge on immoveable property, it is as binding as if there was a mortgage for a binding debt created by the debtor on the property. In other words, as there is no clear authority for the proposition that a charge bona fide created can be defeated by a creditor who has lent money for family purposes, the rule that debts take precedence over maintenance, his Lordship further clarified, is of limited application, and valid only so long as the two obligations — the one to pay a binding debt and the other to pay maintenance — are both of them not charged on the estate. If either of them assumes that shape, the one takes precedence over the other.[3]

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1. The same view was taken in Sham Lal v. Banna, I.L.R. (1882) 4 All. 297, (F.B.); Gur Dayal v. Kaunsila, I.L.R. (1883) 5 All. 367; Kuloda v. Jageshwar, (1889) 27 Cal. 194.

2. I.L.R. (1920) 43 Mad. 800.

3. This equating of the two claims, those of maintenance and debts, is likewise evident in Lakshman v. Saraswatibai, (1875) 12 Bom. H.C.R. 69. Where the ancestral property had been alienated for debts contracted for family purposes, the widow sought to enforce her right of maintenance by attempting to have a charge created on such property in the hands of the bona fide purchaser for valuable consideration. The learned Judges, however held that, while the sacred texts were

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This interpretation is in keeping with the equitable doctrine that, where there are two competing equitable interests, the general rule of Equity is that the person whose equity attaches to the property first, will be entitled to priority over the other,[1] or in brief, Qui prior est tempore potior est jure: he who is earlier in time is stronger in law.[2]

These same principles were the basis of the ruling in Mst. Dan Kuer v. Sarla Devi[3], the Privy Council reiterating that while in the ordinary course of the law, the obligation to pay the binding debts of the deceased will take precedence over the mere claim of a Hindu female's maintenance, nevertheless the rule of the Hindu law — in accord with the principles under s. 39 of the T.P. Act — is that, if either of these two obligations assume the shape of a charge, it would take precedence over the other.[4]

It is submitted that, while from the strictly equitable point of view, there is much in decisions such as the foregoing to commend, the Hindu texts nowhere lay down the condition of a charge for the one claim to have priority over the other. On the other hand, when we consider

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insistent on the legal claim of the widow to be maintained by those who took the estate of her deceased husband, they had likewise made the payment of debts a sacred obligation upon the heirs for the spiritual benefit of the deceased. In such circumstances if — as judicial decisions had conclusively established — property in the hands of a bona fide purchaser cannot be pursued by a creditor of the deceased proprietor, neither was it open to the widow — whom in his lifetime the latter was legally bound to maintain, no less than he was to pay his debts — to enforce her claim against property in the hands of such bona fide purchaser.

1. Snell, op.cit., at 45.
2. Barclay's Bank Ltd v. Bird, (1954) Ch. 274.
3. A.I.R. 1947 P.C. 8.
4. Ibid., at 14. The same view was taken in Mst. Santi v. Sudh Ram A.I.R. 1955 Punj. 22.

the moral force of the Pious Obligation and the duty that it imposes upon those who take the deceased's estate as against the widow's right to be maintained which arises only if there is any estate of the deceased in the hands of the survivors, one submits that on balance, the claim for maintenance may only be met with from the residue, if any, after all claims of the creditors are satisfied.

(3) The Effect on the Claim for Maintenance of Alienations by Coparceners Without Legal Necessity

It has, however, to be borne in mind that though the widow is not entitled to claim maintenance out of the property transferred or attached in execution of a decree for debts incurred by her deceased husband, the sale of the family house without justifying necessity by the surviving coparcener or coparceners, whether voluntary or in execution of a debt not arising out of family necessity, would not affect her right of residence. For if hell is the portion of the master of the family who does not carefully maintain his dependants,[1] the Hindu widow who had resided with her husband and the members of his family in the family dwelling house while he was alive, is entitled to reside therein after his death,[2] and it is neither open to the heir nor to the purchaser purchasing from him, to evict her from the ancestral dwelling.

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1. See Dāya, II. 23. op.cit.

2. This is now a statutory right under s. 23 of the HSA, 1956. Where the Hindu intestate has left a dwelling house wholly occupied by members of the family, the female heirs specified in class I of the Schedule are entitled to a right of residence therein, though their right to claim partition of the same does not arise until the male heirs choose to divide their respective shares therein. The proviso to the section adds that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling house only if she is unmarried, or has been deserted by or has separated from her husband, or is a widow. See above at 54, for a discussion of the discriminatory nature of this provision.

In Mangala Debi v. Dinanath Bose,[1] where the adopted son, on attaining majority, had asserted his right as heir and sold the house in which the widow had continued to reside even after her husband's death, the question was whether the purchaser had such a right as to ask her to quit at a week's notice. In a judgement remarkable for its adherence to the protection that the ancient smṛti texts afforded to females in regard to their rights of maintenance and residence, Peacock, C.J., expressed "very great doubt".[2]

> "(w)hether a son, either natural born or adopted, is entitled to turn his father's widow and the other females of the family who are entitled to maintenance out of the dwelling selected by the father for his own residence, and in which he left the females of his family at the time of his death." [3]

His Lordship referred in particular to the text of Kātyāyana that

> "(E)xcept his whole estate and his dwelling house, what remains after food and clothing of his family, a man may give away, whatever it be, whether fixed or moveable, otherwise it may not be given," [4]

to hold that, this being not merely a moral precept but a restrictive injunction, it would be quite contrary to every principle of Hindu law to assume that, where the property is taken by an heir for the spiritual benefit of the deceased, it would not have contained some provision to protect the widow from being turned out, either by the heir or by the purchaser. Thus as such action would be against the usages and customs of the Hindus and highly injurious to the reputation of the female, it

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1. (1869) 4 Beng. L.R. 72 (O.C.J.).
2. Ibid., at 77.
3. Ibid.,
4. Ibid., at 77-8.

was not within the power of the son to turn her out or even authorise the vendor to do so,[1] without, at any rate, providing her with some other suitable alternative accommodation.[2]

Nor is it open to the coparcener, into whose hands the property has come by survivorship, to jeopardise the right of residence by alienating the estate for debts not binding on the widow. In Venkatammal v. Andiappa,[3] the son, after the death of the father, contracted considerable debts and on mortgage bonds executed by him suits were instituted and the properties brought to sale in execution of decrees passed in such suits. It was not shown that the debts were incurred for purposes which could bind his mother who, on the death of her husband, had a right of maintenance against her son quoad the share of her husband in the joint-family property. Thus, as the mortgage and subsequent sale were in satisfaction of a personal debt, it was held that the house must be sold subject to the mother's right to continue to reside in it.[4]

This principle was reiterated by the Bombay High Court in Malkarjun v. Sarubai.[5] In a joint-family consisting of two brothers — one of them

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1. For similar dicta, see also Gauri v. Chandramani, I.L.R. (1876) 1 All. 262; Talemand v. Rukmina, I.L.R. (1880) 3 All. 353; Dalsukhram v. Lallubhai, I.L.R. (1883) 7 Bom. 282; Bai Devkore v. Sanmukhram, I.L.R. (1888) 13 Bom. 101; Secretary of State v. Ahalyabai, A.I.R. 1938 Bom. 321, at 324 Mt. Ganga Dei v. Jagannath, A.I.R. 1948 Oudh 108; Sm. Khanta Moni v. Shyam Chand, A.I.R. 1973 Cal. 112, where it was held that the destitute widowed daughter could not be evicted by the heir from the residence given to her by her father.

2. The same view was expressed in Yellawa v. Bhimangouda, I.L.R. (1894) 18 Bom. 452, at 453-4; Rachawa v. Shivayogapa, I.L.R. (1894) 18 Bom. 679, at 683; Mt. Ganga Dei v. Jagannath, A.I.R. 1948 Oudh 108, at 110; Rani Bai v. Yadunandan, A.I.R. 1969 S.C. 1118, at 1121.

3. I.L.R. (1882) 6 Mad. 130.

4. An exactly similar ratio was observed in Shambhu Dayal v. Mst. Munni A.I.R. 1933 Lah. 496.

5. A.I.R. 1943 Bom. 187.

still a minor — the elder of them executed a mortgage of the family property for the purpose of starting a family business, and subsequently after the death of the minor brother, on selling the family house to pay off debts incurred in regard to the mortgage, it was contended that the minor's widow had no right to interdict either the sale or the earlier mortgage, for as she took her rights of maintenance and residence in the property as it stood at the time of her husband's death, she could not set up her rights as against alienations effected during his lifetime. In negativing this claim, Divatia, J., however held that, as in the first place the manager of a joint Hindu family has no authority to impose upon a minor member, the risk and liability of a new business set up by him,[1] the mortgage could not bind the widow. Moreover, his Lordship was further of the view, as part of the consideration of the mortgage deed represented some loans to satisfy the personal debts of the alienor, the minor's interest could not be bound, for the fundamental principle is that,

> "(a)lthough a widow is not entitled to claim maintenance out of the property transferred or attached in execution of a decree for an alienation made by the deceased husband, she is entitled to challenge debts incurred by a coparcener such as a son, or a brother of her husband, and to enforce her rights to pay off those debts unless it was proved that they had been incurred for family necessity." [2]

It would therefore follow that, where there is indefeasible evidence that the coparcener in exercise of his authority as manager contracts a debt for the benefit of the family as a whole, or in the due course of the family business, the debts thus incurred, must take priority over

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1. Following Benares Bank Ltd v. Hari Narain, A.I.R. 1932 P.C. 182.
2. Malkarjun v. Sarıbai, cited above, at 190.

the rights of the members of the joint-family including those of the deceased coparcener's widow.[1]

In Johuree Bibi v. Sreegopal,[2] the family business under the management of the surviving coparcener having failed, on a petition being filed in the Insolvency Court, the Official Assignee sold the house to the defendant who then called on the widow to remove from the house. On her resisting on the ground of her right of residence, Pontifex, J., was however quite clear that, debts honestly incurred in the course of running the family business, must over-ride the rights of the members of the joint-family in property acquired with funds derived from the joint business. In other words, those who claim to participate in the benefits must also be subject to the liabilities of the joint business.[3]

The Full Bench considered the question in Ramanandan v. Rangammal.[4] After the father's death, in execution of a decree for recovery of debts contracted by the sons, the family house was sold and the father's widow ordered to vacate the premises. On the finding that the debt had been incurred not for the exclusive benefit of the coparceners, but for the benefit generally of the joint-family, the learned Judges were unanimous in holding that the widow was not entitled to set aside the sale unless she could prove that the debt that had led to it was not

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1. The widow's claim to maintenance and residence is likewise subservient to the personal untainted debts of the male ancestor up to three generations. See Ganga Bai v. Sita Ram, I.L.R. (1876) 1 All. 170 (F.B.), supra at 298, f.n. 2.

2. I.L.R. (1876) 1 Cal 470.

3. Followed in Mst. Champa v. Official Receiver, Karachi, I.L.R. (1934) 15 Lah. 9.

4. I.L.R. (1888) 12 Mad. 260.

binding on her.[1]

Thus while on the one hand, the widow's right of maintenance and residence, for all its imperative nature, is liable to be defeated where the estate is burdened by the debts of the deceased[2] on the principle of the Pious Obligation, equitable principles on the other hand, equally stipulate that debts incurred bona fide for family purpose must bind the widow like any other member of the joint-family, provided that imprudence or fecklessness do not otherwise play their part to vitiate such sale.[3]

7. The Widow's Right to Claim Maintenance While Living Away from the Family House.

The same reasons which require a wife to remain under her husband's roof,[4] do not apply where she has become a widow. However, despite the fact that it is nowhere prescribed that the right of maintenance is dependent upon residence, some early decisions indicate that where after the death of her husband, the widow leaves the ancestral home, the true principle of the Hindu law is that, while she does not lose her right

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1. For similar rulings see also Bayyapparaju v. Lakshmamma, A.I.R. 1937 Mad. 193; Lakshmi v. S.V. Co-operative Bank, I.L.R. (1945) 50 Mys. 39 (F.B.); Kalipada v. Purnabala, A.I.R. 1948 Cal 269.
2. This position has not been materially altered by the "Hindu Code", s. 26 of the HAMA, 1956, providing that unless under s. 27 a charge for maintenance has been created, "debts of every description contracted or payable by the deceased shall have priority over the claim of his dependants for maintenance under this Act."
3. See Chunilal v. Bai Saraswati, A.I.R. 1943 Bom. 393, supra, at 279-80.
4. See Ajaib Kaur v. Uttam Singh, A.I.R. 1960 Punj. 117, where it was held that, as under the Hindu law it is the duty of the wife to remain under her husband's roof and protection, she commits a breach of this duty by living separately from him unless she can by reliable evidence establish that, by reason of her husband's misconduct, or refusal to maintain her in his own house, or for some other justifying cause, she is compelled to live separately.

of maintenance by visiting her own relatives, nevertheless as the widow is not entirely her own mistress, being subject to the control of her husband's family, she is not entitled to separate maintenance in the absence of special circumstances necessitating her withdrawal from the family dwelling.[1]

In endorsing this view, Pinhey, J., in Kasturbai v. Shivajiram[2] after having elaborated on the general dependence of Hindu women, further ruled that it was a fallacy to declare that a Hindu widow is a perfectly independent person, and that however young (provided she were of full years) and however incapable of taking care of herself, she is entitled to throw off all the restraints which every society in some form or the other imposes on its female members, to take a house in the bazaar, and to do exactly as she pleases at the expense of her husband's relatives, subject to the one condition that she was not found out in unchastity and proved to be guilty in a Court of Law. With respect however, it is submitted that such extravagant flights of fancy merit rebuke. It is supreme irony that his Lordship should have, in the same breath, talked of restraints that every society imposes upon its female members (and indeed more so by Indian society than most others), and of widows who leave their homes for patently immoral purposes. Given the general view that women must always be the citadels of virtue, the preservers of the family honour, one is forced to the conclusion that his

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1. Rango v. Yamunabai, I.L.R. (1879) 3 Bom. 44. See also Seshamma v. Subbarayudu, I.L.R. (1895) 18 Mad. 403, where in a suit by the Hindu widow against her husband's brother to establish her right to maintenance and to recover arrears for six years, the Court incidently observed that, though it had the discretion to award arrears, the same could be refused where the widow had chosen to live apart from her husband's family without sufficient cause.

2. I.L.R. (1879) 3 Bom. 372.

Lordship was out of touch with the realities of Indian social conditions. In a Hindu family of moderate means, concern for which the learned Judge had so much at heart, the widow, in leaving her husband's home in the instant case, left it to seek refuge among her own relatives; imputation of unchastity in such cases is, it is submitted, gross generalisation from the few such instances that may have occurred.

Unsupported as this stance is by any authority, textual or otherwise, it may safely be discarded, for it has been settled by decisions of the highest tribunals that though undoubtedly the husband's family home is the proper place for his widow to reside in, it is not necessarily the most proper place for her continued residence, and provided that she is not guilty of unchastity or other disreputable practices after she leaves such residence, her right to claim maintenance remains intact. This minority view — significant only inasmuch as it illustrates how such facile arguments may mislead — was thus rightly rejected, and their Lordships, Westropp, C.J., and Melvill, J., in taking a contrary view, referred in particular to the ruling of Sir Barnes Peacock in Raja Pirthee Singh v. Rani Rajkoer[1] to hold that unchastity apart, non-residence as such could not nullify the claim for maintenance.

In the Privy Council decision,[2] where the widow having voluntarily left the family home to reside with her own relatives, sued seven years later for arrears and future maintenance, the question for decision was whether, under such circumstances, where her departure from the family home had not been motivated by unchaste or other improper purposes, the widow's claim could be negatived. His Lordship reviewed some of the

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1. (1873) 12 Beng. L.R. 238 (P.C.).
2. Ibid.

earliest authorities to establish precedent, and taking in particular the dicta in Cassinaut Bysack v. Hurroosoondry Dossi,[1] where the Privy Council had expressed in general terms that, where the widow from a just cause chose to reside in a place other than the roof of her husband's family home, she did not thereby forfeit her right of succession to his estate, held that this principle was equally applicable to a case of maintenance. This freedom of choice, the learned Chief Justice explained, had respect to causes as applicable to a widow not an heiress as to one who inherited, that is to say that, unless the widow left the residence of her deceased husband for unchaste purposes, she could not be deprived either of the property which she had inherited from him, or of the maintenance which the Hindu law requires of her husband's heirs to provide for her.[2]

It is thus now settled law that mere non-residence in the ancestral home does not thereby defeat the widow's right to claim maintenance, for as Maclean C.J., explained in Siddessury v. Janardan,[3] the term 'dependant'

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1. (1819) 2 Mor. Dig. 198.

2. An earlier decision in Visalatchi v. Anaswmy, (1870) 5 Mad. H.C.R. 150, arrives at a similar view, the Court, however, further adding that where the widow does leave the family residence for unchaste purposes, it would seem to be unsettled whether her unchastity affects her rights to an allowance for the bare necessaries of life. This remark made obiter needs clarification. While it is no doubt true, as we shall presently see, that a widow guilty of unchastity but who subsequently reforms, is allowed a bare or 'starving' maintenance, nonetheless once she decides to leave the protection of her husband's home, she is only entitled if she leads a chaste life. Unchastity under such circumstances would, it is submitted, disentitle her, as by a voluntary act she frees herself from the responsibilities that she would have otherwise have been burdened with, and what is more, adopt a course so frowned upon by the śāstra. On the other hand, what is really the moot question is, (it is submitted) whether or not she loses her claim to maintenance, if, as a consequence of ill-treatment and duress, she is forced to quit the family residence, and having nowhere else to take shelter, then takes to unchastity as a last resort.

3. I.L.R. (1902) 29 Cal. 557.

does not necessarily mean 'resident', and while so long as the non-resident widow does not put forward her claim, the right may remain dormant or in abeyance, nevertheless it subsists continuously as a legal obligation upon those who take the estate.[1]

However, this general rule apart, where the husband chooses by his will to make it a condition that his widow should reside in the family house after his death, such a direction would be binding, and it would be futile to plead that the imposition of this condition is at variance with the enlarged and liberal spirit which has actuated the High Courts in dealing with the question as to the separate maintenance of widows.

In Gokibai v. Lakhmidas,[2] where the husband's will clearly stipulated that, should his widow leave the family house after his death, her maintenance allowance be reduced, the Court nevertheless allowed her claim for separate maintenance, and in purporting to follow the ruling in Raja Pirthee Singh's Case,[3] left open the question whether that rule applies where in defiance of her husband's instructions the widow chooses to live elsewhere. It is however submitted that in fact had the learned Judge, Farran, J., actually followed the ruling of the Privy Council, the

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1. Mokhada Dassi v. Nand Lal, I.L.R. (1901) 28 Cal. 278. A host of decisions vindicate this view, among them, Surampalli v. Surampalli, I.L.R. (1908) 31 Mad 388; Ekradeshwari v. Homeshwar, A.I.R. 1929 P.C. 128, at 132; Srinavasa,v. Lakshmi, A.I.R. 1928 Mad. 216; Har Pratab v. Thakurain Raghuraj, A.I.R. 1933 Oudh 550; Krishnaji v. Anusaya, A.I.R. 1939 Nag. 130; Dattatrya v. Laxman, I.L.R. (1942) Bom. 584; Hari v. Narmadabai, A.I.R. 1951 Nag. 133; Rajamma v. Varadarajulu, A.I.R. 1957 Mad. 198, where as a consequence of a pre-puberty marriage, the widow had never lived with her husband, the Court nevertheless decreed that she was entitled to arrears; Gowardhan v. Smt. Gangabai, A.I.R. 1964 M.P. 168, at 171; Sidramappa v. Mahadevi, A.I.R. 1971 Mys. 145, at 147; Guruswami v. Angaiyarkanni, A.I.R. 1974 Mad. 194, at 198.
2. I.L.R. (1890) 14 Bom. 490.
3. (1873) 12 Beng. L.R. 238 (P.C.).

question would have posed no problem, for in the course of the earlier judgement,[1] Peacock, C.J.'s qualification obiter of the general rule was precisely to the effect that, the widow's right of maintenance cannot be defeated by reason of mere non-residence for purposes other than unchastity except where she deliberately flouts the direction in her husband's will by residing elsewhere without a just cause. In this particular instance, therefore, rather than bringing the widow's case under the purview of the general rule, a more equitable solution for the learned Judge to adopt would have been to bind her to the terms of the will and grant her the reduced maintenance that the testator had envisaged in such circumstances.

The same High Court's later decision in Girianna v. Honama,[2] is, it is submitted, more to the point. Where the minor widow had left the protection of her husband's undivided nephew a year after his death, his Lordship held that despite the general rule that maintenance is not conditional upon residence, where the husband had specified in his will that his widow should remain in the family house until she attained majority, she would be bound by this condition unless she could prove that the nephew's conduct towards her was such as to justify her action.[3]

In effect, therefore, where circumstances justify her leaving the family house, the coparceners cannot escape their liability to maintain

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1. Raja Pirthee Singh's Case, cited above.
2. I.L.R. (1891) 15 Bom. 236.
3. In Jamna v. Arjun, A.I.R. 1941 All. 43, for instance, where the widow in disobedience of the instruction in her husband's will, had left the family residence as a consequence of dissension and strained feelings between her and her husband's adopted son, the Court held that such non-residence being for a just cause, the widow did not thereby forfeit her right to claim maintenance.

the widow notwithstanding that the testator might have stipulated residence as a pre-condition to maintenance. In Mul ji v. Bai Ujam[1], where the bequest to the wife was conditional upon her returning to the family home, it was alleged that as the condition remained unfulfilled, it was not open to the widow to claim arrears of maintenance on the ground that those in possession of her husband's estate were liable for her maintenance. It was however held that,as ill-feeling between the two parties had predominated to the extent that the widow's character was sought to be blackened by the raking up without justification of an old scandalous story against her, it was inconceivable to visualise a joint living of amity and harmony, and this being just enough cause for the widow to live separately, she would be entitled to the arrears she was claiming.

Similarly in Tin Couri v. Krishna Bhabini,[2] where contrary to the condition as expressed in the testator's will, the infant widow was removed from the deceased husband's home with the assistance of the police, their Lordships held that though it would appear that what was contemplated was a wilful, deliberate and intentional leaving, nevertheless considering that the girl could not be treated as a free agent at the time or even subsequently during her period of non-residence, it had therefore to be construed as a plain case of duress which could not be treated as working a forfeiture of her rights as contemplated in the will. However, what adds interest to the ratio is that, while holding in favour of the widow, the learned Judges added at the same time, the note of warning that, while in these exceptional circumstances her right remained intact, their ruling was not to be misconstrued as laying down

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1. I.L.R. (1888) 13 Bom. 218.
2. I.L.R. (1893) 20 Cal. 15.

as a matter of law that mere legal infancy as such could effectively be a plea to keep the widow away from the residence where she was bound to live under the terms of her husband's will.

On the other hand, where there is no such condition of residence in the will, such an intention on the testator's part cannot be imputed. In Narayanrao v. Ramabai,[1] in a suit brought by a Hindu widow for maintenance more than sixteen years after the death of the testator who had bequeathed the entire of his estate to his eldest son, directing him at the same time to provide for his widows and other members and dependants of the family, the plea of the son was that it was a condition precedent to the widow's right to maintenance that she should live under the same roof as the rest of the joint-family. It was however held that, as there was no condition in the will making the plaintiff's right to maintenance dependent upon her residing in the family house, she was therefore left in the ordinary position of a Hindu widow in whose case separation from the ancestral home would not generally disentitle her to maintenance suitable to her rank and position.[2]

8. The Widowed Daughter-in-Law's Claim to Maintenance from the Separate Assets of Her Father-in-Law:

(1) The Moral Liability of the Father-in-Law

Intimately connected with the question of the widow's claim to maintenance from her deceased husband's family is the nature of the right that the widowed daughter-in-law may assert in her demand for

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1. (1879) L.R. 6 I.A. 114.

2. However, as the suit was instituted more than sixteen years after the husband's death, an alert counsel could well have taken advantage of the law of limitation to plead on behalf of the defendant that the claim was barred by time.

maintenance from the self-acquisitions of her father-in-law. Where the deceased husband had left no property, there is, as we have already indicated,no liability on his male collaterals to maintain his widow. Neither, in such circumstances, is the husband's father legally compelled, except that it has been uniformly held, and is settled law that, though the adult son who is not permanently disabled from supporting himself, has no right, moral or legal, to be maintained by the father from his self-acquired assets, nevertheless upon the son's death, the Hindu law imposes upon the father, the moral obligation to provide maintenance for his widowed daughter-in-law.[1]

Thus Manu

> "(T)he father, the mother, the Guru, a wife, an offspring, poor dependants, a guest and a religious mendicant are declared to be the group of persons who are to be maintained." [2]

Likewise Nārada maintains in even more explicit language:

> "(A)fter the death of her lord, the relations of her husband shall be the guardians of a woman who has no son. They shall have full authority to control her, to regulate her mode of life, and to maintain her."[3]

and guided by injunctions such as these, and on the principles of

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1. Appavu v. Nallammal, A.I.R. 1949 Mad. 24, at 25. Note though, that there is no authority for the proposition that, where the daughter-in-law is widowed after the death of her father-in-law, she is entitled to maintenance out of the estate left by the father-in-law to his heirs. The condition precedent attaching to the moral liability of the father-in-law is the pre-decease of his married son. See Mst. Saran Bai v. Abdul Rashid, A.I.R. 1948 Sind 127, at 129.

2. Cited with approval in Lakshmi v. Sundaramma, AIR 1981 AP 88 (F.B.),at 98. See also Dāya II. 23, op.cit: "For the maintenance of the family is an indispensible obligation; as Manu positively declares: 'The support of persons who should be maintained is the approved means of attaining heaven. But hell is a man's portion if they suffer. Therefore, let the master of a family carefully maintain them.'"

3. Nār. XIII. 28, op.cit.

justice and equity, it has long been established by custom and usage that, in a society where child marriages were not uncommon and fathers exercised their not inconsiderable authority in arranging them, the daughter-in-law who was placed in a peculiarly helpless situation as a widow, should at least be provided with food, shelter and raiment by her husband's father, irrespective of whether or not the latter had succeeded to any property of the former.

This right was early recognised but merely as a moral liability on the father-in-law's part that could not ever assume the force of law. In Khetramani Dasi v. Kashinath Das,[1] Lock and Kemp, J.J., were of the view that, not only is the maintenance of a son's widow as a dependant member of the family, a charge on the inheritance, but that, as for all practical purposes she is a member of the family into which she had been married, the obligation to support his family which the law imposes on every Hindu makes it incumbent upon the father-in-law to maintain his widowed daughter-in-law even where his means are self-acquired, as if he were in possession of ancestral property. The rest of the Bench were, however, vigorous in their dissent, and, it is submitted, rightly so. As Peacock, C.J., explained, (with Macphearson, J., concurring), the right of a wife or widow and that of a son's widow to maintenance appear to be governed by very different principles. While the wife may legally enforce her claim against her husband, or the widow against those who take his estate by inheritance, the maintenance of a son's widow is a mere moral obligation upon the father-in-law which cannot be converted into a legal liability; she has no greater right to enforce such a claim after her husband's death, than she would have

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1. (1868) 2 Beng. L.R. 15 (A.C.J.).

had in his lifetime were he unable to maintain her.

The learned Judges being equally divided in opinion, the matter was taken in Letters Patent Appeal to be heard by a fuller Bench, which unanimously concurred with the view taken by Peacock, C.J. Their Lordships in emphasising the merely moral nature of the injunction, elaborated that, the penalties for the non-performance of the duty being the displeasure of heaven, the pains of hell and the reprehension of mankind, it is at best a sin against divine mandate rather than a penal offence against human law; accordingly the Hindu law does not prescribe a civil remedy in such instances, for if the widow's suit be well founded for an annuity to be paid to her out of her father-in-law's property in which her husband, had he been alive, would have had no interest, it would follow that, a son's widow has a legal right to a share in the father's property during his lifetime where the son himself had none —— a position patently absurd and therefore not to be countenanced.

The Full Bench took the same view in Ganga Bai v. Sita Bai,[1] where the daughter-in-law's suit to set aside the alienation of the family house for untainted debts apart, she also claimed maintenance from her father-in-law out of a certain charitable allowance paid to him by the Government. Their Lordships, in negativing the contention, ruled that the father-in-law being possessed neither of ancestral property nor of funds with the disposal of which his son, if alive, could have interfered, his liability to provide his daughter-in-law with maintenance was merely a moral obligation as hers was to minister to his needs. Neglect on both counts is discreditable in this world leading to punishment in the hereafter, but no more than that. A Hindu widow is not, therefore entitled under the Mitākṣarā to be

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1. I.L.R. (1876) 1 All. 170 (F.B.).

maintained by her husband's relative merely as a consequence of the relationship between them and her deceased husband. Her right depends upon the existence in their hands of ancestral property, and where none exists, all she can hope for from the father only, is a moral claim arising from religious precepts but unenforceable in a Court of Law.[1]

(2) The Legal Liability of the Heir

But if it is well settled under the Hindu law as interpreted and administered by the Courts that, the father-in-law is under no legal obligation to maintain the widow of his predeceased son out of his separate property, although he is as a matter of moral obligation expected to do so, it is equally well-settled that at his death an essential element of the son's right of inheritance is the spiritual benefit which in the contemplation of the Hindu law, he must confer upon the soul of his deceased father. Thus the son, inheriting the self-acquired property of his father, takes it subject to such obligations as are conducive to the spiritual welfare of the latter, and what was a moral obligation in respect of the father, ripens into a legal obligation when the estate passes into the hands of his heirs.

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1. Among the early decisions establishing this rule, the Bombay High Court held likewise in Kalu v. Kashibai, I.L.R. (1882) 7 Bom. 127, and in Madras in Meenakshi v. Rama Aiyar, I.L.R. (1912) 37 Mad. 396, the Court held that as the right of maintenance in such circumstances has no obligatory force, the principles of justice, equity and good conscience defeated the widowed daughter-in-law's claim, where she had not been a minor at the time of her marriage, and on widowhood had left —— and indeed relinquished her right in the ancestral estate —— her father-in-law's house to live elsewhere. Mark, however, that Equity has a role to play in such cases as well, and in Ratan Chand v. Smt. Huree (1884) 5 W.R. 225, it was held that though the daughter-in-law could claim maintenance wherever she might elect to live so long as she remained chaste and virtuous, where the father-in-law was a poor old man with no means of supporting his daughter-in-law, or even of maintaining himself, her claim must in justice and equity be defeated.

Mahmood, J.'s learned and illuminating judgement in Janki v. Nand Ram,[1] perhaps best illustrates these principles. Where the pre-deceased son's widow sued for maintenance out of the self-acquired assets of her deceased father-in-law in the hands of the surviving son, his Lordship held that, as in the Hindu law, the devolution of property depends upon the competence to perform the obsequial rites of the deceased, similarly,

> "(O)f the successor to the estate the guardian of the widow and of the son, he who takes the assets becomes liable for the debts." [2]

This injunction of Nārada, while not directly relevant, nevertheless where the statute law is silent, and the original texts of an ancient system of jurisprudence furnish no express authority in specific terms, Judges could not, his Lordship ruled, ignore in disputes arising out of the law of marriage, the conditions, sentiments or prejudices, religious or social, which are held sacred by the population to which the law is administered. Thus the word "debt" in the foregoing text, was to be understood in a broad sense so as to include all classes of obligations including the moral obligation on the father-in-law's part to maintain his widowed daughter-in-law, and under the Hindu law these purely moral obligations imposed by religious precepts upon the father, ripen into legally enforceable obligations as against the son who inherits his father's property, for not to do so would be to expose the widow to risks and a course of action repugnant to the very essentials of Hindu thought and action. To put it in the words of the learned Judge:

> "(W)ould he (the son in denying maintenance) propose that the girl widow ... should marry a second husband, thus incapacitating herself for (sic) conferring any of those spiritual benefits

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1. I.L.R. (1889) 11 All. 194.

2. Ibid, at 221.

> upon his brother and her deceased husband, which the ecclesiastical ceremonials of the Hindu law and religion inculcate and ordain? Would he propose that this widowed girl should claim maintenance from her parental family of which she, by reason of her marriage ... has ceased to be a member, and as such entitled to no such legal right? Would he propose that this widowed girl should enter into some profession to earn a livelihood? Would he propose that if she is unfit by reason of her sex and the condition of Hindu society, to adopt any respectable profession, that she should go begging in the streets for her bare necessaries of life, thus exposing herself ... to all those temptations of immorality which the authorities prescribed by the Hindu law for the widow, are intended to obviate and preclude?" [1]

In the event, despite the opposite party's plea that, all considerations of compassion be ignored, and the case be disposed of entirely upon the technicalities of the law, in what has become a classic judgement his Lordship upheld what was declared obiter in Khetramani Dasi v. Kashinath Das,[2] and there can be no question but that the heir is legally liable where the father-in-law's obligation in his self-acquired assets was merely moral, as numerous reasoned decisions testify.[3]

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1. Janki v. Nand Ram, cited above, at 221.

2. (1868) 2 Beng. L.R. 15 (A.C.J.).

3. This view was upheld in Visalatchi v. Annasamy, (1870) 5 Mad. H.C.R. 150; Adhibai v. Cursandas, I.L.R. (1887) 11 Bom. 199; Kamini Dasee v. Chandrapode, I.L.R. (1888-90) 17 Cal. 373; Devi Persad v. Gunwanti Koer, I.L.R. (1895) 22 Cal. 410; Rangammal v. Echammal, I.L.R. (1899) 22 Mad. 305; Siddessury v. Janardan, I.L.R. (1902) 29 Cal. 557; Indubala v. Panchumani, A.I.R. 1915 Cal. 417; Jai Nand v. Mst. Parandei, A.I.R. 1929 Oudh 251 (F.B.); Rajani Kanta v. Sajani Sundari, (1934) L.R. 61 I.A. 29; Mt. Munni Bibi v. Radhey Shiam, A.I.R. 1943 Oudh 190, at 191; Gangadei v. Jagannath, A.I.R. 1948 Oudh 108; Audemma v. Verarareddy, A.I.R. 1949 Mad. 31, at 37. In view of decisions such as these, the stance adopted in Ammakannu v. Appu, I.L.R. (1888) 11 Mad. 91, that as a Hindu is under no obligation to maintain his adult son or his widow out of his self-acquired property, it therefore followed that the daughter-in-law could enforce no claim for maintenance against such property in the hands of the grandson unless the original owner had shown by conduct or otherwise, an unequivocal intention that it should be taken subject to the obligation of providing for her support, may be dismissed out of hand as militating against the spirit of the Hindu law. For to put it in the words of Mahmood, J., "The Mitākṣarā and the Bengal school do

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The rule applies with equal vigour in the case of widowed daughters. At her marriage the daughter leaves the family of her father and becomes incorporated in the family of her husband. The father is under no legal liability to maintain her any further, but if she becomes destitute by reason of her inability to obtain maintenance from her husband's family, the Courts are agreed that, in such circumstances the father is under a moral obligation to maintain her. However, the conflict of judicial opinion arises as to whether, like the daughter-in-law, the indigent daughter's claim is legally enforceable against the property in the hands of the heirs.

While in Bai Mangal v. Bai Rukmini,[1] Ranade, J., expressed the view that there is no legally enforceable right by which a widowed daughter's maintenance may be claimed as a charge on her father's estate in the hands of his heirs, in Mokhada v. Nundoolall,[2] Maclean, C.J., left open this fundamental question in negativing the daughter's claim to separate

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not differ with each other in the principle that the right of inheritance itself is based on and arises from the contemplation of the Hindu law that the inheritor by taking the inheritance renders spiritual benefits to the soul of the deceased proprietor." : Janki v. Nand Ram, I.L.R. (1889) 11 All. 194, at 212. In view of this clear enunciation of the law, doubts persist as to the correctness of the dicta in Shiva Pujan v. Jamuna Missir, I.L.R. (1968) 47 Pat. 1118, and Kunji Thomman v. Meenakshi, A.I.R. 1970, Ker. 284, infra, at 571-3.

1. I.L.R. (1898) 23 Bom. 291.

2. I.L.R. (1901) 28 Cal. 278. It is to be noted, however, that when the matter came up in the Court of first instance in Mokhada v. Nundo Lall, I.L.R. (1900) 27 Cal. 555, Ameer Ali, J., while holding that the widowed daughter is not entitled to maintenance out of the estate of the father in the hands of the heirs, observed inter alia that, in cases where the father had married his daughter to a person not possessed of means to support her, and had consequently, and as a matter of moral obligation, maintained the daughter and her husband in his own house up to the end of his life, such moral obligation would, after his death, become a legal obligation on the part of those taking his property.

maintenance where not only was there an offer by the heir to maintain her in the family, but more importantly, neither was there any evidence in support of her contention that she was unable to receive maintenance from her husband's family.

However, such questions were put to rest by the decision of the Full Bench in Ambu Bai v. Soni Bai,[1] where in considering whether the step-mother in possession of her husband's property as his heir was bound to provide maintenance to the indigent widowed daughter of her late husband, their Lordships had no hesitation in extending the principle of the decision in Janki v. Nand Ram[2] to hold that those principles applied with equal force to the case of a destitute daughter.

But the story was not to end there, and in Provash v. Prokash,[3] a further step was taken, Das, J., holding that the duty of the heir who takes the estate not for his own benefit but for the spiritual well-being of the owner must be the same in respect of all such moral obligations as are recognised by the law. In the event, as it would be illogical to differentiate between such moral obligation to maintain on mere difference in the degree of relationship, consequently

> "(I) do not see why this principle should be limited to the case of a widowed daughter-in-law or destitute married daughter," 4

and the unmarried daughter of a predeceased son, the object of tender affection whom every Hindu considers himself morally bound to support, must likewise have a right of maintenance legally enforceable against the property in the hands of the heir.

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1. A.I.R. 1940 Mad. 804.
2. I.L.R. (1889) 11 All. 194.
3. (1946) 50 C.W.N. 559.
4. Ibid., at 568.

In Sm. Khanta Moni v. Shyam Chand,[1] these principles were extended even further. Where the widowed daughter with her two minor children had been given shelter by her father in a part of his assets, at his death, his only son sought to evict her on the ground that, as heir to his father he alone was entitled to the property. Sinha, J., however, ruled to the contrary, and in upholding the claim of the daughter on the basis of her actual destitution, adopted a more equitable approach to hold that,

> "(a) widowed daughter to sustain her claim for maintenance out of the estate of the father in the hands of the heirs need not be a destitute nor need be actually maintained by the father during his life. All that she is required to prove to get such maintenance is that at the material time she is a destitute and she could not get any maintenance from her husband's family." [2]

Connected with issue of the legal right of the daughter-in-law to be maintained by the heirs of the deceased father-in-law, the next question for consideration is as to the nature of the right where the family is disrupted by partition. In Yamunabai v. Manubai,[3] the daughter-in-law, whose husband had died during the lifetime of his father, claimed maintenance after the latter's death against the assets in the mother-in-law's hands, some of which had come to her under the terms of her husband's will and the rest by succession. In ruling in favour of the daughter-in-law, the learned Judge, Ranade, J., observed that the distinction of union and separation was very material, and though the son's widow had no legally enforceable claim for maintenance against the

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1. A.I.R. 1973 Cal 112.
2. Ibid., at 114.
3. I.L.R. (1889) 23 Bom. 608.

self-acquired properties in her father-in-law's hands, as her husband had lived in union with his father, it was legally binding on the heirs to provide her with maintenance.

However, this cannot be regarded as good law in view of the contrary, and, it is submitted, much more reasoned approach taken by Division Bench in Appavu v. Nallammal.[1] Where after the disruption of the joint-family, the father had continued to maintain the widow of his predeceased son, his Lordship Gentle, C.J., held in clear terms that,

> "(W)hether the family is joint or whether it is divided in status, the members of it have no right with respect to the father's self-acquired property during his lifetime and, again, whether united or separated, the father's self acquisitions descend to his heirs ... upon his death intestate." [2]

In the event that there had been no partition of the family, the moral liability of the father-in-law to maintain his widowed daughter-in-law out of such assets would undoubtedly have ripened into a legal liability enforceable against those who took the estate by inheritance. Thus since the liability relates solely to the father-in-law's self-acquisitions, its application cannot be said to depend upon the existence or non-existence of the joint status, and so far as the heirs are concerned, as they take the property for the spiritual benefit of the late proprietor,

> "(t)heir liability arises out of their personal position as heirs, and not by virtue of membership of a joint Hindu family." [3]

Decisions such as these establish that at Anglo-Hindu tradition, the legal claim of the daughter-in-law from the joint-family property apart, she had an equally indefeasible legal claim to maintenance in the separate assets of her father-in-law in the hands of his heirs. However,

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1. A.I.R. 1949 Mad. 24.
2. Ibid., at 26.
3. Ibid.

since 21 December, 1956, such right has been statutorily regulated, and while under s. 21 (VII) of the HAMA, the widowed daughter-in-law is classified as a dependant, s. 19 (1) does away with the traditional notion of the father-in-law's moral liability to maintain his widowed daughter-in-law by providing that, a widowed daughter-in-law, whether married before or after the commencement of the Act, may now claim maintenance from the father-in-law only where she is indigent and unable to claim maintenance from the estate of her husband, or from her father or mother, or from her son or daughter, or from his or her estate. This right is further conditional under s. 19 (2) upon the father-in-law having in his possession, coparcenary property out of which the widowed daughter-in-law has not obtained any share. The sub-s. continues tradition, however, in further envisaging that the claim to maintenance ceases on the widowed daughter-in-law's remarriage.

(3) The Legal Liability of the Donee or Devisee

The next question to consider is whether, like the heir the legatee too takes the property subject to the legal liability of maintaining the widowed daughter-in-law where this had merely been a moral obligation upon the deceased proprietor. The Bombay High Court has consistently exonerated the devisee from any such responsibility on the basis that,

> "(p)roperty acquired by valid testamentary disposition is not governed by the rules of the Hindu law of inheritance, and when the power of making such disposition is unrestricted, it is difficult to conceive any consistent ground on which the devisee could be held bound by an obligation from which the testator had power to relieve him, and by the bequest had actually relieved him." [1]

The same view was suggested obiter in Yamunabai v. Manubai,[2] and

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1. Per Batty, J., Bai Parwati v. Tarwadi, I.L.R. (1901) 25 Bom. 263, at 268.
2. I.L.R. (1899) 23 Bom. 608.

while upholding the daughter-in-law's claim to maintenance against the heir, the learned Judge passingly observed that, had the latter been a testamentary devisee, the incidents of self-acquisition would have protected the property in the hands of such legatee on the principle that self-acquired property disposed of by will or gift cannot be made subject to the incidents of inheritance.[1]

The Lahore High Court followed suit in Bhagwanti v. Thakur Mal,[2] the Court adopting the rationale that as her right had been merely in embryo during her father-in-law's lifetime and over which the widowed daughter-in-law had no right or control, she could not possibly be allowed to realise her maintenance from the property which he had seen fit to sell or gift. This view the learned Judge held as "inevitable",[3] as

> "(a)ny other decision would be irreconcilable with the all important proposition that a man may do what he wills with his own self-acquired property." 4

There were, however, early indications of dissent with this view, and in Rangammal v. Echammal,[5] the Madras High Court in upholding the widowed daughter-in-law's right held that,

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1. Followed in Bhagirathi Bai v. Dwarkabai, A.I.R. 1933 Bom. 135 where in holding that no such right inheres in gifted property, it was observed that it is immaterial if the donee under the gift is the next heir.
2. A.I.R. 1926 Lah. 198.
3. Ibid.
4. Ibid. See also Sankaramurthy v. Subbamma, A.I.R. 1938 Mad. 914, where in maintaining a similar stance, it was held that, as the essence of the idea of a gift or will is that the testator or donor is disposing personally and at his own will and pleasure of the property he possesses, when the transfer of property is achieved by such means, it is not necessary for the legatee or donee to take it subject to the spiritual welfare of the deceased.
5. I.L.R. (1899) 22 Mad. 305.

> "(T)he better conclusion is, perhaps,[1] that the party whose moral claim becomes a legal right would not be affected by testamentary dispositions in favour of volunteers made by the person morally bound to provide the maintenance,"[2]

for, his Lordship explained, as the claim to maintenance originated from the status acquired by marriage, it becomes a legal right independently of the testator's volition, and comes into existence at the same time as the disposition in favour of the volunteer become operative. Thus "it is consequently difficult to see how the latter could affect the former,"[3] and in such circumstances, the learned Judge held that, even that property bequeathed to the widow could not be exempted from a charge being created for the widowed daughter-in-law's maintenance.[4]

This view was endorsed with a commendable degree of force in the judgement of Ameer Ali, J., in Foolcomari v. Debendra Nath.[5] The argument addressed before his Lordship was that, as the liability to maintain the widowed daughter-in-law depended upon a certain ingredient in

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1. The word "perhaps" here was seized upon by their Lordships, King and Stodart, J.J., in Sankaramurthy v. Subbamma, A.I.R. 1938 Mad. 914, to reinforce their own view to the contrary in holding that, as the observation was made expressly obiter, it could therefore not be regarded as a definitive statement of the law.

2. Per Aiyar, J., Rangammal v. Echammal, cited above, at 307.

3. Ibid.

4. Followed in In the Goods of Gobinda Chundra, (1913) 23 I.C. 539; Indubala Dasee v. Panchumani, A.I.R. 1915 Cal. 417; Jeot Ram v. Mst. Lauji A.I.R. 1929 All. 751. See also the decision of Mookerjee, J., in Gopal Chandrapal v. Kadimbini Das, A.I.R. 1924 Cal 364, where the property having been transferred by gift inter vivos, the learned Judge held that transfers by will and gift were essentially the same, for while in the one, it was effected during the lifetime of the donor, in the other it took place after his death, but in neither case could the donor so alienate the property as to evade his moral obligation and protect his estate after his death from the claim of the daughter-in-law which according to well-established rules ripens, at that stage, into a legal claim.

5. A.I.R. 1942 Cal. 474.

intestate succession, that of spiritual benefit, it is a liability peculiar to heirs alone, for where there exists absolute freedom to dispose of property, this element is eliminated by gift or will. The learned Judge, in ruling to the contrary, held that, as long as the father is alive, there is the expectation that he would perform the moral duty that the Hindu law imposed upon him, that of maintaining his pre-deceased son's widow. If he dies without performing it he commits a sin, but there is no legal remedy. On the other hand, there can be no question but that the right is legally enforceable against the property in the hands of his heirs, and as the liability is dependent upon the possession of property, it is legally incumbent upon the Hindu heir, bound as he is by the theory of the Pious Obligation, to provide maintenance to the daughter-in-law whether he takes the property on intestacy or by a gift or will, as the judgement of Sir Asutosh Mookerjee[1] had made abundantly clear.[2]

(4) The Legal Liability of the Stranger Donee or Devisee

From the above position there is no resiling, and it may now be regarded as settled by the highest judicial authorities that the donee or devisee heirs are as much bound by the duty of maintaining the widowed daughter-in-law as the intestate heir. But what where a stranger succeeds to the property under a gift or will? In Sankaramurthy

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1. See Gopal Chandrapal v. Kadimbini, A.I.R. 1924 Cal. 364.

2. Followed in Lakshmi v. Sundaramma, A.I.R. 1981 A.P. 88 (F.B.), at 105-6, where Rao J., in disagreeing with the Bombay viewpoint, followed the reasoning adopted by Ameer Ali, J., in Foolcomari's case, A.I.R. 1942 Cal. 474, to hold at 105 that, "when there is property in the hands of the heirs belonging to the deceased who had a moral duty to provide maintenance, it becomes a legal duty on the heirs. In our view it makes no difference whether the property is received either by way of succession or by way of gift or will, the principle being common in either case."

v. Subbamma,[1] their Lordships in absolving the devisee heir of the responsibility of maintaining the son's widow had observed:

> "(I)t is impossible to argue that there is anything in the nature of the transference of property by will or by gift which requires that the legatee or donee should take any thought for the spiritual welfare of the testator or donor. The legatee or donee may be a stranger, may be a Mahomedan, (sic) may be a Christian, may be anybody..."[2]

and while there is no substance in the argument in regard to the donee or devisee who is also the heir, the latter part of the reasoning makes one ponder. Why indeed should the stranger donee or legatee be saddled with the liability of maintaining the dependant widow when the question of spiritual benefit on his part does not arise at all?

In considering the question obiter in Foolcomari's case,[3] Ameer Ali J., while conceding that the matter was not free from doubt, also acknowledged that if strangers are to be affected, the liability must be visualised as something which attaches to the property rather than to the person or the capacity of the devisee or donee —— something in the nature of a charge or implied trust affecting the transferee. But if, his Lordship reasoned, the obligation for maintenance is a liability dependent upon the possession of property, it seemed to him neither startling nor preposterous to conceive of a state of law whereby volunteers or persons taking with notice should be affected by the claim to maintenance of a Hindu daughter-in-law in keeping with the principle if not the actual provisions of s. 39 of the T.P. Act. However, as the learned Judge was not called upon to express any final view, he contented

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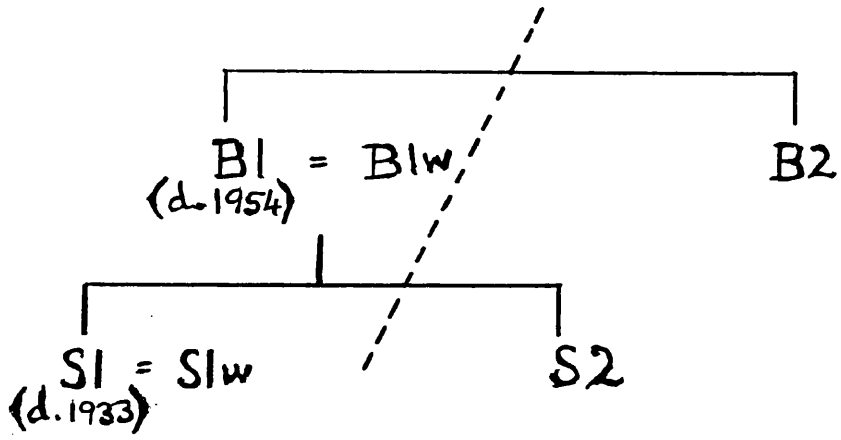
1. A.I.R. 1938 Mad. 914.
2. Ibid., at 915.
3. A.I.R. 1942 Cal. 474.

himself with observing that it was a matter which would no doubt receive the attention of those who were then in the process of codifying this branch of the Hindu law.[1]

Almost forty years later the Andhra Pradesh Full Bench was faced with precisely this question in Lakshmi v. Sundaramma.[2]



S2 having been given in adoption to B2, there was a subsequent partition of the joint family, though B1 and S1 continued to live in a state of jointness. In 1924, S1 executed a registered relinquishment deed in favour of his father, and after giving up all his rights in the moveable and immoveable properties to which he was entitled, died in 1933. B1 in turn bequeathed some of what was now his separate property to his widow B1W, and the remainder to S2, his natural son who had gone in adoption. In 1961, B1W executed yet another registered deed whereby she relinquished her right, title and interest in the property in favour of S2, and on the latter alienating the property by way of sale or gift

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1. A prophetic enough statement, as codification did take shape in the form of the "Hindu Code" with its four components of Marriage and Divorce, Succession, Minority and Guardianship and Adoption and Maintenance, the last of which was to take into account this controversial aspect of the law. See below.

2. A.I.R. 1981 A.P. 88 (F.B.).

shortly thereafter, S1W filed the present suit for possession and alternately for maintenance and residence.

S1 having died prior to 1937, the question of possession did not arise, but after an exhaustive analysis of the ancient smrti texts and judicial authorities, their Lordships having established that, the moral obligation of a father-in-law possessed of separate or self-acquired property to maintain the widowed daughter-in-law ripens into a legal obligation in the hands of persons to whom he had either bequeathed the property or made a gift of it, even as it does in the hands of the intestate successor, the point for decision was whether, where the donee or devisee is a stranger, he is similarly bound.

The learned Judge, Rao, J., speaking on behalf of the Bench, while fully aware of the difficulties that the problem presented in that despite an examination of

> "(t)he development of law for the last hundred years, we have not come across even a single case where the property was bequeathed or made over by gift to strangers," [1]

nevertheless held that as every custom and usage which has been recognised as law in the Hindu jurisprudence indicates that, there is essentially no difference as between a moral obligation and a legal obligation in so far as the head of the family is concerned, the only inference that could be drawn is that the property, even if self-acquired , is treated by the father as trust property for the maintenance of the family members including dependants, in which category the widowed daughter-in-law is placed. Under these circumstances, therefore, it could not be said that a man is entitled to dispose of his property in favour of strangers in such a manner as to deprive the

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1. Ibid., at 107

daughter-in-law of her maintenance. Or to put it in other words, where the head of the family visualised that there is a charge attached to the property to maintain the family members, the transferees, in keeping with the principles of s. 39 of the T.P. Act

> "(a)re affected by such charge, and they would also constitute as trustees to maintain the dependants when the property is in their hands," [1]

and as there is basically no difference between a widow and a widowed daughter-in-law in so far as maintenance is concerned, the principle has to be logically pursued, and where the entire property is bequeathed or made over by gift to a stranger, the donee or devisee stranger takes the estate subject to the liability of maintaining the widowed daughter-in-law.[2]

This rule, i.e. that dependant members of the family are entitled to maintenance from those who take the estate has been incorporated in the HAMA, 1956, and while s.22 (1) lays down that the heirs[3] of a deceased Hindu are bound to maintain the dependants of the deceased out of the estate inherited by them from the deceased, the sub-s. is made

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1. Ibid., at 108.

2. However, having established the principle as would govern the right of maintenance in property in the hands of the stranger donee or devisee, his Lordship was of the view at 107 that, in the present case "by no stretch of imagination could it be said that the transferee is a total stranger to the family," and as a natural son of the deceased, though given in adoption, he, like the grandson in whose favour the property is bequeathed, "would be equally interested, according to the ancient concept, in relieving his ancestors from bodily and mental discomfort and in protecting their souls from the consequences of sin, by providing maintenance to the dependants such as the daughter-in-law."

3. The word "heirs" in the sub-s. has rightly been construed to include all persons on whom the estate has devolved upon intestacy as well as under a testamentary instrument (see Gulzara Singh v. Tej Kaur, A.I.R. 1961 Punj. 228), and, it is submitted, by gift inter vivos.

subject to the provisions of s. 22 (2) which states:

> "(W)here a dependant has not obtained by testamentary or intestate succession, any share in the estate of a Hindu dying after the commencement of this Act,[1] the dependant shall be entitled subject to the provisions of this Act, to maintenance from those who take the estate."

9. The Rate or Proportion of Maintenance That May be Claimed:

(1) Where the Widow is Possessed of Joint Family Assets

Inasmuch as the right to maintenance is a legal right, its accrual and enjoyment by the widow is claimable against those who take the assests of her deceased husband by survivorship to the extent of such assets in their hands. In other words, as the liability for maintenance arises only upon the taking of the property of the deceased, where, as a consequence of partition or any other reason, the widow is herself possessed of such estate, the burden of her maintenance may no longer be imposed upon the remainder of the ancestral property.

This eminently sensible construction did not, however, commend itself to their Lordships Newton and Warden, J.J., and in Bai Lakshmi v. Lakhmidas,[2] the learned Judges ruled that notwithstanding that the widow had obtained the share of her deceased husband and had lived by money-lending for thirty years,[3] the obligation of maintaining her would

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1. These words clearly indicate the prospective nature of the sub-s. So it was affirmed by the Full Bench in Lakshmi v. Sundaramma, A.I.R. 1981, A.P. 88 (F.B.), at 93, following Ramamoorthy v. Sitharamamma, A.I.R. 1961 A.P. 131 (F.B.), which was confirmed on appeal by the Supreme Court in Gopala Rao v. Sitharamamma, A.I.R. 1965 S.C. 1970, over-ruling the opposite construction put to the words in Kameshwaramma v. Subramanyam, A.I.R. 1959 A.P. 269.

2. (1863) 1 Bom. H.C.R. 13.

3. However reprehensible money-lending as a profession may be, to the extent that such earnings are the result of the widow's own exertions, they cannot be taken into account in determining the quantum of maintenance due from the joint assets as we shall presently see, and while the judgement as a whole certainly militates against the rules governing the incidents of the joint family, there can be no question but that

(continued next page)

nevertheless attach to her husband's relatives should she then be destitute.

How little this theory bears up to the more acceptable view in consonance with the correct interpretation of the Hindu law is at once evident if we consider the dismissive comment made obiter in Savitribai v. Luximibai[1], his Lordship observing that it seems against reason and a premium upon extravagance to hold that,

> "(a)fter she (the widow) has received and spent her full share given to her as maintenance, she is entitled again to charge the estate, or her stepson or step-grandson for another share or further maintenance." [2]

This, it is submitted, is by far the more reasoned approach and in Dattaraya v. Rukhmabai[3] where the widow in possession of a fund belonging to the family estate, sought to have a charge declared on the joint assets for her maintenance, Batchelor, J., was unequivocal in invalidating such claim. His Lordship held that as the sum of money in her hands was sufficient to provide for the widow's maintenance for five years at the rate fixed by a decree of Court, it was quite clear that five years earlier, when the suit for maintenance was instituted, she had no cause of action by virtue of being possessed of the joint-family fund, and under the then existing circumstances, no liability to provide

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their Lordships were quite within rights in disregarding it as a factor to be taken into consideration in the circumstances of the case.

1. I.L.R. (1878) 2 Bom. 573 (F.B.).

2. Per Westropp, C.J. ibid., at 583. See also Mst. Thakur Dei v. Dharam Raj, A.I.R. 1953 All. 134, at 135-6, where it was held that a Hindu widow who inherits her husband's property is not entitled to maintenance if she makes a transfer of that property or relinquishes it, and it would then depend on the contract whether or not she gets maintenance from the transferee or reversioner in whose favour it was made.

3. I.L.R. (1909) 33 Bom. 50.

maintenance could attach to the survivorship.

The ratio in Srinivasa v. Ammani[1] confirms this position, and in negativing the widow's contention that, irrespective of whether she had or ought to have had joint-family property in her hands she was entitled to maintenance, it was held that the correct decree in such a case would be not to dismiss the suit, but to direct that the maintenance primarily be, quantum valeat a charge upon the family property in the widow's hands. If that were to prove insufficient and she must live on the capital, she would be entitled to come again to the family for maintenance when that had been exhausted provided she had spent it with reasonable care and caution.

The Court's further observation that whether the property was held ex consensu in lieu of maintenance or not, would make no difference to this general statement of the principle, strikes, it is submitted, the right note, for what must always be kept in mind is that one of the fundamental rules underlying the law of maintenance is that, as the obligation is a corollary to the taking of the deceased husband's assets,[2]

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1. A.I.R. 1931 Mad. 668.

2. A harmonious note is struck in Sarojini Devi v. Sri Kristna, A.I.R. 1944 Mad. 401, where at a time when the HWRPA, 1937, was passed by the Central Legislature but there was no parallel legislation in Madras, in view of the Federal Court's ruling in In re Hindu Women's Right to Property Act, A.I.R. 1941 F.C. 72, to the effect that the Act is ultra vires as regards agricultural lands in Governors' Provinces, (infra, 387), but operates only in respect of other kind of properties, it was held that though the widow was possessed of family assests in that she had inherited her deceased husband's share in the non-agricultural property of the family, she could nevertheless sue for maintenance, the income from the non-agricultural part of the estate in the widow's possession would have to be taken into consideration —— an equitable enough proposition and cited with approval in Rangamma v. Chinnabbayi, A.I.R. 1957 A.P. 598, at 599, his Lordship, Sastri, J., reiterating further at 600 that, "If, (however), by reason of the inapplicability of the Central Act (of 1937) to regulate succession to agricultural lands, the widow is not entitled to her deceased husband's share in

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the widow may under no circumstances claim a right to be maintained out of the shares that fall to the other members of the coparcenary.

(2) Where the Widow is Possessed of the Deceased Husband's Separate Assets

We next come to the interesting question as to whether the widow who inherits her husband's separate property is entitled to claim maintenance from his assets in the hands of the surviving coparceners. It is no doubt true that the liability is common to both sets of properties, and even as the sons and stepsons would have been bound to pay her maintenance out of the separate estate in their hands, similarly her maintenance is exigible therefrom where she is herself the heir. Indeed in Shib Dayee v. Doorga Pershad,[1] Turner and Spankie, J.J., expressed the opinion that though there is nothing to debar the widow from having recourse to the joint estate to meet the deficiency in maintenance where the separate assets are insufficient, nevertheless the primary liability must be borne from out of the profits of the separate estate.

But this, it is submitted, is discriminatory, for the one beneficiary should not be preferred to the detriment of the other, and if the entire burden may not be shifted to the coparceners, neither, on the same principle, may the heir, be it the son or the widow herself, be held primarily liable for the responsibility.

This, much the more equitable approach, was endorsed and elaborated by the Andhra Bench in Rangamma v. Chinnabbayi.[2] Where the limited heir

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the agricultural lands of the joint-family and they pass by survivorship to the other coparceners, her right to maintenance from those properties within the limits of her husband's share does not stand extinguished."

1. (1872) 4 N.W.P.H.C.R. 63, at 72.

2. A.I.R. 1957 A.P. 598.

in possession of her husband's separate property claimed past and future maintenance from out of the joint assets, his Lordship, while upholding her right to make such a claim on the family property, further considered the question whether the income from the separate property should be taken into account in determining the amount of maintenance awardable to her. In a remarkably considered judgement, the learned Judge held that as the liability is common to both sets of properties, the separate estate could not be regarded as the primary fund for the payment of the widow's maintenance, and the deceased husband's share of the joint-family assets as only secondarily liable. There is thus

> "(n)o reason in justice and equity for compelling the widow to pay herself her maintenance out of the separate property of her deceased husband exonerating his share of the joint-family lands from the liability." [1]

On the other hand, as both the estates are equally liable, his Lordship laid down the eminently equitable principle that, the widow as heir is bound to pay herself the pro rata maintenance exigible from the property in her hands[2] and while she is still entitled to claim maintenance out of the joint-family property, it is subject to diminution to the extent that her claim is met by the separate property which is inherited by her.[3]

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1. Per Sastri J., ibid., at 600.
2. A number of decisions vindicate the view that, where the widow succeeds to her husband's separate property, she is bound to defray the charges which are legally payable out of that estate, as for instance, her own maintenance and that of other members of the family whom her husband was bound to maintain, or the legal liability on her part to maintain those whom her husband was morally obliged to support. See, for instance, Ramaswami v. Mangaikarasu, (1895) 18 Mad. 113, at 119-20; Darbari Lal v. Govind, A.I.R. 1924 All. 902; Kuthalinga v. Shanmuga, A.I.R. 1926 Mad. 464; Rajani Kanta v. Sajani Sundari, (1934) L.R. 61 I.A. 29; Viraraju v. Venkataratnam, A.I.R. 1939 Mad. 98.
3. This applies equally where the widow inherits the separate assets of her deceased husband under the HWRPA, 1937, and in Tirathabasi v. Bhuyani, I.L.R. (1949) 1 Cut. 336, it was held that even if those liable for maintenance are unable to completely extinguish the decree granted for the widow's maintenance, they are entitled to get the

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This may now be regarded as settled law, and the rule of contribution, based as it is on justice, equity and good conscience, not resiled from.

(3) Where the Widow is Possessed of Strīdhana

An altogether different set of considerations must be taken into account in assessing to what extent if any, the possession of strīdhana by the widow may affect her claim for maintenance. If the right to be maintained is a liability arising out of the jural relationship between husband and wife, and, in the widow's case, the vestigial relic of what was at one time a claim to a share of the family property, it would logically follow that the obligation of maintenance must fall on no other estate except that of the deceased husband.[1]

However, there are instances where it was held, more on equitable principles one would suppose, than on the injunctions of the Hindu law, that in fact the strīdhana of a Hindu female is a factor to be taken into consideration in determining whether and to what extent she should have maintenance assigned to her. Such was the remark made obiter in

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allowance reduced after taking into consideration the exact value of the separate estate of the deceased husband. Followed in Ramesh Chander v. Bibi Ved, A.I.R. 1951 Punj. 129, at 131.

1. In view of this eminently sensible reasoning —— because in keeping with the spirit of the Hindu law —— the fallacy in the opinion expressed by Das, J., in Indu Bhusan Chatterji v. Mrityunjoy Pal, I.L.R. (1946) 1 Cal. 128, is all too apparent. His Lordship held at 135 that, "If her separate property is to be taken into consideration, there can be no logical reason to confine the consideration to strīdhana received from the husband or the father-in-law or for the matter of that (sic) to strīdhana in general only, and to exclude from consideration properties possessed by her which are productive but which do not technically fall within the description of strīdhana." It is submitted, however, that such a view is a misconstruction of the very nature of the claim, and contrary to every principle governing strīdhana as laid down in the śāstra.

Savitribai v. Luximibai,[1] but as his Lordship did not clarify or dwell on any length on this statement, he appears, on the face of it, to have meant both productive and unproductive strīdhana.

The same view was elaborated at length in Ramawati v. Manjhari[2] where the Calcutta High Court took into account the affluent circumstances of the widow to rule that, so long as an applicant for maintenance has sufficient private means for her own support, she cannot claim maintenance from her husband's family. For, their Lordships reasoned, citing the eminent Hindu law scholar G.C. Sarkar Śāstrī

> "(I)f the right to maintenance depends on necessity for the same, then surely a person whose maintenance is otherwise satisfied, is not in need of it, and therefore cannot lay a claim for what is non est. The right, however, seems to remain but the amount must be nil or nominal as that must be fixed having regard to the need which does not exist."[3]

But to raise an objection which the learned author himself proceeds to raise: as the right of maintenance is conferred by law and annexed to an estate, it should not be —— indeed it must not be —— affected by

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1. I.L.R. (1878) 2 Bom. 573, at 584. For obiter dicta to the same effect, see also Rangubai v. Subaji, I.L.R. (1912) 36 Bom. 383, at 386; Appibai v. Khimji, A.I.R. 1936 Bom. 138, at 151. Similarly as the share allotted to a female at a partition is in recognition of her right of maintenance, Prinsip, J's observation obiter in Siddessury v. Janardan, I.L.R. (1902) 29 Cal 557, at 570, 576, is pertinent: "In a partition of joint-family property, if a widowed mother who is entitled to a share is possessed of strīdhana, i.e. of private property, it is to be taken into account in determining what she should receive at partition." Likewise in enumerating the factors on which the rate of maintenance would depend, it was held in Har Pratab v. Thakurain Rajhuraj, A.I.R. 1933 Oudh 550, at 553 that regard must be had to the strīdhana in her possession.

2. (1906) 4 C.L.J. 74.

3. G.C. Sarkar, Śāstrī, 7th ed., (Cal., The Book Stall, 1936), at 703. Fundamentally wrong as this principle is, it was upheld in Lingayya v. Kanakamma, I.L.R. (1915) 38 Mad 153. Where the widow was in possession of both, a small portion of the joint assets and private property of her own, the Court in holding that she was entitled to an amount sufficient to maintain her in comfort according to the means of the family, ruled at the same time that her private means is a factor to be taken into account in determining the quantum of maintenance.

extraneous considerations,[1] and in view of this, any such contention that seeks to absolve the joint-family possessed of the deceased's assets from the liability to maintain his widow, is clearly untenable.

This controversy was further exacerbated by the question whether, in determining the quantum of maintenance, the widow's income-producing strīdhana should be taken into account. In not a few instances there is evidence, despite the recognition of maintenance as an absolute right due to the female's membership in the family, that the burden on the joint-family —— to the extent of the income-producing strīdhana —— is shifted to the private means of the widow.

In Shib Dayee v. Doorga Pershad,[2] it was held that as the widow who has a son has as much a claim to maintenance as the childless widow, the former's right to sue her father-in-law arises to her from the circumstance that until such time as a partition is effected and the right to a share accrues to the son, the joint undivided estate is retained by the elder coparcener. However, in emphasising this right their Lordships decreed obiter at the same time:

> "(N)or will the fact that a widow has in her possession jewels and other property unproductive of income, deprive her of or diminish her right to maintenance if they constitute her strīdhana. If, on the other hand, she has property in her possession productive of income, the amount should be taken into consideration in determining the measure of her allowance for maintenance." 3

This view finds fuller expression in Gurushiddappa v. Parwatewwa,[4] and while it seemed "illogical" to Wassoodew, J., that in the considera-

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1. Sastri, op. cit., at 703.
2. (1872) 4 N.W.P.H.C.R. 63.
3. Ibid, at 73.
4. A.I.R. 1937 Bom. 135.

tion of the circumstances of her position as well as the estimated income of the properties sought to be made liable for her maintenance the potentiality of the widow's income from her strīdhana ornaments should not be taken into account in fixing the amount of maintenance, Broomfield, J., in concurring held that the general principle that strīdhana ornaments must be excluded in assessing the rate of maintenance, need not be laid down as an invariable rule. Where the ornaments are of great value, his Lordship ruled, which the widow would not ordinarily wear or use, and which she would be likely to dispose of, "that might be another matter".[1]

That, in fact, it is this approach that is essentially illogical, is apparent from the number of reasoned and authoritative decisions taking the contrary view, i.e. that, as the right of maintenance is, under the Hindu law, conferred on the widow in lieu of her husband's share in the joint-family property, it cannot be taken away merely because she is in possession of some property of her own either productive or non-productive of income.

In the enumeration of the six sorts of woman's property, Manu specifies that "what has been received by her from her brother, her mother, or her father,"[2] would be categorised as strīdhana, and would include

"... that which was presented (to the bride)

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1. Ibid., at 137. For similar rulings see also Shyambhai v. Purshothamdas, A.I.R. 1925 Mad. 645, at 659; Krishnaji v. Anusuya, A.I.R. 1939 Nag. 130, at 131; Bai Jaya v. Ganpatram, A.I.R. 1941 Bom. 305, at 307; Indu Bhusan Chatterji v. Mrityunjoy Pal, I.L.R. (1946) 1 Cal. 128, at 135.

2. Mit. II. XI.4 op.cit. See also Yāj. 2. 144, explained at ibid., II. XI. 1-2. The texts of Viṣnu, Kātyāyana and Nārada expressing a similar view is expounded in Dāya. IV. I. 1. 3-4.

> by the maternal uncles and the rest (as paternal uncles, maternal aunts etc.) ..."[1]

Strīdhana derived from these sources, therefore, could not conceivably be regarded as wholly or partly mitigating what is legally the widow's due from her deceased husband's assets, and while objection could rationally be raised to that part of the ruling in her favour where she had dissipated the portion of the joint property held by her for her maintenance, their Lordships rightly held in Bai Lakshmi v. Lakhmidas,[2] and subsequently in Chandrabhagabai v. Kashinath,[3] that where the widow is possessed of property from sources other than the estate of her husband, the liability of the coparceners to maintain her is not thereby extinguished, if she happens to be in needy circumstances.

Strenuously as this view is challenged in Savitribai v. Luximibai,[4] it is submitted that, but for the stipulation in it, it is a harmonious construction of the law of maintenance as envisaged by the ancient seers. As the widow's claim to maintenance is an inalienable right, the charge that it creates in the joint assets, is independent of whether or not she is in straitened circumstances, or indeed of the need to enquire whether the strīdhana in her hands is of a productive or non-productive nature.

This was the considered opinion of his Lordship, Row, J., in Annapoornamma v. Veeraraghava,[5] and in holding that, so far as the widow's right to maintenance is concerned, it is immaterial if she has any private means of her own, or can have them by selling some of the

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1. The gloss of Vijñāneśvara at Mit. II. XI. 2., op.cit., in explaining Yāj. 2. 144.
2. (1863) 1 Bom. H.C.R. 13.
3. (1866) 2 Bom. H.C.R. 323.
4. I.L.R. (1878) 2 Bom. 573 (F.B.), at 583-4.
5. A.I.R. 1940 Mad. 547.

jewellery that is not required by her after her husband's death, his Lordship elaborated in unequivocal terms that, as it would have been the duty of the husband, had he remained alive, to maintain his wife out of his own assets irrespective of her possession of strīdhana or private means, there is no reason why the latter should be regarded as a factor to be taken into consideration in fixing the widow's maintenance after his death.[1] To recognise any such contention, would, in

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1. For similar decisions see also Kodandarami v. Chenchamma, A.I.R. 1930 Mad. 479, at 482; Rangamma v. Chinnabbayi, A.I.R. 1957 Mad. 598, at 599; A.S. No. 264 of 1969, reported in Dugginallakshamana v. Duggina Lakshmi, A.I.R. 1973 A.P. 302 at 305. By the same token, where the widow is possessed of means through the generosity of others or by dint of her own labours, it would be inequitable to take these into account in assessing the quantum of maintenance due to her from the family property. In Saraswati v. Sheoratan, A.I.R. 1934 Pat 99, Wort, J., while holding —— erroneously, it is submitted —— that in fixing the amount of maintenance, among a number of other factors regard must also be had to the widow's means, was however clear that, a sum of money paid by the brother, could not be described as her "means" to which she is legally entitled. On the other hand, where the payment is voluntarily made, no liability could attach to it, and could be stopped at any time. In Madras the same view prevailed in Sundari Ammal v. Venkatarama, A.I.R. 1934 Mad. 384, Pandalai, J., holding that where the widow is in receipt of a certain rate of maintenance from the family but subsequently improves her financial condition, either by her own efforts or by the generosity of others, she is not liable to have that allowance reduced. See also Mavji v. Sushila, A.I.R. 1955 Sau. 45, at 49. Nor, it was held on the same principle, in Bai Lakshmi v. Lakhmidas, (1863) 1 Bom. H.C.R. 13, could the widow's income by money-lending be taken into account, for as the Bombay High Court point out in Bai Jaya v. Ganpatram, A.I.R. 1941 Bom 305, it is a sound principle that once the amount of maintenance is fixed, it is only the permanent reduction in the income of the family property, which could afford a valid reason for reducing the quantum of maintenance. Thus, as income by personal service is always contingent and irregular on account of various causes such as illness, leave without pay, change of salary or even the discretion of the employer, the widow's private means as a consequence of her own exertions is independent of her right to claim maintenance from her husband's family. For, as Aiyer, J., reasoned in Kodandarami v. Chenchamma, A.I.R. 1930 Mad. 479, at 482: "If the result of their honourable activity and laudable attempts to earn a portion of their maintenance should work against them in claiming maintenance from their husband's estate ... it will be a disadvantage both to them and the family ... and such people would have no inducement to work or to save." See also Maheshwari v. Mst. Sahdei, A.I.R. 1937 Oudh 16; Jai Ram v. Mst. Shiv Devi, A.I.R. 1938 Lah. 344; Mavji v. Sushila, A.I.R. 1955 Sau. 45, at 47; Manilal v. Bai Sushila, A.I.R. 1956 Bom. 402, at 404; Rangamma v. Chinnabbayi, A.I.R. 1957 A.P. 598, at 599; Varahalu v. Sithamma, A.I.R. 1961 A.P. 272 (F.B.), at 278.

the learned Judge's view, introduce greater uncertainty into a field where there was already too much uncertainty, leading at the same time to increased litigation as a consequence of the vagueness attendant upon the taking into consideration the extent and mode of such property in determining the rate of maintenance. In other words,

> "(t)he co-existence of an absolute right to get maintenance with conditions of this kind is really difficult to postulate, (for) what is absolute must be unconditional and if there are conditions, there cannot be any absolute right."[1]

But what where the strīdhana in possession of the widow is derived from her husband or father-in-law? In Joyatara v. Ramhari,[2] where notwithstanding that the husband in his will had left gold and silver ornaments, money and sundry other items to his widow, Field, J., was of the view that, the right to maintenance being one which the widow has under the Hindu law, a gift of strīdhana is not equivalent to a provision for maintenance; the right persists unless taken away by express language to that effect.

In Rajamma v. Varadarajulu,[3] in considering whether the gift of precious jewellery to the widow by her husband's father would affect the question of her maintenance, Ramaswami, J., held that as those items fell within the category of strīdhana called saudayika i.e. a gift (including bequests) made through affection by relatives as opposed to strangers,

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1. Annapoornamma v. Veeraraghava, cited above at 551. To this excellent rule one qualification —— dealt with in greater detail below —— may be mentioned here: where a female member of the joint-family is possessed of separate property, earnings, or (under the former system) strīdhana, the rate of maintenance may be affected, to the extent that the needs of the less fortunate will reduce the entitlement of the more fortunate: Derrett, IMHL, op.cit., at 245.
2. I.L.R. (1884) 10 Cal. 638.
3. A.I.R. 1957 Mad. 198.

they became her absolute property to spend, sell, divide or give it away at her own pleasure. As such therefore,

> "(w)hen the absolute property of the plaintiff was allowed to be retained by her, it cannot be considered to be joint-family property given in full quit of her future maintenance." [1]

It is, however, submitted that, considering that the right of maintenance emanates from the legal duty that the Hindu law imposes upon the husband, and the moral liability thereafter upon his father, gifts by them of a valuable nature and productive of income, are in effect the donation to the widow of those very assets from which her maintenance is derivable. Thus though gifts of jewellery cannot be said to diminish the rate of maintenance, whether or not income producing strīdhana may be regarded to be in "full quit" of her maintenance would depend upon the value of such gifts; at any rate, upon equitable principles, they must affect the rate at which the maintenance is to be fixed, and the ruling which perhaps most comprehensively encapsulates, from the Hindu law perspective, the role of such strīdhana and its effect upon the quantum of maintenance, is the judgement of the Full Bench in Varahalu v. Sithamma.[2]

In considering the position of a widow who had sufficient means of her own, but claimed past and future maintenance from the coparceners, Chandra Reddy, C.J., reiterated that as the right to maintenance is not related to any want of means,[3] but to the membership of the deceased

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1. Ibid., at 200.

2. A.I.R. 1961 A.P. 272 (F.B.)

3. In assessing the view expressed at Sir Thomas Strange, Hindu Law, Vol I, 3rd ed., (Mad. Higginbotham, 1859), at 172, that "An opinion that her maintenance should be independent of her (the widow's) peculiar property"is unsupported, his Lordship refers at 274, ibid., to the opinion of the Pandit of Nellore, cited at Strange, Vol II, cited above, at 307-8, where in answer to the proposition that, "On the death of a Brahmin, leaving a widow and two sons, she and they take possession of his estate, subject to her possession of strīdhana,

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husband's family, and is historically the relic of a share, the only deductions that could be made from the allowance (not exceeding the income of the late husband's share) which could keep her in the same degree of comfort, if possible, as she had enjoyed during his liftime, would be on account of properties yielding an income given to her by her husband or his father.[1]

(4) The General Principles upon which the Rate of Maintenance Depends

However, as absolute as the widow's right to maintenance is to the extent of the deceased husband's share in the coparcenary assets, and the duty of persons who are in possession of it, unqualified and unconditional,[2] equity must of necessity play its part, and other factors taken into consideration in finally determining the quantum. Each case must undoubtedly be judged upon its merits, and as the Madras High Court pointed out in Srinivasa v. Lakshmi Ammal[3], where the husband's

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in which case she is entitled only to a half share, the Pandit unequivocally states, "This opinion is generally correct, but I do not understand either the authority or the reason for restricting the maintenance to the amount of a half share, in the case of the existence of Strīdhana ... and the correct opinion seems to be that, it shall be the amount of a full share as received by the coparceners, or perhaps this may be considered as its maximum."

1. Derrett's analysis of the ratio in Varahala v. Sithamma, A.I.R. 1961 A.P. 272 (F.B.), IMHL, op.cit., at 246. The author submits at ibid., that the principle is as applicable to testamentary dispositions as to gifts inter vivos.

2. The absoluteness of this right was emphasised in Gowardhan v. Smt. Gangabai, A.I.R. 1964 M.P. 168, in the unusual circumstances that, the surviving coparcener having obtained the entire estate by survivorship, it was held that, the mere fact that he had given his sons shares at a separate partition would be of no consequence, for where the husband leaves a share in the joint-family property, his widow is entitled to maintenance out of it from those coparceners who take by survivorship.

3. A.I.R. 1928 Mad. 216.

assets which are taken over are small, it may even be that the entire income of his share may be awarded as maintenance to his widow.[1] On the other hand, in other instances there is no fixed ratio. All that is required is that the allowance ought to be such as to enable her to live in comfort having regard to the means of the family. Such being the rule, it is not open to the coparceners to prescribe any arbitrary standard as regards the comforts the widow is entitled to have, or the style in which she should live. For, as the degradation in which a Hindu widow is expected to live is a matter of ceremonial observance rather than of law,[2]

> "(P)rivation per se is no virtue, and while a Hindu widow is certainly expected to live a chaste life, which is further not extravagant or disproportionate to the means of her late husband, we are quite unable to concede that austerity or asceticism should be rightly expected of her by the coparceners of her late husband."[3]

However, despite the general principle that in no case could the rate of maintenance exceed the income from the deceased husband's share of the property, it is not a fixed principle of law either, that the entire income of that share should be given to the widow, for what she

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1. See also Thayammal v. Muthuswami, A.I.R. 1971 Mad. 282, at 285.

2. Per Glover and Ainslie, J.J., Hurry Mohan v. Sreemutty Nayantara, (1882) 25 W.R. 474, at 476. See also Mahmood, J.'s dicta to the same effect in Baisni v. Rup Singh, I.L.R. (1890) 12 All. 558, at 564, and Banerjee, J.'s concurrence with it in Devi Prasad v. Gunwanti Koer, I.L.R. (1895) 22 Cal 410, at 418.

3. Per Anantanarayanan, J., Sankaranarayana v. Lakshmi Ammal, A.I.R. 1960 Mad. 294, at 296. See also Thayammal v. Muthuswami, cited above, where in answer to the contention that as the widow's needs were few and her life style sparse, her claim for enhanced maintenance could not be justified, Kailasam, J., held at 285 that, "We are not able to accept the contention ... that as the widow was living in an extremely frugal manner a small sum of maintenance would suffice ... To accept such a contention would result in victimising widows leading frugal lives and rewarding those spending extravagantly... "

is entitled to is maintenance and not the extra income of the deceased husband.[1] Thus while the widow is entitled to a reasonable maintenance out of the joint property, with reference to the family and their circumstances in life,[2] the position and status of the deceased and the widow,[3] the expenses involved in the religious and other duties that she is expected to discharge,[4] their Lordships held in Smt. Nittokissoree v. Jogendra Nauth[5] that, over and above these factors, "the main subject of inquiry would be the value of the estate."[6]

These decisions are early indications that, however persistent the right of maintenance may be, no single component may be regarded as conclusive in determining the rate, and while it should generally be sufficient to allow the widow to live, as far as may be, consistently with the position of a widow, in something like the same degree of comfort and with the same reasonable luxury as she had in her husband's lifetime[7] no hard and fast rule can be laid down as to what particular

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1. Gowardhan v. Smt. Gangabai, A.I.R. 1964 M.P. 168, at 170; Thayammal v. Muthuswami, A.I.R. 1971 Mad. 282, at 285.
2. Mst. Bheeloo v. Phul Chand, (1824) 3 S.D.A. 298, at 301. See also Hursoondri v. Nubogobind, (1850) S.D.A. 422, at 423; Devi Persad v. Gunwanti Koer, I.L.R. (1895) 22 Cal 410, at 418.
3. Baisni v. Rup Singh, I.L.R. (1890) 12 All. 558, at 563.
4. Ibid. See also Mst. Santi v. Sudh Ram, A.I.R. 1955 Punj. 22 at 24.
5. (1878) L.R.5 I.A. 55, followed in Dalel Kunwar v. Ambika Pratap, I.L.R. (1903) 25 All. 266, where a Hindu widow having been ousted of possession of the immoveable properties of her deceased husband by the adopted son, was awarded maintenance on the basis of the principles in the above case.
6. Smt. Nittokissoree's case, cited above, at 57.
7. To this generally accepted principle, an important qualification was added in Ekradeshwari v. Homeshwar, A.I.R. 1929 P.C. 128, at 130 that, "there may be circumstances in which the past mode of life of the widow has been demonstrably on a penurious a miserly scale, or on the other hand, on a quite extravagant scale, having regard to the total income of the husband." In other words, the Hindu law not having provided for such contingencies, equity must step in in either of such extremes and scale the rate of maintenance so as to make it both consistent and reasonable.

fraction of income derivable from her husband's share in the family should be awarded as maintenance to the widow;[1] and while each of the principles enumerated in the earlier decisions must certainly play its part, the remarkably exhaustive list of the variety of factors that determine the quantum, is the now classic formulation of the principles by their Lordships of the Privy Council in Ekradeshwari v. Homeshwar[2] that, as it is out of a great category of circumstances, small in themselves, that a safe and reasonable induction is to be made by a Court of Law in arriving at a fixed sum,

> "(m)aintenance depends upon a gathering together of all the facts of the situation, the amount of free estate, the past life of the married parties and the families, a survey of the condition and necessities and rights of the members, on a reasonable view of change of circumstances possibly required in the future, regard being, of course, had to the scale and mode of living, and to the age, habits, wants and class of life of the parties." [3]

In other words, depending on the circumstances, there is nothing in law to prevent an increase or a decrease in maintenance should sufficient cause be shown for either,[4] and to the extent that the incidents of joint living[5] and the needs of the less fortunate reduce the

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1. Panchakshara v. Pattammal, A.I.R. 1927 Mad. 865, at 866.
2. A.I.R. 1929 P.C. 128.
3. Ibid., at 130, and quoted with approval in numerous subsequent decisions.
4. Sreeram v. Puddomookhee, (1868) 9 W.R. 152.
5. The Bombay High Court took note of this factor in Sidlingapa v. Sidava, I.L.R. (1878) 2 Bom. 624, and in asserting the necessity of varying the maintenance from time to time and of inquiring into the circumstances of the claimant, or of the family estate, or of the family itself, observed at 630: "Additional burdens may from time to time be cast upon the family estate. Other widows besides previous claimants, may be thrown upon it for support by the death of their husbands, or the number of sons and daughters of the male coparceners may have increased."

entitlement of the more fortunate,[1] "it is not necessary that a Hindu widow should be maintained in the same state that her husband would maintain her."[2] In short,

> "(h)er fortunes are bound up with the fortunes of the family. If the income of the family increases she will be entitled to the benefit of it. Likewise if the income of the family decreases she must submit to a reduction of her maintenance."[3]

Thus in Rajendranath v. Rani Putto,[4] where under a solehanamah or compromise the widow was assigned a certain amount as maintenance, the sum to be recoverable from the produce of certain agricultural lands which subsequently became unfit for cultivation by reason of inundation of salt water causing impoverishment, it was held that, inasmuch as the amount of maintenance must be taken to have been fixed with reference to value and extent of the property, the Court had power to reconsider the

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1. Derrett, IMHL, op.cit., at 245. In Ramchandra v. Sagunabai, I.L.R. (1879) 4 Bom. 261, where the family of the husband was large and the ancestral estate small, Westropp, C.J., refused to countenance the widow's demand for enhanced maintenance, but gave her the right to elect between taking the original sum and living separately, or accepting the offer to be maintained in the family house in the same manner as the other members of the family. Ayyar, J.'s remark obiter in Kodandarami v. Chenchamma, A.I.R. 1930 Mad. 479, at 480, is also worth noting: "No doubt in cases where the income from the joint-family is not sufficient to maintain properly all the members who are entitled to maintenance out of the same, it would be proper that the private properties of any particular member and the income thereof, should be taken into account in fixing the amount of maintenance due to such member having private means."

2. Kallee Persaud v. Kupoor Koowaree, (1865) 4 W.R. 65, at 65. See also Gowardhan v. Smt. Gangabai, A.I.R. 1964 M.P. 168, at 170.

3. Veeraju v. Narayanamma, A.I.R. 1953 Mad. 159 (F.B.), at 161. In explaining, Nair and Spencer, J.J., pointed out in Manikka v. Sowbagia, A.I.R. 1915 Mad. 26 that, as the husband's interest by survivorship formed the nucleus of the subsequent acquisition, it stood to reason that, the widow would get a reduced rate of maintenance if the family income diminished, and on the same principle, she would be entitled to an enhanced rate if the family income expanded.

4. (1880) 5 C.L.R. 18.

allowance and to readjust it to the altered circumstances.[1]

Similarly in Kallee Persaud v. Kupoor Koomaree,[2] where there were debts outstanding on the estate, the High Court's refusal to ratify the Subordinate Judge's decision to enhance the widow's maintenance, was in later years endorsed in Savitri v. Savi[3] where it was likewise held that where the estate is indebted, even one-fifth or one-sixth of the income would not be an insufficient sum for the widow's maintenance.

More recently in A.S. No. 264 of 1969,[4] where the enhanced maintenance awarded to the adoptive mother was challenged, Rao, J., while affirming the decree, modified the quantum having regard to the

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1. However, this is not to assume that, where the family income is reduced as a consequence of wilful negligence, the widow must be made to share in the burden of such negligence. In Gopika v. Dattaraya, I.L.R. (1900) 24 Bom. 386, where the family income was much diminished, chiefly through lack of repairs and the resultant deterioration of the property, Parsons and Ranade, J.J., were agreed that, though maintenance decrees are by their very nature subject to modification according to change of circumstances, nevertheless as in this instance there was no evidence to show that the state of decay had been brought about by natural causes, the rate of maintenance would remain unaffected. Followed in M. Savitribai v. Radhakisan, A.I.R. 1948 Nag. 44 where the sale of some of the properties in execution of the decree for maintenance was held as not a relevant consideration for reducing the quantum, the diminution being due to default in not paying the maintenance charges in the first place. Nor is it consistent with equity to assume that the position of a Hindu mother of a child, deceased subsequent to her husband's death, so far as concerns the principle upon which the allowance of maintenance has to be computed, is inferior to that of a childless widow. On the other hand, in Narhar Singh v. Dirnath Kuar, I.L.R. (1879) 2 All 407. Straight, J., was of the view that the case of a widowed mother, deprived of her only son and consequently of the advantages that might have accrued to her had he survived, seemed the more deserving of sympathy and consideration rather than to make her loss a ground for reducing the allowance she would have been reasonably entitled to had she been a childless widow.

2. (1883) 4 W.R. 65.

3. A.I.R. 1933 Pat. 306, at 341.

4. Reported in Dugginallakshmana v. Duggina Lakshmi, A.I.R. 1973 A.P. 302, at 305.

age of the lady, her reasonable needs and standard of life. It is, however, submitted that in these inflationary times the reduction in the rate from Rs. 125.00 to Rs. 100.00 could not possibly be regarded as making any significant difference in either the needs or the standard of life, and unless the estate was small enough to have warranted it (of which there was apparently no finding), the cutting down of the quantum was more a gesture than any meaningful adjustment of claims as between the parties.

However, if the change of circumstances in the family may justify a suit for reduction of maintenance, they may equally justify a suit for its increase,[1] and the Court must look not only into the needs of the widow, but also any change in those other circumstances to which the Court had regard in fixing the rate of the original maintenance claim.[2] The only limitation to this rule, it was held in Sreeram v. Puddomookhee,[3] is that subject to the limitation that, in any case, the maximum amount of maintenance which the widow can claim cannot exceed the share which her husband would have had, had he lived, there seemed no reason why she also should not be benefitted from the increase in the net income of the family[4] due to the reduction in the number of its members.

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1. Bangaru Ammal v. Vijayamachi, I.L.R. (1899) 22 Mad. 175, at 177.
2. One of such relevant circumstances where the need for enhanced variation of the rate would meet with the approval of the Court is the increased value of assets and income, and the contrasting sharp increase in costs of living, so that what might have been sufficient when the rate was originally fixed, could hardly be regarded as enough years later when the suit for an increase in maintenance is instituted. See Bansidhar v. Champoo Bibi, A.I.R. 1947 Oudh 150, at 156-7; Kirpal Singh v. Chandrawati Devi, A.I.R. 1951 All. 507, at 510; Sankaranarayana v. Lakshmi Ammal, A.I.R. 1960 Mad. 294, at 296; Smt. Saraswati v. Smt. Rupa, A.I.R. 1962 Or. 193, at 196.
3. (1868) 9 W.R. 152.
4. The same view was expressed in Veerayya v. Chellamma, A.I.R. 1939 Mad 37, at 39.

This position has been consistently maintained, and in Smt. Saraswati v. Smt. Rupa,[1] in a suit for enhanced maintenance, after the death of the father-in-law who had executed a deed of maintenance in favour of his deceased son's widow, it was held that, quite apart from the rise in prices and the consequent increase in the family income, as the reasonable anticipation of the senior coparcener of an increase in the family members as a consequence of his second marriage had not only failed to materialise, but, on the contrary, the deaths of the members of the joint-family leaving only one widow as the sole heir had lessened the burden on the estate, it was a material change in the circumstances which would justify the demand of an increase in the quantum.

The principles under which the rate of maintenance is fixed under the new law are substantially the same as those by which they were determined before 1956,[2] with this important distinction, however, that, whereas the better view in regard to the old law was that, as the widow's right to maintenance was unquestionable both from out of the separate assets of her deceased husband, and to the extent of his share of the joint-family property, the possession by her of private means would not affect the quantum, the latter is now a factor to be taken into consideration under s. 23 (3)[3] (f) of the HAMA, 1956.

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1. A.I.R. 1962 Or. 197.

2. That in fact the quantum of maintenance is still dependent upon a gathering together of the facts of the situation is evident from the wide discretion given to the court in determining it. S. 23 (1) of the HAMA, 1956, lays down: "It shall be in the discretion of the Court to determine whether any, and if so what, maintenance shall be awarded under the provisions of this Act, and in doing so the Court shall have due regard to the considerations set out in ... sub-section (3), ..., (below) so far as they are applicable.

3. The sub-s. provides that, "In determining the amount of maintenance, if any, to be awarded to a dependant under this Act, regard shall be had to: —
(a) the net value of the estate of the deceased after providing for the payment of his debts;

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It is thus clear that, though the test (is the taking of the property (of liability by the person to be charged with the maintenance of the female, as it is the totality of circumstances in relation to which each factor has to be weighed and given greater or lesser prominence, the obligation which rests upon the survivors[1] is in its very nature variable.[2] What these factors

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(b) the provision, if any, made under a will of the deceased in respect of the dependant;
(c) the degree of relationship between the two;
(d) the reasonable wants of the dependant;
(e) the past relations between the dependant and the deceased;
(f) the value of the property of the dependant and any income derived from such property; or from his or her earnings, or from any other source;
(g) the number of dependants entitled to maintenance under this Act."

1. We have already noted the alienee's liability under s. 39 of the T.P. Act. On the same basis it was held in Kaveri v. Parameswari, A.I.R. 1971 Ker. 216, at 220-1 that, as the right of maintenance is a recurring right, where the property is charged with the widow's maintenance she is entitled to claim an enhancement of the rate if altered circumstances justify the increase, even where the estate has passed into the hands of an alienee purchasing for consideration with notice of such charge.

2. The opposite view prevailed in Jhunna v. Ramsarup, I.L.R. (1880) 2 All. 777, ie., that, for reasons of convenience, and in order to prevent the recurrence of litigation between the parties, it is far better that a reasonable sum, having regard to all the circumstances of the case, should be ascertained and fixed. But this stance, it is submitted, cannot be countenanced, for while fluctuations in produce and profits in thriving circumstances would militate against the widow, in leaner times it would violate all equitable considerations in that, the lady would continue to get her fixed maintenance, pressures and hardships on the rest of the family notwithstanding. See also Krishnamurthy v. Suryakanthamma, A.I.R. 1955 A.P.5, where a similar suggestion was made at 8, on the analogy of the rule in Peramanayakam v. Sivaraman, A.I.R. 1952 Mad. 419 (F.B.) at 437, 441, that if in partition proceedings the alienee seeks possession of property corresponding to the alienor's share, the maximum he may obtain is the fraction of the assets to which the alienor would have been entitled at the date of the transaction itself, as applied to the net distributable assets at the date of the suit, (see Derrett, IMHL, op.cit., at 307). However, this view was effectively scouted in Subbarayudu v. Papayamma, A.I.R. 1957 A.P. 865, Reddy, C.J., pointing out at 866 that, whereas the alienee's interest cannot fluctuate on the principle that a man gets what he bargained

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are, and to what extent they might affect the quantum would, of course, depend upon the finding of the Court,[1] but the more substantial question that has come up time and again is, whether or not the income at the time of the taking of the property constitutes the measure of the rate of maintenance at all subsequent periods.

In Rangathai v. Munuswami[2], while acknowledging that no hard and fast rule could be laid down that the widow is entitled to a particular fraction of the income, the Court held at the same time that, she could in no event claim more than the income of the share of the estate which her husband would have been entitled to if a division had taken place during his lifetime.[3]

This was also the guiding principle as laid down in Audemma v. Varadareddy,[4] in regard to the self-acquired assets of the deceased husband, Govindarajachari, J., ruling that, as the widow's maintenance cannot be reduced as a consequence of extravagance or imprudence on the part of the heir or devisee, neither could either of them be directed to pay enhanced maintenance when by his own efforts he had made considerable additions to

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for, this rule is inapplicable where the claim for maintenance is to the extent of the assets of the deceased coparcener for the latter's share is not defined as on his death.

1. The principle of the variation of the maintenance rate now finds statutory recognition in the HAMA, s. 25 of which specifies: "The amount of maintenance, whether fixed by a decree of Court or by agreement, either before or after the commencement of this Act, may be altered subsequently if there is a material change in the circumstances justifying such alteration."

2. (1911) 21 M.L.J. 706.

3. The same view was expressed in Subbarayalu v. Kamalavallithayaramma, I.L.R. (1912) 35 Mad. 147, at 148; Srinavasa v. Lakshmi Ammal, A.I.R. 1928 Mad. 216 at 219; Ramzan v. Ram Daiya, (1917) 42 I.C. 944, at 945; Gurushiddappa v. Parwatewwa, A.I.R. 1937 Bom. 135, at 138.

4. A.I.R. 1949 Mad. 31.

the property. The extent of the obligation must therefore be defined in terms of the estate existing at the time of the death of the last male holder.

It has however, to be stated that, so far as the widow's right of maintenance is concerned, the one estate is as liable for it as the other, and the distinction that the learned Judge makes between the two[1] hardly justifiable.[2] What is more pertinent to the discussion here is whether this principle may at all be given credence when we consider that the subsequent accretions are as much due to the investment of the surviving coparceners' own shares as that of the deceased husband's assets in the joint family property.

This view —— consistent with equity —— has been attractively set out in Manikka v. Soubagia.[3] As the major portion of the income was derived from the family trade which had since the husband's death increased considerably, it was held that, as the deceased's interest formed in part the nucleus of the subsequent acquisitions, the amount of property in existence at the time of his death would not limit the widow's claim.[4]

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1. Ibid., at 36, where in regard to joint-family property, his Lordship reiterated the principle that, "as a necessary and logical consequence of the nature of the right possessed by the widow, her maintenance would be dependent upon the varying fortunes of the family. Her comforts will dwindle if the family property is reduced; but if the family becomes more affluent, she will be entitled to participate in that affluence."

2. The correct position, it is submitted, is stated in Raghunath v. Dwarkabai, A.I.R. 1941 Bom. 357, at 360: "There is no distinction between an heir and a surviving coparcener with regard to the claim of a widow for maintenance which is founded not upon the nature of the succession but upon possession of the property belonging to the husband. The principle is that whoever has got the property is liable for the widow's maintenance."

3. A.I.R. 1915 Mad. 26.

4. Followed in Chunilal v. Bai Saraswati, A.I.R. 1943 Bom. 393, where to the argument that a certain property subsequently acquired was not in existence at the date of the suit, nor had it been purchased at the date of the husband's death, Sen, J., ruled at 396: "But as there is a

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In other words,

> "(t)he share the husband would get if he had been alive at the time of the suit should be taken into consideration (in fixing the rate of maintenance) and not the share, if any, he was entitled to on death," [1]

for as a member of the joint-family, the widow's fortunes are bound up with the fortunes of the family, and her maintenance invariably subject to variation —— a feature inconsistent with the assertion that maintenance should be fixed taking into consideration the husband's share in the income of the joint-family at the time of his death and at no subsequent time.[2]

This may now be regarded as settled law in view of the numerous decisions[3] which testify to the eminently equitable nature of this construction, and in Kirpal Singh v. Chandrawati Devi,[4] Sapru, J., while holding that the husband's share of the income, had he been living, would have been substantial enough to justify the claim for enhanced maintenance, extended the principle further to hold that the positive change in social outlook, as represented by the enactment of the HWRPA, 1937, must

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finding that it had become joint-family property by virtue of the family nucleus, ... this property must be taken into account in arriving at the quantum of maintenance." See also Gowardhan v. Smt. Gangabai, A.I.R. 1964 M.P. 168, at 170.

1. Manikka v. Soubagia, cited above, at 26-7.

2. Veeraju v. Narayanamma, A.I.R. 1953 Mad. 159 (F.B.), at 161.

3. For such decisions see Madhavrav v. Gangabai, I.L.R. (1878) 2 Bom. 639, at 640; Sreeram v. Puddomokhee (1883) 9 W.R. 152, at 153; Har Pratab v. Thakurain Rajhuraj A.I.R. 1933 Oudh 550, at 553; Veerayya v. Chellamma, A.I.R. 1939 Mad. 37, at 38; Bansihar v. Mt. Champoo, A.I.R. 1947 Oudh 150, at 156; Hari v. Narmadabai, A.I.R. 1951 Nag. 133, at 137; Subbarayadu v. Papayamma, A.I.R. 1957 A.P. 865, at 866; Smt. Saraswati v. Smt. Rupa, A.I.R. 1962 Or. 193, at 197; Basavayya v. Venkayamma, (1967) 2 An. W.R. 23, at 24.

4. A.I.R. 1951 All. 507.

of necessity affect the rate of maintenance.[1] Consequently, even in cases where the Act itself might have no application because of the death of the husband before it came into force, it would be proper to take into consideration the income from the share of the property which the widow could have demanded in partition under the Act and to fix a reasonable rate of maintenance in relation to it.

10. The Principles Upon Which Arrears of Maintenance are Determined

It is well known that, at one stage the entire question of a claim for arrears of maintenance was in doubt as a legal claim.[2] But, as this liability stems from the personal law governing the parties[3] rather than from any contractual obligation, the implication that these are dues based upon some mere contract which is invariable as between the parties, is misleading.[4] Though as a general rule the widow cannot

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1. See also Thayammal v. Muthuswami, A.I.R. 1971 Mad. 282, at 285 where Kailasam, J., agreed with this view, adding at the same time that "the several enactments providing her with a right to property" —— an obvious reference not only to the HWRPA, 1937, but to the HSA, 1956, as well —— had enhanced the status of the widow, a factor to be recognised in fixing the quantum of maintenance.

2. See Mst. Jamwati v. Maharani, A.I.R. 1931 All. 227, where it was held that as the demand for arrears could not be equated with the right of maintenance, the Court's discretion in awarding it would depend upon whether or not the widow claiming it was in want.

3. Or, in other words, as the Privy Council put it in Ekradeshwari v. Homeshwar, A.I.R. 1929 P.C. 128, at 131: "In the Board's opinion such arrears if they truly exist, fall within the range of the widow's right to maintenance." A similar equating of the arrears with the right itself is equally in evidence in Mst. Savitribai v. Radhakisan, A.I.R. 1948 Nag. 44, at 46: "Once the maintenance is fixed and a charge declared ... a floating charge over the property is created which crystallises month by month as each arrear falls due ... and the principles which enable a creditor to proceed against a family estate, despite partition, in the case of crystallised charges apply with equal force in the case of a floating charge of this character."

4. Sankaranarayana v. Lakshmi Ammal, A.I.R. 1960 Mad. 294, at 297.

claim arrears of maintenance for the period she was living in her husband's family unless she was kept there under extreme penury and oppression, she is, however, entitled to arrears from the time she changes her residence,[1] and it has now been settled in a long series of decisions that a demand and refusal need not precede the claim for arrears,[2] that in fact non-payment of maintenance would prima facie constitute proof of wrongful withholding.[3] In other words, the right to arrears is an absolute right defeasible only on proof of waiver, abandonment, estoppel or limitation.[4]

In fixing the arrears of maintenance to be awarded to the widow, it may be regarded as settled principle that, like the claim for maintenance itself, it is the duty of the Court to consider the whole circumstances of the situation in pronouncing a decree for arrears.[5] Thus while the Court may, in exercise of its undoubted discretion,[6] fix

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1. Ekradeshwari v. Homeshwar, A.I.R. 1929 P.C. 128, at 131.

2. Jivi v. Ramji, I.L.R. (1879) 3 Bom. 207, at 208-9; Raja v. Raja, I.L.R. (1901) 24 Mad. 147, at 155; Panchakshara v. Pattammal, A.I.R. 1927 Mad. 865, at 867; Srinavasa v. Lakshmi Ammal, A.I.R. 1928 Mad. 216, at 222; Sobhanadramma v. Narasimhaswami, A.I.R. 1934 Mad. 401, at 405; Ramarayudu v. Sitalakshmamma, A.I.R. 1937 Mad. 915, at 916; Hari v. Narmadabai, A.I.R. 1951 Nag. 133, at 137; Nagendramma v. Ramakottayya, A.I.R. 1954 Mad. 713, at 726; Krishnamurthy v. Suryakanthamma, A.I.R. 1955 A.P. 5, at 9; Rajamma v. Varadarajulu, A.I.R. 1957 Mad. 198, at 200; Sankarnarayana v. Lakshmi Ammal, A.I.R. 1960 Mad. 294, at 297.

3. Jivi v. Ramji, I.L.R. (1879) 3 Bom. 207, at 210; Raja v. Raja, I.L.R. (1901) 24 Mad. 147, at 155; Panchakshara v. Pattammal, A.I.R. 1927 Mad. 865, at 867; Sobhanadramma v. Narasimhaswami, A.I.R. 1934 Mad. 401, at 405.

4. Apart from the cases in f.n. 1, see also Guruswami v. Angaiyarkanni, A.I.R. 1974 Mad. 194, at 198.

5. Ekradeshwari v. Homeshwar, A.I.R. 1929 P.C. 128, at 131.

6. The view taken by Umamaheswaram, J., in Krishnamurthy v. Suryakanthamma, A.I.R. 1955 A.P. 5, at 9, that there is no discretion in the Court either to cut down or to reduce the amount of past maintenance, appears unduly arbitary, for while certainly the period may not be cut down given the abiding nature of the right, circumstances may justify the award of arrears at a lower rate, as our examination of relevant decisions will presently indicate. That perhaps the learned Judge

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the arrears at a rate not necessarily the same as future maintenance, that discretion may only be exercised if the evidence shows that the conditions of the family, i.e. to say, that the income and the expenses were substantially different from the conditions obtaining at the time of the suit and likely to obtain in the near future.[1]

In other words, the question of fixing the rate of maintenance for arrears should be looked at from the standpoint of the person making the claim and the person who has to meet the claim, and it is to these well-defined principles (rather than the resorting to arbitary or capricious rules) that the Court must look to in determining the rate of arrears.[2]

Thus in Venkataratnamma v. Seetaratnam,[3] in holding that it was fully open to the Court to award arrears of maintenance at some rate less than that fixed for current maintenance, Curgeneven, J. ruled that, as during the period for which arrears were being claimed, the widow had been merely a child from about twelve to seventeen years of age, and consequently her needs being extremely moderate, it was a factor to be

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was himself not quite convinced by his own stance, is indicated a little later at 10, where in modifying the earlier statement he observes: "If the income of the family during the period for which arrears are claimed is less than the income at the time of the institution of the suit, arrears may certainly be allowed at a lesser rate." The general principle obtaining in Kirpal Singh v. Chandrawati Devi, A.I.R. 1951 All. 507, at 511 may in fact be regarded as being more in tune with the correct position: "There is no sufficient justification for making any distinction between the rate allowable for past arrears of maintenance and future maintenance unless there are special circumstances." (Emphasis mine.)

1. Hari v. Narmadabai, A.I.R. 1951 Nag. 133, at 136.
2. Venkanna v. Satyanarayanamma, A.I.R. 1957 A.P. 652, at 654.
3. A.I.R. 1932 Mad. 408.

taken into consideration, and the cutting down of the rate justifiable.[1]

The more problematic issue, however, is whether, where the arrears have been allowed to accumulate, it is open to the Court to award it at a reduced rate. In Dattatraya v. Laxman,[2] the Bombay High Court in laying down the basic principles held that, where silence on the part of the widow for a long time and her omission to demand maintenance might justify an inference that the claim had been waived or abandoned, and her conduct generally such as to lead the person in charge of the estate to believe that he would not suddenly be called upon to meet a claim for a large sum of money from out of his current income, it was in the discretion of the Court to decide whether a claim for arrears of maintenance ought to be allowed in whole or in part.[3]

Judicial opinion, though, has consistently opted for the award of arrears at a lower rate where it had been allowed to accumulate.[4] In an

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1. For a similar decision see also Ramarayadu v. Sitalakshmamma, A.I.R. 1937 Mad. 915. On the other hand, to award arrears at a lesser rate merely because she is in receipt of an independent income, is, it is submitted, violative of the widow's absolute and unconditional right to maintenance from her deceased husband's assets, and in this regard, the dicta in Panchakshara v. Pattammal, A.I.R. 1927 Mad. 865, and other like decisions, merit careful reconsideration.

2. A.I.R. 1942 Bom. 260.

3. Ramaswami, J., in underscoring this principle, in Rajamma v. Varadajulu, A.I.R. 1957 Mad. 198, at 200, followed Sobhanadramma v. Narasimhaswami, A.I.R. 1934 Mad. 401, to hold that, "it is equally well settled that arrears may be fixed on a lower scale than future maintenance ... on the principle that by reason of the arrears not being claimed promptly, the opposite party would have been induced not to make any provision for meeting it out of his annual income and therefore it would not be proper to saddle him with such heavy unexpected liability as would result in the liquidation of the joint-family assets. For similar reasoning see also Venkanna v. Satyanarayanamma, A.I.R. 1957 A.P. 652, at 654.

4. In rare instances, the demand for arrears have been altogether negatived. See, for instance, Seshamma v. Subbarayadu, I.L.R. (1895) 18 Mad. 403, where a demand for past maintenance for six years was denied on the ground that, as the widow had chosen not to reside in the family house, it was a matter in the discretion of the Court not to award any arrears at all —— a stance not to be countenanced in the light of the imperative

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early decision, that of Raghubans v. Bhagwant,[1] it was held that, where the widow had advanced no claim for arrears for nearly eleven years, and considering that the amount spent on her upkeep by her brother was far less than the amount claimed, the Court in the exercise of its discretionary power, was entitled to fix the arrears at a rate lower than what had been awarded for future maintenance.

Equitable as this rationale may appear, the further reasoning of their Lordships that, where the demand for arrears is not made for a long time, those upon whom the liability lies, may well infer waiver of the right, is difficult to comprehend. The question that such a proposition begs is: what may a "long time" be taken to be ? If as a general rule waiver or abandonment cannot be inferred either from the fact that no formal demand was made, or that the widow was living in her parental home, the correct principle must in the circumstances be that, provided that her claim is not barred by time,[2] no waiver may be inferred, and

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nature of the claim to arrears of maintenance, and the equally non-binding rule for the widow, of residence in the family home. See also Audemma v. Varadareddy, A.I.R. 1949 Mad. 31, at 39 where a like view was expressed, and the widow's right to arrears denied on the ground that, as for twenty-seven years she had made no demand, she had implicitly abandoned her claim prior to the institution of the suit. On the other hand the ruling to the contrary in Guruswami v. Angaiyarkanni A.I.R. 1974 Mad. 194, at 198 is, it is submitted, by far the more attractive and equitable of the two viewpoints: "A plea of abandonment or waiver is not always one of law, and that is a matter which has to be expressly pleaded and proved, because abandonment or waiver involves a conscious and deliberate act on the part of the person who has got a right to, or interest in, certain property, which he or she deliberately and with full knowledge of the existence of the right or interest gives up the same."

1. I.L.R. (1889) 21 All 183.

2. That this may not be an unreasonable proposition, is indicated by a like opinion expressed by Umamaheswaran J., in Krishnamurthy v. Suryakanthamma, A.I.R. 1955 A.P. 5, at 9 that, "If the right of a widow is a legal one, and if under the law of Limitation she is entitled to claim arrears of maintenance for a period of twelve years, I am unable to understand how the Courts are entitled to exercise a wide discretion in cutting down the period or the rate of arrears."

she is as much entitled to arrears at the same rate as to her present maintenance,[1] other conditions remaining the same.[2]

Keeping in view the foregoing principles, the decision in Lakshamma v. Venkatasubbiah,[3] is worth noting. Where the widow sued for arrears twenty-seven years after the death of her husband, it was held that, though no waiver or abandonment of the right could be inferred, nevertheless a period of three years was thought sufficient for the award of arrears. On the face of it, a most inequitable judgement in that the award of arrears for only three out of the twenty-seven years might appear as almost tantamount to the denial of the right itself, it is submitted that, on reflection, no injustice was done. The period of limitation runs for twelve years at a stretch, and the widow's claim being barred twice by the consecutive running of time against her, the award of arrears for three years was what her entitlement amounted to.

Where however, the action to enforce the claim to arrears is instituted within twelve years, it is submitted that the Court must

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1. See the decisions in Kirpal Singh v. Chandrawati Devi, A.I.R. 1951 All. 507, at 511; Venkanna v. Satyanarayanamma, A.I.R. 1957 A.P. 652, at 654; Hari v. Narmadabai, A.I.R. 1951 Nag. 133, at 136, all of which lay down that, while the Court has the discretion to decree arrears at a rate different from the rate allowed for future maintenance such discretion may only be exercised when the conditions in the family in the past were different fromthe present conditions. In other words, where the conditions prevailing in the past were the same as those in the present, arrears must be awarded at the same rate as present maintenance.

2. Where the conditions are in fact not the same, if arrears may be fixed at a reduced rate under adverse circumstances, it is equally certain that it may be awarded at an enhanced rate under more favourable conditions. This is brought out clearly in Manilal v. Bai Sushila, A.I.R. 1956 Bom. 402, where on the widow's demand of a certain sum for arrears as a consequence of her having incurred debts, Chainani, J., held at 404 that, "We think the plaintiff should be awarded a much larger amount, having regard to the extensive properties possessed by the defendants."

3. (1925) 48 M.L.J. 266.

exercise its discretion to cut down the rate only on "the gathering together of all the facts of the situation" as envisaged by the Privy Council in Ekradeshwari v. Homeshwar,[1] and not merely because no demand had been made, for where there is a right it cannot be said to have evaporated simply on the basis of its non-assertion.

It has been held that, as the Courts do have a wide discretion in awarding arrears, they may take into consideration that a sudden demand for a large sum by way of arrears, may be inequitable and embarassing to those upon whom the liability rests.[2] It is upon this principle that it was held in Gowardhan v. Smt. Gangabai[3], that, as the widow had taken no action to enforce the claim for arrears for twelve years, and the amount accumulating in that period was a large sum to pay which the defendant would encounter difficulties, the Court had of necessity to exercise its discretion in fixing a lower rate of arrears.[4] It is certainly true that, if the demand for accumulated arrears is to be met with from the current income alone, hardships must inevitably result, but to cut down what is legitimately the due of the female, is, it is submitted, quite as unreasonable, quite as inequitable.[5] The dicta in Guruswami v.

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1. A.I.R. 1929 P.C. 128, at 130.
2. See Sobhanadramma v. Narasimhaswami, A.I.R. 1934 Mad. 401, at 405; Dattatraya v. Laxman, A.I.R. 1942 Bom. 260, at 262.
3. A.I.R. 1964 M.P. 168.
4. Ibid., at 171.
5. See also Sidramappa v. Mahadevi, A.I.R. 1971 Mys. 145, at 148, where the ruling is the more reprehensible in that, while recognising the widow's right to arrears for the past twelve years, as well as taking cognisance of the fact that the sum awarded by the trial Court could not be said to be excessive in any manner taking into consideration the status of the parties, nevertheless, "as the defendants have to pay in one lump sum of money, by way of past maintenance for a period of twelve years which they may have to find from out of current income, it would be equitable to reduce the past maintenance..." It is submitted that, however else one may regard this dicta, equitable it certainly is not. In holding the contrary view in Guruswami v. Angaiyarkanni, A.I.R. 1974 Mad 194, Ismail, J., puts in proper perspective the entire question of

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Angaiyarkanni,[1] may here be called in aid to resolve the dilemma, and once that formula is resorted to, the person upon whom the liability lies would, one feels certain, recognise the recurring nature of the right and make proper provisions accordingly as the liability arises.

11. The Effect of Unchastity on the Right of Maintenance

The protection from destitution by way of the right of maintenance that the Hindu law provides to the female after her husband's death is, however, conditional upon her living a life of chastity. As the estate from which her maintenance is deriveable is that of her late husband's she must, for the remainder of her life, remain constant to his memory, and incontinence must of necessity result in forfeiture: so the smṛti texts state unambiguously.[2]

The Courts have consistently upheld this view, and as early as 1843, it was held in Bussant v. Kummul,[3] that, having voluntarily quitted her husband's house in the night with a stranger male, the claim of the widow for an allowance from her husband's family was untenable, as according to the "shasters" her own conduct had deprived her of all claim to maintenance from them.

In Muttammal v. Kamakshy,[4] the Madras High Court arrived at a

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arrears in quite rationally holding at 199 that, while the demand for an exaggerated amount by way of arrears was rightly regarded as inquitable and embarrassing to the estate in Dattatraya v. Laxman, A.I.R. 1942 Bom. 260, nonetheless there is no "unalterable and fixed principle of law that whenever a widow comes to the Court with a demand for lump sum payment by way of arrears of maintenance, the Court should treat such a demand as inequitable and embarrassing to the estate."

1. A.I.R. 1974 Mad. 194, above, at 360 f.n. 4
2. Mit. II.I. 13; Dāya. V. 19; Nār. XIII. 26, supra, 270.
3. (1843) 7 S.D.A. 168.
4. (1865) 2 Mad. H.C.R. 337.

similar decision to hold that, where the wife had been divorced for adultery and continued to live in unchastity after her husband's death, she was disentitled to claim maintenance from the property in the hands of the survivors.

Similarly in Raja Pirthee Singh's case,[1] which was essentially concerned with the question of the legal implications and the effect thereto of the widow's non-residence in the family house on her right of maintenance, it was made clear during the course of the judgement that, unless she is guilty of unchastity or other disreputable practices which disentitle her altogether, the widow's right to maintenance is unimpeachable.

Likewise in Moniram v. Kerry Kolitany,[2] in considering the effect of unchastity upon the estate inherited by a sonless widow, Sir Barnes Peacock drew a distinction between Nārada's injunction[3] in regard to maintenance and that of Kātyāyana's [4] in regard to maintenance to hold that, as the right to receive maintenance is very different from a vested estate in property, what is said as to maintenance could not be extended to the case of a widow's estate by succession —— a point of view that may well be open to challenge,[5] but important for our purposes is its clear endorsement of the generally accepted principle that, maintenance is indeed conditional upon chastity.

What is however interesting is that, while Nārada and Yājñavalkya envisage the grant of maintenance only to such widows who maintained the

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1. (1873) 12 Beng. L.R. 238, at 247.
2. (1880) L.R. 79 I.A. 115.
3. Supra, at 270.
4. Supra, at 222.
5. See Br. XXV. 49; Kātyāyanasmṛti, V. 921, supra, 222. See also Mit. II. I. 6, op.cit., Dāya. XI.I.7, op.cit., for the declaration of Vṛddha Manu that "The widow of a childless man, keeping unsullied her husband's bed, and persevering in religious observances, shall present his funeral oblation and obtain (his) entire share."

code of conduct that the śāstra had entailed upon them, the text of Hārīta that,

> "(I)f a woman becoming a widow in her youth, be headstrong, a maintenance must in that case be given to her for the support of life," [1]

was fastened upon in some instances[2] for the interpretation that, provision —— however frugal —— must be made for even the erring female, Westropp, C.J. taking the view that, the observations of the Privy Council in Raja Pirthee Singh's case[3] as to loss of maintenance in consequence of unchastity, referred to maintenance as a full right, and not to a "starving" maintenance, as a bare maintenance has sometimes been denominated.

To contemplate that the abhorrence that is unchastity in the sight of the lawgivers should to this extent be mitigated, is to militate against the very spirit of the ancient texts. As was to be expected this construction did not gain ascendency, and in Valu v. Ganga,[4] Sargent, C.J., in dissenting with the earlier view, was clear that the texts[5] which bear directly on the question of maintenance make the widow's right to it conditional upon her leading a chaste life.[6]

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1. Mit. II. I. 37, op.cit. Kane draws our attention to the full import of this text. See H.D. Vol. I, Part I, op.cit., at 545. See also H.D., vol. IV, op.cit., at 105, where in explaining Yaj. III. 296, and Manu XI. 176, the learned author expounds: "A woman, however, was not to be altogether abandoned on the street and left to fare for herself, though she be patitā, but she was to be lodged in a cottage thatched with grass near the house, and was to be guarded against further lapses and given bare maintenance (enough to keep body and soul together) and (dirty) clothes."

2. See Honomma v. Timannabhat, I.L.R. (1877) 1 Bom. 559.

3. (1873) 12 Beng. L.R. 238.

4. I.L.R. (1883) 7 Bom. 84.

5. His Lordship referred in particular to the text of Nārada, (supra 270), and to the Smṛti Chandrikā, X.1. 34, op.cit., : "Whichever wife becomes a widow and continues virtuous, she is entitled to be provided with food and raiment."

6. See also Vishnu v. Manjamma, I.L.R. (1885) 9 Bom. 108, where in overruling the subordinate Judge's dicta that, the right of maintenance having once commenced, it could not be extinguished, their Lordships

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The Calcutta High Court followed suit in Roma v. Rajonimoni.[1] The widow having resorted to unchastity subsequent to her husband's death, it was held that as maintenance was not a vested right of which she could not be divested, the widow's chastity at the date of her husband's demise was of no consequence in determining the loss of that right as a consequence of her subsequent unchastity. So far as the question of starving maintenance was concerned, it was rightly held that only those widows were entitled who, having taken a false step, had subsequently reformed.

That unchastity disqualifies absolutely the right to maintenance even though it might have been secured by a decree or agreement, is the inevitable corollary of the right and the contingency that it is based on —— such is the view expressed in some decisions . In Daulta v. Meghu,[2] the allegation of unchastity having been proved, the widow contended that so long as the declaratory decree entitling her to maintenance stood unreversed her right to the amount decreed to her by it would remain unaffected, and that, in any case, her unchastity notwithstanding, she was entitled to what is known as starving maintenance. In negativing these claims, it was held on the authority of the Bombay decision in Vishnu v. Mangamma[3] that, a decree obtained by a Hindu widow declaring her right to maintenance, is liable to be set aside or suspended in its operation on proof of subsequent unchastity. As regards the

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were explicit that by virtue of the text of Nārada, such a right is liable to resumption or forfeiture depending on the conduct of the widow.

1. I.L.R. (1890) 17 Cal. 674.
2. I.L.R. (1893) 15 All. 382.
3. I.L.R. (1885) 9 Bom. 108.

second proposition, i.e. that she is entitled at least to a starving maintenance, the High Court reiterated the earlier decisions that, in the face of continuing unchastity, the right to maintenance is destroyed in its entirety.

It might well be argued that such rulings are in direct contravention to Hārīta's insistence that even the incontinent widow be given the barest minimum by way of food, raiment and shelter. What has, however, to be borne in mind is that, as under the Hindu law chastity is absolutely incumbent, the text of Hārīta must be construed in the context of this fundamental principle; as aware as the widow might be of her rights under her personal law, she must be equally aware that disreputable conduct on her part would neither be overlooked nor condoned by the same law.[2]

This general rule might, however, be waived in exceptional circumstances, and in Nagamma v. Virabhadra,[1] where the widow denied unchastity, and averring that her pregnancy had been the result of a forciable connection, sued to recover arrears of maintenance due to her under an agreement. While upholding the established principle that the unchaste widow was indeed deprived of the right otherwise due to her, their Lordships were willing to consider, on equitable grounds, the grant of a starving allowance on the basis that no text had been cited in the pleading, in favour of the theory that a bare maintenance could not be allowed, assuming that the pregnancy and subsequent out-casting was indeed the consequence of a forcible alliance. Thus though the claim for maintenance under the deed of agreement was nullified, as no proof of her continuing unchastity was forthcoming, the widow's right to a bare minimum was upheld.

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1. I.L.R. (1894) 17 Mad. 392.

2. However, where maintenance is secured under an agreement or decree of Court, the better view is that the personal law ceases to operate. See below.

On the other hand, where maintenance demands had resolved themselves in compromises the Courts have taken the view that the personal law is no longer operative, and such suits must be judged on their own merits. In Kisanji v. Lakshmi,[1] the claim of the widow for maintenance against her deceased husband's collaterals was compromised on the understanding that a lump sum was to be paid in cash to her, and the remainder in monthly instalments. On the stoppage of the installments on the allegation of unchastity, Madgavkar, J., ruled that, while undoubtedly the premium placed by the Hindu legislators upon the chastity of a widow was so high as not to deter a Court from depriving her of the right, nevertheless where the widow's claim rests upon an independent consideration, as in this instance, a compromise of her claim to property, she would not stand to lose out by reason of subsequent unchastity.[2]

By parity of reasoning the same principle is held to apply where the grant to a widow for her maintenance is secured under a testamentary disposition. In Parami v. Mahadevi,[3] the deceased husband had devised all his property to his relatives with this provision, that they should maintain his widow in case she lived with them, but that if owing to dissension she lived apart, they should give her a certain sum of money per annum by way of maintenance. The provisions of the will were resisted

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1. (1931) 33 Bom. L.R. 510.

2. That the widow's subsequent unchastity does not affect the agreement as her claim rests upon a compromise and not on any principle of Hindu law, was also the ruling in Bhup Singh v. Lachman Kunwar, I.L.R. (1904) 26 All. 321. On the same principle, it was held in Shivlal v. Bai Sankli, (1931) 33 Bom. L.R. 490, that a specific agreement of annuity arrived at by a Family Arrangement as between the parties, could not be negatived on ground of the widow's subsequent unchastity. In view of these rulings it is clear that the ratio in Daulta v. Meghu .I.L.R. (1893) 15 All. 382, (supra at 367) and likewise in Sathyabhama v. Keshavacharya I.L.R. (1915) 39 Mad. 658 (infra, at 371) may not be countenanced.

3. I.L.R. (1909) 34 Bom. 278.

on the ground that, subsequently the widow, having resorted to unchastity, had given birth to an illegitimate child. In ruling in her favour, Chandravarkar, J., held that, quite apart from her entitlement under the Hindu law itself in circumstances where she had since reformed,[1] as the widow's right had been secured by a testamentary disposition, it could not be questioned. For, his Lordship explained, as a Hindu's power to make a will is co-extensive with his power to make a gift inter vivos, the mere fact that the word "maintenance" was used, could not affect the unconditional terms of the bequest. In other words, where maintenance is awarded by will, unchastity does not work a forfeiture, unless it is expressly provided that it should be so forfeited.

What therefore emerges from the foregoing is that (those instances apart where the personal law may not apply at all), while continuing unchastity on the part of the widow would certainly disentitle her to the maintenance which she could otherwise effectively claim, on her return to a life of continence, she must at least be entitled to a starving maintenance, for as Mitter, J., so aptly observed in Moniram Kolita's case,[2] to maintain that a widow once unchaste must forever remain unchaste, appears fundamentally opposed to some of the texts of the Hindu law, and to the essentially protective nature of the same,[3]

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1. Dealt with below.

2. (1880) L.R. 79 I.A. 115.

3. Iyengar, J., dwells on this protectiveness of the law during the course of his judgement in Ananthanarayana v. Sharadamma, (1943) 22 Mys. L.J. 237 at 242: "The idea of starving'maintenance' is not to be found in any other system of law, because among communities where divorce is permissible it is open to a woman after divorce to marry another husband and thus have the means of receiving maintenance, while among Hindus, a woman who is abandoned by her husband on account of unchastity, has not that advantage. That is the reason why the smritkāras, while showing the utmost abhorrence against unchastity, did not condemn the unchaste woman to die of starvation or to be forced by absolute necessity to lead a life of shame and misery, and directed that she should be given a starving maintenance ... "

it is submitted.

To revert to Parami v. Mahadevi,[1] the learned Judge, after an elaborate review of the various smṛti texts,[2] reiterated the general rule that, as a Hindu wife cannot be altogether abandoned by her husband, even in the event of her unchastity, he is bound to keep her in or near the house under restraint and provide her with food and raiment just sufficient to support life. If, however, she repents, returns to purity and performs such expiatory rights as are ordained, she must be reinstated[3] so as to entitle her to all conjugal and social rights. In decreeing a bare maintenance in favour of the widow, his Lordship rightly reasoned that what applies to the erring wife must a fortiori apply to the widow.[4]

In Sathyabhama v. Keshavacharya,[5] on the other hand, where the widow's maintenance had been settled under an agreement, it was held that on her repudiation of the unchastity to which she had resorted, the widow was entitled to the bare minimum for her upkeep and not the rate fixed under the agreement. Whether this construction can at all be countenanced is

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1. I.L.R. (1909) 34 Bom. 278.

2. Reliance was particularly placed on verses 70-2, and 297 of the "Marriage and Ritual" chapter in the Mitākṣarā.

3. The reason for this is obvious and has been stated elsewhere, but to recapitulate: As the claim to maintenance is a recurring right, it may be in abeyance during the unchastity of the wife or the widow as the case may be, only to revive on the cessation of the disqualification. On analogy with this principle it was held in Mst. Shibbi v. Jodh Singh, A.I.R. 1933 Lah. 747, that where the husband had denied maintenance to his wife on her alleged unchastity, it was not a bar to her claim to maintenance on his death if in fact there had been no unchastity.

4. As unimpeachable as the ratio is, it is submitted that the obiter dicta in the judgement requires further thought, and is dealt with in the appropriate place below.

5. I.L.R. (1915) 39 Mad. 658.

debatable, for as we have already established, the personal law in such instances ceases to operate and the parties are bound by their own undertakings. However, while this aspect of the ruling might well be dismissed, what does merit approbation is the enunciation that though the texts of Manu, Yājñavalkya and Nārada make no provision for a woman who had repented and was subsequently leading an honest life,

> "(I)t is not to be presumed from the omission to provide for such a contingency that, the resumption once made is to be irrevocable and that the fallen woman who had reformed is to be denied even starving allowance." [1]

The same rule applies with all the greater force where it is established from the evidence that the woman was guilty of only a single moral lapse. In Ananthanarayana v. Sharadamma,[2] where barring the one deviation into adultery, the wife had subsequently maintained an unsullied existence, the learned Judge followed the now established rule to hold that, though her misconduct could not entitle her to be maintained by her husband on the same scale as a virtuous wife, neither by that single act of infidelity could she be entirely deprived,[3] and must of right be provided with starving maintenance just enough to keep

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1. Per Aiyer, J., ibid., at 660 . The grant of a starving allowance to the reformed widow was also upheld in Bhikubai v. Hariba, I.L.R. (1925) 49 Bom. 459; Ram Kumar v. Bhagwanta, I.L.R. (1934) 56 All. 392.

2. (1943) 22 Mys. L.J. 237.

3. It is submitted that from a purely subjective angle what most attracts is the reasoning of the learned Judge that, where the wife is guilty of marital disloyalty, the husband cannot be exonerated from blame, for as among Hindus a woman is under perpetual tutelage, "When, during coverture, the husband has control over his wife and is her guardian, he should take proper precautions and necessary measures to safeguard her against all evil temptations. The ancient Hindu lawgivers therefore regarded the husband as being partly responsible, on account of his negligence, for his wife yielding to temptation and becoming unfaithful to him." : Ananthanarayana v. Sharadamma, cited above, at 242.

her body and soul together.[1]

In the learned Judge's view, however, be the wife's sin ever so heinous as to justify her abandonment by the husband, she is to be abandoned only for the purposes of conjugal relations and religious ceremonies. For the rest, the texts of Yājñavalkya and the Mitākṣarā 's commentary thereon, clearly indicate that whether or not she performs the prāyaśchitta (penance) her right to a bare or starving maintenance cannot be denied.[2]

Thus the obiter dicta in Parami v. Mahadevi[3] that,

> "(I)f, however, she repents, returns to purity and performs expiatory rites, she becomes entitled to all conjugal and social rights, unless her adultery was with a man of a lower caste, in which case, after expiation, she can claim no more than bare maintenance and residence,"[4]

must be rejected as being not only inconsistent with a modern outlook,[5] but also contrary to śāstric injunctions, for as his Lordship was perceptive enough to note, while in the caste hierarchy a Kṣatriya Vaiśya or Śūdra are all of a "lower caste" than the Brāhmin woman, the abandonment contemplated in the smṛti is in regard to misconduct with a jungitaha,[6] i.e. the chaṇḍāla or the charmakāra (the outcast). Thus

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1. What applies to the wife is equally applicable to the widow, and in Jai Kissen v. Mst. Ram Rakhi, A.I.R. 1950 H.P. 12, where it was the widow who was guilty of a single moral lapse, a similar decision was arrived at.

2. In defence of his reasoning, his Lordship draws attention to the comments of the Mitākṣarā on verse 297 in the Prayaśchittādhyāya of Yājñavalkya Smṛti that, it is only in the case of women who have committed the four kinds of heinous sins, who will not be entitled to even starving maintenance, i.e. one who yields herself to her husband's disciple, and one who yields herself to her husband's guru, and particularly one who attempts the life of her lord or one who commits adultery with a jungitha (a chuckler or the like).

3. I.L.R. (1909) 34 Bom. 278.

4. Ibid., at 283.

5. Derrett, IMHL, op.cit., at 171.

6. More properly jungita. See Vas. 21.10, op. cit.

in the present case, though the liaison of the Brahmin woman was undoubtedly with a man of a lower caste, as he was not a jungitaha, her repentance was sufficient to dispense with purification ceremonies, and her right to a starving maintenance undisputed.

Decisions such as these leave no doubt in mind that however stringent the view the sacred texts may take of moral lapses, it is only in very rare circumstances that the woman is left totally unprovided for, and while compassion might have had a part to play, it is equally certain that, in making provision for a bare minimum to the erring female, the lawgivers were propelled by the driving fear of the shame and dishonour that the destitute widow's conduct might otherwise heap on the patriarchs of the family.

Once this is clear, it is then quite in order that, in the contemplation of the "Hindu Code" the stipulation of unchastity in regard to both maintenance and inheritance is dispensed with, in keeping with the broader, and theoretically at least, more tolerant perspective of modern times.

12. The Effect of Remarriage on the Right of Maintenance

That the remarriage of the Hindu widow was never in the contemplation of the Hindu sages, and was unlawful except where it was sanctioned by caste custom, is evident when we consider the various detailed injunctions prescribed in the śāstra in regard to her demeanour and mode of existence upon her husband's death.[1] However, all that was changed, and the departure from tradition marked by the passing of the HWRA, 1856, legalising the remarriage of widows.[2] But such relief as this much needed piece of

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1. Supra, 153ff. See also Dāya., XI. I. 43.

2. The HWRA, 1856, was repealed in 1983.

* Since the remarried widow would depend on her second husband for maintenance, the law requiring her to forfeit maintenance from her previous family was admittedly reasonable.

legislative enactment might have been brought to bear upon the stark conditions of deprivation attendant upon widowhood, was effectively nullified by the provisions of s. 2 in the stipulation of which the widow on her remarriage forfeited all rights by way of maintenance and inheritance in her deceased husband's property.[1]

It is thus clear that, where the widow remarried under the enabling provisions of Act, there can be no doubt but that she was equally bound by the restrictive clause in it, and stood divested of the estate that had inhered in her as her deceased husband's heir,[2] and by parity of reasoning, of her right to claim maintenance from the same. But the real problem that arose in the wake of the new legislation was whether the widow who was permitted to remarry by the custom of her caste was as liable to forfeit such interest —— be it that of inheritance or maintenance —— as her counterpart who remarried in reliance on the statute of 1856.

The conflict of judicial opinion is an indication of the complexity of the problem, the Allahabad High Court consistently holding to the view that the widow is divested on remarriage except where by the custom of the caste and apart from the Act, she is entitled to remarry, and decisions to the contrary could not be said to lay down the correct law.

In Gajadhar v. Kaunsilla,[3] where the widow had remarried in accordance with the custom in her caste, the transferees from her husband refused to pay her further maintenance under s. 2 of the Act of 1856, the

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1. Supra, 196. (cont) *

2. See Thangavelu v. Lakshmi, A.I.R. 1957 Mad. 534. After the coming into effect of the HSA, 1956, the view that rightly prevailed was that, where the widow had remarried prior to 17th June, 1956, she could not claim the benefit of s. 14 (1), as under s. 2 of the HWRA, 1856, she was divested of the estate which had inhered in her as her husband's heir. Infra, 495.

3. I.L.R. (1909) 31 All. 161.

contention being that, as the right of maintenance was founded upon relationship, the effect of the remarriage was to dissolve all ties between the widow and the family of her first husband. Banerjee, J., however, took as precedents the Allahabad rulings in Har Saran v. Nandi,[1] and Ranjit v. Radha Rani,[2] to hold that as the Act of 1856 was inapplicable to the case of the widow who was permitted by the custom of the caste to remarry, there could be no forfeiture of the property inherited by her from her late husband. While unchastity may work a forfeiture of her right of maintenance, his Lordship opined, as remarriage could not be equated with unchastity, she was entitled to retain the estate of her first husband, and a fortiori, to receive the maintenance fixed by the decree against her husband and against the transferees of his estate.[3]

This early stance was reinforced yet again in Allahabad in Bhola v. Mst. Kausilla,[4] where in holding that the Act must be read as being controlled by the Preamble,[5] Mukherjee, J., was of the view that, as the statute was meant to apply to only those Hindus among whom widow remarriage was not permitted by caste custom, its enabling provisions were

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1. I.L.R. (1889) 11 All. 330.
2. I.L.R. (1898) 20 All. 476.
3. Followed in Mula v. Pratab, I.L.R. (1910) 32 All. 489; Mangat v. Bharto, I.L.R. (1927) 49 All. 203; Ram Lal v. Mst. Jwala, I.L.R. (1928) 3 Luck. 610; Gajadhar v. Sukhdei, I.L.R. (1930) 5 Luck. 689, though it is to be noted that, in the Allahabad rulings in the main, the learned Judges hesitated not a little in accepting this point of view, but eventually capitulated, in that they felt bound by the course of decisions, and were reluctant to overturn the tradition established in the Allahabad High Court.
4. I.L.R. (1933) 55 All. 24.
5. The Preamble lays down the purpose of the Act as, "An Act to remove all legal obstacles to the marriage of Hindu widows."

never meant to create disabilities where none existed. As such, therefore, the strict and orthodox Hindu law could not logically be invoked[1] in order to furnish a rule of forfeiture on remarriage, applicable in the case of those castes which, in derogation of that strict and orthodox law, had recognised and permitted the remarriage of widows.[2] Under these circumstances, therefore, it would be necessary for the party claiming that there had been forfeiture by reason of remarriage to prove affirmatively that such forfeiture is an incident of the custom under which the remarriage took place.[3] In Murugayi v. Viramakali,[4] where the widow had remarried, it was held that notwithstanding that such remarriage was sactioned by the caste to which she belonged, the law would not permit such widow to retain the inheritance, for by her remarriage she had violated the fundamental principle upon which the

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1. An irrational and illogical statement, as earlier, his Lordship had maintained that, while certain castes might not permit remarriage, the śāstra certainly permitted it. This being so, so far as the Hindu law was concerned, there could be no forfeiture as there is no express text which lays down that a forfeiture of the widow's estate will follow upon her remarriage. Nor, it is submitted, is it possible to endorse the further stance of the learned Judge that, if —— upon an interpretation of the texts relating to the conditions attaching to female inheritance, and in reliance upon the dicta in Moniram Kolita's case, (1880) L.R. 79 I.A. 115, —— open unchastity does not entail forfeiture, it would prima facie follow that, a remarriage would not, either. To put matters in proper perspective, what has to be borne in mind is that the Hindu lawgivers' motivation in allowing a starving maintenance to the unchaste widow was as much to save her from further incontinence as to make allowances for human frailty. On the other hand, remarriage, unlike unchastity, was as it were, a snapping of the matrimonial tie, the negation of the very concept of the oneness of husband and wife which is a constantly reiterated theme in the śāstra.

2. The Allahabad High Court has persisted in this view in Narain v. Mohan, A.I.R. 1937 All. 343; Jileba v. Parmesa, A.I.R. 1950 All. 700; Mohan Lal v. Mst. Bhudevi, A.I.R. 1954 All. 558; Smt. Ram v. Board of Revenue, U.P. A.I.R. 1972 All. 492, and Madhya Bharat followed suit in Ram v. Occha, A.I.R. 1951 M.B. 97.

3. The same view is evident in Jileba v. Parmesa, cited above; and Smt. Ram v. Board of Revenue, U.P., cited above, Rampiyari v. Board of Revenue, A.I.R. 1972 All. 492.

4. I.L.R. (1877) 1 Mad. 226.

*2a. Derrett takes the contrary view. See "Hindu Law", J.D.M. Derrett ed., An Introduction to Legal Systems, (Lond., Sweet and Maxwell, 1968), 81-103, stating categorically at 97, "Custom was ... at the root of the smrtis themselves."

**2b. The significance of the words "any widow" in s. 2 of the Act of 1856 (supra, at 196) cannot be minimised. It is submitted that they clearly postulate the application of the provisions to all Hindu widows, for were the intention otherwise, the specific words of the Preamble, i.e. "Hindu widows with certain exceptions", could well have been incorporated in their place.

widow's right is based, i.e. that she is the surviving half of her husband.

This was further elaborated in Matungini v. Ram Rutton,[1] the Full Bench explaining that the widow takes her husband's interest not because of past relationship, not because she was the wife of the deceased, but on the basis of a continuing relationship, that notwithstanding the death of her husband, she is still his patnī, capable of conferring by her pious acts, spiritual benefit on the deceased. Accordingly, where she remarries, whether by the custom of the caste, or under the enabling provisions of the Statute of 1856, she forfeits all rights in the deceased husband's property.[2]

This, it is submitted, is the correct interpretation, for as the Hindu texts nowhere prescribe remarriage for the widow, the custom of the castes permitting it is deviation from the strict contemplation of the sacred texts.[2a*] On the other hand, the HWRA, 1856, cannot be construed to extend to the widow permitted to remarry under caste rules, the latitude it denies to the rest, for the clearly indicates that, both its enabling as well as restrictive clauses were intended to be applied equally to all Hindu widows.[2b**]

It has to be borne in mind, however, that where the widow married after 1956, s. 2 of the HWRA cannot be called in aid to divest her, for s. 14(1) having vested her with full authority over the property, she cannot subsequently be divested.[3]

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1. I.L.R. (1892) 19 Cal. 289 (F.B.).

2. For similar decisions see also Vithu v. Govinda, (1898) 22 Bom. 321 (F.B.); Suraj v. Attar, A.I.R. 1922 Pat. 378; Santala v. Badaswari, A.I.R. 1924 Cal. 98; Rama Appa v. Sakhu Dattu, A.I.R. 1954 Bom. 315; Manabai v. Chandanbai, A.I.R. 1954 Nag 284; Hira v. Bodhi, A.I.R. 1954 Or 172; Kishan v. Arjun, A.I.R. 1959 M.P. 429.

3. Mulla, 501 ff.

In cases of compromises, agreement and the like, the Courts have rightly taken the view that the disenabling clause of the statute could not operate to the detriment of the widow's right under the compromise etc. In Arunchalam v. Konjiti,[1] the widow in consideration of the execution of a promissory note of a fixed amount in lieu of maintenance, renounced all claims in the ancestral estate. On her subsequent remarriage, it was contended that, as she had by her remarriage forfeited her right to maintenance from her husband's estate, the balance due on the promissory note being in fact money due for her maintenance, she was incapable of claiming it. It was held, however, that if the promissory note was evidence of the surrender of the widow's right to maintenance, the coparceners were equally bound by the terms of the agreement irrespective of any consideration of the right to maintenance under the Hindu law. Thus the widow's claim under the document was a debt due to her by the coparceners which could not be treated as an interest in the property of the deceased husband, and as such, neither in the strict letter of the Act of 1856, nor indeed in Equity could the coparceners repudiate the debt.[2]

12. An Assessment of the Right of Maintenance

The incidents of the right of maintenance thus established, it is perhaps in order that, in concluding, we look upon the right as a whole, and assess exactly what its basic characteristics are. Despite the

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1. A.I.R. 1938 Mad. 994.

2. It was likewise held in Bangaru v. Mangammal, (1946) 2 M.L.J. 377, that, where under a deed, the widow had obtained property absolutely in lieu of her maintenance, with power to alienate by way of gift, sale, exchange, etc., the estate which is conferred on her is absolute and not liable to forfeiture on her remarriage. See also Sm. Sankaribala v. Sm. Asita, A.I.R. 1977 Cal 289, infra 403, f.n, 1. and 646-7.

divergence of view in the Mitākṣarā and Dāyabhāga schools in regard to the incidents of female inheritance and succession, there are none of those sharply defined distinctions in the view that the two systems take of the maintenance right of the female. Both the schools are agreed that, the sacred texts enjoin maintenance as a moral obligation upon the Hindu, for

> "(M)aintenance by a man of his dependant is, with the Hindus a primary duty. They held that he must be just before he is generous, his charity beginning at home; and that even sacrifice is mockery if to the injury of those he is bound to maintain." [1]

After him, it assumes the character of a legal duty, on those who take his estate, to maintain his dependants, particularly his widow. De as she was from taking property, it was inconceivable that after her husband's death, want and poverty should drive her to the indignities attendant upon destitution, and, worst of all, perhaps even to vagrancy.

Much has therefore been made of the humane spirit of the Hindu law,[2] and, as we have seen, with reason too. But while there can be no gainsaying its essentially compassionate nature, it would seem to the discerning eye that there was more than mere benevolence behind this provision for maintenance for widows. Any blot on the family honour was (and still is) an abhorrence not to be countenanced, and if the widow chose not to consign herself to the flames on the funeral pyre of her husband, the only other option open to her was a lack-lustre life of dreary penance and piety. Chastity was made the prerequisite for maintenance, and for all that sympathy may have played its part, by far the more pressing motivation was surely the time-hallowed notions of family

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1. Strange, Vol I., op.cit., at 67.
2. See, for instance, Gupte, Hindu Law in British India, op.cit., at 1056.

honour and prestige.

This appears all the more convincing when we see the contrast in attitude towards the widow, disqualified from inheriting by reason of her sex, and other male members equally disqualified by reason of other disabling factors,[1] though not by unchastity, male unchastity of course not being a matter of any moment. Both were entitled to maintenance by virtue of their being members of the joint family. But there their equality of status ended; for while

> "(T)he sons of these persons (disinherited coparceners), whether they be legitimate offspring or issue of the wife, are entitled to allotments, or are rightful partakers of shares; provided they be faultless or free from defects which should bar their participation, such as impotency and the like,"[2]

for the widow the provisions were unyieldingly stringent. Her only entitlement was to maintenance, and she might neither make extravagant use of, nor make a gift, mortgage or sale of any property she might have in possession for maintenance purposes; after her death the corpus must revert to her husband's heirs.

In the light of our investigation, and assessed from the point of view of the female who at one and the same time is able to identify herself and sympathise with her own sex, and yet retain that objectivity which is the perquisite of the spectator, one is forced to an awareness that the concept of the right of maintenance in the Hindu law, like most other discriminations generally applied to women, was an ingenious device to which the ancient rsis were parties, a means of securing the joint stock from fragmentation, the insistence on chastity and penance further circumscribing any tendency towards extravagance and waste. In

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1. Supra, at 268-9.
2. Mit. II. X. 10, op.cit.

many cultures the bearing of population upon natural resources is reflected in civil law, notably family law, and not least in those whose laws are coloured by religion. By the times of our rsis, it seems, the Hindus had reached a frontier and land was not an indefinite commodity. *

Once its true nature is ascertained, it then becomes clear that the grant of maintenance to widows was an important means of securing at one and the same time the family honour and the family property. That the institution took root must be attributed to the fact that the law makers and law expounders were all males, and female protests —— if at all heard —— were themselves evidence of unfitness for the compassionate treatment upon which the culture prides itself.

* On the other hand one must admit that an artful and deserving female could always turn the right to be maintained into a very valuable asset, more valuable than a lump sum would be to her - but that must depend to some extent on, not only her own adroitness, but on the good will, good luck and competence of those who manage the property.

CHAPTER FIVE

The HWRPA, 1937

"See, they return; ah, see the tentative
Movements, and the slow feet,
The trouble in the pace and the uncertain
Wavering!"
Ezra Pound
From "The Return"

1. Introduction

Whatever might be the merits of the Hindu joint-family as a legal and social institution - and it has to be admitted that there are not a few[1] - certainly so far as the female was concerned, there can be no doubt but that the institution was instrumental in keeping her in a position of subordination. Her right of maintenance apart, the denial that a woman could own property was somewhat modified by the admission of the institution of stridhana. But as if to counteract the effect of this concession, her right to a share in the joint stock was effectively curbed, though once that was admitted, the question was not whether a woman could own property, but whether she had svātantrya, i.e. an unrestricted power of disposition.[2]

The emergence of the "limited estate" in British India finally resolved this question. As we have already indicated, all that the widow stood to gain from it was what might best be described as relatively a 'pittance,"[3] presumably because of the notion current at one time that the widow's duty was to spend the rest of her life in penury,

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1. As for example, the spiritual and material benefit of joint-living making it economical, efficient and practical, the fact that handicapped members are taken care of, widows and other persons whose contribution to the whole may once have been great but is now minimal, are maintained and the common mutual share of fortune and misfortune. : J.D.M. Derrett, "Birth Control and the Intended Abolition of the Hindu Joint-Family," Law Asia, Vol. 4, No. 2, Dec. 1973, (Univ. of N.S.W.), 155-68, at 161. See also G-D. Sontheimer, The Joint Hindu Family, (New Delhi, Munshiram Manoharlal, 1977), Intro., at XVII.
2. Sontheimer, ibid., at 45.
3. Derrett, HLPP, op. cit., at 204.

obscurity and prayer.[1] Impermanent as this thesis was to prove, the consolidation of the Empire and with it the misguided zeal of the Privy Council further entrenched it deep within the Hindu system of inheritance, and the Hindu female continued to suffer from the deprivations that were inevitably resultant upon this artificially created institution.

However the British conquest of India was of no small moment, and consequent upon it, there were certain significant and momentous changes in the social and legal aspects of the lives of the indigenous population. Notwithstanding the general policy of non-intervention in the personal laws of the subject people, there were certain glaring evils, the perpetration of which could not be tolerated, and humanitarian considerations, as also active agitation on the part of enlightened Indian opinion, compelled the British legislators to modify certain areas of Hindu law through Imperial Regulations and Acts.

These were, in the main, and in effect, pieces of permissive legislation which did not affect the majority of Hindus, but were modifications of existing practices so as to better the lot of women. The prohibition of infanticide in 1795, the abolition of sati in 1829, the Child Marriage Restraint Act of 1929, the Hindu Widows' Remarriage Act of 1856 - these were all ameliorative steps that had far-reaching consequences in restoring to the Hindu woman a measure of her dignity as an individual. But the Mutiny of 1857 had the effect of bringing to an abrupt halt all such compassionate legislation, and though there were still many inequities to be remedied, from then onwards, the Hindu female continued to linger in the limbo of stagnation and indifference to her plight for well over eight decades.

At the same time however, with the British advent in India, a transformation of the cultural pattern had become inevitable by virtue

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1. Ibid.

of the new economic organization, ideology and administrative system that they brought with them. In particular, liberalism in the ideological domain, and the principle of equality in the social and political systems became the order of the day. Liberalism attacked all privileges and disabilities based on birth; it challenged authority and insisted that institutions and traditions not being sacrosanct, they may be repudiated and discarded when they fail to stand the test of Reason.[1] More picturesquely put:

> "(T)hat contented acquiescence that has come down from the past is selfish and anti-social, because amid the ceaseless change that is inevitable in a growing organism, the institutions of the past demand progressive readaptation." 2

The essence of this new philosophy was thus in a real sense, the emancipation of the individual.

Respect for the individual which this philosophy inculcated, and the concept of rights, personal, social, economic and political, were given a further impetus by a new system of education transferred in all its principles and almost all its details from the British Isles.[3] Along with the new education went the dissemination of the English language bonding together Indians who had formerly been separated by language barriers, and this common language, and through it, the exposure to ideas newly current in the West, were probably - and ironically - the main channels through which a feeling of national identity came to India. What is more, the building of the railways and the construction of new roads provided her with a communications system which ensured the spread of these ideas throughout the country.

Little wonder then at the tide of political and social awareness that swept over the country in the first half of the twentieth century.

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1. A.D. Ross, Hindu Family in its Urban Setting, (Univ. of Toronto Press, 1967), at 233-4.
2. J.V. Morley, quoted at ibid, at 234.
3. Ross, op. cit., at 18, 24.

The struggle for freedom was on, and as the national movement gained momentum, the clarion call of the Mahātmā went forth for women to bear the yoke of independence along with men. Unusual circumstances demand unusual behavioural patterns, and this participation in the freedom struggle brought for certain women not only a sense of prestige, but also a new awareness of themselves as individuals; some breach of the mores had been accomplished, and there was a growing feeling among the more advanced of the Indians that the first reforms with which the country should be overhauled was the emancipation of women, the raising of their status, and the elimination of the inequalities which they had hitherto suffered from.

The demand went forward for the bringing about of major changes in law, and for removing the legal disabilities and ending the discrimination against them in matters like marriage, divorce, guardianship and inheritance. Crucially important as each of these areas is, the social conditions emphasised the need for the recognition of the rights of inheritance of women. In particular there was a definite shift in preference from the agnatic kindred to the members of the nuclear family group, and it was felt that both from the point of view of need as also the closer affinity of relationship, the widow and children, whether sons or daughters, deserved priority over claims of brothers and nephews.[1]

Reform became the need of the day, and the Legislature took the first step towards this end in 1937 when the Hindu Women's Rights to Property Act was passed. The Act came into force in British India on the 14th April 1937 and in certain Princely States of India and other states from shortly after Independence until it was repealed for India by the Hindu Succession Act 1956. By an unfortunate oversight the statute was passed in the Indian Central Legislature only, which was not entirely competent to legislate, under the provisions

1. B. Sivaramayya, Women's Rights of Inheritance in India (Mad. M.L.J. Office, 1973), at 36.

of the 1935 Constitution, concerning the devolution of interests in agricultural land, and the Federal Court held that the Central Legislature's Act operated to regulate succession only to non-agricultural land and was ultra vires as regards succession to agricultural land in Governor's Province as it fell within the exclusively Provincial list of subjects.[1] Thereafter on the recommendation of the Rao Committee appointed by the Central Government to consider the situation created by the Federal Court's judgment, some provincial statutes enacted provisions corresponding to the original Act, and this, with subsequent retrospective amendments, apply thenceforward to all property. A few provinces, now States, for example Bengal and, until very shortly before the repeal of the main Act, the Central Provinces and Berar, neglected to extend the original Act, with the result that leases, mortgages and all interests in agricultural land fell outside the operation of the statute, and the Anglo-Hindu law and the law as amended by the HWRPA operated simultaneously on the various categories of a deceased intestate Hindu's estate. The statute produced effects which will long be felt, and its provisions must be regarded as in a sense current law.[2]

However for all that the Act effects important changes both in the law governing the devolution of a person's separate property as well as the interest which he might have in joint-family properties, it is nonetheless an example of piecemeal legislation which sacrifices clarity for brevity. Ill-drafted, in language that is loose and not strictly legal, it has given rise to unintelligibleness, ambiguities and anomalies, creating confusion and complexities in an already complicated state of law. What the Legislature left unsaid or

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1. In re Hindu Women's Right to Property Act, A.I.R. 1941 F.C. 72.
2. Derrett, IMHL, op. cit., at 253.

undefined has resulted in a spate of litigation, and it was left to the Judiciary to define its ambit, import and limitations - no easy task as we shall presently see.

2. The Widow's Entitlement in Separate Property under S. 3 (1)

Let us now examine the relevant provisions of the Act as regards the separate estate of a Hindu male dying intestate. S. 3 (1) provides:

> "(W)hen a Hindu governed by the Dayabhaga school of Hindu law dies intestate leaving any property, and when a Hindu governed by any other school of Hindu law or by customary law dies intestate leaving separate property, his widow, or if there are more than one widow all his widows together, shall, subject to the provisions of subsection (3), be entitled in respect of property of which he dies intestate to the same share as a son; provided that the widow of a predeceased son shall inherit in like manner as a son if there is no son surviving of such predeceased son, and shall inherit in like manner as a son's son if there is surviving a son or son's son of such predeceased son; provided further that the same provision shall apply mutatis mutandis to the widow of a predeceased son of a predeceased son."

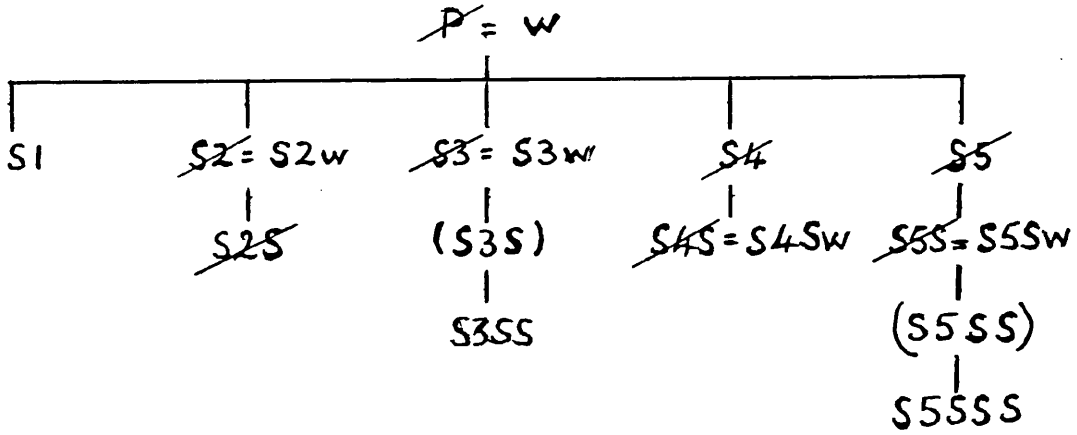
Relevant to this subsection (as also to s. 3 (2) which we will discuss later below), is s. 3 (3) which lays down:

> "(A)ny interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as the Hindu woman's estate, provided however that she shall have the same right of claiming partition as a male owner."

It is apparent that as a result of this enactment, important changes were effected in the law governing the devolution of the separate property of the deceased. In place of the provision that a widow could take only in default of a son, grandson and great-grandson, the Act provides that the widow shall be entitled to a share in the inheritance along with such persons. It also provides for the first time, and under all schools of law, a heritable capacity on the widow of a predeceased son, and the widow of a predeceased son's predeceased son.

As regards the quantum of interest which the widow takes, the sub-s makes it clear that she is to have the same share as a son. The widow of a predeceased son will take the share of a son of the deceased if no son of her own husband survived the deceased; in the event that such a son survived, she will take the share of a son's son. A similar provision is made as regards the share of the widow of the predeceased son's predeceased son.

The diagram below illustrates this:



At the time of P's death, S1 is his only surviving son, S2, S3, S4 and S5 having predeceased him. S2S was dead at the time that succession opened, and S4S and S5S were the predeceased sons of S4 and S5 respectively.

According to the provisions of s. 3 (1), w is entitled to the same share as S1. So too is S2w, S2S not having survived. S3w's share is equal to that of S3S's in the event of his being alive, but were he to have died earlier, she would take a share equal to that of S3SS. S4S having predeceased S4, S4Sw's entitlement is equal to that of S1, whereas S5Sw's share would be the same as that of S5SS or, should he have died prior to P, to that of S5SSS.

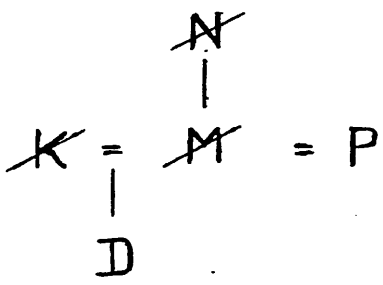
The widow inheriting will take "the same share as a son, "from which it follows that the tenancy will either be a joint tenancy or tenancy-in-common with the co-heirs according as the latter were undivided or divided at the moment that succession opened, and according as the parties were governed by the Mitākṣarā or the Dāyabhāga. Thus in all provinces subject to the Mitākṣarā law, if after inheriting the property as joint tenants and before any partition is effected

among the co-heirs, any of them dies, whether it be the widow or the sons of the deceased, the interest of such co-heirs would survive to the rest. Where however the co-heirs had taken the inheritance as tenants-in-common, then on the death of the widow subsequently, she having only had "the limited interest known as the Hindu woman's estate" under s. 3 (3) of the Act, succession will once again open to her husband, and his heirs at that time would succeed to such interest.

So far as the Dāyabhāga school is concerned, the provisions of s. 3 (1) do not create any problems, in as much as the expression "any property" is comprehensive albeit of a limited nature under s. 3 (3), and includes, unless something to the contrary can be spelt out from the other provisions of the Act, all forms and types of interest answering to the description of property in law. The property must be heritable property in respect of which alone the question of succession may legitimately arise.[1]

(1). Shebaitship is Property Within the Meaning of S. 3 (1)

According to the construction of the Supreme Court in Angurbala v. Debabrata,[2] even shebaitship is property within the meaning of the Act.



One N. a Hindu widow and her son M. who was the real owner of the properties in question, executed an indenture by which certain properties

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1. Angurbala v. Debabrata, A.I.R. 1951 S.C. 293 at 297.
2. Ibid.

were dedicated to a deity. The indenture provided that N, and after her death M, were to be the shebaits, (managers). Should M be survived by his wife K, she was then to take up the office, and after her death the heirs of M were to act as shebaits. K died during the lifetime of M, leaving a minor son D, the defendant in the suit. Soon after M married the plaintiff as his second wife, and died shortly after the marriage. The plaintiff filed a suit for a declaration that she was the sole shebait of the deity under the terms of the indenture, or in the alternative, was entitled to shebaitship jointly with D, she being the co-heir with her stepson under the HWRPA.

It was contended on her behalf that, as K had died during the lifetime of M, the grant of the shebaiti right in her favour had lapsed and the heirs of M were therefore entitled to come in as next shebaits after M's death. Who these heirs were had to be determined according to the law in force at the time when the succession opened on the death of M, and under the HWRPA 1937, the widow of a propositus, who dies intestate, would rank as an heir along with the son, and would be entitled to the same share as a son gets in the property of the deceased, and, as shebaitship is property, it would devolve under s. 3 (1) of the HWRPA upon both the plaintiff and the defendant jointly. The further contention was that, if for the sake of argument it is assumed that the expression "property" as used in the HWRPA does not include shebaiti right, it is nonetheless a well established proposition of law that succession to shebaitship is governed by the ordinary rules of inheritance in respect to secular property under the Hindu law, and as the HWRPA had amended the general rule of inheritance in certain matters, the same alterations must be recognised in regard to succession to shebaitship as well.

As against this, the defence was that the HWRPA is a piece of special legislation enacted for a special purpose, and does not use

the expression "property" in a wide and unlimited sense; it would therefore appear from the provisions of the different sections of the Act that it could not have had in contemplation, and does not purport to effect, the rules of succession relating to the special and somewhat anomalous type of property which shebaitship admittedly is.

In delivering the judgment Mukherjea, J., held otherwise, and stressed that as no testamentary disposition of shebaiti (other than shebaiti executed by testament) property is possible or could take effect in law, the testator must in such circumstances be deemed to have died intestate in respect of such property, and this would be in accordance with s. 5 of the Act which lays down:

> "(F)or the purposes of this Act, a person shall be deemed to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect."

There is thus nothing in any of the provisions of the Act from which an inference can be drawn that the expression "property" as used in s. 3 (1) has a limited or restricted interpretation, and is not applicable to shebaitship, which is recognized as property in Hindu law.

In his Lordship's opinion, this view is all the more reinforced when the dicta in Umayal Achi v. Lakshmi Achi[1] is considered, where the widowed daughter-in-law's insistence was that certain religious and charitable trusts left by the deceased came within the purview of the HWRPA. It was held however that the HWRPA was intended to apply only to properties beneficially owned by the propositus, and it was not applicable to rights in the nature of trusteeship.

Shebaitship, on the other hand, involves precisely this element of beneficial or personal interest, and in the learned judge's view, the dicta in Suryanarayanacharulu v. Seshamma[2] would be more to the point.

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1. A.I.R. 1945 F.C. 25.
2. A.I.R. 1950 Mad. 103.

There the question arose in connection with the rights associated with the office of archakatvam (priesthood), which is a hereditary religious office and the holder or holders of it for the time being are beneficially entitled to enjoy certain income arising out of the endowed property. The Madras High Court was of the opinion that the principle laid down in Umayal Achi's case[1] had no application to the case relating to the office of archaka, and that, that decision proceeded only on the main ground that the Act governs succession to property beneficially owned by the propositus. So too, the learned judge held, with shebaitship where, for all that there is an ingredient of office in it, succession to it follows succession to ordinary or secular property, and therefore there is nothing in any of the provisions of the HWRPA which excludes from the scope and operation of the Act, succession to shebaitship which is a recognised form of property in Hindu law.

(2). Judicial Construction of the Words "Separate Property" in s. 3 (1)

The construction of the words "separate property" in s. 3 (1) however ran into difficulty where the Mitākṣarā school was concerned. The question as to what constitutes "separate property", whether or not it would include, for the purposes of the Act, property in the hands of the sole surviving coparcener, and property obtained at partition became a matter of prolonged controversy, and is an instance of the kind of legislative ambiguity inherent in the Act which it was left for the Judiciary to resolve.

Nandakumari v. Bulkan Devi[2] was one of the first cases to come up for decision before the Patna High Court. A sole surviving coparcener in a joint Hindu family died, leaving a widow, three daughters and the widow of his predeceased son. The main point for decision was whether

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1. A.I.R. 1945 F.C. 25 2. A.I.R. 1945 Pat. 87.

the daughter-in-law's claim to a half share in the properties on the death of the sole surviving coparcener was justified under the provisions of s. 3 (1) of the Act. On appeal Beevor J., acknowledged that although there may be, at a particular time, only one surviving coparcener of a Hindu joint-family, there may still be "joint-family property" or "coparcenary property" in which any new male member introduced into the joint-family will take an interest by birth or adoption.

His Lordship however refused to countenance the defence raised that such property could not be regarded as "separate property" so long as there was no such birth or adoption, as, according to the learned judge "separate property" in s. 3 (1) is a description of property bearing a particular character, which character is determined by the manner in which the intestate or his predeceased coparceners acquired title to the property.

The alternative interpretation, his Lordship held, is that they (the words "separate property"), refer not to the character of the property itself, but to the mode in which the intestate possessed or enjoyed it, and it is "well-settled that so long as there is only one surviving male member of the Hindu joint-family, his power of alienating the family property is unrestricted."[1] As the words "an interest in a Hindu joint-family property" in s. 3 (2) not merely refer to property bearing a particular character, but also has reference to the mode of possession or enjoyment of that property, so also, the learned judge emphasised, the words "separate property" in s. 3 (1) have reference to the mode of possession or enjoyment. The sole surviving coparcener of a Mitākṣarā joint Hindu family has not merely an interest in the property, but holds the property exclusively or separately whatever its character.

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1. Ibid, at 89-90.

The words "separate property" in s. 3 (1) would therefore mean property which the intestate had separately, in the sense that he held it without the participation of other coparceners, and therefore the widow and the predeceased son's widow would each take half the property, the one taking "the same share as a son" under s. 3 (1), and the other "in like manner as a son" under Proviso 1 of the section.

However at about the same time, the Federal Court in Umayal Achi v. Lakshmi Achi[1] differed vigorously from the interpretation of the Patna High Court. In a lengthy and learned disquisition, Varadachariar, J., bracketed property in the hands of the sole surviving coparcener with property obtained at partition to hold that such property is not "separate property" within the meaning of the Act. Indeed so far-reaching have been the repercussions of this startling judgment, as we shall presently see, that it is important to examine at some length the novel, though strictly correct interpretation of the words "separate property" by the learned Judge.

The relevant facts are that a wealthy Hindu governed by the Mitākṣarā school died, leaving among others, two widows and a widowed daughter-in-law, who thereupon brought an administration action in which she claimed a half share in the entire property on the ground that the deceased had acquired it as the sole surviving coparcener.

The contention that property left by the sole surviving coparcener is "separate property" within the meaning of s. 3 (1) was negatived, and in fact a very strict construction of the expression was propounded. According to the ordinary and commonly accepted interpretation, the words "separate" and "self-acquired" are often used in the same sense, and joint-family property held by the sole surviving coparcener passes on his death by succession to his heirs.

Varadachariar, J., however, called this a "loose" interpretation,

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1. A.I.R. 1945 F.C. 25.

and while acknowledging that the expression "separate property" has sometimes been used in a limited sense to denote what is known as self-acquired property, and while in fact both property obtained by a person at a partition, and property held by him as the sole surviving coparcener may, in some measure resemble self-acquired property, there is nonetheless a difference.

For all that the owner may have, at the moment a full dispensing power over such property, while in the case of self-acquired property, the owner's power of disposition will continue to remain undiminished throughout his lifetime, in the case of the other two kinds of property, his power of disposition will become qualified and his interest reduced the moment a son is born to him, or the widow of a predeceased coparcener takes a boy in adoption. In such contingencies such "separate" property would become joint-family property again, and therefore the property held by the sole surviving coparcener cannot be regarded as "separate property" within the meaning of s. 3 (1).

It will be seen therefore that while the Patna High Court held that property which is potentially joint-family property remains separate property within the meaning of s. 3 (1), the obiter dicta of the Federal Court accentuates the view that such property not being separate property, it must be deemed to be joint-family property within the meaning of s. 3 (2).

The authoritative pronouncement of the Federal Court, and its impact on the various High Courts, cannot be minimized for all that it is not free of anamolies, and in fact certain rather curious pronouncements may be clearly traced to the influence of the dicta laid down in it.

In Bhaoorao v. Chandrabhagabai[1] where the joint-family having broken down by a partition, on the death of first the father and then the son, the dispute was between the widows of the former and the sons

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1. A.I.R. 1949 Nag. 108.

of the latter who claimed to be entitled to the property of their grandfather.

Hidayatullah, J., held on the authority of Umayal's case[1] that property obtained on partition is indeed "separate property" under s. 3 (1) but what is more astonishing, his Lordship was further of the view that, considering the facts of the case, the property in question was "separate property" under the ordinary Hindu law, for the coparcenary having broken down, and the widow's powers of adoption having come to an end, the traditional Hindu law would prevail, and in the absence of undivided sons, the divided sons would be the preferential heirs to the exclusion of the widows. Such property would therefore come neither under sub-s. (1) nor sub-s. (2) of s. 3 of the Act.

This, it is submitted, cannot be the correct interpretation when we consider that the Act was specifically passed to give 'better rights' to women. Ss. 3 (1) and (2) were intended to exhaust between them all categories of property, and it is difficult to envisage the rather anamolous situation that, while providing for better rights in respect of undivided joint-family property, or even self-acquired property under all the laws, whether Mitākṣarā, Dāyabhāga or even customary, the Legislature could overlook altogether, the claims of the widow of a person who had separated from his sons, and had left her in the same unsatisfactory position in which she was prior to the passing of the Act and to allow the unamended law to prevail, thereby excluding her in favour of the divided son.

An interesting situation developed when in Subramanian v. Kalyanarama[2], and a few years later, in the case of the same name[3] which up on appeal against the judgment in the earlier decision, the came

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1. A.I.R. 1945 F.C. 25.
2. A.I.R. 1953 Mad. 22.
3 Subramanian v. Kalyanarama, A.I.R. 1957 Mad. 456.

same High Court came to totally opposite conclusions as to the interpretation of the words "separate property" in s. 3 (1).

The contention was that the property obtained by a coparcener in a partition with his sons would not be separate property within the meaning of s. 3 (1). Nayudu J., however insisted that in Umayal's case[1] the Federal Court had merely considered the nature of property in the hands of a sole surviving coparcener; and while the decision of the Federal Court must bind the High Courts, it can bind them only to the extent it purports to decide and nothing more. It would therefore follow that property obtained on partition must be deemed to be "separate property", as the coparcener dividing from his sons would be entitled to deal with it absolutely since there is no other to question his actions.

In rejecting the viewpoint expressed in the above case, when the matter came up again,[2] it was left for Rajamannar, C.J., to point out that in fact the Federal Court had categorically distinguished between self-acquired property, and property in the hands of the sole surviving coparcener, and property obtained at partition. As Varadachariar J., had clarified,[3] the latter two types of property not being "separate property", by the very same token they must be deemed to be an interest in Hindu joint-family property within the meaning of sub-s. (2) of s. 3.

These varying interpretations, the one holding that property obtained at partition would neither be "separate property" within s. 3(1), nor joint-family property under s. 3 (2), but outside the scope of the Act altogether, the other holding that such property is indeed "separate property" within the meaning of s. 3 (1), and the third viewpoint insisting that such property could only be regarded as joint-family property under s. 3 (2), caused not a little confusion in an already

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1. A.I.R. 1945 F.C. 25.
2. In Subramanian v. Kalyanarama, A.I.R. 1957 Mad. 456.
3. In Umayal Achi v. Lakshmi Achi, A.I.R. 1945 F.C. 25.

perplexed state of law, and we are faced with the situation where Andhra Pradesh preferred to follow Nagpur[1] in Seshamma v. Ramakoteswara[2] to hold that where, the sole surviving coparcener died after a partition with his sons, the claim of his widow that such property was joint-family property under s. 3 (2) of the Act, so as to exclude the widow of the predeceased son, could not be upheld. But, the Court held, neither could it be said to be his "separate property" under s. 3 (1), for neither of the sub-ss. deal with the two categories of separate property represented by what a Hindu holds as the sole surviving coparcener, and what he has obtained at a partition as and for his share.

On the other hand the Patna High Court in Asrafa v. Bhureshwari,[3] chose to follow the precedent set in Nandakumari's case,[4] and ruled that the words "separate property" in s. 3 (1) must be taken to mean property which the intestate held separately in the sense that he held it without the participation of other coparceners. As such, property obtained on partition in the hands of the sole surviving coparcener would be property within the meaning of s. 3 (1), and, the widowed daughter-in-law would be entitled to her share under Proviso (1) to s. 3 (1).

That the ambiguous wording of the Act has raised many conundrums is evident from a most curious ruling in The Commissioner of Income Tax v. Thiagarajan.[5] The father having divided from his son, the question subsequent to his death was whether such property could be held to be joint-family property for tax purposes as both the widow and the son claimed. In Jagadisan J's view, it was irrational for the sharers

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1. Bhaoorao v. Chandrabhagabai, A.I.R. 1949 Nag. 108.
2. A.I.R. 1958 A.P. 280.
3. A.I.R. 1959 Pat. 210.
4. A.I.R. 1945 Pat. 87.
5. A.I.R. 1964 Mad. 58.

to hold such property to be joint-family property once the assets are divided, and even the ameliorative nature of the Act could not be made to strain the statutory language almost to the point of distortion. Yet for all his emphatic pronouncement, his Lordship felt that his own judgment must be subservient to the authority of the Federal Court and to the precedent set by Madras in the decisions (discussed below) which followed it.

The function of the Bench is to analyse and interpret the law, and when a decision such as this is presented where the judgment is contrary to the interpretation, it is, one submits, a disservice to the integrity of the Bench - a lack of courage perhaps, to be condemned in resounding terms.

However, the majority view is in acceptance of the Federal Court ruling, and time and time again we are faced in the various decisions, with lengthy passages from Umayal's case[1] to lend weight to the view that property in the hands of a sole surviving coparcener, and property obtained at partition do not constitute "separate property" within the meaning of s. 3 (1). The effect of this is that the widow's share will be enhanced.

In Visalamma v. Jagannadha,[2] the plaintiff, the divided son, claimed a half share in his father's property under s. 3 (1) of the HWRPA, while the widow's contention was that she was entitled to all of it under s. 3 (2) of the same Act. In delivering judgment their Lordships were in complete agreement with the decision in Umayal's case[3] that property held by the deceased on partition was potentially joint-family property in the contingency of either birth or adoption, and could not therefore come under the purview of s. 3 (1). The authority

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1. A.I.R. 1945 F.C. 25.
2. A.I.R. 1955 Or. 160.
3. A.I.R. 1945 F.C. 25.

of the obiter dicta in the Federal Court decision to the effect that

> "(T)he Act of course is intended to redress the widow's disabilities even in such a case; but that redress is provided in sub-s. (2) and not by sub-s. (1) of s. 3," [1]

was in fact the basis for their Lordships' decision, for in their opinion

> "(E)ven the obiter of a Federal Court is binding on this Court unless they make it clear by appropriate expression that the view is a tentative one." [2]

In Bombay where the question was once again as to the right of the divided son in competition with the widow, the learned judge in holding that the widow took under sub-s. (2), explained that the words "any interest in a Hindu joint-family property" in sub-s. (2) must be given a comprehensive meaning as a logical corollary to the narrow meaning of the expression "separate property" in sub-s. (1). furthermore his Lordship clarified, since it was not in the contemplation of the Act to create a lacuna, the argument that such property is governed by the ordinary Hindu law[3] would be to negate the very purpose of the Act, i.e. to give better rights to widows in competition with sons.[4]

Similarly in Jhangalu v. Pancho Bai[5] where the widow filed a suit for declaration of her title to the entire property alloted

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1. Ibid, at 32.
2. Visalamma v. Jagannadha, A.I.R. 1955 Or. 160, at 162.
3. As in Bhaoorao v. Chandrabhagabai, A.I.R. 1949 Nag. 108.
4. Jana v. Parwati, (1957) 60 Bom. L.R. 553 (A.C.J.). As against this, the original defendant preferred an appeal some years later in the Bom. High Court in Parwati v. Jana, A.I.R. 1969 Bom. 77, where one of the two questions that was referred by the Single Bench Judge to the Division Bench was whether the share obtained at partition by a member of a joint Hindu family is, and continues to be an interest in joint-family property. In affirming the decree of the Single Bench, it was unequivocally held that in view of the decision in Umayal Achi v. Lakshmi Achi, A.I.R. 1945 F.C. 25, such property could not be held to be "separate property" as it was not "self-acquired" property, and therefore it could not properly attract the provisionsof s. 3 (1).
5. A.I.R. 1968 M.P. 172.

to her deceased husband at a partition with his son, Tare J., was quite clear that in view of the pronouncement of their Lordships of the Federal Court,[1] it is settled law that s. 3 (1) of the HWRPA 1937 cannot at all be attracted in respect of the divided share of a coparcener, as "separate property" as used in s. 3 (1) of the Act has a limited sense analogous to self-acquired property. It is however not clear from the judgment whether in his Lordship's view, such property would then pass on to the widow under s. 3 (2), or whether he was in agreement with the Nagpur [2] and Andhra[3] decisions to hold that it would be neither "separate property" under s. 3 (1) nor joint-family property under s. 3 (2), and as such, the ordinary Hindu law would prevail so that the divided son would take to the total exclusion of the widow; and to the extent that this is not clarified, it is submitted that the decision is vague and hence unsatisfactory.

From the decisions examined above, it is therefore clear that though the widow could not take the same share as a son as a result of the interpretation of the words "separate property" in s. 3 (1), in regard to property in the hands of the sole surviving coparcener, or in property obtained at a partition, she is nonetheless entitled to the "same interest" as her deceased husband in such property under s. 3 (2). On the other hand, this same interpretation worked adversely as against the claim of the widowed daughter-in-law under Proviso 1 of s. 3 (1), for such property having been held to be joint-family property, no provision is made in the Act in regard to this particular category of property.

Where however the separated coparcener forms a new coparcenary, the widowed daughter-in-law is still entitled. This eminently

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1. In Umayal Achi v. Lakshmi Achi, A.I.R. 1945 F.C. 25.
2. Bhaoorao v. Chandrabhagabai, A.I.R. 1949 Nag. 108.
3. Seshamma v. Ramakoteswara, A.I.R. 1958 A.P. 280. Overruled by Venkata Rao v. Raja Rao, (1967) 2 An. W.R. 141 (F.B.).

equitable ratio was arrived at in Trisul v. Doman[1] where the widowed daughter-in-law of the separated coparcener claimed a share on his death in the property held by him on the basis that such property on partition assumes the character of "separate property" within the meaning of s. 3 (1). The Court held however that although she could not claim under s. 3 (1), as the expression "separate property" is the antithesis of other expressions viz. "ancestral property", "coparcenary property", and "joint-family property",[2] there was certainly no question but that she was entitled to the share of her deceased husband under s. 3 (2).

The same question came up again in Mst. Manbhari v. Bishun,[3] where the divided coparceners claimed the property in the hands of the sole surviving coparcener to the exclusion of the widowed daughter-in--law. In decreeing that such property could not be held to be separate property reference was made to the observation in Subramanian v. Kalyanarama[4] to the effect that property obtained by a coparcener at a family partition where there were no undivided sons, would result in the property falling under s. 3 (1). It would therefore follow that, the property owned and possessed by the sole surviving coparcener who died leaving the widow of a predeceased coparcener, would not come within the scope of s. 3 (1) by reason of the decision of the Federal Court in Umayal's case,[5] but would in fact revert to his heirs under the ordinary Hindu law.

The daughter-in-law's claim came up again in Lakshamma v. Kondayya,[6]

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1. A.I.R. 1957 Pat. 441.
2. Umayal Achi v. Lakshmi Achi, A.I.R. 1945 F.C. 25, at 32.
3. A.I.R. 1958 All. 769.
4. A.I.R. 1953 Mad. 22.
5. A.I.R. 1945 F.C. 25.
6. A.I.R. 1961 A.P. 505.

where the owner having been allotted a one-third share of property obtained at partition in a settlement deed, his widowed daughter-in-law, at his death, claimed to be entitled as his heir by virtue of Proviso 1 of s. 3 (1). The Andhra High Court which traditionally follows Madras negatived her claim on the basis of the ruling of the Federal Court[1] and that of Subramanian v. Kalyanarama[2] to hold that such property would not come under s. 3 (1).

So too in Mst. Khatrani v. Smt. Tapeshwari[3], it was reiterated on the authority of Umayal[4] and other decided cases that property obtained at partition, and property in the hands of the sole surviving coparcener are not "separate property", and while the widow of the predeceased son is entitled to her husband's share, she can lay no claim to the share of the sole surviving coparcener at whose death his widow would take under s. 3 (2).

Where the widowed daughter-in-law in competition with the divided sons, claimed to be further entitled in the one-fifth share obtained by her father-in-law at a partition with his sons, her claim was similarly negatived on the basis that such property could not be held to be separate property in the hands of the sole surviving coparcener.[5]

It is therefore clear that the Federal Court's interpretation of "separate property"[6] in s. 3 (1), narrow and restrictive as it is, has had far-reaching consequences. A few isolated instances apart, most of the judges had felt "dutifully bound"[7] by the ratio decidendi

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1. Umayal Achi v. Lakshmi Achi, A.I.R. 1945 F.C. 25.
2. A.I.R. 1957 Mad. 456.
3. A.I.R. 1964 Pat. 261. (F.B.).
4. A.I.R. 1945 F.C. 25.
5. Manoharlal v. Bhuri Bai, A.I.R. 1972 S.C. 1369.
6. In Umayal Achi v. Lakshmi Achi, A.I.R. 1945 F.C. 25.
7. Jana v. Parwati, (1957) 60 Bom. L.R. 553, at 558.

in Umayal[1] to the total eclipse of the viewpoint adopted in Nandakumari's case.[2]

It has to be admitted that startling as the interpretation is, the reasoning cannot be faulted in so far as property in the hands of the sole surviving coparcener, as well as property obtained at partition may indeed change character and take on the garb of joint-family property in the event of either birth or adoption. Any other interpretation would lead to further confusion and anomalies, and in fact Varadachariar J.,[3] was impressed with the difficulty that if property obtained at partition was to be regarded as "separate property", in the subsequent coparcenary, the widowed daughter-in-law would claim her husband's half share, and should she then choose to exercise her right of partition under s. 3 (3), there would be a further division of property between her and her father-in-law whereby, at his death she could claim an additional one-fourth share in such "separate property" under Proviso 1 of s. 3 (1) to the detriment of the widow. This would be both inequitable and undesirable, a result hardly likely to have been contemplated by the Legislature.

It must also be kept in mind that the entire scheme of the Act envisages better rights for widows at the expense of sons. However, where a partition is effected between the father and his son or sons, were the divided estate in the hands of the father to be regarded as separate property, at his death his widow entitlement would amount to merely the same share as a son. In other words, where she would have got the same interest as the deceased himself had, i.e. the entire estate under s. 3 (2), if such property is construed to be joint-

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1. A.I.R. 1945 F.C. 25.
2. A.I.R. 1945 Pat.87.
3. In Umayal Achi v. Lakshmi Achi, cited above.

family property, the former interpretation drastically reduces her entitlement accordingly as there are the number of sons.

On the other hand, however, the restricted meaning given to the words "separate property", and its acceptance by the various High Courts, has resulted in the denial of any benefit of the Act to the widow of a predeceased son, and the widow of the predeceased son of a predeceased son in cases where the husband of these two died before the passing of the Act (the Act not being retrospective), thus excluding them from the purview of the "better rights" that was in the intention of the statute to confer on women.

Self-defeating in certain respects, it is true that the interpretation of the sub-s. resulted in unhappy situations, giving rise to difficulties and uncertainties and anomalous situations, but that by far the most acceptable solution is that provided by the Federal Court pronouncement,[1] is evident in that in decisions contrary to the latter interpretation, there is no abatement of the ambiguity inherent in the wording, and years later the Supreme Court could do no less than to hold that property in the hands of the sole surviving coparcener, and property obtained at partition are indeed joint-family property for the purposes of the old Act.[2]

3. The Widow's Entitlement in Joint-Family Property under S. 3 (2)

We now come to the provisions of the Act in regard to the Mitākṣarā joint-family where the changes effected were most material. S. 3 (2) lays down:

> "(W)hen a Hindu governed by any school of Hindu law other than the Dayabhaga school or by customary law dies having at the time of his death an interest in a Hindu joint-family property, his widow shall subject to the provisions of sub-s. (3) have in the property the same interest as he himself had."

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1. Umayal Achi v. Lakshmi Achi, A.I.R. 1945 F.C. 25.
2. Manoharlal v. Bhuri Bai, A.I.R. 1972 S.C. 1369.

In effect therefore, we are told that upon the death of her husband, the widow of a Mitākṣarā coparcener, or a coparcener under customary law (such as that of the Punjab), has in the property, i.e. the joint-family property, the same interest that her husband himself had subject to this qualification, that she has not an absolute interest in it, but only the interest known as the Hindu "woman's estate,"[1] by virtue of sub-s. (3) of s. 3, which further confers on her the same right of claiming partition of the joint-family property in the same way as any coparcener entitled to do so under the general law.

But beyond this we are told nothing. We are not told what the effect of this is upon the other members of the joint-family, nor upon the powers of the manager; we are not told whether she takes this interest as a fixed or as a fluctuating interest, nor whether she is a coparcener along with her deceased husband's coparceners.

These are questions that inevitably come to mind, and it is imperative that in order to arrive at the correct answer, the Act must be strictly construed, so that no more disturbance is created by it than is needed in order to convey the rights specifically given, and if the result of the combination of the rule set up by the statute (as construed in the above manner) with the rest of the chapter of the law as unamended, is to create anomalies, that inconvenient and undesirable result must nevertheless be tolerated.[2]

The effect of s. 3 (2) is that instead of persons owning interests being all males having absolute interests, subject to varying disabilities regarding alienation which depend on the law administered in the respective state, the existing male coparceners are to be joined by widows who shall have in the property "the same interest" as the

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1. J.D.M. Derrett, "Three Questions Arising Out of the HWRPA 1937," (1954) 56 Bom. L.R. (J)., 137-146, at 138.

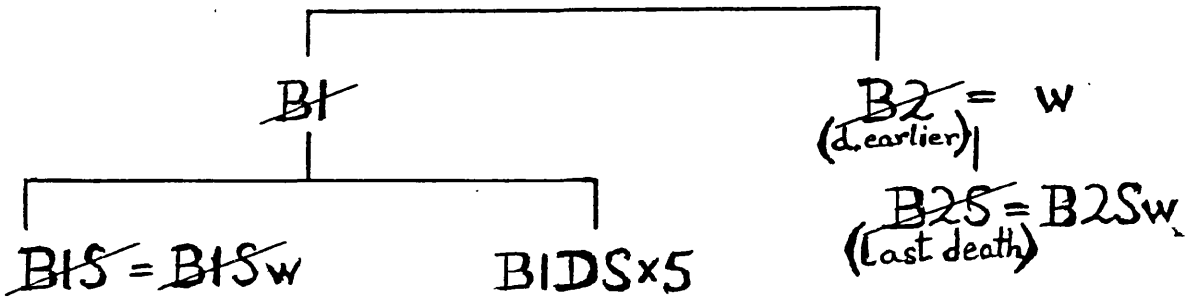
2. Ibid, at 138.

deceased husband.

(1). The Widow Does Not Become a Coparcener

The question that then comes to mind is whether the widow becomes, by virtue of the sub-s., a coparcener in the joint-family to which she belongs. Linked to this is the question as to whether she has the right to take by survivorship which is an essential element of the coparcenary interest or, in other words, is the right that she takes capable of being enlarged by deaths, whether of a coparcener (including the sole surviving coparcener), or of widows who likewise had taken under the Act.

If we turn to judicial decisions, the Madras High Court unequivocally held in Manorama Bai v. Rama Bai[1] that the widow did indeed become a coparcener. The facts are difficult to disentangle in the lengthy and learned judgment, but they amount to this:



Two brothers B1 and B2 had two sons S1 and S2 and five daughters; B1 gave S2 in adoption to B2 so that the picture was that the two brothers each had a son, whom we can rename B1S and B2S. After their marriages the family was joined by B1Sw and B2Sw. In an accident B1, B1S and B2S and B1Sw were killed, and it was held as a fact that the last to die was B2S on the presumption that death occurred in order of

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1. A.I.R. 1957 Mad. 269.

seniority.[1] The sisters of B1S objected to claims by B2Sw, who was not involved in the accident, to take the family property subject to the claims of the widow of B2 who had died earlier. The question was whether as the widow of the last coparcener to die, B2Sw, the plaintiff was entitled to the entire properties of the family. The relative times of the deaths of B1S and B1Sw were not inquired into and were not established, and it was assumed in passing that if momentarily B1Sw acquired any rights under the Act of 1937, these passed on her death to the sole surviving coparcener B2S who himself died last in the tragedy.[2]

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1. Presumption first gained statutory recognition in India by virtue of s. 21 of the HSA which lays down that "(W)here two persons have died in circumstances rendering it uncertain whether either of them, and if so which, survived the other, then, for all purposes affecting succession to property, it shall be presumed until the contrary is proved, that the younger survived the elder." In sharp contrast to the Roman civil law with its complicated presumptions of survivorship among commorientes, at common law there was no presumption to aid the devolution of property by testament or intestate succession. Accordingly the dicta in Wing v. Angrave, (1860) 8 H.L.C. 183 was to the effect that where the deaths of several persons were caused by one and the same cause, the question is entirely one of fact and there is no presumption from age or sex as to survivorship; neither is there any presumption that all died at the same time. However, in 1925 when presumption was finally statutorily introduced under s. 184 of the Law of Property Act, the Indian Court had the jurisdiction to apply an English statutory rule under the residuary source of law known as Justice, Equity, and Good Conscience, but no advantage was taken of this. Consequently, in decision after decision, as for example, Neksi v. Jwala, A.I.R. 1934 Oudh 101; Gopibai v. Chuhermal, A.I.R. 1939 Sind 234; Agha Mir v. Mir Mudassir, A.I.R. 1944 P.C. 100, and even very recently in Manni v. Paru, A.I.R. 1960 Ker. 195, their Lordships simply relied upon Wing v. Angrave, (1860) 8 H.L.C. 183 and the common law was applied to the exclusion of English statutory law, i.e. to say, that survivorship must be proved like any other fact, and there is no presumption. Manorama Bai v. Rama Bai, A.I.R. 1957 Mad. 269, thus provides a welcome break from this monotonous precedent and is in harmony with s. 21 of the HSA. See J.D.M. Derrett, "Commorientes", Univ. of Ceylon Review, Vol. XX, No. 1. Apr. 1962, 55-83.

2. Summarised at Derrett, "The HWRPA 1937: A Sting in the Tail," (1965) 67 Bom. L.R. (J), 35-41 at 37.

In a lengthy investigation of what is meant by "coparcener", the conclusion that Ramaswami J., arrived at was that by virtue of the Act, the widow being possessed of all those incidents of the coparcenary that any ordinary coparcener is associated with, it would be less than just to regard her not as a pucca (true) coparcener, but at best a kucha (notional) one, merely because she had no right by birth. It was therefore held that B2Sw was as good as if she were a coparcener, and was thus entitled to take by survivorship.

This, it is submitted, is not the correct interpretation, for though her position in the joint-family may, in many respects, be analogous to any undivided male coparcener, and though undoubtedly she takes a coparcenary interest, as the learned judge was at pains to point out, she does not thereby become a coparcener.

An investigation of the rights of a person who claims under a statute must first look to the statute, and not add to the statute any qualifications or conditions which might be suggested by any individual interpretation or application of that statute, whether by the Courts or by the jurists.[1] In the light of this principle, it is clear that what the Act gives the widow is a statutory right, i.e. the same interest as her husband. What it does not, and cannot convey to her is the Mitākṣarā male birth right which is of the essence of the coparcener's right in the joint-family property, and as such, the widow, on whom certain special rights have been conferred by the provisions of this special enactment, cannot aspire to the status of a coparcener in the absence of express provision to that effect in the Act.

However, numerous other decisions vindicate the view that the interest that the widow takes under s. 3 (2) of the Act, does not

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1. Ibid, at 38.

thereby have the effect of making her a coparcener. This has been insisted upon since at least as far back as In re HWRPA 1937,[1] Jadaobai v. Puranmal,[2] Seethabai v. Narasimha,[3] and in recent times the Supreme Court has been in agreement with this view.[4]

(2). The Widow takes a Statutory Interest

The widow not being a coparcener, the question then is as to the nature of her right, and while in a minority of cases it has been held that the interest that she acquires under s. 3 (2) devolves on her by inheritance, the majority — and it is submitted, the correct — view is that she acquires such interest neither by inheritance nor by survivorship, but what she takes is a special kind of statutory interest which cannot be brought under known categories of interest, but is sui generis, created by statute to ameliorate the conditions of Hindu widows.

The minority view prevailed in Saradambal v. Subbarama[5] as also in Siveshwar Parsad v. Harnarain[6] where it was pleaded that the widow would not be liable for her husband's debt, and in Jadoabai v. Puranmal,[7] where the widow's effort to recover a debt due to her

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1. A.I.R. 1941 F.C. 72.
2. A.I.R. 1944 Nag. 243.
3. A.I.R. 1945 Mad. 306.
4. Commr. I.T.M.P. v. Seth Govindram Sugar Mills, (1965) 2 S.C.J. 289, Lakshmi Perumallu v. Krishnavenamma, A.I.R. 1965 S.C.825, Satrughan v. Sabujpari, A.I.R. 1967 S.C. 272.
5. I.L.R. (1942) Mad. 630.
6. A.I.R. 1945 Pat. 116.
7. A.I.R. 1944 Nag. 243. On the same principle, it was held in Mt. Rajendrabati v. Mungalal, A.I.R. 1953 Pat. 129, that because the widow acquires by inheritance and not by survivorship, she could not sue for recovery of money due upon a handnote executed in favour of her deceased husband, unless she obtained a succession certificate.

deceased husband was resisted on the ground that she did not take by succession. The Madras, Patna and Nagpur High Courts were all agreed that survivorship having been ruled out, the only other way that she could be said to have taken under s. 3 (2) would be by succession or inheritance.[1]

On the other hand, the consensus of opinion in decisions too numerous to enumerate, is to hold that the interest which s. 3 (2) conveys to her is a statutory interest, the result of which has been to introduce "changes which are alien to the structure of a coparcenary."[2]

By the Act, as his Lordship Shah, J., explained in Satrughan v. Sabujpari,[3] certain antithetical concepts are sought to be reconciled. Because she is invested with the same interest as her husband had, she is thereby introduced into the coparcenary, and between the surviving coparceners and her, there arises community of interest and unity of possession. But she does not on that account become a coparcener; all that this statutory substitution does is to suspend the rule of survivorship as between coparceners so long as the estate enures.[4]

From this it follows that where the widow of the payee of a

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1. The same opinion was expressed in Kedar Nath v. Radha Shyam, A.I.R. 1953 Pat. 81 at 84: "The better opinion... is that the widow takes the property, the share of her deceased husband, by inheritance...". Madhya Pradesh came to the same conclusion in Bhagobai v. Bhaiyalal, A.I.R. 1957 M.P. 29, where it was reiterated at 30 that she (the widow) takes as heir of her husband. In Jugalkishore v. Wardhasa, A.I.R. 1955 Nag. 166, in deciding whether the non-joinder of the deceased coparcener's widows would result in an abatement of the suit against the present coparceners, it was held that the widows represented the deceased husbands, and unless the suit was specifically as against the kartā in his managerial capacity, the widows would have to be necessary parties to the suit. Implicit in this ruling, it is submitted, is the view that the widow takes by inheritance.

2. Satrughan v. Sabujpari, A.I.R. 1967 S.C. 272, at 274.

3. A.I.R. 1967 S.C. 272.

4. Ibid., at 274. See also Ramji Sharma v. Smt Deoshakhi, A.I.R. 1983 Pat. 164 (NOC) which summarises the entire incidents of the estate that a widow acquires under s. 3 (2) of the HWRPA, 1937.

promissory note endorses the note in favour of another, the endorsee need procure a succession certificate in favour of the widow before not instituting a suit on the note, for it does not follow that because she does not obtain her right by survivorship, she must of necessity have obtained it by inheritance.[1] What the Act gives her is a statutory right, and the cumulative effect of sub-ss. (2) and (3) of s. 3 may be regarded as recognising a survival of the husband's persona in the wife, giving her the same right as the husband had, except that she may alienate such property only under certain special circumstances.[2]

(3) Can the Widow be a Kartā?

Since the powers of the manager (kartā) are founded upon his being an "owner" of coparcenary property for he binds himself by all proper acts which bind his coparceners - it is questionable whether a female, who cannot be a coparcener, is entitled to act as a true manager when she had acquired an interest in coparcenary property by virtue of the statute of 1937. The stricter view that prevails in Madras, Bombay and Patna i.e. that she cannot be a manager rests on the basis that statute must be taken to have disturbed the Hindu law only so far as is necessary for their purposes, but no further.[3] Technically sound as this argument is, it is necessary to evaluate,

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1. Quoted with approval in Lakshmi Perumallu v. Krishnavenamma, A.I.R. 1965 S.C. 825, at 830, the learned judge Mudholkar, J., authoritatively concluding at 831 that, "(t)he interest devolving upon the widow need not necessarily be either by survivorship or by inheritance but could also be in a third way i.e. by statute..."

2. Natrajan v. Perumal, (1942) 2 M.L.J. 668 followed in I.L.T. Development Ltd. v. Koltayya, A.I.R. 1955 A.P. 135. See also Controller of Estate Duty Madras v. Alladi Kuppuswamy, A.I.R. 1977 S.C. 2069.

3. Derrett, IMHL, op. cit., at 260.

at this stage, the Hindu law, and to put in proper perspective the dharmaśāstra position in regard to this question.

The śāstra is clear that in the absence of the senior member, the junior member, or even a female may incur debts for the needs of the family. An alienation of interest for such debt would therefore be binding upon the family, and must be paid out whether from the minor's own interest or from his interest in the coparcenary.

The authority for this may be derived from the text of Nārada which is numbered Ch. III. 13 in Jolly's edition in translation of the shorter Nārada-smṛti (London, 1876).

It says:

> "(T)he manager or householder, (actual or eventual) is liable to accept (or admit) all alienations made for the purposes of the family, by a pupil, apprentice, slave, wife, agent or bailiff." 1

Appearing as it does in the Smṛti Chandrikā, the Vivādaratnākara, the Parāśara-Mādhavīya, the Vyavahāra-prakāśa of the Vīramitrodaya, and the Vivāda-taṇḍava, its significance and binding authority cannot be denied in Benares, Madras, Andhra, Maharashtra and Gujarat.

The inference is clear: i.e. alienations for maintenance or even for less necessary purposes (provided they are for the family's benefit) will be binding upon the manager (when he returns or appears on the scene by simply coming of age, as the case may be), because in his absence the implied authority rests with his formally authorised representative or, failing one such, with his fellow members of the family who, though not major coparceners, are able to transact business in such emergencies.[2]

If then in certain special circumstances, the ancient sages could conceive of the female in a managerial capacity, the Act of

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1. J.D.M. Derrett, "May a Hindu woman be the Manager of a Joint-Family at Mitākṣarā Law?" ECMHL, Vol. IV, 1978, op. cit., at 128.
2. Ibid, at 129.

1937, - the professed aim of which was to give her better rights - should hardly be construed to have in effect restricted what in traditional law was her right. And yet certain High Courts, as we have already noted earlier, have not hesitated to rule adversely as against this special privilege accorded to the female.

In Madras for instance, in Seethabai v. Narasimha,[1] the widows objected to the appointment of a guardian for the property of the minor sons as they claimed that, they were themselves members of the undivided coparcenary. This the learned judge refused to countenance and held that, in a coparcenary consisting of only minors, the widow(s) could not claim to be the kartā, as under the Act the widowed mother is not a coparcener although she may be a member of the undivided family.

Two years later however Nagpur struck (it is submitted), the right note in Pandurang Dalake v. Pandurang Gorle[2], and considered the question from the purely Hindu law point of view. The widowed mother had passed a promissory note as guardian of her two minor sons, and it was held that, the widow being the de facto manager of the family, she was within her legal rights to incur debts for necessity, and which the sons could not repudiate on attaining majority. Not only was this an eminently equitable decision in so far as the honest creditor is thereby not defrauded as a result of collusion, but to add weight to its pronouncement, the Court relied upon the authority of the F.B. decision in Kasheo v. Jaganatha,[3] and dwelt in particular upon the dicta in Hunoomanpersaud's case[4] that, given the necessity the realities must be observed and the

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1. A.I.R. 1945 Mad. 306.
2. A.I.R. 1947 Nag. 178.
3. A.I.R. 1926 Nag. 81.
4. (1856) 6 M.I.A. 393.

female alienor must be understood to have acted as manager of the estate[1] - a point of view which fits in well with the decisively positive attitude of the śāstra.

This same progressive attitude is evinced in I.T. Commr. v. Laxmi Narayan,[2] where the mother in her capacity as kartā of the undivided family consisting of herself and her two minor sons, entered into a partnership, renewing thereby the partnership which her late husband had had with his brothers. Their Lordships insisted that the right to take by survivorship, or the status of a coparcener is not a sine qua non of competency to become the manager of the joint Hindu family, that in view of the fact that at Dāyabhāga law women could be coparceners and so even managers, and the recognised fact that a female may even be manager of a religious endowment, and considering the changing times and the Act of 1937 which had improved the widow's status, it would be quite in order for the female to become the manager, particularly if she is the only member left sui juris in the joint-family.

That the question was by no means settled soon became evident from the rulings taking the opposite viewpoint. Thus in Radha Ammal v. I. - T. Commr. Madras[3] where the mother, guardian of minor sons, purported to execute a deed of partnership admitting a stranger as a partner in the ancestral business, the Madras High Court, true to its conservative trend, held that for all its ameliorative effects, the HWRPA did not make her a coparcener, nor was she clothed with the right to represent the family as their kartā, guardianship powers

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1. Derrett, "May a Hindu Woman..." op. cit., at 131-2.
2. A.I.R. 1949 Nag. 128.
3. A.I.R. 1950 Mad. 538.

being distinctly less broad than those of a manager at Hindu law.

Bombay followed suit in Rakhmabai v. Sitabai[1], and as the facts were broadly similar to the Madras ruling in Seethabai v. Narasimha,[2] the learned judge chose to rely on the latter to the total exclusion of the Nagpur decision.

But then, as if to make up for the unseemly haste with which Bombay seemed to have dispensed with any notion of the expansion of the widow's rights beyond the literal letter of the law as embodied in the statute of 1937, the Full Bench of Travancore-Cochin reconsidered the question in Balakrishna v. Ganesa,[3] and reverted to the authority of Hunoomanpersaud's case[4] to hold that the mother in the absence of adult male members, is competent to act as the manager of the family, and the test of binding alienations by her would be legal necessity.

In Orissa the conservative view prevailed earlier,[5] but in Budhi Jena v. Dhobai Naik,[6] where the issue really was whether a minor could act as manager through his guardian, the obiter dicta in regard to the mother's powers as manager, is indicative of a change of heart. It was held that since there is no text in Hindu law which makes it imperative that no one else at any time or under any

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1. A.I.R. 1952 Bom. 160.
2. A.I.R. 1945 Mad. 306.
3. A.I.R. 1954 Tr-Co 209 (F.B.). The F.B. was undoubtedly — and quite naturally — influenced by the fact that Kerala has had a tradition of matrilineal families of which females could be managers.
4. (1856) 6 M.I.A. 393.
5. Manguni v. Lokananidhi, A.I.R. 1956 Or. 1, where the legal competency of the mother to alienate for legal necessity in her capacity as de facto manager, in the prolonged absence of her son the kartā, was decisively rejected. A passing reference may also be made to the Patna attitude in Sheogulam v. Kishun, A.I.R. 1961 Pat. 212, where it was the wife who in the absence of her husband incurred a loan for family necessity. The conservative stand was reiterated in holding that coparcenership is a necessary requisite for the managership of a joint Hindu family.
6. A.I.R. 1958 Or. 7.

circumstances except the coparcener is competent to be the manager, there is therefore no inherent incompetency. The Supreme Court in C.I.T. M.P. v. Seth Govindram Sugar Mills[1] was not directly concerned with this issue, and it was in fact a situation where the kartās of two families having formed a partnership, one of them died in 1943, and it was not till 1949 that a minor coparcener attained majority in his family. In order to resolve the question that then arose, i.e. whether in the intervening period the partnership existed, the Supreme Court discussed incidently the Nagpur view that widows could be managers, and - for all that no such contention had been made in the present case - remarked obiter that the widow not being a coparcener, cannot be a manager, and therefore the partnership stood dissolved.

It is however submitted that this, and all other like decisions adopt the retrogressive attitude. The argument that because she is not a coparcener she cannot be a manager is fallacious and misleading. Independently of the statute, the śāstra says that females, given an emergency, are entitled to act. The test therefore is not who did it, but whether it was justified. The Act of 1937 must be held not to have disturbed the law more than was strictly necessary. It must also be held to have enhanced the rights of females, not to have subtracted from them. It would therefore follow that the Supreme Court's obiter is per incuriom, Madras, Bombay, Orissa (earlier on) and Patna are wrong, and Nagpur right.

(4). The Widow's Position Vis-à-Vis Alienations of the Joint-Family Property:

(a). The Manager's Power to Alienate for Valid Purposes Binds the Widow

The manager of a coparcenary is authorised to alienate the

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1. (1965) 2 S.C.J. 289.

joint-family property under an elaborate head generally referred to for convenience as "legal necessity" or "benefit of the family." This authorisation is a matter of law, and is independent of any explicit authorisation made by the coparceners themselves which will of course bind their interests if the manager acts upon it. When the Act gave the widow the same interest as the deceased husband himself had, there was a dramatic change in the coparcenary in that, instead of persons owning interests being all males having absolute interests, subject to varying disabilities regarding alienation, the existing male coparceners were to be joined by widows who would have in the property the aforesaid "same interest".[1]

That interest invariably conferred certain well-known rights, and indeed includes the right to question alienations made by the manager or another coparcener without authorisation. By the same token, it must be borne in mind that the Act having impliedly given the widow that right, also imposes on her, by implication, the authority of the manager in regard to the alienation of the joint-family property, including the share that she gets, for legitimate purposes, i.e. for legal necessity or for the benefit of the estate.[2]

In Seethama v. Veerana[3] where a Hindu widow demanded an account of the joint-family business for the period of time prior

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1. Derrett, "Three Questions Arising...," op. cit., at 138.

2. See for instance Saradambal v. Subbarama, I.L.R. (1942) Mad. 630, and Siveshwar Prasad v. Lala Har Narain, A.I.R. 1945 Pat. 116 where it was held that the widow takes her husband's interest with all its rights and liabilities, not least of such liabilities being the manager's right of alienation for legal necessity. Similarly a suit cannot be dismissed simply because the widow was not impleaded. For, in spite of the statutory interest of the widow, the joint-family is not disrupted; the proper person to bring a suit on behalf of such joint-family is the manager, and the non-joinder of the widow would not make any difference to the efficacy of the suit. See Kalianbai v. Kashinath, A.I.R. 1943 All. 188; Murikupdi v. Madanam, A.I.R. 1943 Mad. 246; Satyanarayancharlu v. Narasamma, A.I.R. 1943 Mad. 708; Kamal Kishore v. Hari Har, A.I.R. 1951 Pat. 645; Fateh Chand v. Brij Bhushan, A.I.R. 1957 All. 801.

3. A.I.R. 1950 Mad. 785.

to partition, Rajmannar, C.J., was quite clear that the effect of the Act is not to confer larger rights on the widow than the rights that the coparcener would have been entitled to if he were alive, and as the coparcener cannot demand from the kartā an account of the management of the joint-family except in special circumstances e.g. fraud, misappropriation, it would follow that the kartā is not liable to render an account of his management to the widow for any period prior to the issue of the notice for partition.

In Bombay the same principles were relied upon to hold that, where the sole surviving coparcener alienated the family property including the widow's interest for his medical expenses, this would be regarded as legal necessity, and the widow had no right to interdict such alienation.[1]

(b). The Widow's Power to Question Invalid Alienations

However, coparcener though she certainly is not, the widow's statutory right in the joint estate, so far as the kartā's powers are concerned, are somewhat analogous to the right of an undivided coparcener, and if her widow's interest is sought to be defeated by an unjustified alienation, she is entitled to challenge it in just the same manner as a coparcener would.

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1. Mahadu v. Gajarabai, A.I.R. 1954 Bom. 442. See also Parvathamma v. Subhadramma, A.I.R. 1963 A.P. 236, where the mortagee sued for recovery of a mortgage debt, and the A.P. High Court held that the mortgage debt being for business purposes, this would fall under the category of legal necessity, and the widow's claim to free her half share from such encumbrance must fail. Decisions such as these, it is submitted, are right for they clearly do not infringe the fundamental principle.

In Shivappa v. Yellawa,[1] the Bombay High Court considered the question as to whether it was within the legal competence of the sole surviving coparcener to execute a deed of gift of the major portion of the joint-family property to his daughter. Decreeing in favour of the predeceased son's widow who had sued to recover so much of the gifted property as fell to her share under s. 3 (2) of the HWRPA, the court explained that the sole surviving coparcener could not now claim "unfettered" powers of disposal, as there was also the statutory entitlement of the widow to consider in the undivided family. This, it is submitted, is an eminently equitable view, for it would follow as a necessary corollary that, if like her deceased husband, the widow is subject to the kartā's powers of management, she has also the right to challenge alienations which might unjustifiably impinge upon her interest under the Act.

In view of this the dicta in Rathinasabapathy v. Saraswati Ammal[2] requires careful reconsideration. His Lordship Nayadu, J., held that

> "(T)hough a gift of coparcenary property is not as such recognised even if it is by the entire body of coparceners, a transaction evidencing the gift of ancestral property to which all the coparceners were parties cannot, however, be attacked as void... and the gift does not become invalid as the interest of any other person is not affected by such transaction." 3

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1. A.I.R. 1954 Bom. 47. Madras in similar circumstances was guided along the same lines in Lakshmi Ammal v. Ramchandra, A.I.R. 1960 Mad. 568, Jagadisan, J., referring with approval to the observation in Ramalingam v. Ramalakshmi, A.I.R. 1958 Mad. 228, that the widow in such circumstances is quite competent to question the alienation as otherwise her rights under the Act would be gravely imperilled. She cannot therefore be a mere "passive spectator." The same view was taken in Udai Narain v. Dharamraj, I.L.R. (1954) All. 204 and the widow's right to challenge a mortgage deed executed by the kartā on the ground of lack of legal necessity, was decreed. See also Pappayamma v. Gopalkrishnamurty, A.I.R. 1969 A.P. 341 where the Court stressed that the widow's interest could be best protected by her being conceded the right of preservation of the property with the concomitant right of challenging a non-binding alienation. For a like decision see D. P. Rai Ahuja v. Rameshwar Lal, A.I.R. 1971 Raj. 269.

2. A.I.R. 1954 Mad. 307.

3. Ibid, at 309-10.

This contention, it is submitted, cannot have any validity after the passing of the HWRPA. The widow's interest, it must be remembered is affected, and, considering that she was not a party to the alienation, her right to impeach it must be regarded as being just as strong as that of any disaffected coparcener despite the learned judge's ruling that, "interest" in s. 3 (2) of the Act does not include a right to interdict an alienation, or any other right which her husband possessed, and which could only be exercised by a coparcener and not by any member of the joint-family.

The reasoning in Ramsaran Sao v. Bhagwat Shukul[1] likewise requires reappraisal. Notwithstanding that the widowed daughter-in-law had obtained a decree[2] against a gift inter vivos of the ancestral property made by the sole surviving coparcener, it was later held that the interest of the widow in the share of the property of the sole surviving coparcener being merely a spes successionis during his lifetime, the donee was entitled to half of the property after the donor's death. The dicta apart, while admitting that the sole surviving coparcener's absolute right of disposal of the family property "is necessarily limited by the interest to which the widow of the deceased coparcener succeeds under the Act,"[3] his Lordship, Reuben C.J., nonetheless dismissed the suit on the basis that since hers was not a coparcenary interest, the Act of 1937 had not given

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1. A.I.R. 1954 Pat. 318.
2. Bhagwat Shukul v. Mst. Kapurni, A.I.R. 1944 Pat. 298 (F.B.).
3. Ramsaran Sao v. Bhagwat Shukul, A.I.R. 1954 Pat. 318 at 319. It is submitted that such powers of the sole surviving coparcener are additionally limited in that, a coparcener may well come into existence at any given time by reason of the widow's capacity to adopt, or in the event of the birth of a son to the sole surviving coparcener.

to the widow the same right that a coparcener had to interdict alienations.

In view of the ameliorative intent of the Act, this attitude, one submits, is not justified, for to envisage the enlargement of the kartā's powers beyond even the traditional law would mean the effective nullification of the widow's statutory right of partition - a state of affairs apparent in the specious reasoning of both the Madras and the Patna High Courts in the decisions discussed above.

(5). The Widow's Right to Maintenance

There are no express words in the Act to the effect that the widow's general right to be maintained out of the joint-family estate had been taken away, and yet there is a school of thought which maintains that, since maintenance under the Hindu law is allowed only by reason of exclusion from inheritance and from a share on partition, it can reasonably be urged that once that share is conceded under legislation, the right to maintenance is no longer operative.[1]

It is however submitted that there is nothing in the Act that can be construed to yield such a result, for this principle must be subject to the qualification that the widow exercises her right of partition and takes her separate share which would then be deemed to be in lieu of maintenance. For to hold otherwise would be to negate the very purpose of the Act, i.e. to give her "better rights", and she would not be in any better position than what she was before the Act.

The position was further complicated by the decision of the Federal Court[2] that the Act was ultra vires agricultural land, the

1. Mayne, Hindu Law and Usage, 11th ed., op. cit., at 711.
2. In Re HWRPA 1937, A.I.R. 1941 F.C. 72.

result of which was that the widow stood excluded from succession to agricultural property in the absence of provincial legislation on parallel lines in respect of such land, and the question then was as to the position of the widow in regard to her right to maintenance.

In Venkata Subbaratamma v. Krishniah[1] and Sarojini Devi v. Kristna,[2] the widows claimed their husbands' share under s. 3 (2) from the entire property, but on the Federal Court's decision being known, they amended their plaints, and the question for decision was whether, notwithstanding the right to share in the non-agricultural properties of the family, they were still entitled to any rights of maintenance as under the ordinary Hindu law. Prima facie they were in principle entitled and both the learned judges were agreed that in so far as the widow stood excluded from succession to agricultural land, it could not be said that the reason for the right to maintenance had ceased to exist, and while she could exercise her right of partition over property that was non-agricultural, she was at the same time entitled to claim maintenance from the agricultural part of the estate, the only proviso being that in assessing the amount of maintenance, due allowance had to be made for the share that she took under the Act.

This was also the view expressed in Parappa v. Nagamma[3] which was an appeal to the Full Bench from a suit filed in 1949. Their Lordships held that by reason of the Federal Court decision,[4] the scope of the Act became confined to properties other than agricultural, and as such it left untouched the widow's pre-existing right under

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1. A.I.R. 1943 Mad. 417.
2. A.I.R. 1944 Mad. 401.
3. A.I.R. 1954 Mad. 576 (F.B.), below at 427, 429.
4. In Re.HWRP, A.I.R. 1941 F.C. 72.

the general Hindu law to claim maintenance in respect of agricultural property. In regard to the widow's demand for enhanced maintenance, the learned judges further held that the plaintiff not being entitled to a share in properties acquired from and out of the income from the agricultural lands subsequent to the death of her husband, the said properties should be added to the other agricultural assets of the family for the purpose of fixing the rate of maintenance.

However, once the scope of the Act was extended so as to include within its purview agricultural land as well, Nayudu J., in Rathinasabapathy v. Saraswati Ammal,[1] made it clear that the widow's right to claim maintenance apart from partition was by reason of the fact that the Act as originally passed before the amendment of 1947 in Madras, did not give a right to the widow to claim a share in agricultural lands. By reason of the amendment it could not however be said that such right of maintenance had been extinguished. Discounting 'Mayne's' view,[2] his Lordship explained that there was nothing in the Act to suggest that the right to partition was in substitution for the right of maintenance. There being no provision in the Act expressly taking away her right to maintenance, such maintenance, the learned judge ruled, would still be available, and the option would rest with the widow, i.e. to claim maintenance or a share, but not both.

In an Andhra case[3] where the question for determination was whether by reason of the right to a share conferred on the widow under the Act, she would not be entitled to claim maintenance, his

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1. A.I.R. 1954 Mad. 307.
2. Hindu Law and Usage, 11th ed., op. cit., at 71-2.
3. Varahalamma v. Ammathalli, A.I.R. 1959 A.P. 590.

Lordship was quite clear that if for some reason she was not in a position reasonably to ask for a share, (as this widow was not, since it would mean supervision of cultivation in a far-off village), her right to maintenance could not be said to have been lost. The learned judge discounted the view expressed by some scholars and given credence to in Misralal v. Mst. Simarta[1] that, maintenance was a right in substitution for partition, and agreed with the decision in Tirthabasi v. Trinayani[2] that the right to maintenance out of certain properties which passed out of the family could not be held to have vanished, and decreed in favour of the widow.

In Gajavalli v. Narayanswami[3], the plea of the respondent rested on the strength of a settlement deed, which he alleged was in full settlement of all the widow's claims in the joint-family. It was held that the nature of the estate conferred upon the widow under the settlement deed could not determine the nature of the claim made by her. Since the Act of 1937 did not deprive the widow of her general right of maintenance, she was free to choose either this general right or the specific right conferred upon her by the Act of 1937, whichever was more favourable.

To sum up, the maintenance rights of the widows (of three generations) mentioned in the HWRPA 1937, were not abolished in express terms, but the effect of recognition of their rights by the Act was that there was little occasion for them to claim maintenance since they were not excluded from inheritance and were entitled to a share on partition.

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1. I.L.R. (1948) 23 Luck. 227.
2. A.I.R. 1951 Or. 306.
3. A.I.R. 1962 Mad. 187, followed in Basanta v. Laxmi, I.L.R. (1966) Cut. 926.

(6). The Widow's Power to Alienate Her Interest under the Act

Since it is established by judicial decisions that a coparcener may not alienate his undivided interest at his pleasure, but subject to elaborate provisions of law and which differ according to region,[1] it would follow that if the widow took the "same" interest as her husband had, she was entitled to alienate it subject to exactly the same terms. But this could not be, as the interest that was given to her was by statute and subject to the limitations of the "women's estate"; it was therefore an interest distinct from, and thus could not be alienated similarly with, the coparcenary interest. She had first to demand partition (one would suppose), and then hold the property as if she were an heir of her husband under the ordinary Hindu law.[2]

In Saradambal v. Subbarama[3] it was said obiter and in Parappa v. Nagamma[4] it was repeated by the Full Bench obiter that the interest taken by the widow was not only liable to separation at the widow's option, but thereafter alienable inter vivos for valuable consideration. In Kunja Sahu v. Bhagaban Mahanty[5] the Orissa High Court went even further and took the view that the widow is entitled to alienate her undivided interest upon the ground that a right of property was conveyed to her by the statute - and this in a state where not even male coparceners enjoy such a privilege! The reasoning was that by merely allowing her the right of partition, the Act conveyed thereby a special kind of proprietory right to the widow,

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1. See Derrett, IMHL, op. cit., at 284-99.
2. Derrett "Three Questions Arising...," op. cit., at 140.
3. I.L.R. (1942) Mad. 630.
4. A.I.R. 1954 Mad. 576, (F.B.).
5. A.I.R. 1951 Or. 35.

and, the estate being expressly a "woman's estate", she could not be forbidden to alienate by considerations specially appropriate to coparceners. These would remain subject to their traditional legal fetters, the Act of course having done nothing to "improve" their position!

The matter was considered again, and the strange view of the Orissa High Court generally approved of by the Bombay High Court in Dagdu v. Namdeo.[1] Where the widow had sold her interest in the joint-family property, and the alienee then filed a suit for partition, their Lordships held that she was entitled to alienate her undivided interest absolutely for legal necessity, or to alienate for her life (or until surrender), without such justification, and as in this case she must be held to have assigned her life interest, by that very fact the alienee became entitled to partition and to disrupt the family tenure.

The difficulty that one faces in a construction of the Act which gives to the widow the "same" interest, provided that it is subject to the limited interest which is known as the Hindu "women's estate", and the resultant anomaly, i.e. the widow is thus given greater powers of alienation than a coparcener, was in fact the very basis of the understandably adverse ruling in Hemant Kumar v. Somenath.[2] The widow having alienated her share in the joint-family property without any legal necessity, the learned judge held that the obiter

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1. A.I.R. 1955 Bom. 152. To the same effect had been the observation in Mahadu v. Gajarabai, A.I.R. 1954 Bom. 442, i.e. that under the provisions of s. 3 (3) the widow takes the limited interest known as the Hindu woman's estate, and the result is that the widow could without any legal necessity alienate her own 'life' estate in the property but if she wanted to convey her undivided interest absolutely it would be necessary that there should be legal necessity for the alienation! A similar decision was arrived at in Pem Mahaton v. Bandhu Mahto, A.I.R. 1958 Pat. 20.

2. A.I.R. 1959 Pat. 557.

dicta in Parappa v. Nagamma[1] (a case from Madras where the coparcener has the unconditional right to alienate his interest), could not apply to areas where the coparcener himself had no right to alienate without legal necessity. Sub-s. (3) of s. 3 therefore operates as a limitation of the right conferred on the widow by sub-s. (2), and so long as she did not resort to a partition, she could not claim the right of alienating even for legal necessity the interest which had devolved on her, or for her life without such legal necessity, where and when her husband had no such right.

The Patna decision[2] is thus in complete contradiction to the rule laid down in Orissa[3] and Bombay,[4] and one is again faced with the problems of ambiguity and obscurity inherent in the Act. To hold as the Patna High Court held that, the widow was disentitled to alienate altogether would be to contravene the notion of the "limited estate" and the incidents accruing to it. Besides which that does not solve the dilemma of the patent contradiction, i.e. that the interest devolving on her would be the Hindu "woman's estate",[5] but that she would also take the "same interest"[6] as her deceased husband.

Perhaps the more acceptable solution would be to hold, as was held in Kunja Sahu's case,[7] that "same interest" is not qualitative but quantitative, and means the share the husband would have taken. It is not absolutely necessary that this share should be assessed at

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1. A.I.R. 1954 Mad. 576, (F.B.).
2. Hemant Kumar v. Somenath, A.I.R. 1959 Pat. 557.
3. Kunja Sahu v. Bhagaban Mahanty, A.I.R. 1951 Or. 35.
4. Dagdu v. Namdeo, A.I.R. 1955 Bom. 152.
5. Sub-s. (3) of s. 3 HWRPA 1937.
6. Sub-s. (2) of s. 3, ibid.
7. Kunja Sahu v. Bhagaban Mahanty, A.I.R. 1951 Or. 35.

the husband's death, nor that it should be exempt from fluctuation. But once it is admitted - as all the High Courts except Orissa have admitted - that the interest fluctuates like a coparcener's interest we are more than half way to admitting that the "same interest" is same qualitatively and not quantitatively!

Once this is clear, sub-s. (3) falls into proper perspective, and can then be understood as a limitation upon the coparcenary interest and as no more than that. In other words the interest known as the Hindu "woman's interest" must be held to have a special definition in that it merely means a series of limitations as follows: the property is not stridhana and would devolve accordingly; it is not freely alienable upon the terms known in each respective state to attach to the ordinary coparcenary interest, but those who take the interest after the widow (whether by her death or surrender), would not be bound by those alienations which were outside a widow's normal powers, and also outside the powers of a coparcener. In other words the sub-s. in question adds limitations and does not indirectly grant special facilities above those possessed by coparceners and the special grant of the right of partition suggests as much.[1] Automatic solution to this problem eluded us at the time the Act was repealed by the HSA, 1956.[2]

(7). The Widow's Right to Claim Partition and the Fluctuation of Her Share

Sub-s. (3) of s. 3 conferred on the widow the "same right of claiming partition as a male owner." However, so long as partition did not take place, her possession and enjoyment extended to the entire property conjointly with the other members of the coparcenary, and because she took the "same interest" as her deceased husband,

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1. Derrett, "Three Questions Arising...," op. cit., at 142-3.

2. But see Sukh Ram v. Gauri Shankar, A.I.R. 1968 S.C. 365 (at 560 below), which took the Orissa view.

the share that devolved on her was not a fixed and determinate share, and until there was a partition either at her own volition or by virtue of a partition among the coparceners, her interest was subject to fluctuation, i.e. to increase or decrease by births or deaths as the case may be in the coparcenary.

Once partition takes place, it effects a severance in the joint status, and the widow must be considered to hold her interest separately: her interest is defined. It would then be worked out having regard to the circumstances obtaining in the family on the date of partition.

A few discordant rulings apart, judicial decisions confirm this interpretation. In Chinniah Chettier v. Sivagami,[1] one of the earlier cases in regard to fluctuation, the sole surviving coparcener having adopted a son, the question was whether the widow was entitled to a half or a one-third share in the coparcenary property. The Court was quite categorical that, as what she got under the Act was her husband's share which was subject to alteration by fluctuation, she could not be said to be in a better position than a coparcener, and her share at partition would therefore decrease to one-third by reason of the adoption.

An interesting situation came up in Madras in Subba v. Nallammal.[2] Where the coparcener had died in 1942 leaving agricultural lands, and the widow then claimed a half share, the question arose whether she would be entitled to share the produce derived from the land after

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1. A.I.R. 1945 Mad. 21, followed in Gangabai v. Parmesharibai, A.I.R. 1949 Sind. 5, where on the same principle the widow's share was held to have been augmented on the death of a coparcener. See also Nagappa v. Mukambe, A.I.R. 1957 Bom. 309, Kedarnath v. Radha Shyam, A.I.R. 1953 Pat. 81, Mahadu v. Gajarabai, A.I.R. 1954 Bom. 442, Shivappa v. Yellawa, A.I.R. 1954 Bom. 47, Gangadhar v. Subhashini, A.I.R. 1955 Or. 135, Ramchandra v. Ramgopal, A.I.R. 1956 Nag. 228, Harekrishna Das v. Jujesthi Panda, A.I.R. 1956 Or. 73.

2. A.I.R. 1950 Mad. 192.

her husband's death. The learned judges held that she was not entitled to share either in the agricultural lands or the produce from such land derived subsequent to her husband's death. According to their Lordships, on a plain reading of the language of s. 3, it is clear that the rights of the widow had to be determined as on the date of the death of the husband and not on the date of the particular suit.

The rationale behind this seemingly adverse ruling was explained by the Full Bench of the same High Court in Parappa v. Nagamma[1] where the widow filed a suit for partition and possession of a half share in the non-agricultural properties of the family. While holding that the widow could ask for such partition and separate possession of her husband's share, which share was to be worked out having regard to the circumstances obtaining in the family on the date of the partition, their Lordships were however clear incidently that this could apply to non-agricultural property only, in view of the dicta in In re Hindu Women's Rights to Property Act 1937.[2] The position would therefore be that on the death of the husband, the agricultural properties would go by survivorship to other members of the joint Hindu family, (as it did in Subba's case[3]), while the husband's interest in non-agricultural property would devolve upon the widow.

In Orissa however, the Court held in Kunja Sahu v. Bhagaban[4] that in the same way that a coparcener's interest becomes a specified interest the moment it is attached by a creditor after his death, which then stands out of fluctuation by preventing its lapse into the joint-family estate, so too would the interest which devolved

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1. A.I.R. 1950 Mad. 576, (F.B.).
2. A.I.R. 1941 F.C. 72.
3. A.I.R. 1950 Mad. 192.
4. A.I.R. 1951 Or. 35.

upon the widow. After devolution such interest could be predicated with certainty, and as property, it carried with it the incidents of transferability. Subsequent partition could not affect the fraction or the nature of the property subject to it.

On the other hand in Radhi Bewa v. Bhagwan Sahu[1] the Bench was divided, Jagannadhadas J., holding that the widow not being a coparcener, her interest must be held to be the same as it stood at the time when her husband died, and therefore not subject to fluctuations, Panigrahi J., insisting on the other hand that until such time as a partition is effected, her interest is a coparcenary interest and liable to fluctuation. In fact the learned judge further emphasised this point in Nandakishore v. Sukti[2] where in criticising the observation of Ray C.J., in Radhi Bewa's case[3] that reduction by fluctuation is permissible but not enhancement, he felt that there was no authority for such a proposition, for either a member is a coparcener or he is not.

Fortunately, however, the authoritative pronouncements of the Supreme Court have now put to rest all such controversy as might have raged as a result of the strange interpretation in the Orissa High Court. We have for instance, the clear dicta in Lakshmi Perumallu v. Krishnavenamma[4] that the widow will be entitled to be allotted the same share as her husband would have been entitled to had he lived on the date on which she claimed partition.[5]

On deeper reflection it thus becomes clear that fluctuation has been recognised by the Courts in cases where the size of the share

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1. A.I.R. 1951 Or. 378.
2. A.I.R. 1953 Or. 240.
3. A.I.R. 1951 Or. 378.
4. A.I.R. 1965 S.C. 825.
5. Reiterated in Satrughan v. Sabujpari, A.I.R. 1967 S.C. 272.

obtained by the widow at partition differed from what she would have obtained had the suit been instituted earlier. What has really happened is that the interest given to the woman by the statute is by the same statute declared capable of being realised by partition. Not merely by partition, but by partition as if she were a male owner. This tells us that where a male owner in her situation could demand partition she could demand it, and where a right to institute a partition at Mitākṣarā law had ceased for any reason, the incidents of partition formerly open to her had ceased as well.[1] It therefore followed that there could be no survivorship as between the sole surviving coparcener and the widow, for the right of partition having come to an end, the incidents of fluctuation were extinguished once and for all!

If we now turn our attention to the Madras decision in Manorama Bai v. Rama Bai[2] we will recall that the learned judges held that the widow took by survivorship from the sole surviving coparcener of her husband, that is to say, that she took because she was a coparcener. With respect it is submitted that the true view is that, at the death of the sole surviving coparcener, the Mitākṣarā joint-family came to an end, and with it the widow's right to demand partition and any fluctuation resultant upon it; her right being statutory and not a birthright, her interest was confined to the interest which her husband had, and therefore she took the property vested in him as sole surviving coparcener under s. 3 (2), and not by survivorship, as there was no statutory gift to her of survivorship as such.

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1. Derrett, "The HWRPA 1937: A Sting..." op. cit., at 39.
2. A.I.R. 1957 Mad. 269.

1* On the other hand, where the sole surviving coparcener did not indicate either in his lifetime or in his will, his intention to effect severance of status, he is not entitled to dispose of joint-family property by testamentary disposition, and in such cases as the bequest becomes inoperative, the widow is entitled to survive to it. See Tukaram v. Mathurabai, A.I.R. 1973 Bom. 37.

This reasoning was lost sight of in Bhondu v. Ramdayal[1] where in a coparcenary consisting of a father and his unmarried son, on the widow of the former taking taking the entire estate on the latter's death, the contention was that the coparcenary having ceased, the widow's rights came to an end as well. In negativing the claim, their Lordships of the Full Bench decreed, (mistakenly it is submitted), that the widow's interest being in the nature of a fluctuating interest which she derived from her husband in that it was capable of being enlarged by deaths and liable to be diminished by births, she must be held to have taken the entire estate by survivorship. That she was not entitled to take by survivorship is clear; what she did take is the half share of her husband under s. 3 (2), the share of her son reverting to his heirs by succession. 1a *

Manicka Gounder v. Arunachala Gounder[2] was an appeal from the judgement of Jagadisan J., in the case of the same name.[3] In a coparcenary consisting of two brothers, one married and the other unmarried, the former dying first followed in quick succession by the latter, the widow claimed to be entitled to the entire property by survivorship. In a remarkably erudite judgment, Iyer J., explained that the statute of 1937 could prima facie be construed as changing the law to no greater extent than its words or necessary intendment require. The benefits conferred on the widow did not thereby make her a coparcener; the sole surviving coparcener's rights, and after him those of his heirs, remain intact, and with the extinction of the coparcenary, the fluctuation of interest in the family property ceases; and the logical result of all this would be that the sister as the reversionary heir would be entitled to the share of the sole

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1. A.I.R. 1960 M.P. 51 (F.B.).
2. (1964) 2 M.L.J. 519 (F.B.).
3. (1961) 2 M.L.J. 483.

surviving coparcener. As there could be no survivorship from the sole surviving coparcener, for the very same reason there would be no survivorship as between widows who took under the Act.

In an Orissa decision[1] two brothers having died, their widows became entitled under s. 3 (2). Subsequent to the death of one of them, it was held that the surviving widow was not entitled to the entire property by survivorship. The coparcenary having been extinguished, the widows held as tenants-in-common, and on the death of one of them, her life-estate ceased and the reversionary right, in abeyance during her lifetime, reasserted itself.

This was exactly the decision in Mst. Khatrani v. Tapeshwari[2], where at the death of a mother-in-law the widow of the predeceased son claimed to take by survivorship on the basis that her husband must be held to be alive in her person. In a learned judgment replete with reference to the authority of decided cases, Sahai J., reiterated that since the two widows never attained the status of coparceners, the disputed property would pass to the husband's heirs under the ordinary Hindu law.

(8). Devolution of Interest on the Death of the Widow

The Act is silent as to the devolution of the widow's interest upon her death. The separate property inherited by her would, it is clear, devolve upon her husband's heirs as reversioners. The complexities arose where the widow took an interest in the joint-family property under s. 3 (2) and we have then to consider the devolution of her interest where she died unseparated, where she died pending a suit for partition and finally, where she died separated.

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1. Keluni v. Jagabhandhu, A.I.R. 1958 Or. 47.
2. A.I.R. 1964 Pat. 261 (F.B).

(a). Where She Died Unseparated

Where the widow died without a partition having been effected, the question was whether her interest would pass to the reversioners, i.e. the heirs of the husband, or to the surviving coparceners. The specific statement in sub-s. (3) of s. 3 that the interest would be the limited interest known as the Hindu woman's estate suggests at once that the devolution of the interest would follow the course taken by property normally held subject to that estate, viz to the next surviving heir of the last male holder.[1]

That in fact was the premise on which the learned judge remarked obiter in Radha Ammal's case[2] that, the interest devolving on the widow is a Hindu woman's estate with the limitations and qualifications imposed by Hindu law on such an estate, that is to say, that on her death it would devolve on her husband's heirs who take it as ancestral property.[3]

However that the Courts were not entirely free from doubt as to the correctness of this approach is evident from the ruling in Kedarnath v. Radha Shyam,[4] where the moiety share of the joint-family property given to the widow under a compromise, was the bone of contention between the sole surviving coparcener and the next reversioner of the last male holder. In Sinha, J.'s, "better opinion,"

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1. Derrett, "Three Questions Arising...," op. cit., at 144.
2. A.I.R. 1950 Mad. 538.
3. See also the observation of Jagannadhadas J., in Radhi Bewa v. Bhagwan Sahu, A.I.R. 1951 Or. 378 to the effect that on her death the widow's interest in the joint-family property, or even the share therein that she may take on separation does not prima facie revert back to the coparcenary as such, but goes to the heirs of the husband as the fresh stock of descent.
4. A.I.R. 1953 Pat. 81.

the widow took the property, the share of her deceased husband, by inheritance, with the result that, on her death the property would devolve not by survivorship but by inheritance to her husband's heirs.

It must however be kept in mind that the learned judge proceeded along the assumption that, in fact, severance of the joint status had already taken place by virtue of the compromise, and while such assumption itself may be open to question, there can be no doubt but that the principle that,

> "(I)f there had been no cessor of jointness by virtue of the compromise aforesaid, it could have been seriously argued that the properties would go by survivorship," 1

is in essence accurate, for we have to keep in mind that while she did indeed take the woman's estate, the widow continued at the same time the persona of her deceased husband, and the property must be held to have devolved as it would have devolved if he had died on the date that she died.

This view is confirmed in Parappa v. Nagamma[2] where their Lordships of the Full Bench declared obiter:

> "(I)f she divided herself from the other members of the family during her lifetime on her demise the succession would be traced to her husband on the basis that the property was her separate property. If there was no severance, it would devolve by survivorship to other members of the joint Hindu family." 3

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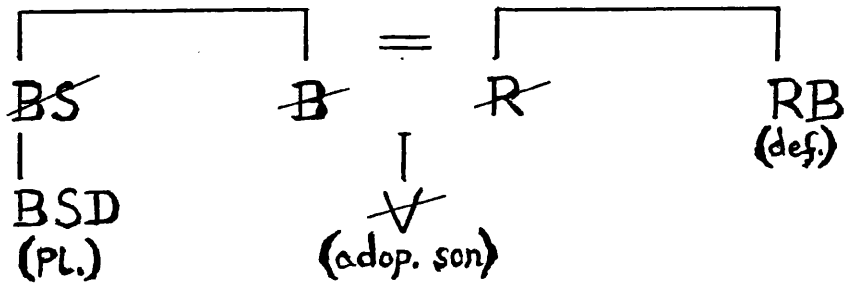
1. Ibid, at 83.
2. A.I.R. 1954 Mad. 576 (F.B.).
3. Ibid, at 579. While generally approving of this observation, Nayudu, J.'s view in Ramaswami v. Lakshamma, (1962) 2 An.W.R. 238 that the interest vesting in the widow would not pass by survivorship to the surviving coparceners even if she did not claim partition as such, is open to question, Umamaheswaram J., laying down the correct position that only if she effects a severance in status or if she actually gets the property divided, can the course of devolution be traced to her husband's heirs.

This it is submitted, must be the correct assertion of the law as it stood before 17th June 1956,[1] and keeping in mind that the Act of 1937 must not be so construed as to impinge on areas of the Hindu law for which it did not provide, the rule of survivorship must be upheld where the widow died without effecting severance of status.

That the position could be very different where the widow died at the moment where there were no coparceners in the joint-family is indicated in Harekrishna v. Jujesthi.[2] The widow having taken under s. 3 (2), her son, the only surviving coparcener died thereafter, and it was held that if on partition the property reverts to the husband's heirs, while, in the undivided state, the right of survivorship is put in abeyance to revive as soon as the widow dies, it should follow logically "that the interest of the widow succeeding to her husband's interest in coparcenary property goes to the heirs of her husband after her, in the absence of any coparcener living at the time of her death." [3]

This eminently equitable position was however resiled from and the High Court of Madhya Bharat adopted an entirely different attitude in Laxman v. Gangabai.[4]



1. That survivorship as such is no longer operative after the 17th June 1956 even where the widow remains joint with her husband's coparceners has been established by judicial decisions, and Parappa v. Nagamma, A.I.R. 1956 Mad. 576 (F.B.), has been effectively overruled in Chockalingam v. Alamelu, A.I.R. 1982 Mad. 29.
2. A.I.R. 1956 Or. 73.
3. Ibid, at 76.
4. A.I.R. 1955 M.B. 138.

The suit properties belonged to one B, whose death was followed in quick succession by the deaths first of his adopted son V, and then by his widow R. The plaintiff, B's sister's daughter, alleged that R became owner of half of the property after her husband's death by virtue of s. 3 (2), and at V's death the rest of the property vested in her, and as such she, the plaintiff, claimed to be entitled to a moiety of the property which R, the widow, had taken under the Act. The defendant who was R's brother, contended that R did not get any share on the death of her husband, and the whole property devolved upon him being the nearest heir of the last male holder, V. The Court held that under the Bombay school of Hindu law, there was no doubt but that the defendant was entitled to the entire property of B, moveable and immoveable. It is submitted that this cannot be taken to be the correct view, for their Lordships did not take into consideration the extent to which the existing law must be held to have been modified by the Act of 1937. It must with respect be pointed out that the share which the widow took under s. 3 (2) was the share of her husband in the joint-family property, and in the absence of coparceners, the claim that such share would devolve upon the husband's reversioners, must be upheld. See Satrughan v. Sabujpari, A.I.R. 1967 S.C. 272, (at 443 below).

(b). Where She Died Pending the Suit for Partition

The institution of a suit for partition is the best possible evidence, in the absence of special circumstances, both of the intention to separate and of intimation to other parties. The widow therefore who dies after suing for partition must be considered to have been notionally separate at the moment of her death.[1]

1. Derrett, "Three Questions Arising...," op. cit., at 145. The same author explains that "(t)he right to sever the status of

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* However, this rule i.e. that the date of posting the notice of severance to the manager was the operative date, must be subject to revision in the light of the decision in Raghavamma v. Chenchamma, A.I.R. 1964 S.C. 136. In the Supreme Court's view, communication must be made to all interested parties, not merely to the manager, and if the communication is received by different members on different dates, their receipts related back to the time of dispatch of the notice (simultaneously sent, it is presumed), so that the separating member is not to be understood to have separated from the different receipents on different dates.

However, judicial decisions have not been uniform on this particular issue, and where the widow died pending a suit for partition, the question of succession to the interest that she took under the Act was once again brought into sharp focus.

In Subba Rao v. Krishna Prasadam,[1] the widow, having brought a suit for partition, died during its pendency, and there was an application for bringing her daughter on record as her legal representative. In disallowing the claim, their Lordships were agreed that the object of the Act was to confer better rights on women, and not to put an end to the joint-family system under the Mitākṣarā law. Since s. 3 is based on the principle that the widow is the surviving half of her husband, her right is a personal right which comes to an end on her death, and the right of the coparceners to take by survivorship which was in abeyance so long as she was alive reasserts itself, so that the cause of action which the plaintiff had held did not survive to her daughter.

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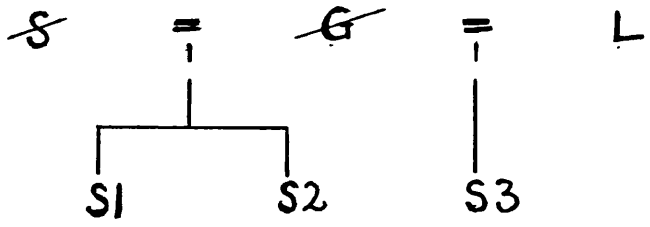
jointness is distinct from the right to a physically separated share. The right to separate possession is however dependent on the severance of status which must precede the acquisition of a separate share (which is its natural end-product) by however short a time." : IMHL, op. cit., at 317. Accordingly it has been held that the major coparcener or owner of a coparcenary interest may sever in interest merely by the unequivocal communication of a settled intention to sever. See Suraj v. Ikbal, (1913) L.R. 40 I.A. 40; Girja v. Sadashiv, A.I.R. 1916 P.C. 104; and the operative moment is when the intention is communicated and not the moment when it is received. Otherwise the members' severance would occur at different times if the communication were received by non-managing members at different times. : Narayana v. Purshotama, A.I.R. 1938 Mad. 390. (cont.) *

1. A.I.R. 1954 Mad. 227. See also Shamrao v. Kashibai, A.I.R. 1956 Nag. 110, and Alamelu v. Chellammal, A.I.R. 1959 Mad. 100 where exactly similar decisions were arrived at.

On the other hand, in a Bombay case[1] an interesting situation developed.



A joint Hindu family consisted of G and his two sons by his first wife S, and a son by his second wife L. S and her sons filed a suit for partition against G, L and their son. G died during the pendency of the suit, and S died thereafter. On the quantum of shares of the parties to the suit, it was held that the three sons of G were entitled to a one-fourth share each, while the two widows of G took together G's one-fourth share under s. 3 (2) as he died in a state of jointness with L and their son. On S's death L's one eighth share was augmented by the fact that S's one-eighth share which had vested in her on G's death, devolved upon L.

In essence the effect of the judgment was that "the status of jointness by which the members of the family were bound before the institution of the suit came to be terminated at the date when the suit was filed." In other words, the Bombay High Court has in Shyamu's case,[2] by giving S's undivided share to L (however objectionable on other grounds) signified that it rejected the Madras notion that S notwithstanding her suit for partition would have died leaving no interest that could pass by succession to reversioners. The learned Bombay judges have distinctly said not merely that

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1. Shyamu v. Vishwanath, (1955) 57 Bom. L.R. 807.
2. Ibid.

S and L were entitled, while S lived, to a one-fourth share between them, but also that S's one-eighth devolved on L, though S never lived to see a final partition decree, not to speak of partition by metes and bounds.[1]

That Bombay is right and the High Courts of Nagpur, Orissa and Madras wrong, has been firmly restated by the Supreme Court in Satrughan v. Sabujpari[2] which was an appeal from the Patna suit of Sabujpari v. Satrughan[3]. The widow having died after filing a suit for partition, her daughters were brought on the record of the suit as her heirs and legal representatives, and the contention then was that the expression "partition" in s. 3 (3) does not mean actual severance by metes and bounds followed by assumption of exclusive possession by the widow. In negativing the reverse inference the Supreme Court laid down in unambiguous language that when the widow instituted a suit for partition, her interest became defined, and vested in her free from all claims of her husband's coparceners. On her death, even though the interest was not separated by metes and

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1. Derrett, "Two Difficult Bombay Cases in Hindu Law", (1956) 58 Bom. L.R. (J) 97-104, at 101-2. In marked contrast to the Bombay decision is the earlier Nagpur view in Bhiwra v. Renuka, I.L.R. (1949) Nag 400. A joint Hindu family consisted of B, his two wives R and S, and two sons A, and D by R. A filed a suit for partition against B, and R and S were impleaded as party defendants. During the pendency of the suit B died, and A then claimed that he was entitled to a one-third share. It was held that by the provisions of the Act, the rule of the Mitākṣarā — which gave the ladies a share in the property at partition was abrogated, and the two widows became entitled to inherit the share of B only. In effect what the Nagpur Court was stressing was that the right of a female who is entitled to a share on partition becomes concrete only when acutal division is made, and possession is handed over; and if before actual division is made the female dies, her share reverts to the estate from which it was initially carved out. However as Shah J., in criticism of this viewpoint asserts in Shyamu's case at 811: "The assumption made by the Court in Bhiwra's case that the right of inheritance or substitution to which a Hindu female is entitled under the Hindu Women's Right to Property Act is in lieu of all other rights they may have under the Hindu law appears open to serious doubt."

2. A.I.R. 1967 S.C. 272.

3. A.I.R. 1958 Pat. 405.

bounds, and not in her exclusive possession, it still devolved upon the nearest heirs of her husband, her daughters.

From this it may well be concluded that when a widow institutes a suit for partition and then dies during the pendency of the suit, the correct view - confirmed by the Supreme Court dicta - is that having evinced a definite and unambiguous intention to separate, she must be deemed to have separated herself from the joint status, and the share that she took under the Act must therefore devolve accordingly.[1]

(c). Where She Died Separated

Where the widow had effectively separated, i.e. when under s. 3 (3) she exercises her right and there is a partition by metes and bounds, the question remains as to the devolution of such interest after her death.

If we now turn our attention to judicial decisions, the consensus of opinion seems to have been set by the ruling in Parappa v. Nagamma.[2] The obiter dicta [3] of the Full Bench had far-reaching consequences as we shall presently see , and was followed by another

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1. This would be in keeping with the Mitākṣarā law where severance takes place in two stages, a severance of status (by demand) followed by a partition by metes and bounds; and where there is a severance of status by demand—and surely there can be no more tangible proof of such demand for severance than the institution of a suit for partition — the effect is nonetheless of actual partition which follows. It therefore follows that after the passing of the HSA, s. 14 applies even where the widow merely demanded partition, and dicta to the contrary, it is submitted, is unfairly restrictive of female entitlement under the Act. See below at 536 ff.
2. A.I.R. 1954 Mad. 576 (F.B.).
3. Ibid., at 579.

Full Bench of the same High Court in Ranu v. Santu.[1] Partition having been effected, the widow subsequently died, and it was held that though an alienation by her had been without legal necessity, no member of the coparcenary could challenge it, as such property passed not by survivorship but by succession to the heir of her husband, the daughter.[2]

This was the authority for the subsequent decision in Manda v. Pandurang.[3] On the remarriage of the widow after partition, it was held that on her death, civil or natural, the property allotted to her on partition was incapable of reverting to the coparcenary, and the deceased husband's heir must be held to be entitled by succession.

However, a discordant note had been struck in Subba Rao v. Krishna Prasadam,[4] where in holding that the widow's right of partition was a personal one, their Lordships were further of the opinion that the "precise" effect of the interposition of the widow under s. 3 (2) was a mere postponement of survivorship, so that the subsequent devolution after the widow's death is not affected by a division enforced by her in her lifetime. The result of this was that a partition at the instance of the widow would not have the effect of converting her husband's coparcenary interest into his separate property, and on her death, the estate would not devolve on her husband's heirs but would pass by survivorship to the coparceners.[5]

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1. A.I.R. 1961 Bom. 1.
2. The Patna High Court took the same view in Bhuri Bai v. Manohar Lal, A.I.R. 1967 Pat. 323.
3. A.I.R. 1968 Bom. 340.
4. A.I.R. 1954 Mad. 227.
5. That this line of reasoning is unattractive is clear from the eminently equitable view expressed in Parappa v. Nagamma, A.I.R. 1954 Mad. 576, (F.B.) (which effectively overrules this decision), and approved of in Satrughan v. Sabujpari, A.I.R. 1967 S.C. 272.

While this might be considered to be merely an opinion - albeit a valuable one - the hard core of the ratio in Bhagobai v. Bhaiyalal[1] (unaffected then by the decision in Parappa's case[2]), proceeded along the same lines, i.e. on the death of a widow who takes on partition, there is a reverter of the property back to the coparcenary.

While this seems to be in keeping with the principle that the statute must be so interpreted as not to disturb the unamended law so that the "better rights" envisaged by the Act must not be thought to extend to the reversion (who are usually very different people from the deceased husband's surviving coparceners), one must also keep in mind the conflicting point of view and the logic inherent in it.

If the fiction that the legal persona of the husband continues to live in her is given any credence, then the widow's estate at partition is indeed separate property, and must devolve as such under the ordinary Hindu law. Objection might then be raised as to the very concept of this fiction, and perhaps rightly so. We have then to consider the effect of s. 3 (3) under which she takes the "limited" interest, and there can be no argument but that one of the incidents of this estate was that she could alienate absolutely for legal necessity or for the benefit of the estate. This being so, to say as was said in Subba Rao's case[3], that on the widow's death, the rights of the parties must be determined exactly as if there had been no interposition of the widow, must be considered with some reservation.[4] It is only to the residue (free from valid alienations) that such a remark can apply.

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1. A.I.R. 1957 M.P. 29.
2. A.I.R. 1954 Mad. 576 (F.B.).
3. A.I.R. 1954 Mad. 227.
4. The reader's attention is directed to M. Rao "Conflict Between Parappa v. Nagamma, (1954) L.M.L.J. 250 (F.B.) and Subba Rao v. Krishna Prasadam, (1953) 2 M.L.J. 561, "(1954) 1 M.L.J. (J), 52-4, which carefully examines this conflict.

Parappa[1] steers clear of such anomalies, and considering its wide appeal not least of all on the Supreme Court[2], it is respectfully submitted that what the Act left unsaid is perhaps best explained by the latter interpretation. This would also be in accord with the now partly exploded decision[3] in Pratapmull v. Dhanabati[4] that the female sharer, be she wife or mother, is not entitled to initiate a partition, and her right to a share arises for the first time when the coparceners separate the property by metes and bounds; until such division actually takes place she is not recognised as the owner of such share, as she has no pre-existing right in the estate save a right of maintenance,[5] and if she dies before such partition is effected, her share reverts back to the coparcenary from which it was carved out. It would therefore follow that when a Hindu widow acquired under s. 3 (2), and that interest was defined on partition, it must necessarily devolve by succession upon the heirs of her husband.

(9) The Actual Benefits That the Act Conferred on the Widow

Having analysed the express provisions (as also the lack of them) of this "troublesome"[6] statute, and having noted the baffling ambiguities and anomalies inherent in it, we must nevertheless in

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1. A.I.R. 1954 Mad. 576, (F.B.).
2. In Satrughan v. Sabujpari, A.I.R. 1967 S.C. 272.
3. See Munnalal v. Raj Kumar, A.I.R. 1962 S.C. 1493, discussed below at 543-5.
4. A.I.R. 1936 P.C. 20.
5. This statement no longer has any relevance as it has now been established after much conflict of decisions that, the right of maintenance is a pre-existing right under s. 14 of the HSA. See below at 584.
6. J.D.M. Derrett, "The HWRPA 1937: A Change of Direction in Madras and an Apology", (1965) 1.M.L.J. (J) 13-15, at 13. The same author also refers to it as "this puzzling Act",: "Five Doubtful Cases in Hindu Law from Madras," (1963) 1.M.L.J. (J), 20-4 at 20, and "this dreadful statute", "which has given endless trouble",: "The HWRPA 1937: A Sting...," op. cit., at 35; and one could not agree more.

the light of judicial construction attempt to assess the "better rights" that the Act of 1937 envisaged and actually conferred on the widow.

There can be no doubt but that the effect of the statute as it finally emerged was to bring about material changes both in the law governing the devolution of a Hindu intestate's separate property as well as the law governing any interest which he might have in undivided joint-family properties.

The changes are in a sense dramatic. We are told in unambiguous language that the Hindu widow so long denied equal rights of inheritance, became by virtue of the provisions of the Act an heir in her own right. In direct contrast to the traditional Mitākṣarā law, where the widow could succeed to the separate property of the deceased only in the absence of descendants in the male line up to three generations,[1] the Act provided that the widow shall be entitled to the share in the inheritance along and equally with the sons even if these are not her own sons.

It also conferred for the first time, under all schools of law, a concurrent heritable capacity on the widow of a predeceased son, and the widow of a predeceased son's predeceased son. This is all the more remarkable in that in bringing in these two latter widows as heirs, they were given a very high rank in the line of succession superseding even the daughter and the daughter's son, specially when we consider that under the ordinary Hindu law, their only claim, whether they became widows prior, or subsequent to, the death of the father-in-law, was to a mere right to maintenance against the father-in-law's property in the hands of his heirs.

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1. Mit. II.I.3. See also II.I.6. op. cit.

Perhaps even more startling is the effect of s. 3 (2) under which the widow took in the Mitākṣarā coparcenary, the same interest in the joint-family property as the deceased husband himself had. The effect of this is at once clear; the widow took in spite of, and in the presence of coparceners, and in so doing interrupted the rule of survivorship which has for millennia been of the very essence of the Mitākṣarā coparcenary. This was a valuable right which the Act of 1937 conferred on the widow, and mitigated, in the vast majority of cases, any hardship conceivably inflicted on her where her husband's interest passed by survivorship while she was simultaneously confined to rights of maintenance. In any case, by a stroke of the pen (however inept) the status of the widow — and therefore wife — was upgraded.

At the same time she was further given the right to claim partition as any undisqualified male member had, and thereby to get her interest quantified, and though this right was to no mean extent qualified by the stipulation that her interest would be the limited interest known as the Hindu "woman's estate", the dissatisfied widow could always exercise her option of partition and thus effectively keep at bay any unscrupulous designs of other members of the coparcenary, the manager included, not to speak of their actual or suspected incompetence. Her relative lack of experience was no longer the handicap it had been previous to the passing of the Act, for to drive the widow to the exercise of this right would have meant, in effect, substantial loss of the joint stock, and hence not to the advantage of the survivorship. In sum then partition was a weapon, as it were, in the hands of the widow, and the compelling reason for the Legislature to confer on her this right was no more than to make a sure and certain provision for her maintenance at a rate not more

than she was entitled to prior to the Act. This seems to be the only plausible explanation for the apparent dichotomy, i.e. she is entitled to a share "in like manner as it devolves upon a son" under s. 3 (1), and she takes the "same interest as her husband" under s. 3(2), provided however that she takes it subject to the limited estate under s. 3 (3).

(10). Dissatisfaction with the Act

However if the benefits conveyed to the widow under the Act were in a measure substantial, there is much in the provisions, or in the lack of them, that has come in for criticism and justifiably so.

G.V. Deshmukh, the sponser of the bill, originally projected to bring women other than widows within the ambit of its provisions. However opposition from the more conservative section of the legislators, generally opposed to any change in their time-hallowed law, was such that the ambitiously proclaimed HWRPA, the express purpose of which was to give "better rights" to women in property belies its name, and was forced to be restricted in its benefits; the rights finally conferred were only on widows answering a particular description i.e. the three categories of widows specified therein. The rights of all other women - wives, daughters, mothers, sisters - were ignored. Not only that, s. 4 pointedly lays down:

> "(N)othing in this Act shall apply to the property of any Hindu dying intestate before the commencement of this Act."

Not having any retrospective effect therefore, there is a further exclusion from its purview of the numbers of those to whom any benefit accrued in so far as all widows whose husbands had died before the passing of the Act were excluded. How significant this exclusion was, is reinforced only when we consider that child widows

are by no means rare in India. While the Act had to be restricted in its scope as a result of conservative opposition to the extension of its benefits to all women, (though that is by no means an extenuating factor for the title), what is incomprehensible is the non-retrospective aspect of the Act, and the exclusion from its ambit of those hapless females, widows all, whose only fault was the death of their husbands prior to the passing of the Act.

The construction of the words "separate property" in s. 3 (1) coupled with the non-retrospective character of the Act led to even more hardships. If the Federal Court's interpretation is accepted (and it is, as we have already seen), then the restricted meaning given to the words excludes property obtained at partition as also property which devolved on the sole surviving coparcener. This had resulted in a denial of any benefit of the Act accruing to a widow of a predeceased son, and the widow of a predeceased son of a predeceased son in cases where the husbands of these two died before the passing of the Act, and for all that they are expressly mentioned as beneficiaries in the Act, they joined league with the legion of widows whom the Act operates to deprive rather than provide.

The provision for partition, praiseworthy in certain respects as it obviously was, must also come in for criticism, not for the conferment of the right itself, but for the unfortunate step that the Legislature took in that it made the widow only compete with sons for separate property, including a share in Dāyabhāga joint-family property, and made widows alone statutory heirs to their deceased husband's interests in joint-family property at Mitākṣarā law. The result was that mothers and daughters were liable to be prejudiced because the responsibility for looking after them was legally divided between the sons and the widow, who could demand partition at her

option and so be difficult to consult thereafter. Indeed it was this right of partition conferred by s. 3 (3) of the Act which was felt to be onerous and was said to be the partial undoing of the Act.[1]

But if that was the partial undoing of the Act, it is surely not overstating the matter to say that the actual undoing of the statute was the retention of the "limited estate" which in effect nullified almost all the benefits which the Act conferred, or sought to confer.

The incidents of the "limited estate" are well-known, and have been elaborated elsewhere at length. Suffice to say that, the widow's entitlements notwithstanding, the overall limitation or circumscription which was conceived by the Act, viz. that she should not, for reasons not contemplated or accepted by the then personal law of the Hindus, sell or alienate her share except for accredited and sanctioned purposes,[2] could not possibly be justified in an Act, in the contemplation of which it was to give "better rights" to females.

Once that clause was incorporated, the reforming zeal of the Act may well be said to have been inchoate, proleptic, and we have to recognise it for what it was - partial, imperfect, transitional, not in consonance with modern popular notions of "justice" and "equity". It was only a matter of time before Parliament in Independent India undid this piece of unintentional mischief which had received legislative recognition in 1937.

S. 14 of the HSA, which repeals the HWRPA by providing that the Hindu female shall become the absolute owner of any property in her possession, frees her at a stroke, from the disabilities to which she had hitherto been subjected in regard to the holding of, and title to, property, and which as we have seen, the Act of 1937 had not seriously considered mitigating.[3]

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1. Derrett, Critique, op. cit., at 196.
2. Narasimhachari v. Andammal, A.I.R. 1979 Mad. 31, at 34.
3. See in this respect the comments of Fazal Ali, J., in Tulasamma v. Sesha Reddi, A.I.R. 1977 S.C. 1944, at 1974.

CHAPTER SIX

S. 14 of the HSA, 1956

"The wheel has come full circle, and the proposition of the Mitākṣarā upheld ... There is no going back."

J.D.M. Derrett,
From "The Rights of Inheritance ...," op. cit., at 353.

1. The History of the "Hindu Code" Bill

The HWRPA, 1937, confined as it was to a single aspect of so complicated and inter-connected a structure as the Hindu law, is an instance of uncoordinated attempts at piecemeal legislation, which not only ran into unforeseen and complicated problems of construction, but was also, at best, a timid and half-hearted attempt at reform which could not be tolerated for long.

By 1939 the strong current of opinion against the statute had compelled the Government into an awareness of its not inconsiderable drawbacks, and of a serious consideration of a systematic overhauling of the entire Hindu law. What precipated the chain of events - the eventual outcome of which was the "Hindu Code" Bill - was in the first place the number of pending Bills which sought to clarify existing legislation and to secure more positive rights for women.

The first of these was introduced in the Central Legislative Assembly on 18 February, 1939, by one A.C. Datta, who sought by an amendment of the HWRPA, to secure for daughters the right to inherit in their deceased parents' estates. However, there was a strong feeling against further piecemeal legislation, and the desire evident for comprehensive reform under the supervision of experts.

Under the circumstances, when on September 22, 1940 the non-official member moved that his Bill be referred to a select committee, the Government gave an undertaking to appoint a committee of eminent lawyers and scholars to advise them as to how the existing legislation regarding succession under the Hindu law should be clarified.

In persuance of that undertaking, the Government of India appointed a Hindu Law Committee on January 25, 1941, with Sir B.N. Rau as the Chairman, and D.N. Mitter, J.R. Gharpure and V.V. Joshi as members of the Committee with the following terms of reference:

> (a) "to examine the HWRPA, 1937,... and to suggest such amendments to the Act as would —
>
> (1) resolve the doubts felt as to the construction of that Act;
>
> (2) clarify the nature of the right conferred by the Act upon the widow; and
>
> (3) remove any injustice that may have been done by the Act to the daughter..." 1

After performing what the Committee considered to be a

> "(d)istasteful analysis of the technical defects of a legislative measure which was inspired by high motives and which, in spite of its faults marks an important stage in the evolution of women's rights," 2

in its Report dated June 8, 1941, it unanimously recommended codification in gradual stages, of the entire Hindu law beginning with the law of succession followed by the law of marriage and in due course, by other branches of the Hindu law.

The 1941 Report was accompanied by two draft Bills, each of which was laid before a select committee of both Houses of the Legislature.

Much publicity was given to the project, and in view of the recommendation that steps should be taken to resuscitate the Hindu

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1. Report of the Hindu Law Committee, 1941, at 1.
2. Ibid., at 10.

Law Committee and to encourage the formulation of the remaining part of the projected Code, the Rau Committee — as it came to the known — was revived in 1944, and under its auspices a Draft Code dealing with Succession, Maintenance, Marriage and Divorce, Minority and Guardianship and Adoption, prepared. It was this Code which was widely circulated and discussed and which gave the name "Hindu Code Bill" to the whole project. After publication in twelve regional languages and the utmost publicity, the Rau Committee, after three years of deliberation during which it had toured the country and examined witnesses, finally submitted its Report to the Government on February 21, 1947, which included a revised draft of the Code, compiled in the light of oral evidence and replies to questionnaires. The revised Code was published in the Gazette of India on April 19, 1947 after introduction in the Legislative Assembly as Bill No. 42 of 1947.[1] The Central Government asked the opinion of the Provincial Governments on the Bill and while many Governments would not commit themselves to an answer, those of Bombay, Orissa, Madras and Delhi were among those which replied in general agreement with the proposals.[2]

Intended originally that the Bill should become law on January 1, 1948, the progress of the project was however interrupted by the country gaining Independence, and the Legislature's entire energies were directed towards the formation and consolidation of the new government.

In the meanwhile, though, the Bill did not lapse, and while it was still pending in the House, the Ministry of Law after due scrutiny and revision produced a revised draft which, without making any

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1. The name of the Bill as stated in the Gazette was: A Bill to Amend and Codify Certain Branches of the Hindu Law.
2. Derrett, HLPP, op. cit., at 59-60.

substantial changes in the Bill, rearranged the clauses and effected an improvement in the general arrangement. Thereafter the Constituent Assembly referred this revised draft to a select committee under the Chairmanship of the then Law Minister, B.R. Ambedkar.

The select committee considered both the original and the revised drafts in seven sittings, and though the changes brought in by the Law Minister were almost entirely accepted by his Committee, they did not let this second draft as a whole pass without certain significant modifications of their own. The select committee's Report together with a third revised draft was presented to the House on August 12, 1948.

The "Hindu Code Bill" in this its third draft aroused widespread controversy and indeed downright antagonism. The abolition of the Mitākṣarā joint-family, equal shares for daughters, the abolition of the widow's limited estate, and the generally hostile stance adopted towards customs — all of which the "Hindu Code" incorporated in its third draft, aroused ire and opposition from all quarters. In particular, the clause incorporating divorce for oppressed spouses became the target of vehement indignation. The inevitable cry of religion in danger was raised, and inevitably, this further fanned the flames of hostile, and not infrequently, vituperative resistance. A number of pamphlets were written condemning the Code[1] and there were debasing references to the qualifications and social origins of the prime mover and author of the third draft.[2] In short, so charged was the atmosphere both in and out of Parliament that the Government wondered whether it was

1. See for instance Why the Hindu Code is Detestable, published by Shastra Dharma Prachar Sabha (All. - Cal.), Author(s) unknown.
2. The Law Minister belonged to a Scheduled Caste, i.e. a Harijan.

at all feasible to carry the project through in the atmosphere of violent hostility that it had generated.

The Law Minister however persevered, and utilised the interval between 1949 and 1951 to canvass further public opinion on the Code. He convened a conference in 1950 participants to which were leading authorities in the Hindu law from all walks of life and which included pandits from Banares. All the areas of controversy in the "Hindu Code Bill" were placed before the conference, and the views expressed were subsequently given careful consideration by the Government. In addition, a special conference was held at Trivandrum to consider how far persons governed by the special systems of law in force in that part of the country[1] could be brought within the scope of the Code. Certain proposals were made by a special committee appointed by this conference. As a result of these conferences, several amendments were drafted on behalf on the Government to be moved in the House when the Code next came up for consideration.

When the third draft came to be considered by the Constituent Assembly (Legislative) which had become the provisional Parliament as a result of the Constitution coming into force, it was clear that many of the members were nervous about the changes sought to be made in the law and fearful of the unfavourable reaction that it might provoke in the country.

The debate dragged on and amendment after amendment was tabled until by September 1951, for all the heroic efforts of the Law Minister, the session ended with only four clauses passed. That the fourth came to be passed was itself no mean achievement, for that clause gave the Bill its over-riding effect. The principle of codification

1. The Marumakkattāyam and Aliyasantāna laws.

was admitted, while retaining at the same time the right of members to question and debate on the individual clauses of the Code.[1] The sessions ended, and in 1952 fresh elections saw the dissolution of the provisional Parliament and with it the "Hindu Code Bill" stood lapsed for all intents and purposes.

It may be mentioned in passing that when the "Hindu Code Bill" was being debated before the provisional Parliament, those in opposition to it were vehement in their protests that in respect of such a revolutionary measure of social reform vitally affecting the religion, culture and traditions of the Hindus, the provisional Parliament had no mandate to pass such a Bill in the absence of a Referendum or other sign of approval by the majority of the people. Consequently Pandit Jawaharlal Nehru, as leader of the Congress Party, made it in terms a part of the Congress Manifesto that if returned to power in the elections of 1952, they would enact the "Hindu Code Bill", and true to this promise, when Parliament assembled for the first time under the Constitution in 1952, the matter of the Hindu Code Bill was again taken up with renewed vigour.

The nature of the discussions on the Hindu Code in the provisional Parliament, the diversity of views, and the tactics adopted by many a member to delay the passage of the Bill, if not to kill it altogether, had by then convinced the Government that the wiser course would be to introduce the Code in the form of separate Bills, one to each Chapter or Part, and each with identical "application" and "over-riding effect" clauses.

In order to test the temper of Parliament the first part to be dealt with was not that part which was logically first, Marriage

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1. Derrett, HLPP, op. cit., at 71.

and Divorce, but only that part of it which proposed to deal with civil marriages. The most tactful method, and the most appropriate, was to take up the question in the form of a repeal and re-enactment with amendments of the Special Marriage Act, 1872.[1]

The Special Marriage Bill of 1952 which sought to provide a civil and secular form of marriage for all persons in the country, irrespective of the faith which the parties may profess, was referred to the Joint Committee of both the Houses in December 1953, under the chairmanship of the then Law Minister C.C. Biswas. The two Houses rapidly passed the Bill and the President's Assent was given in October of that year.[2]

The success of the SMA, 1954 gave, as it were, a new lease of life to the till then moribund "Hindu Code Bill", and soon thereafter, the Hindu Marriage and Divorce Bill, dealing exclusively with the Hindu "sacramental" marriage was introduced and passed with some amendments first in the Rajya Sabha (Council of States) and then by the Lok Sabha (the House of the People), as the HMA, 1955.

While the Hindu Marriage Bill was still pending, the Government turned its attention to what was conceivably the most momentous part of the Hindu Code, the law relating to intestate succession among Hindus, which was first published,[3] and then formally presented to the Rajya Sabha on September 19, 1955, and subsequently in the Lok Sabha.

The Hindu Succession Bill, as it was called, received a large measure of support in both the Houses. Gone were the days of vitriolic opposition, and in fact members vied with another in

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1. Derrett, HLPP, op. cit., at 73.
2. Ibid, at 73-4.
3. See Gazette of India Extraordinary, Part II, s.2, at 339-59.

recommending a better deal for women. Objections were levelled, in particular, at the exclusion of joint-family property from the purview of the Bill, and the half share that the Bill suggested as the daughter's inheritance.

The select committee to which the Bill was thereafter referred, took serious note of these objections, and its recommendations, geared, as they were, towards the improving of the status of women, were eventually incorporated in the HSA, 1956, when the Bill became law. It suggested a share equal to that of the son for the daughter, and at the same time recommended the abolition of the limited estate with retrospective effect, that is to say, whatever property the female Hindu was possessed of at the commencement of the new law, was to be possessed by her as her absolute estate. The Committee also displayed considerable sympathy for the widow for obvious reasons, and despite the generally accepted proposition that property ordinarily descends rather than ascends, was of the view that the mother be placed in the first group of heirs, to inherit equally and along with the lineal descendants, their widows and the widow(s) of the deceased. The result of this was that, when the HSA came into existence, the father alone was relegated as secondary heir to class II of the Schedule.

On a further recommendation of the ever conciliatory though extremely capable H.V. Pataskar, — a minister of State who had been appointed in the Law Ministry and designated the onerous task of reform in place of the ailing Law Minister — a clause was incorporated whereby the share of a Mitākṣarā coparcener in joint-family property was deemed heritable by his heirs; for the purpose of calculating his interest, the device of a notional partition which was deemed to have taken place between him and the other

coparceners immediately before his death, was adopted.

To remove further opposition to the Bill, and to put at rest the agitation in regard to the family dwelling house, Pataskar's advice was acted upon, and a provision included, whereby a female heir would not be able to claim partition of the dwelling house unless the male heirs chose to divide their respective shares. At the same time her right to live in the family dwelling house was guaranteed so long as she remained unmarried, or was widowed or deserted by her husband. In this its amended form, the Bill received practically the unanimous approval of both the Houses of Parliament, and on June 17, 1956, the HSA became the law of the land.

The story thereafter is one of smooth progress, and further instalments of the Hindu Code followed in quick succession. The Hindu Minority and Guardianship Bill was introduced in the Rajya Sabha in April 1953, and was referred to a select committee by motions adopted by both the Houses. The select committee presented its Report on March 16, 1955, and after being passed by both the Rajya Sabha and the Lok Sabha came into force as the HMGA, 1956, on August 25, 1956 when it was assented to by the President. Consistent with the new trend of thought, the position of women under this law was also considerably improved.[1]

The Hindu Adoptions and Maintenance Bill — the last Bill in the series was introduced in the Rajya Sabha on August 23, 1956. It was then referred to a select committee of both the Houses, and on the committee presenting its Report on November 19, 1956, there was no dissenting note on any of the important provisions of the Bill; thus unimpeded, it made rapid progress and became law on December 21, 1956 as the HAMA. Like the earlier Acts, there is

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1. See above at 71 ff. for a fuller discussion.

much in the HAMA as well that puts the female in a more advantageous position than heretofore in regard to adoption.[1] One important aspect of the Act must however be mentioned. S. 11, (iii) and (iv), is a safeguard against immoral purposes in that it provides that, where the adoption is by a male or female, of a child of the opposite sex, the difference between the age of the adoptive parent and that of the adopted child must be at least twenty-one years. The provisions regarding maintenance are largely a codification of the existing law.

Thus was passed successfully a very substantial part of the "Hindu Code Bill" as originally envisaged.[2] "Only a half-way house"[3] towards the codification of the entirety of the Hindu law it may be, but the desire inherent in it to do away with restrictive and antiquated practices which stood in the way of the Constitutional promise of equality of all in the eye of the law, has a significance all its own from the Hindu female's perspective. In particular, the new rules of inheritance and succession - the giving to her the right of absolute ownership in property - frees her at a stroke from the tutelage which for millennia had been her fate, and, provided that she is herself able to shake off the shackles of subservience that, to this day, is in evidence as being of the essence of her mental ethos, the Hindu female need be in no further apprehension of the indiscriminate biases of the past.

With this background, we must turn our attention to an examination of the same right, how far it has worked to the female's advantage, the satisfactory settling of the problems of construction connected with it and those that still elude resolution - aspects of a state

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1. For a fuller discussion see above at 55.
2. The only part of the Code that did not become law was the Joint-Family Bill.
3. Derrett, RISI, op. cit., 321.

of affairs inevitably consequent upon piecemeal legislation.

2. The HSA 1956 — Its Scope

The dedicated and tireless — if often frustrating - efforts of the social reformers had at last borne fruit in 1956, and when on June 17 of that year, the HSA became operative, it was the culmination of a movement which had aimed at changing the ancient Hindu law for a more equitable, consistent and coherent form of jurisprudence.[1]

"An Act to amend and codify the law relating to intestate succession among Hindus,"[2] it is a consolidating statute and must be interpreted as containing in complete form the whole body of law on the subject it deals with, including testamentary succession[3] among Hindus, uninfluenced by considerations derived from the previous state of law. To the extent therefore that there is a provision in this Act with reference to any matter relating to succession, that provision must apply whatever the previous law might have been. However, an enactment of this nature should not be so construed as to affect or alter any incident which does not fall either expressly or by necessary implication within its ambit, for it is axiomatic in the interpretation of an amending statute that it should be

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1. Per Chhangani J., Mst. Bhuri Bai v. Mst. Champi Bai, A.I.R. 1968 Raj. 139 at 141.

2. Preamble to the HSA, 1956.

3. Notwithstanding the express words of the Preamble, s. 30 of the HSA lays down: "Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so disposed 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;" and according to the Explanation, the words "any property" in the section would include the interest of a male Hindu in a Mitākṣarā coparcenary property.

construed strictly, as rigorously confined to the subject-matter of its express provisions.[1]

In view of the changed social and economic conditions, and against the backdrop of the impetus to accord equal status and treatment to women in matters of succession, the essential scheme of the Act is to bring about fundamental and far-reaching changes. One basic principle that ran through the estate inherited by a female heir, namely, that she took a limited estate, has been abolished except where expressly created by will or other instrument, and whatever property she now inherits, whether from a male or a female, and by whatever school of Hindu law she is governed, is now taken by her as her absolute property. In addition to the female heirs specified in the traditional law and those introduced by the Hindu Law of Inheritance (Amendment) Act, 1929[2], and the HWRPA 1937, numerous other female heirs have been newly added to the list.[3] Their position in the line of heirs has been considerably advanced, and the widow, daughter and mother being class I heirs, they take the property simultaneously and equally with the son. Conversion to another religion, unchastity and remarriage subsequent to the HSA (it is submitted), are no longer bars to succession, and the female Hindu now constitutes a fresh stock of descent, so that the property after her descends to her own heirs and not to reversioners as heretofore.

Broad as these outlines are, the ameliorative sweep of the HSA is nonetheless put in perspective, and with this backdrop we must now turn our attention to its provisions and the judicial

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1. Raghava Chariar, 7th ed., Vol. II, op. cit., at 813.
2. Hereinafter referred to as the HLI(A)A.
3. See the Schedule to the HSA, 1956.

decisions thereupon to assess how far the legislative intendment has been practically achieved.

3. The Provisions of S. 14

Radical as the HSA is in many respects, by far the most radical departure from the traditional law is the incorporation of s. 14 in the Act, the provisions of which leave no manner of doubt that the overall intent of the Legislature was to abrogate the stringent provisions of Hindu law which militated against full proprietary rights of a female owner, and to confer upon her the status of an independent and absolute owner of property. Sub-s. (1) of s. 14 lays down:

> "(A)ny property possessed by a female Hindu, whether acquired before or after the commencement of th Act, shall be held by her as full owner thereof and not as a limited owner.
>
> "(E)xplanation. In this subsection, 'property' includes both moveable and immoveable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act."

The scope of the word "property" is thus enlarged, so that in the light of the Explanation it must be understood to include every type of it legally in the woman's possession. Or in other words, the object of the sub-s. is to extinguish the estate called "limited estate" or "widow's estate" in Hindu law and to make a Hindu woman, who under the old law would have been only a "limited" owner, a full owner of property with all powers of disposition and to make the estate

heritable by her own heirs[1] and not revertible to the heirs of the last male holder.[2]

It is also noteworthy that the emphasis is on the word "acquired" which — as the Supreme Court has emphasised — has to be given the widest possible meaning[3] in view of the comprehensive Explanation which amplifies the scope of the words "any property" to include within its ambit every description of property, moveable or immoveable, and howsoever acquired, the object of the Legislature being to wipe out the disabilities from which a Hindu female suffered in regard to ownership of property under the old śāstric law, to abridge the stringent provisions against proprietary rights which were often regarded as evidence of her perpetual tutelage, and to recognise her status as an independent and absolute owner of property.[4]

However, if the purpose of sub-s. (1) of s. 14 was calculated to achieve a social purpose by bringing about a change in the social and economic position of women in Hindu society, it was certainly not the intention of the Legislature to discriminate in favour of females by granting them privileges denied to males. So

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1. The general rules of succession in the case of female Hindus are governed by the provisions of s. 15 which lays down:

   (1) The property of a female Hindu dying intestate shall devolve..., —

      (a) firstly upon the sons and daughters (including the children of any predeceased son or daughter) and the husband;" (b) ...

2. Per Ramaswami, J., Eramma v. Veerupana, A.I.R. 1966 S.C. 1879, at 1822.

3. Per Grover, J., Seth Badri Pershad v. Kanso Devi, A.I.R. 1970 S.C. 1963, at 1966.

4. Per Bhagwati, J., Tulasamma v. Sesha Reddi, A.I.R. 1977 S.C. 1944, at 1947.

as to maintain this balance, sub-s. (2) of s. 14 declares:

> "(N)othing contained in subsection (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property."

This provision is more in the nature of an exception to sub-s. (1), and keeping in mind the social purpose of the latter, it must therefore be construed strictly so as to impinge as little as possible on the broad sweep of the ameliorative provision of sub-s. (1).[1] It specifies that where the terms of the instrument prescribe a restricted estate, such acquisition of property will be excepted from the operation of sub-s. (1). Or to expand more fully, where the instrument, typically a will, deed, or compromise or decree for the first time[2] confers on a woman an interest in property, and does so with a limitation cutting down the tenure to something less than an absolute estate, the limitation stands. In all other cases whatever the original intention of the parties, the woman holds the property absolutely.[3]

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1. Ibid.
2. Seth Badri Pershad v. Kanso Devi, A.I.R. 1970 S.C. 1963, at 1966. In explaining the significance of the word "acquired" in sub-s. (2) of s. 14, Patel, J., had this to say: "... ordinarily the word in a statute must receive its ordinary meaning. But a word may have a wider or limited meaning by reason of the context of its purpose. The Court has, while construing a statutory provision, to consider the language used, other relevant provisions, the circumstances under which the statute was enacted and its purpose. Having regard to the intention of the Legislature in enacting s. 14 of the Act which was to reform the Hindu law and give full status to women, the word "acquired" must mean acquisition for the first time.": Udhav Shankar v. Tarabai, A.I.R. 1968 Bom. 308, at 309.
3. Derrett, Critique, op. cit., at 203.

(1) Judicial Construction of the Word "Possessed" in S. 14 (1)

No difficulty is likely to arise in respect of property acquired by a female after the commencement of the Act, as it is clear that any such property would be held and possessed by her as absolute owner with full powers of disposition except where a restricted estate is prescribed as provided in sub-s. (2).

However, though the section is retrospective in so far as it enlarges the Hindu woman's limited estate into an absolute tenure even in respect of property which had been acquired by her before the Act came into force,[1] its operation is nevertheless confined to property in the possession of the female on the date the Act came into force.[2]

What could be regarded as such "possession" was the subject of considerable controversy,[3] the interpretation of which may now

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1. See for instance the decision in Brundaban Misra v. Iswar Swain, A.I.R. 1983 Or. 172, where the widow having remained in possession as a limited owner since 1940, thereafter when the HSA had come into force, it was held that a gift made by her in 1969 was valid.

2. Shortly after the enactment of the HSA, it was held in Kamla Devi v. Bachulal, A.I.R. 1957 S.C. 434 at 444: "(T)here can be no doubt that by reason of the expression, 'whether acquired before or after the commencement of the Act,' the section is retrospective in effect." It is submitted that in those early days, the full implication of the words perhaps escaped the Supreme Court, for in fact s. 14 is only partly retrospective in that the property may be acquired by her either before or after the commencement of the Act; however that it is also partly prospective is evident from the stipulation that she must be possessed of such property at the time the Act came into force, "and the two things, that is, the acquisition and possession, either actual or constructive, must co-exist for the conferral of an absolute estate on a Hindu female.": Per Tare, J., Anandibai v. Sundarabai, A.I.R. 1965 M.P. 85, at 90.

3. G.K. Dabke draws our attention to this controversy when he points out that "(I)t is said that the said term (possessed), is not a happy one, and that the Legislature should have used the term 'held' in its stead (vide Marudakkal v. Arumugha, A.I.R. 1958 Mad. 255). In another case the term 'owned' is suggested as a better substitute (vide Annapurnamma v. Sankararao, A.I.R. 1960 A.P. 359). In some other quarters it is suggested that the phrase 'belonging to' would have been more appropriate." But in explaining the problems of construction, the same writer makes the pertinent point that, though it is also possible to suggest more phrases such as 'acquired by', 'vested in' etc, "(i)t will however have, to be borne in mind that none of the aforesaid terms would have been less exposed to the difficulties of

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however be regarded as satisfactorily settled in view of certain authoritative Supreme and High Court pronouncements.

The first clear exposition of the word "possessed" as used in s. 14 (1) is to be found in the judgment of Mookherjee, J., in Gostha Bihari v. Haridas[1] where his Lordship spelt out in clear terms that

> "(T)he opening words 'any property possessed by a female Hindu' obviously meant that, to come within the purview of the section, the property must be in the possession of the female concerned at the date of the commencement of the Act... That possession might have been actual or constructive or in any form recognised by law... taking the word "possession"in its widest connotation..."[2]

What the words "widest connotation" might imply was then explained by the Supreme Court to mean that the word "possessed" is used in s. 14 (1) in a broad sense, and in the context means the state of owning or having in one's hand or power. Such possession need not be actual physical possession or personal occupation of the property by the female Hindu, but may be possession in law.[3]

In Mangal Singh v. Smt. Rattno,[4] it was reiterated that the use of the expression "possessed of" instead of "in possession of" in s. 14 (1) was intended to enlarge the meaning of this expression.[5] The woman must therefore have ownership with a right to possession. In case where property is in actual physical possession, it would obviously be in one's own hands; if it is in constructive possession, it would be in one's own power. But in explaining the expression "the state of owning"in Mangal Singh's case,[6] Bhargava, J.,

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interpretation than the term actually used."; "Full Ownership of Hindu Women," (1960) 62 Bom. L.R. (J.), 162-68 and 177-82, at 164.

1. A.I.R. 1957 Cal. 557. 2. Ibid., at 559.
3. Kotturuswami v. Veeravva, A.I.R. 1959 S.C. 577, at 581 approving Venkayamma v. Veerayya, A.I.R. 1957 A.P. 280.
4. A.I.R. 1967 S.C. 1786. See below at 485.
5. Ibid., at 1789.
6. Cited above.

considered a third category, that is

> "(w)here there may not be actual, physical or constructive possession and yet, the person still possesses the right to recover actual physical possession or constructive possession; that would be a case covered by the expression "the state of owning," [1]

or possession in law which would have the effect of bringing it within the purview of s. 14 (1).

From the foregoing one may deduce that a female Hindu is "possessed" of property, (1) of which she is in actual lawful possession, (2) of which she is in lawful constructive possession, or (3) of which she may be the owner and entitled to recover possession from a third party holding not on her behalf or with her permission.[2]

(a) Constructive Possession

The right of ownership has two dominant characteristics, that is, title and usufruct. If the limited owner retains the title and the usufruct is parted with in any of the modes permissible under law, such as mortgage, lease (temporary or permanent), licence and the like, those who take from her merely retain derivative title under her, admitting and recognising the female owner as the owner of the property in their possession. In all such cases of constructive possession s. 14 (1) applies and the reversionary rights stand extinguished.[3]

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1. Ibid., at 1790.
2. R.D. and A.B. Dial, A Commentary on the HSA, 1956, 3rd ed., (New Delhi, Anand, 1979), at 120.
3. In concurrence with this view, it was held in Venkayamma v. Veerayya, A.I.R. 1957 A.P. 280 at 281 that the possession of a licencee, lessee or mortgagee from the female owner, or the possession of a guardian, or trustee, or agent would be her possession under s.14. This was quoted with approval in Kotturuswami's case, A.I.R. 1959 S.C. 577 at 581, and followed in numerous other decisions. On parity of reasoning, s. 14 (1) cannot apply where the widow herself is in possession in any of these capacities. So it was held in Chandradeep v. Mahip, A.I.R. 1960 Pat. 112, where the rehan bond apart, the limited owner

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(i) Mortgage

Where the mortgage is a simple mortgage and the female holder is in possession of the property at the time that the Act came into force, it is obvious that the operation of s. 14 (1) would bar the reversioners from questioning its validity on grounds of lack of legal necessity or benefit of the estate.

The question whether, if the mortgage was a usufructuary one with possession transferred to the mortgagee, and s. 14 (1) would apply to enlarge the interest of the mortgagor into an absolute estate is more difficult, and falls to be answered by considering the proper meaning to be given to the word "possessed" in the sub-s.

In a usufructuary mortgage no doubt the corporeal possession of the property is transferred to the mortgagee, but the female mortgagor is still entitled to the equity of redemption which is certainly property, and that property admits only of what may be called constructive possession in the sense of a right to possession on redemption.[1]

This was the view taken by the Madras High Court in Arumugha v. Nachiamuthu,[2] where the presumptive reversioners brought a suit

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had also executed a deed of trust in favour of a particular deity and was in possession as a trustee when the HSA came into force. Rai J.'s, ruling was to the effect that the possession of the limited owner as a trustee of the properties endowed, would not be "possession" within the meaning of s. 14 (1). Similarly it was held in Nathuni v. Mst. Kachnar, A.I.R. 1965 Pat. 160, that in respect of property which had gone out of ownership and possession of a Hindu widow on account of alienation by way of dedication to a deity prior to the passing of the Act, the widow could not acquire absolute ownership under s. 14 (1). On a further finding of the invalidity of the dedication itself, the claim of the reversioners as not binding on them was upheld.

1. Raghavachariar, 7th ed., Vol. II, op. cit., at 907.
2. A.I.R. 1958 Mad. 459.

for a declaration that the mortgage deed executed by the limited owner would not be binding on them beyond her lifetime. During the pendency of the suit however, the HSA came into force, and in ruling against the reversionary claim, Ramaswami, J., emphasised that the widow not having parted with the equity of redemption, she would be deemed to be in constructive possession of the property within the meaning of s. 14 (1).[1]

It would therefore follow that s. 14 (1) applies to enlarge the limited owner's interest in the equity of redemption to that of an absolute estate subject to the rights of the mortgagee to be in enjoyment of the property till the mortgage debt is paid off. Accordingly in Jai Ram v. Tota Ram[2] where the woman executed a usufructuary mortgage which continued at the time and after the Act was passed, it was held that the female was in constructive possession, and despite the invalidity of the mortgage the reversionary claims must be regarded as extinguished.

This view was however resiled from in Madras, and in Kanthimathinatha v. Vayyapuri[3] in circumstances similar to the Punjab decision,[4] Anantanarayanan, J., — ruling in favour of the

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1. The same decision was arrived at in Chandradeep v. Mahip, A.I.R. 1960 Pat. 112; see also Rabari v. Bai Mani, (1976) 17 Guj. L.R. 729, where the husband mortgaged property, and subsequent to his death, his son executed two further mortgage deeds — all prior to the HSA — and it was held that in view of the ratio in Munnalal v. Rajkumar, (A.I.R. 1962 S.C. 1493 at 1499-1500), abrogating Pratapmull's case, (A.I.R. 1936 P.C. 20), the mere fact that the Hindu widow had not demanded partition, did not disentitle her to her half share under s. 3 (2) of the HWRPA, 1937. As a result, she would be deemed to have been in constructive possession of her share in the mortgaged properties when the Act of 1956 came into force, and continued to be in such possession till her death in 1961.
2. A.I.R. 1961 Punj. 395.
3. A.I.R. 1963 Mad. 37.
4. Jai Ram v. Tota Ram, cited above.

plaintiff who was both the reversioner to the estate as well as the actual heir of the limited owner, — stressed that since the real object of the Act was to improve the legal status of Hindu women, it was never the intention of the Legislature that alienees from such limited owners should be benefitted from any consequential and automatic enlargement of their estate. This being so, "there is no room in principle for distinguishing the case of a mortgage which is one kind of alienation from outright sale which is another kind."[1] It is however submitted that there is in fact a quite distinct difference in the nature of the two alienations. In alienation by way of sale, there is a total relinquishment with no present or future interest. But since the limited owner could not convey more than she herself possessed, all that the alienee stood to gain was the limited interest of the female, so that at her death, and despite s. 14 (1), the reversionary right subsisted. On the other hand, where a usufructuary mortgage is executed, the heir at the widow's death after the HSA must be entitled to the property, but it is submitted, he is entitled only to the extent that he is heir to the right in her of future physical possession, and not in any reversionary capacity.

(ii) Lease

The principle as applicable to the case of a mortgage by the limited owner is equally applicable in the case of a lease under which she puts the lessee in physical possession of the property, but retains ownership thereof.

In Thakur v. Jago,[2] the contention was that the two permanent leases executed by the widow could not be invalidated even if the

1. Kanthimathinatha v. Vayyapuri, A.I.R. 1963 Mad. 37, at 38.
2. A.I.R. 1962 Pat. 131.

money raised by them were not for legal necessity. Concurring with this view, the Court's ruling was that there is essentially no difference between a temporary and a permanent lease, and as with the former so also with the latter, the widow still retains some interest which is capable of being converted to absolute estate under s. 14 (1). The fact that the lease is for a notional rent would make no difference, and the reversioner's right to challenge the alienation on the ground of lack of necessity stands nullified.[1]

(iii) Property in the Hands of an Agent

S. 14 (1) was undoubtedly meant to improve the legal status of females, so the Courts have consistently held, and in Sampat Kumari v. Lakshmi Ammal,[2] the word "possessed" was held to include

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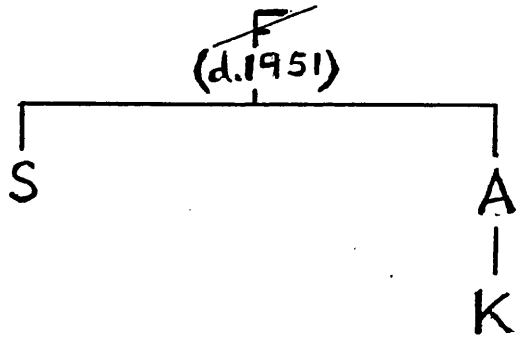
1. The obiter dicta in an unreported judgment of the Madras High Court, and quoted in Sampat Kumari v. Lakshmi Ammal, A.I.R. 1963 Mad. 50, at 57 is to the effect that "(I)f for instance, at the date of the commencement of the Act, property inherited by a woman were in possession of a lessee from her, it cannot be contended that s. 14 (1) does not apply to the case on the ground that the woman was not in physical possession of the property." In criticising the view taken by the Courts in regard to mortgages and leases, G.K. Dabke has this to say:"But with great respect, what has been overlooked is that though in one sense the possession of the mortgagee or the lessee is on behalf of the mortgagor or the lessor, as the case may be, strictly legally speaking in transactions involving transfer of interest in the property there is a qualitative division of the property, the alienee getting into possession of what is transferred, and the alienor continuing in possession of the residue;" and he submits "with respect" that, "it is the residue that will transform into full estate, and what is transferred being the subject-matter of unauthorised alienation will go to the reversioners. To hold otherwise would be to give (the) benefit of the Act to the alienees for whose benefit it has not been enacted. " — see "The HSA, Section 14," (1962) 64 Bom. L.R. (J)., 97-101, at 99. Such an argument is, it is submitted, self defeating, for once the mortgage is redeemed or the lease terminated, whether in the lifetime of the widow or not, the property reverts to the female Hindu or her heirs under s. 15, as an absolute estate.

2. A.I.R. 1963 Mad. 50.

property in the hands of an agent. In a case burdened with convoluted facts, one of the contentions by the appellant, the surviving daughter, was that the widow having surrendered control of her portion of the estate by executing a general power of attorney in favour of a third party, had thereby forfeited her right to remain in possession, and was in effect "civilly dead altogether."[1] In refuting this argument the learned Judge, Venkataraman, J., reiterated on the authority of earlier judgments that, the word "possessed" in s. 14 (1) means the state of owning, and as there can be no ownership without title, it would follow that in the present case, the actual physical ownership of the property being with the agent who was nevertheless accountable to the widow, such possession would be "possession" within the meaning of s. 14 (1).

(iv) Property in the Hands of a Co-sharer

It has also consistently been the view of the Courts that, a widow may be deemed to be in constructive possession through other co-sharers, as in law the possession of one co-sharer is the possession of, and on behalf of all the co-sharers. So the Madhya Predesh High Court held in Anandibai v. Sundarabai.[2]



After the death of the father in 1951, S filed a suit in 1953 for

1. Ibid., at 56.
2. A.I.R. 1965 M.P. 85.

partition and separate possession of the property from her sister A, who however alleged that, not she but her son K, was in exclusive possession by reason of his adoption by their father. The claim of adoption having been negatived, it was found that both A and K were in fact jointly in possession. To the extent that the principle of co-ownership was involved, Tare, J., in delivering judgment was quite clear that the right of a co-widow or sister as co-heir, to claim partition was there even before the enactment of the HSA, 1956, so that after the Act had come into force, there could be no doubt but that such a suit was tenable, and to the extent that the property was in the hands of A,[1] S would be deemed to be in constructive possession thereof.[2]

(v) Sham or Fictitious Transfer Effected by the Widow

The principle that the female is in constructive possession though the actual possession is of another under an invalid transfer, will apply to those cases where the transfer by the female is such as would not bind her. Obviously where it is binding on her during her lifetime, she has no right to possession despite the HSA and is to the advantage of the reversion.

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1. For a discussion of the rights of a female owner as against a trespasser, see below at 482 ff.

2. See also Amar Kaur v. Joginder Kaur, (1967) 69 Punj. L.R. 545 where property was mutated jointly in favour of the step-mother and the unmarried daughter for the latter's maintenance in accordance with customary law, and it was held that despite her marriage in 1961, the provisions of sub-s. (1) of s. 14 were attracted, as in 1956 she was in possession of it constructively through her other co-sharer. Similarly in Madhab Chandra v. Smt. Joymati, A.I.R. 1976 Gau. 10, where neither the plaintiff nor her widowed mother through whom she claimed title, was in actual possession of the suit properties but which was for over twenty years in the possession of persons who were co-owners with the father, it was held that even if the plaintiff, and before her, her mother, was not in actual physical possession, the possession of the defendants in the eye of the law, was the constructive possession of the plaintiff and before her, her mother.

The question for consideration before the Patna High Court[1] was whether the reversionary right could be asserted where the two deeds of gift executed by the widow were attacked as "farzi, collusive, illegal, null and void and ineffective."[2] In the view of the learned Judge, Misra, J., since the reversioners themselves alleged in strong language that the gift was invalid so that obviously possession did not pass to the donees, it would follow that the property was still in the possession of the Hindu female. S. 14 (1) applied in terms to the case so as to nullify all reversionary claims.[3]

An incomplete gift not resulting in transfer of title stands on the same footing. Thus in Viswapathi v. Venkatakrishna,[4] the decision was to the effect that the female holder would be deemed to be in possession of the property after the Act, where she had executed an ineffective deed of gift prior to the Act, the Court holding that mere execution of a deed of gift is ineffective; it must be accompanied by delivery from the donor to the donee. Where therefore on the plaintiff's own averment that, "she... is now in possession of the same in widow's estate,"[5] her right to the estate would be

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1. Ramsewak v. Sheopujan, A.I.R. 1959 Pat. 75.
2. Ibid., at 80.
3. See also Shib Dai v. Ghausi Lal, A.I.R. 1965 J. & K. 11, another decision on collusive gift by the widow. For collusive sale see Jamuna v. Ramsarup, A.I.R. 1960 Pat. 182, where it was held that, on the plaintiff's own case, the sale deeds being sham transactions, illegal and invalid and not binding on them, the possession of the transferees must be regarded as merely permissive, and the widow deemed in law to be in constructive possession thereof. However that this view is not free from doubt is evident from the ruling in Sheopujan v. Ramsewak, A.I.R. 1963 Pat. 330, reversing Ramsewak v. Sheopujan, cited above. On the other hand the dicta in Rangammal v. Marudamuthu (1970) 2 M.L.J. 620, that even if the widow retained possession during her lifetime after executing a settlement deed, that possessory right alone would not attract the provisions of s. 14 (1) is open to serious objection. The correct position it is submitted, is that established in Kaduri v. Abburi, A.I.R. 1972 A.P. 246, where the settlement deed having proved ineffective, it was held that the widow's ownership rights still subsisted and was capable of being enlarged into full ownership under s. 14 (1).
4. A.I.R. 1963 A.P. 9
5. Ibid., at 12.

enlarged to an absolute tenure by reason of s. 14 (1).[1]

(vi) Where the Property is Transferred under an Invalid Will by the Widow (Pre-Enactment)

In the traditional law, as we have already seen, the limited owner had no authority to dispose of her estate except for accredited purposes, but where she did alienate by way of an invalid will, the effect of s. 14 (1) has been to convert such estate into an absolute tenure, the principle being that as a will is normally made for the purpose of making dispositions of property to take effect after the testator's death there is no transfer of property as such, and the reversionary claims must be regarded as effectively terminated in all such cases.

Judicial decisions have construed accordingly, and in the Rajasthan High Court a bequest by a Hindu widow to a temple, made prior to the passing of the HSA, was held to be valid after her death in August, 1956, on the principle that the defect that was attached to the will when it was executed, was cured by the HSA when it

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1. See also Chhagunram v. Naginram, I.L.R. (1966) Guj. 900, where on the same principle it was held that the widow's gift prior to the Act, to a minor relative, herself acting as the guardian, having been invalidated, the subsequent sale by her after the commencement of the HSA, could not be impeached, as she had both title to, and possession of property.
   The operation of s. 14 (1) on property in other ways bound, prior to the coming into effect of the HSA, is evident in Subbareddi v. Penchalamma, A.I.R. 1962 A.P. 368.. The widow retained the property in her possession and made only a gift of the vested remainder after her lifetime to her daughters. The HSA having come into effect while she was alive, it was held that s. 14 (1) operated to the detriment of the reversion in enlarging her estate to absolute property. See also Rathinasamy v. Nagammal, A.I.R. 1963 Mad. 133, where one of two widows relinquished her rights in the property in favour of her co-widow and her daughter, retaining only the right to possess and enjoy the same during her lifetime. At her death after 1956, it was held that she had become absolute owner of her share by virtue of s. 14 (1), and had therefore been entirely within her rights to settle the property on a third party. A similar decision was arrived at in Venkatasubba v. Penchalamma, (1962) 2 An. W.R. 156.

came into force and conferred the right of absolute ownership on the widow in respect of the disputed property which was undoubtedly possessed by her.[1]

(vii) Where an Invalid Adoption is Effected by the Widow

Adoption by the widow under the traditional law, had the effect of divesting her of her limited estate as a consequence of the theory of "relation back" whereby the adopted son was deemed to have come into existence at the moment of his adoptive father's death. However, where such adoption was proved to be invalid on technical grounds, its effect would be precisely that of any other invalid transfer of property and the widow deemed to be in constructive possession to the elimination of the reversioners.

The question was first touched upon in Somiah v. Rattamma,[2] where the alleged invalid adoption by the widow in 1950 having been negatived, the Court was nevertheless at pains to underscore the consequences that must flow in circumstances where there had indeed been an

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1. Mst. Ladhi Bai v. Thakur Shriji, A.I.R. 1965 Raj. 41. Similarly the survival of the widow after the commencement of the HSA validates the bequest. In Smt. Sunderdevi v. Manakchand, A.I.R. 1975 Raj. 211, where to the contention that the limited owner had no authority to dispose of her widow's estate in 1953, the Court's response was that since the will speaks at the death of the testator, and admittedly as at that time the widow had unfettered capacity to dispose of the said property, the will was perfectly valid; and this would be in harmony with the general principle that: "A will unless a contrary intention appears therein must be construed, with reference to the real estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator and as if the condition of things to which it refers in this respect is that existing immediately before his death.": Halsbury's Laws of England, Simonds ed., 1962, op. cit., Likewise even where the property had been transferred under an invalid gift, a later will — after the HSA became operative — was held to be valid on the basis of the widow's constructive possession.: Bai Champa v. Chandrakanta, A.I.R. 1973 Guj. 227.

2. A.I.R. 1959 A.P. 244.

invalid adoption. Under such circumstances the widow must in law be deemed to be in possession of her husband's estate, there being no legal vesting of the property in the adoptee, and s. 14 (1) would then be applicable in terms to such property.

This principle was reaffirmed by the Supreme Court in Kotturuswami v. Veeravva.[1] The last male holder who died in 1920, had by his will authorised his widow to adopt a son, and in compliance therewith she effected an adoption in 1924. Thereupon the appellant purporting to be the nearest reversioner, filed a suit for a declaration that the adoption was invalid and not binding on him. Making short shrift of the contention that the words "any property possessed by a female Hindu" in s. 14 (1) of the HSA referred to actual possession of the property, and citing with approval the dicta in Venkayamma v. Veerayya[2] and Gostha Behari v. Haridas[3] to the effect that the word "possessed" is used in s. 14 (1) in a broad sense[4] and must be given the widest connotation,[5] his Lordship, Imam, J., ruled that if the adoption was invalid, the full owner of the deceased Hindu's estate was his widow. Assuming moreover that the adoptee was in actual possession of the property, then by reason of the invalidity of the adoption, his possession in law was merely permissive, and constructive possession being with the widow, the effect of s. 14 (1) would be to abrogate all reversionary claims.[6]

If we now turn our attention once again to the Andhra decison in Vishwapathi v. Venkatakrishnan,[7] the Court did not touch on the

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1. A.I.R. 1959 S.C. 577.
2. A.I.R. 1957 A.P. 280.
3. A.I.R. 1957 Cal. 557.
4. Venkayamma's case cited above.
5. Gostha Behari's case, cited above.
6. See also Nathuni v. Mst. Kachner, A.I.R. 1965 Pat. 160, and Bassavant v. Channabasawwa, A.I.R. 1977 Mys. 151, where similar decisions were arrived at.
7. A.I.R. 1963 A.P. 9, discussed above at 477.

question of the invalidity of the adoption (which one might add was pertinent to the suit), and merely decreed in favour of the widow on the basis of an incomplete gift. What had actually happened was that while a suit questioning the legality of the adoption was still pending, the HSA came into force, and on the plea of the widow that the suit was no longer maintainable as a consequence of s. 14 (1) of the Act, the reversioner's further rejoinder was that, as she had already gifted away the property in 1952, the widow was not competent to derive benefit from the Act. Consequently the original challenge in regard to the alleged invalid adoption was not resolved. It is submitted that his Lordship, Chandra Reddy, C.J., should have further augmented the force of his decision in favour of the widow by drawing attention to the contention of the invalid adoption to hold that, granted the two factors, i.e. the invalidity of the gift by the limited owner, and — on the plaintiff's own admission — the invalidity of the adoption, the widow would in any event be deemed to be in constructive possession so as to oust the reversion.

(b) Possession in Law

In fulfilment of the social purpose of the HSA, and so as to give the female the widest possible benefit of the sub-s., the word "possessed" in s. 14 (1) has been construed to be significant enough to also include within its ambit, property of which the limited owner may not have been in actual or constructive possession but to which she had a right to title or possession in law.[1]

(i) Where the Assets are Vested in the Receiver

It was argued before the Calcutta High Court that if possession is the test of applicability, then the property allotted to a female

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1. Mangal Singh v. Smt. Rattno, A.I.R. 1967 S.C. 1786, at 1790, and quoted at supra, 470

in a preliminary decree for partition but in the hands of the Receiver appointed by the Court, is not property "possessed" by her for the purpose of s. 14 (1), for all that she may still have a right to possession of it. Such a view was however firmly dismissed, the Court holding that in fact title or ownership being of the essence of possession, the possession of the Receiver in law is the possession of the female, and at the material date, she acquires absolute ownership under s. 14 (1). [1]

(ii) Property in the Hands of a Trespasser

If ownership is the test of possession, it would then naturally follow that where a third party held illegally as against the female Hindu, s. 14 (1) would effectively convert the juridical possession of such female into an absolute tenure.

This would seem to stand to reason but it was almost immediately apparent that judicial opinion, at least in the initial stages, was neither clear nor in agreement, and we must of necessity take into account the observations — in the nature of obiter dicta,

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1. Krishna v. Akhil, A.I.R. 1958 Cal. 671. The same view was taken by the Madras Bench in an unreported judgment cited in Sampat Kumari v. Lakshmi Ammal, A.I.R. 1963 Mad. 50, at 57 where it was stressed that, the limited estate which vested in the Receiver to safeguard the reversionary interest is converted, on the relevant date into an absolute tenure for "s. 14 does not, in our opinion connote possession as distinct from title," and the fact that the widow herself had been appointed Receiver could make no difference to the result. See also Janak Dulari v. Dist. Judge Kanpur, A.I.R. 1961 All. 294, where the zamindari having been abolished, part of the compensation money was paid to the limited heir and part of it retained in the Court of the District Judge. On the coming into force of the HSA, Bhargava, J., held that as she was in law possessed of it, the rest of the compensation must be hers to hold absolutely. Similar decisions were also arrived at in Saila v. Saila, A.I.R. 1961 Cal. 26, and Shakuntala Devi v. Beni Madhav, A.I.R. 1964 All. 165 where the compensation money invested in bonds and Government Securities were held to be the female Hindu's possession in law so as to convert to absolute property under s. 14 (1).

but significant all the same — in a number of decisions which were however not directly related to the widow's rights as against a trespasser.

In Venkayamma v. Veerayya,[1] Sastri, J's, observations obiter were to the effect that if the limited owner had the right to the property on the date the HSA came into force, she might "conceivably" be regarded as an absolute owner, although the property might be in the hands of a trespasser, provided however that such trespasser had not perfected his title by adverse possession before the coming into effect of the Act.[2]

As tentative as this suggestion was, their Lordships of the Supreme Court[3] were ready to concede even less, and having taken note of the Andhra viewpoint, nevertheless left open the question of the widow's rights vis - a - vis the trespasser,[4] and in this fluid and ambiguous atmosphere judicial opinion was hard put to arriving at a solution to this vexed problem.

We have for instance, the clear dicta of Shah, J., in Yamunabai v. Maharaj,[5] to the effect that, where the property vested in

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1. A.I.R. 1957 A.P. 280.
2. Ibid., at 81 and quoted with approval in Ramsaroop Singh v. Hiralal Singh, A.I.R. 1958 Pat. 319, at 322; Krishna v. Akhil, A.I.R, 1958 Cal. 671, at 674; Ramsewak v. Sheopujan, A.I.R. 1959 Pat. 75, at 77. See also the obiter dicta in Marudakkal v. Arumugha, A.I.R. 1958 Mad. 255, at 260, which strikes an exactly similar note.
3. Kotturuswami v. Veeravva, A.I.R. 1959 S.C. 577.
4. To quote Imam, J., who speaking on behalf of his learned brothers had this to say: "We do not think that it is necessary in the present case to go to the extent to which the learned Judges (of the Andhra High Court in Venkayamma v. Veerayya, A.I.R. 1957 A.P. 280), went. It is sufficient to say that "possessed" in s. 14 is used in a broad sense and in the context means the state of owning or having in one's hand or power.": Ibid., at 581-2.
5. A.I.R. 1960 Bom. 463.

the widow but was in the actual possession of the defendant who had failed to establish his adoption,

> "... the possession contemplated by s. 14 is legal possession and property in the wrongful occupation of a trespasser either directly or through his tenants is nonetheless possessed by a Hindu female within the meaning of s. 14. [1]

However, that the question could by no means be regarded as settled was soon enough clear when the Madhya Pradesh High Court was faced with the same problem in Anandibai v. Sundarabai.[2] In Tare, J's, view for s. 14 (1) to be operative the female owner must be possessed of the property, and given the fact that in its broadest connotation the Supreme Court[3] was not willing to concede that this would also include property in the trespasser's hands[4] - a point of view with which his Lordship was in complete agreement[5] — his solution was to the effect that where the alleged adoption had been disproved and the holder manifestly a trespasser, the female could, nevertheless not be said to be in possession even constructively. Possession as such lay with the stranger — albeit without any right — and the female's remedy against such trespasser would be to dispossess him and obtain juridical possession, which possession then and then only, would come within the ambit of s. 14 (1). Ingenious as this reasoning is, the dichotomy inherent in it is immediately noticeable.

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1. Ibid., at 467. See also Sivaiah v. Tekchand, A.I.R. 1966 A.P. 305, where the daughter claiming under a fraudulent will was held to be a trespasser from whom the widow was entitled to recover the property and hold it absolutely under s. 14 (1).
2. A.I.R. 1965 M.P. 85. See above at 475-6.
3. Kottumswami v. Veeravva, A.I.R. 1957 S.C. 577.
4. Ibid., at 581-2.
5. "I do not propose to go to the length of stating that the property, although in the possession of a trespasser, will become the absolute property of the female Hindu.": Per Tare, J., Anandibai v. Sundarabai, A.I.R. 1965 M.P. 85, at 89.

Illegal occupation cannot deprive the rightful owner of possession except by prescriptive title, and, one submits, under such circumstances while juridical possession may be a wise practical step to gain control of the property, it is nevertheless not essential - the widow's title being sufficient to bring it within the purview of s. 14 (1).

Hardly had the ink dried on the Madhya Pradesh judgment[1] when the Supreme Court found itself faced once again with the same issue in Mangal Singh v. Smt. Rattno.[2] The decision may be regarded as a landmark in as much as unlike the earlier noncommittal attitude apparent in Kotturuswami's case,[3] the highest judicial authority in the country could ill afford to resort to its earlier evasiveness in a decision where the central issue was the widow's rights under s. 14 in regard to property in the hands of a trespasser.

Briefly the facts were that, a Hindu widow who had entered into possession of land belonging to her deceased husband in 1917, but had been illegally dispossessed by her husband's collaterals in 1954, brought a suit for repossession on the plea that the present occupiers were mere trespassers. During the pendency of the suit, the HSA came into force in 1956, and subsequently in 1958 the widow died, and her legal representative was brought on record. The question for decision was that, as on her own admission, the widow was out of actual[4] possession and the property in the hands of trespassers continuously since 1954, could she under such circumstances be said to be possessed of such property as envisaged in s. 14 (1)?

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1. Anandibai v. Sundarabai, A.I.R. 1965 M.P. 85.
2. A.I.R. 1967, S.C. 1786.
3. A.I.R. 1959 S.C. 577.
4. Emphasis mine.

In a judgment remarkable for its extension of the meaning of the word "possessed" so as to give it even wider applicability than heretofore, Bhargava, J., speaking on behalf of the Bench, drew attention to the significant use of the expression "possessed by" instead of "in possession of" in s. 14 (1) to stress that the former expression must, in effect, cover cases other than actual or constructive possession, and since legally the word "possession" is defined as equivalent as "the state of owning or having a thing in one's own hands or power," it would follow that three different meanings are derived; one is the state of owning, the second is having a thing in one's own hands, and the third is having a thing in one's own power, and where both physical and constructive possession are lost, one may still, retain at law, the right of ownership. It would therefore irrefutably follow on the language of s. 14 (1) and its interpretation in other Supreme Court decisions[1] that in the present case, despite the illegal occupation of trespassers, the widow nevertheless possessed the right to recover actual physical possession[2] or constructive possession, and she was therefore held to have been "possessed" of it when she died in 1958 for it to pass by succession to her heirs under s. 15 (1) of the HSA.

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1. The decisions dwelt upon were Kotturuswami v. Veeravva, A.I.R. 1959 S.C. 577, where despite the reluctance of the Supreme Court to commit itself, the learned judge held that their Lordships of the earlier Bench certainly included the state of owning within the broad definition of the word "possessed"; Munnalal v. Rajkumar, A.I.R. 1962 S.C. 1493, where it was laid down that the female Hindu would be regarded as possessed of the property where in a suit for partition, only a preliminary decree declaring her right to a share had been passed. See below at 543-5, and in Eramma v. Veerupana, A.I.R. 1966 S.C. 1879, which by emphasising that mere physical possession of the property by the female Hindu without the right of ownership, would not attract the provisions of s. s. 14 (1), reinforces the converse view that property in the hands of a trespasser is property possessed by the widow. See below at 488-9.

2. See also Rani Bai v. Yadunandan Ram, A.I.R. 1969 S.C. 1118. The stranger having dispossessed the widow of property which she held in lieu of maintenance, it was held that she was entitled to restoration of possession, as the respondent had no right, title or interest and was a mere trespasser. See below at 601.

Thus it may now be regarded as settled that, as the trespasser holds illegally as against the widow, she must be held to be in ownership in implementation of the intention of the Legislature to accord to the word "possessed", the meaning of the "right to possess"[1]

(ii-a) The Widow's Acquisition as a Trespasser

Since the word "possessed" in s. 14 (1) connotes legal possession, the mere fact that the female is in possession of another's property as a trespasser without any right thereto does not attract the provisions of the subsection so as to confer on her absolute right therein.[2]

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1. On the other hand it must follow that if the trespasser had acquired title to such property by adverse possession prior to the commencement of the HSA, s. 14 (1) would have no application. Thus where the widow alienated her husband's property to her son-in-law in 1943 who thereafter transferred it to a stranger in the same year, and the latter remained in occupation thereof for more than twelve years continuously, the Court ruled in Elliah v. Gangamma, A.I.R. 1957 A.P. 776, that he got absolute title by adverse possession; and the fact that the transaction in favour of the son-in-law was only a nominal transaction and therefore not valid, would make no difference, as the HSA leaves untouched the general law in regard to property. This, it is submitted, is the correct interpretation, and in view of this the obiter dicta in Sansir v. Satyabati, A.I.R. 1958 Or. 75, at 78 to the effect that "Viswanatha Sastri, J., (in Venkayamma v. Veerayya, A.I.R. 1957 A.P. 280), while giving a wider meaning to the word 'possessed' had made an observation that it might also include the possession of a trespasser. In my opinion it is putting too wider (sic. for wide), a meaning. A trespasser's possession can never (emphasis mine) be taken to be a possession in any mode of the rightful owner as his possession is completely adverse to the interest of the rightful owner," cannot be said to be the correct law.

2. This however was not the view that Tek Chand, J., took in Mst. Prito v. Gurdas, (1958) 60 Punj. L.R. 194, infra, at 615. To the contention that the words "any property possessed by a female Hindu occurring in subsection (1) of s. 14 should be given restricted meaning confining them to lawful possession of the property , his Lordship held that the language of subsection (1) of s. 14 is of broad amplitude. The Explanation leaves no doubt as to its broad scope, and in particular the word "whatsoever" has a very wide and comprehensive meaning, so that the above indicated words cannot be given restricted meaning confining them to lawful possession of the property. But subsequent judicial decisions

Legal decisions confirm this viewpoint and in Madras, where the grand-daughter who had been in continuous but not hostile possession of her grandmother's limited estate since 1922 purported to be possessed of it absolutely under s. 14 (1), the Court negatived her claim to rule that she had not held adversely to her grandmother; she was at best a trespasser, and her acquisition could not possibly be included within the comprehensive wording " any other manner whatsoever" which must be interpreted only ejusdem generis with the other terms which confer a right of ownership.[1]

However, it was left to the Supreme Court to consider the matter exhaustively and authoritatively so as to lay to rest any lingering vestiges of doubt in regard to the matter. In Eramma v. Veerupana,[2] where a competent Court had decided that the maternal uncle was the heir of a deceased Hindu minor, on appeal the step-mother, who was in occupation of the property, contended that the HSA having come into force in the meanwhile, s. 14 (1) had the effect of converting it to an absolute estate. The Court ruled firmly that, as the HWRPA 1937, had not come into force at the time of her husband's death, the widow could have no manner of title to the property at the promulgation of the HSA. The fact of possession alone is not sufficient to attract the operation of s. 14 for, their

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clearly take the opposite, and it is submitted, the correct view that illegal possession does not come within the purview of s. 14 (1). See for instance the observation of Khosla, J., in Mst. Dassi v. Mst. Kapur, A.I.R. 1958 Punj. 208, at 209 to the effect that "(T)his section, however, cannot be interpreted to validate the illegal possession of a female Hindu and it cannot confer any rights on a trespasser."

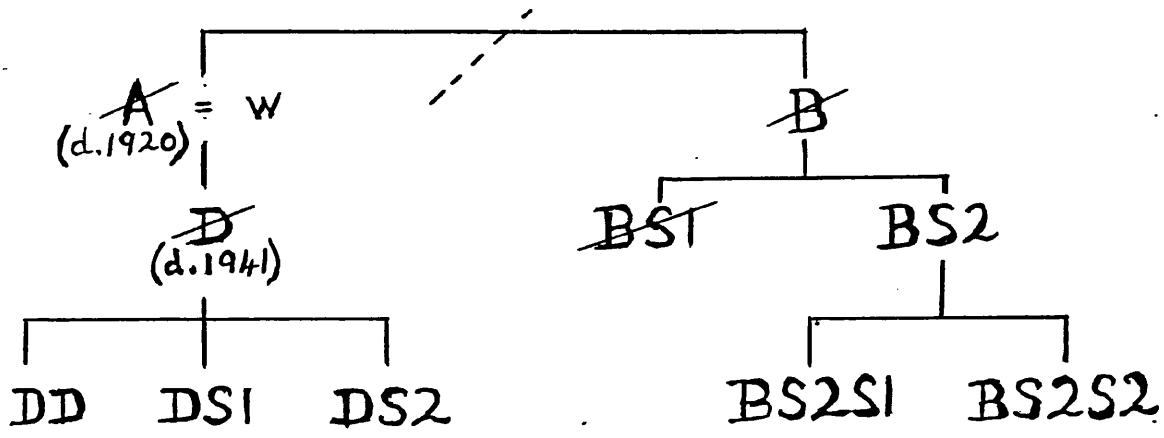
1. Andal v. Sivaprakasa, A.I.R. 1963 Mad. 452.

2. A.I.R. 1966 S.C. 1879, affirming Veerupana v. Eramma, A.I.R. 1966 Mys. 130.

Lordships explained,

> "(t)he section cannot be interpreted so as to validate the illegal possession of a female Hindu and it does not confer any title on a mere trespasser. In other words the provisions of s. 14 (1) of the Act cannot be attracted in the case of a Hindu female who is in possession of the property of the last male holder on the date of the commencement of the Act, when she is only a trespasser without any right to property." 1

Not long thereafter, the Supreme Court had occasion to confirm this dictum in Dindayal v. Rajaram.[2]



A separation having been effected between A and B, A died in 1920 leaving behind — for our purposes — his widow W, and a daughter. The widow made a gift of her husband's property in her possession to her daughter in 1936 who later died in 1941. Thereupon on repossession of the properties she gifted them first in 1952 and then in 1957 to BS2S1 and BS2S2. The contention on behalf of the donees was that, as the widow's repossession had revived her right to hold as limited owner, the effect of s. 14 (1) of the HSA was to convert such estate to an absolute tenure. In invalidating this claim, Hegde, J., explained in clear and succinct terms that as the validity of the original gift to the daughter had effectively destroyed the widow's title, and her repossession being that of a trespasser, s. 14 (1)

1. Ibid., at 1882.
2. A.I.R. 1970 S.C. 1019.

would have no application.

It is thus clear from these pronouncements that however broadly and sympathetically one may interpret s. 14 (1) in favour of the female Hindu, the trespasser's acquisition being by definition illegal acquisition, the provisions of the subsection stop short of endorsing it, and the law as it stands must be of impartial application to illegal occupation be it that of male or female.

(iii) The Widow's Acquisition by Adverse Possession

The title acquired by adverse possession is likewise independent of the Hindu law, and is regulated by Art. 65 of the Limitation Act of 1963 which corresponds to Art. 44 of the old Schedule under the repealed Limitation Act of 1908.[1]

Adverse possession, as its words imply, must be actual possession of another's land with intention to hold it and claim it as his own to the exclusion of the rightful owner.[2] In other words, if the possessor holds by any title, he cannot hold adversely to any other person who is either entitled to the remainder of the estate, the

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1. The normal period within which a person, who obtains possession of immoveable property and holds it adversely as against the true owner can perfect his title to such property, is twelve years as prescribed by Art. 65 of the Limitation Act of 1963.

2. R. Mitra, The Limitation Act, 3rd ed., C.L. Gupta and J. Lal revised, (Allah. Law Publishers, 1978), at 587. Judicial decisions have construed accordingly. Thus it was held in Ramlal v. Chetu, A.I.R. 1958 Punj. 335, at 336 that adverseness must commence with the wrongful dispossession of the rightful owner at some particular time, and must commence in wrong and maintained against right. It must be actual, open, notorious, hostile, under claim or right, continuous and exclusive and maintained for the statutory period. See also P. Lakshmi Reddy v. L. Lakshmi Reddy, A.I.R. 1957 S.C. 314 where his Lordship, Jagannadhadas, J., in reliance upon Secretary of State for India v. Debendra Lal Khan, A.I.R. 1934 P.C. 23, laid down at 317-8 that, the ordinary classical requirement of adverse possession is that it should be nec vi nec clam nec precario, and as such the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor.

reversion, or the beneficial or other interest in the property. If on the other hand he has no title at all, it follows that he holds adversely to all the world.[1]

There is no reason why female trespassers should be hampered in their unjustified acquisitions, and yet in the days before the revolutionary changes brought about by the Act of 1956, the nature of the title which a Hindu widow acquired by prescription depended on the nature of her claim. Thus where she acquired by adverse possession lands to which she had no shadow of title,[2] she must have acquired to herself against all the world, and the resulting estate would be strīdhana under the pre-1956 law.[3]

On the other hand, where she acquired prescriptive title in immoveable property on the assertion that she held as her husband's heir, or where she prescribed adversely to joint-family property from which in any case she was entitled to maintenance — in all such cases while she possessed adversely to the true owners, she excluded only those who might, during her lifetime, have enjoyed the property. In other words she exceeded her rights — she dispossessed people who in the first instance were her husband's heirs, and in the second instance were in any case obliged to her. Thus at her death no

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1. J.D.M. Derrett, "A Strange Privy Council Decision and the HWRA 1856," A.I.R. 1955 (J)., 10-19 at 14.
2. Thus it was held in Mst. Kirpal Kaur v. Bachan Singh, (1958) 21 S.C.J. 438, that the possession of the widow of a predeceased son, not proved to be under any arrangement with the heirs of the deceased, or claiming as the heir of the deceased, must be taken to be adverse to the reversion. See also Tilakdhari Rai v. Parma Rai, A.I.R. 1963 Pat. 356.
3. Derrett, Critique, op. cit., at 208.

rightful benefit could accrue to her own heirs or legatees,[1] since it was presumed (irrespective of her intention), that her possession was related to her right which emured only for her lifetime.[2]

With this background we must now turn our attention to the statute of 1956, and there need be no doubt but that under s. 14 (1) a woman who has prescribed against the true owner or owners will prescribe for an absolute estate, unless perhaps she has a restricted estate within s. 14 (2), in which case no length of time will improve her tenure in respect of it or its income beyond the terms laid down in the instrument from which she takes her title.[3]

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1. The Privy Council established this in Mt. Lajwanti v. Safa Chand, A.I.R. 1924 P.C. 121, where a Hindu widow held property claiming as an heir though she was only entitled to maintenance, and it was laid down that her possession though adverse to the reversioners, she did not acquire the property as stridhana but only as an accretion to the husband's property, and as such it would pass, after her death, to the husband's heirs in preference to the reversioners and (it is submitted), her stridhana heirs.

2. See the decision of the F.B. in Gunderao v. Venkamma, A.I.R. 1955 Hyd. 3, at 14 where the majority view was that where a Hindu widow not entitled to inherit an estate enters into possession of that estate and remains in possession for over the statutory period, the nature of her estate (a) where she asserts a title as an absolute owner from the very beginning of her possession, will be an absolute estate, and (b) where she does not assert her absolute title it does not become her absolute property but becomes an accretion to the estate of the last male holder. See also Sampat v. Surajmal, A.I.R. 1959 Bom. 504 at 505 , where it was reiterated that what a widow acquires by adverse possession becomes her stridhana and does not become an accretion to her husband's estate unless it is shown that she took adverse possession of the property as representing her husband's estate. On this principle it was decided in Thailambal v. Kesavan, A.I.R. 1957 Ker. 86, that where it was established in a previous litigation that the nature of the title prescribed for by the widow was only a limited estate, it was not consequently open for her grand-daughters to say that she had prescribed for an absolute estate by adverse possession and claim as her stridhana heirs.

3. Derrett, Critique, op. cit., at 207. This would apply equally to cases where the Act of 1956 would operate as an interruption to adverse title of the trespasser's hostile possession of the limited estate, thereby depriving him from acquiring any title, unless he holds possession for a further statutory period beginning from the date of the commencement of the Act. See C.R. Ravi, "Effect of Section 14, HSA, 1956, on Rights of Trespasser in Adverse Possession Against Female Hindu," (1971) 1 M.L.J. (J), 5-8 at 7-8.

So the Patna High Court held in Gulab Chand v. Sheo Karam[1] where the widow of one of two joint brothers having been in possession of the family house from 1918, on the claim that her husband had died as separate from his coparceners, Mahapatra, J., on the strength of the decisions in Satgur Prasad v. Rajkishore Lal,[2] Mt. Kirpal Kaur v. Bachan Singh,[3] and Ramanna v. Sambamoorthy[4] ruled that by the 17th June 1956 she had prescribed her limited title to that property against the other members of the family and the effect of s. 14 was that such adverse possession had ripened into full ownership.[5]

The Punjab High Court held likewise in Mst. Harmal Kaur v. Smt. Kartar Kaur,[6] where the question for determination was whether the provisions of s. 14 (1) of the Act would cover the possession of a Hindu widow who had entered into possession of the property of her father-in-law without any right or title, but with the intention to hold it as a limited owner on a life tenure more than twelve years before the commencement of the HSA, and continues to be in such possession right up to the date of the commencement of the Act. Upholding this contention, Sarkaria, J., was quite clear that though s. 14 cannot be interpreted so as to validate the illegal possession of a female Hindu and does not confer any title on a mere trespasser,

1. A.I.R. 1964 Pat. 45.
2. A.I.R. 1919 P.C. 60.
3. A.I.R. 1958 S.C. 199.
4. A.I.R. 1961 A.P. 361.
5. Note also the obiter dicta of the same learned Judge in Sheoji Tiwary v. Prema Kuer, A.I.R. 1964 Pat. 187 at 193 where in explaining the wide amplitude of sub-s. (1) of s. 14 and the Explanation thereof, he had this to say: "(E)ven if the female Hindu comes in possession as a trespasser in any property and continues to be so for a period of twelve years, she prescribes her title in as much as a suit by a rightful owner for her eviction will be barred by the laws of limitation."
6. A.I.R. 1968 P. & H. 295.

nonetheless when the alleged wrongful possession started about forty-one years before the suit, and the widow had since been in continuous, uninterrupted and open possession, such possession though that of a trespasser at its inception, would ripen into limited ownership after the expiry of twelve years' adverse possession, which prescriptive limited title would then fall within the ambit of the words "property possessed by a female Hindu" in s. 14 (1) to thereby convert her limited estate into full ownership.[1]

In evaluating the Punjab case,[2] Gupte's criticisms are levelled at the fact that

> "(T)his decision discloses a certain amount of confusion in as much as if the woman was in possession claiming title by adverse possession she would acquire absolute title to the property without the assistance of s. 14 (1); and even if she entered into possession as a limited owner (though a trespasser) her title would not be enlarged by s. 14 (1)." [3]

It is however submitted that the learned author in fact himself betrays a certain confusion of thought in that he seems to have lost sight of the subtleties inherent in the interaction of the law of prescription in relation to the Hindu woman's estate and the statutory law of 1956. True enough, as he asserts, the widow does not require the

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1. That Punjab has consistently kept to this line of thought is also evident in its earlier ruling in Jangir Singh v. Mst. Daya Kaur, A.I.R. 1962 Punj. 481 where it was held that any other considerations apart, by the very fact that the erstwhile reversioners had allowed the widow to remain in possession for more than twelve years, they had lost their right to the estate by reason of her adverse possession. See also Nand Lal v. Smt. Khillian, (1970) 72 Punj. L.R. 54. The widow having been in possession for thirty years before the HSA came into force, the Court held that she was no mere trespasser, the implication being, that her right of maintenance apart, at the very least she could claim prescriptive limited title which converted to an absolute tenure under s. 14 of the HSA, 1956.
2. Mst. Harmal Kaur v. Smt. Kartar Kaur, A.I.R. 1968 P. & H. 295.
3. Hindu Law of Succession, (Bom. Tripathi, 1972), at 528.

assistance of s. 14 where she acquires absolute ownership by her adverse possession; true also that s. 14 can have no effect on the limited estate of a trespasser; but where she prescribes for a limited estate, that is to say, where for all practical purposes she is the absolute owner except that she could never be a fresh stock of descent of such property, the widow can no longer be regarded as a trespasser, and s. 14 then converts such limited estate into full ownership.

(2) Remarriage of Widows

(a) The Position of the Widow

The śāstric law, as we have already seen, did not sanction the remarriage of the Hindu widow. No longer the patnī of her deceased husband, such an act on her part is regarded, in the classical law, as unchastity at the very least with the consequences attendant upon it.

The HWRA 1856, for all its seemingly reforming zeal is, in the ultimate analysis, merely an extension of this deeply entrenched attitude in that it envisages remarriage as, what is known to law, as civil death, and as in the case of natural death, so with remarriage, the limited estate which the widow acquired either by inheritance or by will, reverted to the next heirs of her deceased husband or other persons entitled to the property on her death.[1]

With the coming into force of the HWRPA, 1937, the Act of 1856 was still operative, but it was a matter of some debate whether an unchaste widow could take in view of the words "Notwithstanding any rule of Hindu law or custom to the contrary..." prefixed to the rules

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1. HWRA, 1856, s. 2, supra, at 196.

enabling a widow to inherit. On a strict construction, the words would seem to suggest that the normal rule of Hindu law which disentitles a Hindu widow from succeeding to her husband's property, could no longer be operative, a view taken by the Bombay[1] and Calcutta[2] High Courts. However, given the generally restrictive nature of the rights conferred on widows by the Act of 1937, it is doubtful whether the Legislature intended to abrogate this ancient rule, and the majority of the Courts leaned towards the strict view that the antecedent and fundamental Hindu law could not be repealed without express words to that effect.[3]

A fortiori a widow remarrying forfeited her right of succession to the property of her deceased husband.[4] This was so whether she married according to caste custom[5] or in reliance upon the HWRA, 1856,[6] and the HWRPA, 1937 made no difference.[7]

With the enactment of the HSA, 1956, the traditional disqualifications in regard to inheritance are swept away.[8] Essentially secular in character, the prime purpose of the statute is to put an end to discrimination on grounds of sex and to place females on par

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1. Akoba v. Sai, A.I.R. 1941 Bom. 204.
2. Surja v. Manmatha, A.I.R. 1953 Cal. 200.
3. See Ramaiya v. Mottayya, A.I.R. 1951 Mad. 954 (F.B.); Appa v. Gurubasawwa, A.I.R. 1960 Mys. 79; Kanailal v. Pannasashi, A.I.R. 1954 Cal. 588.
4. Manabai v. Chandan Bai, A.I.R. 1954 Nag. 284.
5. Hira v. Bodhi, A.I.R. 1954 Or. 172; Rama v. Sakhu, A.I.R. 1954 Bom. 315. The opposite view expressed in Ram v. Occha, A.I.R. 1951 M.B. 97, must be taken to have been overruled by Kishan v. Arjun, A.I.R. 1959 M.P. 429.
6. Thangavelu v. Lakshmi, A.I.R. 1957 Mad. 534.
7. In Krishna v. Ammalu, A.I.R. 1972 Ker. 91, it was held that a woman married to several brothers, was entitled, under the statute of 1937, to succeed to the interest in the joint-family property as the widow of one while she continued to be the wife of the other two. But this ruling, it is submitted, was incapable of uniform application to the rest of India, and Kerala with its long tradition of matriarchy must be regarded as the exception.
8. See s. 28 of the HSA, supra, at 268.

with males in respect of property rights; and to the extent it applies, the ancient law as also any statutory provision stand abrogated. The provisions of s. 4 make this abundantly clear. It provides:

> "(O)verriding effect of the Act
>
> (1) 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 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 in so far as it is inconsistent with any of the provisions contained in this Act."

By the very fact that s. 14 (1) abolishes the limited estate and converts it to an absolute tenure, it would therefore follow that on and from June 17, 1956, the widow's subsequent remarriage would not have the effect of divesting her in view of the provisions of s. 4, and s.2 of the HWRA, 1856, must be held to have been implicitly repealed, provided however that the widow was "possessed" of such property at the date that succession opened.

Nonetheless in the face of such overriding provisions (i.e. those of ss. 4 and 14 (1) of the HSA), some scholars would have us believe that it is the civil death as envisaged in s. 2 of the HWRA, 1856, that appears the basis of the rule of divesting, and the quality and nature of the estate inherited appears to be of no moment to its application,[1] so that in spite of s. 14 (1), the widow must be held to

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1. G.K. Dabke, "Divesting of an Estate on Remarriage," (1957) 17 Bom. L.R. (J)., 132-8 at 134. S.V. Gupte holds the same view when he states: "(A)lthough s. 2 of the HWRA, 1856 was drafted at a time when the widow succeeding to her husband or his lineal successor, took only a limited estate, the language of that section is, it is submitted, capable of applying to a widow having an absolute estate." : Hindu Law of Succession, op. cit., at 458.

be divested on her civil death in the face of her remarriage

Happily this theory has not been borne out by judicial decisions, and we have the clear pronouncements of the Supreme Court that by virtue of s. 4 of the HSA, the Legislature abrogated the rules of Hindu law in all matters in respect of which there is an express provision in the Act.[1] As such therefore, the ambit of the estate that a female Hindu takes under s. 14 cannot be cut by any text, rule or interpretation of Hindu law, for such an estate is an absolute one and not defeasible under any[2] circumstances.[3]

S. 24 of the Act does of course stipulate that certain widows remarrying may not inherit as widows. It provides:

> "(A)ny heir who is related to an intestate as the widow of a predeceased son, the widow of a predeceased son of a predeceased son or the widow of a brother shall not be entitled to succeed to the property of the intestate as such widow, if on the date the succession opens, she has remarried."

However that there is no inconsistency between this provision and s. 4 is evident when we consider that the disability of an ex-widow under this section is, strictly speaking, not a disqualification: it is merely logical. They cease to be widows and so cease to be related.[4] Even for such widows as are disqualified under s. 24 remarriage must have taken place before the opening of the succession, for the section does not provide for the divesting of the estate vested in the widow on her remarriage subsequent to the date

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1. Munnalal v. Rajkumar, A.I.R. 1962 S.C. 1493, at 1500.
2. Emphasis mine.
3. Punithavalli v. Ramalingam, A.I.R. 1970 S.C. 1730 at 1731.
4. Derrett, IMHL, op. cit., at 373. The omission of the intestate's widow in the section appears to be due to the fact that it is not possible to conceive of a person leaving a widow who had remarried.

the succession opens.[1]

The consequences that follow from the foregoing are:

(i) All widows are divested of their husband's estate in the event of their remarriage prior to the Act of 1956 in accordance with the provisions of s. 2 of the HWRA, 1856.

(ii) The remarriage of the widow of the deceased after the commencement of the HSA does not divest her of her full tenure.

(iii) The remarriage of certain widows specified in s. 24 of the HSA disqualifies them where such remarriage takes place prior to the date that succession opens.

(i) The Remarriage of the Widow Prior to the Enactment of the HSA, 1956

The rule of forfeiture is based upon the general principle of Hindu law[2] so that when on remarriage the widow is divested of her limited estate, s. 14 cannot have any effect in the vacuum thus created, and s. 4 must not be held to have abrogated the provisions of s. 2 of the HWRA, 1856; in the event that the remarrying widow is in possession of such property, her possession will be regarded in law as the possession of a trespasser without any right or title, and the reversioners in constructive possession.

So it was held in Mst. Bisarti v. Mst. Sukarti,[3] where the widow's possession of her late husband's property was invalidated as a consequence of her remarriage in 1953, the Court holding that since the possession must be a consequence of, and related to, the life estate which a Hindu widow has in her husband's property, it is only when such possession continues that her rights are enlarged under s. 14

1. The same view was taken in Bhuri Bai v. Champa Bai, A.I.R. 1968 Raj. 139, where his Lordship, Chhangani, J., pointed out at 145 that, while the principle embodied in s. 24 of the Act disentitling certain other widows from inheriting, points to the non-applicability of s. 2 of the Act of 1856 to a widow succeeding or acquiring absolute estate under the HSA, the omission of the intestate's widow in s. 24 cannot lend support to a contrary view.

2. Per Mahapatra, J., Rup Raut v. Basudeo Raut, A.I.R. 1962 Pat. 436, at 440.

3. A.I.R. 1960 M.P. 156.

of the 1956 Act. Hence as remarriage divests her of such estate, the reversioners would become entitled immediately on her remarriage, and the fact that they neglected to take action to dispossess her, would not enlarge the rights of the widow.[1]

This very satisfactory exposition of the extent of the operation of s. 14 has generally been favourably received,[2] so that we must regard with some reservation the dicta in Padala v. Mutchi.[3] After the widow's remarriage, the deceased husband's father brought a suit in or about April or May 1956, claiming that in accordance with the custom prevailing in the community to which the parties belonged, he was entitled to recover ornaments and jewels from the remarried widow. Naidu, J., however disagreed to hold that s. 5 of the HWRA[4] safeguards

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1. An essential requisite for this principle to prevail is that where such allegation is made, before the plea of remarriage can be regarded as established, there must be legal proof that the widow had in fact and in law contracted a valid second marriage; where such proof is lacking, s. 14 would have the effect of converting the limited estate estate to a full tenure.: Mst. Chabu v. Roma Kanta Rai, A.I.R. 1964 Ass. 106.

2. For similar rulings see Mst. Anarjia v. Tengari Kabar, A.I.R. 1962 Pat. 65; Rup Raut v. Basudeo Raut, A.I.R. 1962 Pat. 436; Setabai v. Ramdhani, A.I.R. 1966 Cal, 66, where the minor coparcener on attaining majority sought to set aside a partition suit which had dragged on since 1955, and the Court negatived the remarried widow's claim to institute a fresh suit on the basis that she had become "a stranger to the coparcenary" and as such had no right to fritter away joint-family funds in costly litigation; Sankar v. Ushabala, A.I.R. 1978 Cal. 525. In ruling against the widow who had remarried prior to the enactment of the HSA Maitra, J., held that after such remarriage, she continued to be in constructive possession without any title. What his Lordship meant, it is respectfully submitted, is that hers was a trespasser's possession for to connote constructive possession as such, is to militate against the legal construction of the term.

3. A.I.R. 1961 A.P. 55.

4. S. 5 of the HWRA, 1856, reads "(E)xcept as in the three preceding sections is provided, a widow shall not, by reason of her remarriage forfeit any property or any right to which she would otherwise be entitled; and every widow who has remarried shall have the same right of inheritance as she would have had, had such marriage been her first marriage."

and provides against the forfeiture of any such property, and any custom that contravenes its provisions must be struck down as invalid. Further, his Lordship held, the Explanation to s. 14 (1) converts all moveables in the possession of a female Hindu, and however acquired, as her absolute property, and to engraft upon that section a condition that on her remarriage the gift would be forfeited to the donor, is to nullify the operation of that section. It is however submitted, that excellent as the learned Judge's decision is, his line of reasoning requires careful reconsideration. In any objective assessment of the HSA, it must always be kept in mind that s. 14 is only partly retrospective, and can therefore have no application where the female is already divested, so that in the decision under discussion, the widow is saved from being divested not on the strength of the Explanation to s. 14 (1) alone, but because s. 5 of the HWRA had already exempted such moveables from forfeiture. This it is submitted, is a subtle distinction which his Lordship should have expounded more incisively.[1]

(ii) The Remarriage of the Widow in the Period 1956 Onwards

If the remarriage of the widow while she was yet a limited owner, worked a forfeiture of her estate so as to oust the applicability of s. 14 (1), in view of the provisions of ss. (4) and 14 of the HSA, and despite expressions of doubt to the contrary no less than by

1. In view of decisions such as these and in the light of the express provisions of ss. 4 and 14 of the HSA, the decision in Gurbachan Singh v. Khicher Singh A.I.R. 1971 P. & H. 240 cannot be construed as laying down the correct law. Despite her remarriage before 1956, the widow was in possession of her late husband's estate, and at her death in September 1956, it was held that whatever might have been the limitations earlier with regard to her title to the property, the widow became full owner with the coming into force of the HSA and succession to such estate would be regulated by s. 15 (1) (a) to the exclusion of her late husband's reversioners. Such a ruling, it is submitted, can have validity only if the widow had acquired prescriptive title of which incidently there is no mention in the judgment.

the Supreme Court,[1] the general consensus of judicial opinion has nevertheless — and it is submitted, rightly — been that the Act of 1856 stands abrogated to the extent of repugnancy with the provisions of the HSA, 1956.

The Orissa High Court[2] was faced with the contention of the judgment - debtors that in spite of the passing of a preliminary decree for declaration of title and possession of her deceased husband's estate, the widow's application for a final decree could not be entertained as a result of her subsequent remarriage. Decreeing in favour of the widow, Misra, J., was of the view that as the widow's title to the property was based on inheritance from her husband, the limited estate which she had thus acquired was converted to an absolute tenure under s. 14 (1) of the HSA, 1956. Since the specification for forfeiture under s. 2 of the HWRA, 1856, is the limited estate, both the provisions put together, his Lordship reasoned, led to the irrefutable conclusion that, where the limited estate is converted to an absolute one, and her remarriage is subsequent to the acquisition of that absolute interest, the remarrying widow could not be divested of the property as admittedly she was in possession of the same[3] on the date of the

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1. "This is a moot question and not free from doubt.": Per Fazl Ali, J., Kasturi Devi v. Deputy Director of Consolidation, A.I.R. 1976 S.C. 2595 at 2597. In view of our exposition of the law both traditional and statutory, and the consensus of judicial opinion in favour of such widow, such doubts must be held to be without foundation in view of the pronouncement in yet another Supreme Court decision to the effect that an estate once vested cannot be divested. See Punithavalli v. Ramalingam, A.I.R. 1970 S.C. 1730, at 1731.
2. Ballabha v. Jasodhara, I.L.R. (1965) Cut. 398.
3. The preliminary decree for partition being a confirmation of this possession. See below at 540 ff.

passing of the Act.[1]

(iii) The Position of the Widowed Daughter-in-Law

We have already seen that the remarriage of widows prior to the enactment of the HSA, 1956, has the effect of divesting them of their limited estate so as to oust the applicability of s. 14, and this applies equally to the widow of the intestate, the widow of the predeceased son, the widow of the predeceased son's predeceased son and the brother's widow. S. 24 additionally provides that the intestate's widow apart, all other categories of widows mentioned in the section are divested on their remarriage prior to the opening of succession. Necessarily therefore, where any such widow remarries after succession has already opened, the provisions of s. 2 of the HWRA, 1856, must be held to be in repugnance to the provisions of the HSA.

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1. The same view, that is, that the remarriage of a Hindu widow will not work a forfeiture of her rights, was taken in Mst. Bhuri Bai v. Mst. Champa Bai, A.I.R. 1968 Raj. 139, Chhangani, J., reinforcing his view by pointing out at 145 that, "(W)hen the widows specified in s. 24 do not forfeit the property vested in them on remarriage, it will be hardly proper to hold that the widow of the intestate himself should forfeit the property on remarriage even after she has become absolute owner." The Madras High Court after some slight expression of doubt arrived at the same conclusion to hold that, if under the old law the F.B. could rule in Ramaiya v. Mottaya, A.I.R. 1951 Mad. 954 (F.B.), that the widow's subsequent unchastity would not work a forfeiture of her limited estate, it must correspondingly follow that the intention of the HSA, whether it is deliberate or not, appears to be that a subsequent remarriage will not divest the widow of her absolute estate. On the same principle it was held in Keshri v. Harprasad, A.I.R. 1971 MP 129, that where the widow had acquired the property of her deceased second husband as an absolute owner, at her death in 1962 the devolution of such property would be governed by the provisions of s. 15 so as to entitle her son by her first marriage to succeed to the detriment of the reversioners of the late estate-holder. See also Pandurang v. Sindhu, A.I.R. 1971 Bom. 413; Chinnappavu v. Meenakshi, A.I.R. 1971 Mad, 453; Jagdish v. Mohammad Elahi, A.I.R. 1973 Pat. 170; Vallayammal v. Sivakami Ammal, (1974) 2 M.L.J.7 (N.O.C.); Sm Sankaribala v. Sm Asita, A.I.R. 1977 Cal. 289, where Sen, J., held that though the estate vested in the widow by way of inheritance

P.T.O.

In Annapurna v. Kalpana,[1] where the widowed daughter-in-law took the suit properties under s. 3 (1) of the HWRPA, 1937, and later remarried in 1958, the contention raised against her was that she stood divested of her limited estate on the basis of s. 2 of the Act of 1856. The Gauhati High Court however held that, on and from June 17, 1956, the widowed daughter-in-law having become the absolute owner of the suit land by virtue of s. 14, s. 2 of the HWRA would have no application in view of the provisions of s. 4 of the HSA.

The same contention was raised under similar circumstances in Sasanka v. Amiya,[2] and a like decision arrived at, the Calcutta High Court further elaborating that the provisions of s. 24 of the HSA make it clear that the widow must be related to the intestate as envisaged in the section and that she must not have remarried on the date succession opens. In this case the widow had inherited and possessed the property of her father-in-law in her share in limited interest as the widow of the predeceased son. Thereafter when she was remarried, admittedly long after the succession had opened and the HSA come into operation, she could not be held to have lost her right, title and interest as absolute owner thereof.

Undoubtedly correct as these dicta are, it is submitted that s. 24 has nevertheless restricted applicability to cases governed by the Dāyabhāga law, for where she takes the same share as her deceased husband under s. 3 (2) of the HWRPA, 1937, the Mitākṣarā system precludes her from taking as heir to her father-in-law. An assessment

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would not be divested as a consequence of her remarriage after 1956, in his Lordship's view the gifted property would continue as a limited tenure for the widow to hold for her lifetime only, under the terms of the gift deed. See below at 646-7; Harbati v. Jasodhara, A.I.R. 1977 Or. 142; Chando Mahtain v. Khublal Mahto, A.I.R. 1983 Pat. 33.

1. A.I.R. 1972 Gau. 107.
2. (1973) 73 C.W.N. 1011.

of s. 24 would not be complete however, without a reference to the incomprehensible omission of the father's widow from the list of (of Schedule, Class II, (VI)) widows disqualified on remarriage. One can at best attribute this to an oversight on the part of the Legislature, for in the interests of justice and equity there seems no reason why there should be this discrimination in favour of the father's widow, and it is submitted that, when Parliament considers such amendments in the HSA as must necessarily be made, this omission be rectified, and she placed with the other three categories of widows who stand divested on remarriage.

(b) The Position of the Mother

We must now turn our attention to the position of the mother and the effect of s. 14 at her remarriage. It is now well settled that under the old law, a Hindu widow who had inherited property from her son, forfeited by remarriage her interest in such property[1] though she was not divested of any property the son had himself acquired.[2] On the other hand a remarried Hindu widow was entitled after her second remarriage to succeed to the property of her son by her first husband on the principle that she was no longer the widow of the man whose son's estate was in the first place in question and through whom her rights are traced.[3] In 1956 with the enactment of the HSA, for all that certain radical changes were effected, an examination of judicial decisions will help us assess how far its provisions have impinged upon these basic and fundamental rules of Hindu law.

In Ramchandra v. Sakhram,[4] the husband having died in 1944, and the son a few months later, the property devolved on the mother who

1. Vithu v. Govinda, I.L.R. (1898) 22 Bom. 321 (F.B.).

2. Thayamma v. Giriyamma, A.I.R. 1960 Mys. 176.

3. Akora v. Boreani, (1868) 2 Beng. L.R. 199 (F.B.); Basappa v. Raghuva, I.L.R. (1905) Bom. 91; Faguniswari v. Dhum, A.I.R. 1951 Cal. 269; Ramaswami v. Thivar, A.I.R. 1972 Mad. 314.

4. A.I.R. 1958 Bom. 244.

then made a gift of it to her deceased husband's sister, and shortly thereafter contracted remarriage in 1945. To the plea made on behalf of the widow's alienee that such remarriage did not have the effect of divesting her, the learned Judge, Shah, J., held on the authority of Vithu v. Gobinda[1] that in accordance with the rule of Hindu law that, where she contracts remarriage after coming into inheritance from her son, the property thus acquired must be traced to the deceased husband as a consequence of which she is divested under the provisions of s. 2 of the HWRA. In such circumstances, his Lordship decreed

> "(U)nder the rules of Hindu law and Act XV of 1856 her interest in her husband's property stood determined; and there is nothing in the HSA which revives an interest already determined."[2]

In effect therefore s. 4 of the HSA would have no application,[3] and as possession is in terms made a postulate to the enlargement of her estate, there is nothing in s. 14 which revives the estate of a limited owner determined before the commencement of the Act by death, actual or civil.

Praiseworthy as the dicta is for its clear exposition of the interaction of the classical Hindu law, the Act of 1856 and the statute of 1956, it is submitted that whatever the defendants might have pleaded, the true position was that the widow was divested of her estate not merely as a mother, but also in her capacity as widow, for in 1944 the Act of 1937 was still operative, under which she had acquired the same interest as her deceased husband in the suit properties — a point of law to which the trial Court drew attention,

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1. I.L.R. (1898) 22 Bom. 321 (F.B.).
2. Ramchandra's case, cited above, at 246.
3. The Court further clarifying that any text, rule or interpretation of Hindu law as also laws in force immediately before the commencement of the HSA, stand pro tanto repealed by s. 4, but only to the extent of repugnancy with the new Act.

but which on appeal, the Bombay High Court overlooked altogether.

The Madhya Pradesh High Court was faced with a quite different situation in Mantorabai v. Paretanbai[1], where the widow having remarried lost her rights to the property left by her deceased husband, the question for decision was whether she was entitled to any share of the property when succession opened in 1960 at the death of her son, the sole surviving coparcener. His Lordship Surajbhan, J., decreeing in her favour, drew attention to s. 24 of the HSA to hold that the disqualification of remarriage is confined to the cases of the three female heirs mentioned therein who are entitled to succeed under the Act as widows or relatives of the intestate. The mother on the other hand, does not succeed as the widow of the father but in her own right as one of the simultaneous heirs mentioned in class I of the Schedule, so that in this case notwithstanding her remarriage, she was entitled to take absolutely under s. 14 along with the son's widow.[2]

This, it is submitted, is an eminently equitable reading of the combined intent of the old law and the effect of the various relevant sections of the HSA, which from the purely juridical point of view violates no principle of justice or of impartiality, and the Supreme Court in holding the same view further propounded that where the widow remarried in 1963 and the son died subsequently in 1970, the principle which disqualifies a widow, that is, that on her remarriage she relinquishes her link with her husband and enters a new family, cannot be the basis of divesting of the mother, and as such, her remarriage

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1. A.I.R. 1972 M.P. 145.

2. See also Gurdit Singh v. Darshan Singh, A.I.R. 1973 P. & H. 362 where the relationship of mother and son was similarly stressed to hold that notwithstanding her remarriage many years ago, the widow continued to be the mother of her son, and what she got at his death in 1959, was an absolute estate with unrestricted powers under the law, to transfer, waste, neglect or abandon the land, and no reversioner or heir had the right to object to the manner in which she managed or mismanaged the property.

is no bar to her succeeding as heir to her son.[1]

(3) The Effect of the Doctrine of "Relation Back" After the Coming into Force of the HSA, 1956, and the HAMA, 1956

(a) "Relation Back" in the Traditional Law

The foundation of the doctrine of adoption according to traditional Hindu principles is the duty which every Hindu owes to his ancestors to provide for the continuation of the line and to ensure spiritual salvation after his death by the periodic offerings of rice oblations and libations of water to the manes.[2] For the reason that women were considered to have no spiritual needs, the widow had no independent power to adopt; she could adopt only to her husband, never to herself, and that by virtue of the express or implied authority of the husband.

An adoption which is valid in all respects has the effect of transferring the adopted boy from his natural family into his adoptive family; it confers on the adoptee the same privileges and rights in the family of his adoption as an aurasa son, and these relate back to the date of death of the adoptive father.[3]

As a consequence of this doctrine of "relation back," that is

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1. Smt. Kasturi Devi v. Deputy Director of Consolidation, A.I.R. 1976 S.C. 2595.

2. Both the P.C. and the S.C. are however agreed that the substitution of a son of the deceased for spiritual reasons is the essence of adoption, and the consequent devolution of property, a mere accessory to it.: Amarendra Singh v. Sanatan Singh, A.I.R. 1933 P.C. 155, at 158; Chandrasekara v. Kulandaivelu, A.I.R. 1963 S.C. 185, at 193.

3. See the judgment of Ameer Ali, J., in Pratapsing v. Agarsinghji, A.I.R. 1918 P.C. 192, where the learned Judge held that an adopted son and a son of the body standing exactly in the same position in so far as continuity of line is concerned, an adoption has retrospective effect. The later decision of the P.C. in Amarendra Mansingh v. Sanatan Singh, A.I.R. 1933 P.C. 155 is generally considered as reinforcing the view that property vested in another is divested by the application of the doctrine of "relation back." See also Srinivas Krishnarao v. Narayan Devji, A.I.R. 1954 S.C. 379.

to say, of the fiction that the adoption — and the rights it confers — date back to the death of the adoptive father, the vesting of the property in others in the interval between the period of the death of the father and the adoption is treated as provisional, and the emergence of the adopted son with a superior title divests the estate which had in the meanwhile vested in them.

This retrospective effect given to adoption, caused not a few problems as can well be imagined though not in Dāyabhāga law since the adoption by the widow merely had the effect of substituting an heir, her own nominee, for herself in the property owned by the deceased husband. Meanwhile at Mitākṣarā law, grave difficulties were caused, for necessarily relation back had the effect of disturbing titles to property, both the separate property of the deceased husband, and his interest in joint-family property which, at least till 1937, would not be within her control. Logic was added to theory: "relation back" was taken to its logical conclusion. The inconvenience, not to say injustice of this could not go on indefinitely,[1] and the Supreme Court determined at last in Srinivas v. Narayan[2] that the claim of the adopted son to divest a vested estate rests on a legal fiction and the legal fiction must not be extended so as to lead to unjust results, and the fiction of "relation back" was trimmed to perform precisely the purpose for which it was intended, namely the continuation of the santāna and the family of the deceased adoptive father.[3]

The efforts of the Supreme Court did not however remedy the mischief: it merely contained it; and the basic notion that a son adopted by the widow is the son of her husband for all purposes remained

1. Derrett, Critique, op. cit., at 125.
2. A.I.R. 1954 S.C. 379.
3. Derrett, IMHL, op. cit., at 125. For a comprehensive synopsis of the S.C. dicta see ibid., at 125-8.

unimpaired.

(b) The Effect of s. 14 (1) on the Doctrine of "Relation Back" Prior to the Passing of the HAMA, 1956

Necessarily confined as our study must be to the effects of "relation back" on the widow's entitlements after the enactment of the HSA, the first question that we are confronted with is whether, prior to the passing of the HAMA, the doctrine would continue to operate so as to divest the widow notwithstanding the absoluteness of her tenure under s. 14 (1) of the HSA.

The principle that we must stress is that where the adoption was made before the HAMA but after the HSA had come into force there can be no doubt but that the adoption does not work a defeasance of the absolute estate of the widow. So the Courts have consistently held,[1] and in Yamunabai v. Ram Maharaj,[2] where pending the regularisation of the adoption, the adoptive mother died, and the property that passed to the co-widow was converted to a full estate as a result of the HSA coming into force in the meanwhile, it was held that a sanction ex post facto to an adoption may have the effect of divesting property vested in another person by inheritance from the sole surviving coparcener or a limited owner, but that incident of the estate does not justify the imposition of a limitation restricting the connotation of the expression "full owner" used in s. 14 of the HSA. Full

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1. Madras held otherwise in Ramalingam v. Punithavalli Ammal, (1964) 2 M.L.J. 571 to lay down that adoption at Anglo-Hindu law which enables the adopted son to divest property belonging to his father no matter in whose hands it might have passed in the interval between the father's death and the adoption, had not been abolished by anything in the HSA, 1956, which alone fell to be discussed. On appeal however, the S.C. overruled the Madras decision in Punithavalli Ammal v. Ramalingam, A.I.R. 1970 S.C. 1730, discussed below.

2. A.I.R. 1960 Bom. 463.

ownership as contemplated by that section is not made by the Legislature subject to any incident of divesting by adoption.[1]

The Supreme Court held likewise in Punithavalli Ammal v. Ramalingam[2] and in a brief but remarkably lucid exposition of the law confirmed the viewpoint of the Bombay High Court. The facts briefly are that on the death of a Hindu governed by the Mitākṣarā school of law in 1937, his widow inherited the property and was possessed of it in 1956 which thereupon converted to an absolute estate under s. 14 (1) of the HSA. On July 13, 1956, that is to say, before the coming into effect of the HAMA, she adopted a son, and soon thereafter made a settlement of the property on one of her daughters, and the question for decision was whether the matter dealt with under s. 14 (1) of the HSA impinges on the rule of adoption relating back to the date of death of the adoptive father. Hegde, J., speaking on behalf of their Lordships, ruled that

> "(F)rom a plain reading of s. 14 (1), it is clear that the estate taken by a Hindu female under that provision is an absolute one and not defeasible under any circumstances. The ambit of that estate cannot be cut by any text, rule or interpretation of Hindu law. ... The fiction mentioned earlier (that of "relation back"), is abrogated to the extent it conflicts with the rights conferred on a Hindu female under s. 14 (1) of the Act." 3

The actual rationale in Punithavalli's case[4] is simply this, that even before the HAMA but after the HSA, a widow's adoption of a

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1. Followed in Kisan v. Hari, A.I.R. 1974 Bom. 65, where Chandurkar, J., approving the decision in Yamunabai's case, above, held that the son adopted by the widow prior to the HAMA, could not question the alienations effected by the widow in her capacity of full owner under s. 14 (1) of the HSA, his Lordship further maintaining at 67 that, "(t)his principle has been given effect in s. 12 of the HAMA... where... the Legislature has clearly provided in clause (c) of the proviso of this section that the adopted child shall not divest any person of any estate which vested in him or her before the adoption. See also Banabai v. Wasudeo, A.I.R. 1979 Bom. 181.
2. A.I.R. 1970 S.C. 1730.
3. Ibid, at 1731.
4. A.I.R. 1970 S.C. 1730.

son could not divest her of her absolute estate made absolute by s. 14 (1) of the HSA, not because of s12 proviso (c) of the HAMA, but simply because an absolute estate could not be divested by an adoption if it had become absolute in the terms laid down in s. 14 (1).[1]

(c) The Persistence of "Relation Back" After the Enactment of the HAMA, 1956

But what of adoptions made after the coming into force of the HAMA? We have already seen that the subject gave rise to endless difficulties. Everyone was agreed that the chaos caused in respect of property rights as a result of divesting subsequent to the adoption was a disgrace, "a confounded nuisance"[2] and should be stopped. Then the HAMA by s. 12 proviso (c) appeared to remedy the mischief by bold words:

> "(t)he adopted child shall not divest any person of any estate which vested in him or her before the adoption."

However the remainder of the statute did not abolish the doctrine of "relation back" in so many words; it allowed the adopted child to acquire ties in the family of his adoption in substitution for those which he had obtained by birth in the family of his birth; and it left under the plain terms of s. 4 (identical in all aspects to s. 4 of the HSA, 1956), all the previous law in force which was not contrary to any provision in the statute itself. The question remained how far s. 12 proviso (c) had abolished the doctrine of "relation back" since it evidently did not wipe it totally away.[3]

What happens when a widow adopts a son according to Anglo-Hindu

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1. Derrett, "Adoption and Relation Back ...": op. cit., at 34.
2. Ibid., at 31. In Baisnab v. Parma, A.I.R. 1964 Or. 156, the validity of adoption having been established in 1957, the reversionary claim was held abrogated. It is however submitted that if the adoption had been effected in the intervening period between the death of the husband in 1956 and the recognition of the adoption in 1957, (a vital point which is omitted altogether in the set of given facts) the reversioner would have no claim, not because of the adoption as the Court held, but by virtue of s. 14 (1).
3. Derrett, "Adoption and Relation Back...,": op. cit., at 31.

law and conformably with the HAMA, 1956, and thereupon the adopted son claims to represent the widow's deceased husband in respect of the latter's separate property and in respect of his interest in Mitākṣarā joint-family property? Judicial decisions indicate that the judiciary was severely puzzled. On the one hand it was thought that the adoption made after the Act had come into effect could give the adoptee no rights at all; while on the other hand it was felt that he was a member of his adoptive father's family and could participate in its property.

In Hanumantha Rao v. Hanumayya,[1] where the estate had passed to the sole surviving coparcener in 1936 long before the widow's adoption in 1957, their Lordships held that the language of clause (c) of the proviso as also the expression "with effect from the date of adoption" in s. 12 had the effect of abrogating the legal fiction of "relation back" in the traditional law of adoption, so that the rights of the adoptee must be determined with effect from the date of adoption. It is clear that the Andhra Judges had based their reasoning on the entirely unfounded premise that the property had "vested" in the sole surviving coparcener, for it is respectfully submitted, the sole surviving coparcener is not a vestee of the property so long as a widow survives with power to adopt. Proviso (c) of s. 12 can thus have no relevance where potentially the coparcenary survives with all the incidents appertaining thereto.[2]

That "relation back" survives despite the effort of the Legislature to do away with it, soon became evident from the Supreme Court decision in Sawan Ram v. Kalawanti.[3] The widow as limited owner alienated

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1. (1964) 1 An.W.R. 156.
2. See below at 518 f.n. 3.
3. A.I.R. 1967 S.C. 1761.

property by way of mortgage and sale, and on the next presumptive reversioner challenging the alienations as being without legal necessity and therefore not binding on him, the suit was decreed. During pendency of the appeal before the High Court the widow adopted a son in 1959. In spite of the adoption the appeal was dismissed, and the position remained that the reversioner was entitled to the alienated property after the death of the widow. At her death soon after, the appellant brought a suit for possession of the property. It was argued before their Lordships that in view of the provisions of ss. 12, 13[1] and 14,[2] the HAMA gives the female Hindu an independent right of adoption, and where a widow adopts a son, he becomes the adopted son of the widow but not necessarily the son of the deceased husband. The learned Judges however, unimpressed by such pleadings drew attention to the provisions of s. 5 (1) of the HAMA to the effect that

> "(N)o 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 adoptions made in contravention of the said provisions shall be void."

In their view the significance of the little word "to" could not be ignored, and opting for cultural continuity held that the widow not only adopts to herself but also to[3] her husband who is dead, or has completely and finally renounced the world or has been declared to be of unsound mind, and this would tie in neatly with s. 12 which specifies

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1. S. 13 of the HAMA lays down : "Subject to any agreement to the contrary, an adoption does not deprive the adoptive father or mother of the power to dispose of his or her property by transfer inter vivos or by will.
2. S. 14 of the HAMA specifies: "(1) Where a Hindu who has a wife living adopts a child, she shall be deemed to be the adoptive mother (2) ... (3) Where the adoption has been made with the consent of more than one wife, the seniormost in marriage among them shall be deemed to be the adoptive mother and the others to be step-mothers."
3. Emphasis mine.

that the rights that the adopted son loses in the family of his birth are replaced by the rights created by the adoption in the adoptive family, that is the widow's family which is her deceased husband's family.[1]

The importance of this decision lies for us in that it effectively reprieves the doctrine of relation back to establish, not that the improperly alienated property is recoverable, for that in any case is established, but that by the same doctrine the adopted son is entitled to dislodge the presumptive reversioner of the right to recover such property, the Supreme Court holding that the adopted son being the next heir of the deceased Hindu, he was entitled to the property as the nearest reversioner.[2]

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1. That this reprieval of "relation back" has brought grief to many a veteran scholar of the Hindu law of adoption is evident from the spate of articles in criticism of the Supreme Court's decision in Sawan Ram's case, A.I.R. 1967 S.C. 1761. Instances of such hostile reaction are: G.K. Dabke, "Divesting on Adoption," (1968) 70 Bom. L.R. (J)., at 143-9; P. Diwan, "Adoption by a Hindu Widow: Adopted Son's Relationship with the Deceased Husband," 21 Law Review, (Univ. of Punjab), April 1969, at i-xviii; G.K. Dabke, "That Little Word "To" in s. 5 (1) of the HAMA, 1956," (1969) 71 Bom. L.R. (J)., at 13-4; B.N. Sampath, "The Doctrine of Relation Back: An Unfortunate Revival, (1970) 2 S.C.J. (J)., at 1-10; J.D.M. Derrett too gives only guarded support. He has this to say: "Hence relation back is saved under the Act by that little word "to." Had it been up to the Supreme Court to determine what that word meant the present writer would have advised, cautiously, against giving it that sense: but the Supreme Court has performed its function, and there will be no going back..."; Adoption in the Joint Hindu Family: A Recent Supreme Court Decision and Its Limits," (1968) 70 Bom. L.R. (J)., 51-5, at 55. See also H. Gujrathi, "Adoption by a Widow After 21st December, 1956," A.I.R. 1966 Journl, 19-20, which merely attacks the decision in Ankush Narayan v. Janabai, A.I.R. 1966 Bom. 174 (discussed below), for its upholding of the principle of "relation back"; but the effect of s. 14 (1) of the HSA — of supreme importance in the set of given facts, is ignored altogether.

2. That the right of the presumptive reversioner is a mere spes successionis, and a decree in his favour against improperly alienated property does not thereby have the effect of vesting the land in him, was the basis of the decision in Dunni Chand v. Paras Ram, A.I.R. 1970 Del. 202, where Khanna, J., held that under such circumstances, the adopted son as preferential heir was entitled to the estate of his deceased adoptive father. On a similar set of facts, it was

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That despite the HAMA, "relation back" did indeed persist, was reiterated by the Supreme Court in Smt. Sitabai v. Ramchandra.[1] Where on the death in 1930, of one of two brothers who constituted a joint Hindu family, an illegitimate son was born to the widow as a result of a liaison with the surviving brother. At the latter's death in 1958, the son adopted by the widow shortly afterwards was held entitled to take as coparcener by survivorship from the adoptive father thereby ousting the illegitimate son.[2]

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held in Arumugha Udayar v. Valliammal, A.I.R. 1969 Mad. 72, at 81 that, "(I)t is too much to argue that this fiction of affiliation to the deceased husband has been kept alive for the limited classes of cases in which the estate of the widow did not become absolute by reason of the widow not being in possession of the property within the meaning of s. 14 of the HSA." However we must regard this decision as expunged from our list of authorities now that the S.C. has established without doubt that "this fiction of affiliation" does indeed live on. Similarly what vests in the alienee as a result of alienations effected by the widow as a limited owner, is only a life estate, and as a consequence of his new status in the adoptive family, the adopted son, despite proviso (c) of s. 12, is entitled to challenge all such alienations. So it was held in Hausabai v. Jijabai, A.I.R. 1972 Bom. 98; Kiran Bala v. Ashok Kumar, A.I.R. 1974 Pat. 291.

1. A.I.R. 1970 S.C. 343.

2. Followed in Bai Chanchal v. Manishankar, (1971) 12 Guj. L.R. 576, where on the principles established in Smt. Sitabai's case, cited above, their Lordships were of the view that the ancestral property held by the sole surviving coparcener after the death of his brother in 1923, continued to be joint-family property in the presence of the deceased's widow with a right of maintenance and residence. Thus by reason of her adoption in 1958, the adopted son became a coparcener entitled to take by survivorship and so participate in a partition of the joint-family property, and the question of divesting the sole surviving coparcener could not arise because exclusive and absolute title to it had not vested in him by devolution. For an appreciative assessment of this case see J.D.M. Derrett, "Adoption: The Whole Hog," (1972) 74 Bom. L.R. (J)., 97-9. This principle is in direct conflict to the declaration of their Lordships obiter in Sawan Ram's case, A.I.R. 1967 S.C. 1761, which postulates that where a coparcenary unit is reduced to a single coparcener, the joint property vests in him, and he holds a fixed interest incapable of any fluctuation or disturbance by a subsequent adoption by the widow of the deceased coparcener. That Sitabai's case, A.I.R. 1970 S.C. 343, is undoubtedly right, based as it is upon more convincing reasoning and upon the logical extension of the basic concepts governing a Hindu undivided family, is given greater credence in view of yet another S.C. ruling in Gowli Buddanna v. Commissioner of Income Tax, Mysore, A.I.R. 1960 S.C. 1523, which held that the property of the joint-family did not

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(d) The Effect of S. 14 (1) on "Relation Back" After the Enactment of the HAMA, 1956

The significance of the foregoing, which might at first sight seem a disgression, is to explore the question whether since the pernicious principle of "relation back" and its disastrous consequences are indeed a reality, despite vociferous and vehement protests,[1] what may its effect be on the estate that the widow takes under s. 14 (1).

In Ankush v. Janabai,[2] at the death of the senior widow in 1948, the junior widow came into possession of the entire estate of her husband who had died in 1917. In 1957 she adopted a son who thereupon sued her for possession of the estate. Reliance was placed on her behalf on s. 12 and its proviso (c) to claim that when an adoption is made under the new system, the widow does not divest herself, for the son that she obtains to herself has no relationship whatever with her deceased husband's family. Their Lordships took the view that s. 12 did indeed apply, but that the most important part of the section was the last phrase before the provisos commenced. On a clear reading

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cease to belong to the joint-family merely because the family is represented by a single coparcener who possesses rights which an absolute owner of property may possess. In view of this, the remark obiter of Hegde, J., in Punithavalli Ammal v. Ramalingam, A.I.R. 1970 S.C. 1730, at 1731, that "(t)he alienation effected by a sole surviving male (sic) coparcener can be successfully challenged by a person adopted subsequent to the alienation," must be upheld despite expressions of doubt to the contrary. See Derrett, "Adoption and Relation Back..." op. cit., at 34-5. See also Subhash Misir v. Thagai Misir, A.I.R. 1967 All. 148, where the widow-heiress died pending litigation for recovery of property from her deceased husband's collateral who purported to be in exclusive possession, and it was held that the son adopted by her in 1961 must be deemed to be the child of her husband as well and therefore entitled to the property.

1. Supra, at 515, f.n. 1.

2. A.I.R. 1966 Bom. 174.

therefore of the latter section and sub-s. VI of s. 11,[1] the effect of adoption under the Act is that when either of two spouses adopts, both get a child and all the ties of the child in the family of his or her birth become completely severed to be replaced by those created by the adoption in the adoptive family, as the expressions "family of its adoption" and "adoptive family" in the two sections would indicate, and this would be true for all different purposes. As a consequence, the adopted son was held entitled to divest the adopting mother. Implicit in their Lordships' judgment is a concern that adoption should have its entire and proper effect unhampered by anything that the HAMA might say unless it said it in plain words,[2] but, it is submitted, the intendment of the HAMA could not be clearer: it says in so many words that an estate once vested cannot be divested as a consequence of subsequent adoption. Where therefore the adoptive mother obtains property under s. 14 (1) of the HSA, she has an absolute estate already, which (with the special and only apparent exception of the estate created under the Act of 1937 and still capable of fluctuation) vests: she is not divested by the adoption and if she wants to make provision for the child she has adopted she must do it by settlement or will.[3]

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1. Sub-s. VI of s. 11 lays down: "The child to be adopted must be actually given and taken in adoption... with intent to transfer the child from the family of its birth to the family of its adoption."

2. J.D.M. Derrett, "Adoption, Succession and the Present State of the Hindu Law," (1966) 68 Bom. L.R. (J)., 41-8 at 44.

3. Ibid., at 45. Incorrect as the decision in Hanumantha Rao's case, (1964) 1 An.W.R. 156 is, we must nevertheless note here the correctness of the obiter dicta at 159, that when a widow now adopts, she is not divested by the adoption. In Rukmani Bai v. Commr. of Wealth Tax, Bihar and Orissa, A.I.R. 1964 Or. 274 at 279, the same view is evident but on the mistaken premises and a denial of relation back as "from the date of adoption he could only be her next heir and cannot divest her of the property that has already vested in her. In Smt. Sitabai's case, A.I.R. 1970 S.C. 343, the S.C. gave specific approval to Ankush Narayan's case, A.I.R. 1966 Bom., 173, and Derrett correctly doubts in his Critique, op. cit., at 144 that "... since in that case the Bombay High Court actually allowed the adopted son to divest his adoptive mother's inheritance which vested in her absolutely under s. 14 of the HSA, (and) unless we are to imagine a new doctrine of 'provisional vesting', this would appear to be flatly contrary to the statute."

That the question of "relation back" under the scheme of the "Hindu Code" was by no means settled soon became evident in Banabai v. Wasudeo,[1] where the ratio was simply and firmly this: The fiction of relation back as a result of the adoption has been done away with by s. 12 of the HAMA.[2] Briefly the facts were that a Hindu widow's alienation of property in 1960 was challenged by the son she had adopted in 1959 shortly after her husband's death in 1958, on the ground that as a consequence of the adoption he had become a member of the deceased husband's family and had acquired the status and rights of a natural born son in it. His Lordship, Tulpule, J., however held that s. 12 is clearly to the effect that the adopted son becomes a member of the adoptive family only from the date of adoption, and as a result the status and rights which accrue to him are controlled by, and subject to his incapacity to divest any person of an estate which had already vested in him under the clear terms of proviso (c) to s. 12. Thus as her late husband's estate had vested absolutely in her under the provisions of the HSA, the widow could not be held to have lost her ownership of the property as a consequence of a subsequent adoption by her. Neither could an ante-adoption agreement the terms of which merely spelt out the legal consequences of the adoption, i.e. that the adopted son would get all the rights of a natural born son to the widow and her deceased husband, be regarded as having the effect of abating the widow's full ownership of the property, for s. 13[3] makes it abundantly clear that unless there is a specific agreement imposing restrictions, the right or power to transfer is not affected by the adoption. Correctly

1. A.I.R. 1979 Bom. 181.
2. Ibid, at 187.
3. S. 13 lays down that, "(S)ubject to any agreement to the contrary, an adoption does not deprive the adoptive father or mother of the power to dispose of his or her property by transfer inter vivos or by will.

decided on fact, the judgment, it is submitted, must nevertheless be subject to criticism, for nowhere does the learned Judge state the correct position, i.e. that "relation back" is abrogated only to the extent it clashes with the provisons of s. 14 (1) of the HSA. In fact the conclusive pronouncement of its extinction apart, implicit in the obiter dicta the same view is apparent. In considering obiter, the rights of the natural born son in the joint-family property after the HSA, his Lordship rightly explains that a notional partition would be deemed to have been effected between the deceased coparcener and his sons and widow just prior to his death and the shares going by succession under s. 8 worked out. But, maintains the learned Judge, the question is irrelevant, for shorn of the fiction of "relation back", the adopted son's rights in the property would spring into existence only from the date of his adoption. That this interpretation is untenable, that "relation back" survives where property has not vested absolutely, we have already seen; that it lives on to affect the interest in joint-family property even after the HSA — a subtlety which escaped his Lordship entirely — is brought to our view when it is explained that

> "(A)fter 1956 the interest in joint-family property will pass by testamentary or intestate succession in every case, because the presence of the widow (who adopts) makes this certain (see s. 6 of the HSA). But the share that passes by succession must be established... by making a calculation to find out what proportion of the joint-family property would have fallen to the deceased if there had been a distribution of the property itself by metes and bounds immediately before his death. Now since relation back has been reprieved, our adopted son must be understood as alive at the moment of the adoptive father's death. Thus there are three people to be considered, the father himself, his widow (the adoptive mother-to-be) and the (adopted son): hence the proportion that passes to the heirs is one-third (see Rangubai's case), 1

1. Derrett, "Adoption in the Joint Hindu Family...," op. cit., at 54-5. In Rangubai v. Laxman, A.I.R. 1966 Bom. 169, (followed in Ananda v. Haribandhu, A.I.R. 1967 Or. 194), where the coparcener died leaving

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and this one-third of the father's share does not vest in anybody but passes by succession to be shared equally by the heirs mentioned in class I of the Schedule thus entitling the adopted son to take his share of the undivided joint-family property, together with his birth-right in respect of one-third of that estate.[1] However, that "relation back" in regard to joint-family property is valid only where in the presence of heirs other than the widow a notional partition is contemplated, is obvious when we consider that where the widow is the sole heir, the property vests absolutely in her under s. 14 (1), and of it she cannot be divested by a subsequent adoption.

That the question continued to agitate judicial minds is again evident in Hirabai v. Babu Manika.[2] Long after the death of the sole surviving coparcener prior to the passing of the HWRPA, 1937, the widow, his sole heir, adopted a son in 1962, and once again the question for determination was whether the adopted son had acquired any interest in the property of which the widow had become full owner under s. 14 (1) of the HSA, so as to challenge the alienation effected by her after his adoption. In the view of their Lordships, Masodkar and Rele, JJ.,

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a widow and an adopted son, the widow instituted a suit claiming a half share in the property, i.e. a one-third share on the basis of a notional partition as envisaged in Explanation I to s. 6 of the HSA, and one-half of the one-third on succession to her husband's share. Patel, J., held that under the Explanation there is not merely a notional partition but a partition in fact and in substance, and as such the widow's claim must be upheld so as to entitle her not only to her share on inheritance but also to her share on partition, both of which must be separated and given to her. On the alternative basis the widow's entitlement would have only been to a one-sixth share, the son getting two-thirds by survivorship and one-sixth by succession out of the one-third undivided interest along with his adoptive mother. For a critical assessment of the ratio in this decision see S. Manohar, "Rangubai Lalji v. Laxman Lalji and s. 6 of the HSA, 1956," (1966) 68 Bom. L.R. (J), 60-2; Derrett, "Adoption, Succession...," op. cit., at 46-8.

1. Derrett, "Adoption in the Joint Hindu Family:...," op. cit., at 54.
2. A.I.R. 1980 Bom. 315.

under the express terms of s. 12 of the HAMA, the fiction of "relation back" had been done away with to be replaced by what they call "prospective furthering," that is to say, that with effect from the date of adoption, the son adopted by the widow must be deemed to be a member of the deceased husband's family as well, entitled to similar rights in the property as a natural child, subject however to proviso (c) of s. 12 so as not to divest other members of the family of the estate vested in them. However, as the nature of the property continues to be joint-family property despite the full ownership of the widow, the adopted son gets title as if by birth on the date of the adoption, and by virtue of prospective-furthering, the rights and privileges thereto would get annexed to whatever remains of the property. In short as the adopted child gets interest in the joint-family property from the date of his adoption, he is entitled to question alienations made by the widow in that part of it which vests in him by reason of his civil birth as a coparcener; and as in this case, the adoptive mother had validly surrendered her interest in his favour, he was held entitled to divest the alienee from her. Its excruciating tortuousness and verbosity apart, it soon became evident to those involved in the dramas of the Hindu law of adoption that the judgment, if left unscotched, was likely to create further conundrums in an already complicated state of law, and criticisms of it were not slow in coming.[1] In the first place, that "relation back" can have no application in the present case, we are all agreed and there can be no quarrel with that; but to hold as the

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1. For an incisive critical analysis of the case see J.D.M. Derrett, "A Bombay Experiment in the Law of Adoption," (1981) 2 M.L.J. (J), 1-3; see also Kesharbai v. The State of Maharashtra, A.I.R. 1981 Bom. 115 which mercifully overrules this decision.

learned judges do that it is abrogated under s. 12, is an altogether untenable proposition as we have already seen. Mischievous as it certainly is, it nevertheless survives, so the highest judicial authority has held, and so very many High Court cases including Bombay cases acknowledged. We are then told that the widow possessed full proprietary rights in the estate under s. 14 (1) but that what she held was joint-family property and the adopted son, from the date of adoption, is co-owner with the mother to the extent of a moiety, an altogether paradoxical situation, it is submitted. The misunderstanding that property in the hands of the widow, living joint-family style, with no surviving coparcener is still joint-family property is dispelled when we consider that, the Hindu law proposition that property does not cease to be joint-family property so long as a widow survives capable of adoption is true only when a coparcener, formerly joint with her husband survives. Then the adoption recreates a joint-family, or rather a coparcenary,[1] so that partition and back-accounting can occur.[2] Such property is the property of a"Hindu undivided family" for tax purposes, and where the widow obtains it under s. 14 (1) her absolute title in it cannot be impugned. Finally, the flimsy evidence of surrender in favour of the adopted son and upheld by the learned Judges,

1. Derrett, "A Bombay Experiment...," op. cit., at 2.

2. Derrett at ibid, vindicates this view by drawing our attention to the decision in Gurupadappa v. Karishiddappa, A.I.R. 1954 Bom. 318, to the effect that the dattaka is entitled to cause the alienation of joint-family property that would not have been binding upon him, made by the sharers during the period when an adoption to his adoptive father might conceivably have been anticipated, to be set off in South India (including the former Bombay districts of Mysore and some districts of Orissa State, but excluding pre-1956 Mysore), against the share of the alienors respectively, so that he might take his share as far as possible free of non-binding alienations. See also Kristappa v. Gopal, A.I.R. 1957 Bom. 214 where the reopening of partition was held to be a simple case of doing equities in order that the property should be redivided on a fair and equitable basis.

must come in for close scrutiny. Undoubtedly under the traditional law a widow could surrender orally to a reversioner, but once her limited tenure is converted to an absolute one under s. 14 (1), reversionary rights are pro tanto extinguished,[1] and the allegation that the adopted son's rights emanated from such surrender must be rejected out of hand.[2]

However matters were put in correct perspective again by the Full Bench decision of the Bombay High Court in Kesharbai v. The State of Maharashtra.[3] In an effort to avoid the consequences of holding surplus land under the amended Maharashtra Agricultural Lands (Ceiling on Holdings) Act, which came into retrospective effect from 1970, the widow claimed that the son she had adopted in 1964 was entitled to a one-half share in the property of her husband who had died in 1934. In determing the question as to whether a subsequent adoption would have any repercussions on the full ownership conferred upon a Hindu female under s. 14 (1) of the HSA, their Lordships held that as the ownership contemplated in the HSA would have all the attributes of full ownership as is normally understood in law, and comparable in many respects to the self-acquired property of a Hindu male over which the adopted son could claim no rights, the "full ownership" contemplated by s. 14 of the HSA is similarly not made by the Legislature subject to any incident of divesting on adoption. In a situation therefore, where the only person surviving was a widow who becomes full owner of the property under the HSA and who thereafter adopts a son, s. 12 of the HAMA can have no application, for as there is no joint-family property in existence,[4] the adopted son cannot claim on the date of his artificial birth in the

1. Infra, at 525-7.
2. Derrett, "A Bombay Experiment...," at 2-3.
3. A.I.R. 1981 Bom. 115.
4. Effectively overruling the Division Bench decision in Hirabai v. Babu Manika, A.I.R. 1980 Bom. 315.

family any right in the property. His claims could arise only after his adoptive mother's death as her heir or legatee, or during her life-time where she executes a deed of gift in his favour by virtue of the provisions of s. 13. Lucid and conclusive as this view of the law is, a footnote is nevertheless in order. Their Lordships declare in express terms that

> "(t)he adoption after the (Hindu) Succession Act operates prospectively and not retrospectively. 1 There is no relation back." 2

But what where the widow is not the sole heir? What where the deceased leaves behind heirs other than the widow mentioned in class I of the Schedule? Their Lordships did not ask, indeed did not need to ask, given the facts of the case, what under those circumstances would the position of relation back be. It is submitted — and has been shown[3] — that "relation back" is then indeed a reality, and the adoptive son participates in the notional partition to determine the share that passes by succession.

(4) S. 14 (1) and the Reversionary Right

We must next consider what was once the controversial question as to the effect of s. 14 (1) on the reversionary right. Obviously where

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1. Shripad Goyanan v. Dattaram Kashinath, A.I.R. 1974 S.C. 878, which deals with adoption in the Anglo-Hindu law nevertheless anticipates this interpretation at 881, where in regard to the doctrine of "relation back" after the HSA had come into force, the observation is made obiter that "(I)t is unlikely that a similar question will arise hereafter since s. 4 of the HSA, 1956 has practically swept off texts, rules and the like in Hindu law, which were part of that law in force, immediately before the commencement of the Act, till provisions have been made for such matters in the Act. Since on the husband's death the widow takes an absolute estate, questions of the type which engage us in this appeal will be stilled forever."
2. Kesharbai v. The State of Maharashtra, A.I.R. 1981 Bom. 115, at 122.
3. Supra at 512 ff.

the female Hindu was in possession of the property when the HSA came into force, the plain terms of s. 14 (1) convert her limited estate to a full tenure, and there is no question but that in such cases the reversionary rights are extinguished.

So their Lordships of the Orissa High Court held in Sm. Laxmi Devi v. Surendra Kumar Panda,[1] where a suit by the full sister of the last male holder for a declaration of her reversionary right was dismissed on the ground that, having been relegated to the list of heirs in class II, she had neither any legal character nor any interest in praesenti, as the HSA had effectively conferred full ownership on the widows in possession of their deceased husband's property.[2]

The reversioners would have no right either, to challenge the validity of a mortgage, lease, settlement or other perpetual grants[3] in which the widow had preserved even a nominal right because all that

1. A.I.R. 1957 Or. 1, followed in Bhabhani Prosad v. Smt. Sarat Sundari, A.I.R. 1957 Cal. 527.

2. Consequently as the power to dispose of it absolutely is an incident of the absolute estate, it was held in Hari Ram v. Harbans Singh, A.I.R. 1973 H.P. 71,that where the widow sells subsequent to the HSA, there is no doubt but that such sale passes to the purchaser an absolute interest in the property, because as absolute owner she can deal with it in any manner she likes irrespective of any question of a binding purpose. So too in Harak Singh v. Kailash Singh, A.I.R. 1958 Pat. 581 (F.B.), where their Lordships of the F.B. declared obiter at 584 that, "she has the absolute power to dispose of such property by sale, mortgage, gift, lease, exchange etc. ... The devolution of such property after her death is governed by s. 15 of the Act and the Hindu woman becomes a fresh stock of descent. ..." See also Mt. Lukai v. Niranjan, A.I.R. 1958 M.P. 160 (F.B.), at 161; Marudakkal v. Arumugha, A.I.R. 1958 Mad. 255, at 259; Ramsewak v. Sheopujan, A.I.R. 1959 Pat. 75, at 78; Dayal v. Buja, A.I.R. 1959 Punj. 326 at 326 ; Mt. Janku v. Kisan, A.I.R. 1959 M.P. 5, at 2 and 4; Shivram Hede v. Aba Madne, A.I.R. 1960 Bom. 32 at 35; Subbareddi v. Penchalamma, A.I.R. 1962 A.P. 368, where it was held that the life-interest that the widow retained for herself in settling the properties on her grand-daughters, was converted to an absolute estate under s. 14 (1), so as to extinguish the reversionary right completely. Lalchand Bhur v. Sushila Sundari, A.I.R. 1962 Cal. 623 where a consent decree which embodied an undertaking by the widow not to alienate, or encumber or otherwise deal with the estate so as to prejudicially affect the reversionary interest was held to have become inoperative after the passing of the HSA.

3. Supra, at 470 ff.

might be comprehended within the word "possessed".[1] This would be equally applicable to property which may not be in her actual possession but to which she may have a right in law to recover possession,[2] as it would to all cases of fraudulent and invalid transfers.[3]

(a) The View That Reversionary Rights are Extinguished Despite the Widow's Improper Alienation Prior to the HSA

However, what of situations where the female Hindu alienated her limited interest without the consent of reversioners and without justification, and the alienees cannot prove that they made sufficient bona fide enquiry and satisfied themselves that circumstances justifying the alienation existed? The question that then falls to be considered is whether the widow is entitled to the beneficial provisions of s. 14(1) so as to convey to the alienee a valid title to the total abrogation of reversionary rights.

In the initial stages, some perplexity of judicial opinion apart,[4] the weight of considerable authority lent support to the view that the effect of the HSA was to do away with reversioners altogether.[5] That

1. Ramsewak v. Sheopujan, A.I.R. 1959 Pat. 75, at 79.
2. Supra, at 481 ff. 3. Supra, at 476-9.
4. See for instance Kamla Devi v. Bachulal, A.I.R. 1957 S.C. 434, where Das, C.J., left open the question as to the validity of the alienation made by the widow in favour of her daughter in the light of the provisions of the HSA, merely stating at 444 that, as under the Hindu law it was a valid gift "it is unnecessary to decide in this case the true scope and effect of s. 14 of the HSA." See also Sita Bai v. Kothulal, A.I.R. 1959 Bom. 78, where it was contended inter alia that as the HSA had put an end to the reversioners, the widow's improper alienations prior to the Act could not be challenged. While upholding the principle of reversion in regard to devolution of tenancy rights in respect of agricultural holdings, Vyas, J., however, left open the more specific question as to whether or not the reversion had been abrogated under the 1956 Act.
5. J.D.M. Derrett, "Some Problems Arising under the HSA, 1956," (1957) 59 Bom. L.R. (J), 33-9, and 49-55, at 49-50. To the contradictory dicta in Venkayamma v. Veerayya, A.I.R. 1957 A.P. 280, (discussed below), the same author, in his article "Recent Decisions and Some Queries in Hindu Law," (1957) 59 Bom L.R. (J), 178-89, brought the objection at 187 that, "Surely on the cessation of her (the widow's)

despite dissenting voices,[1] this view did somewhat find favour in the High Courts, is evident in the number of minority decisions in affirmation of this attitude.

In Ram Ayodhya v. Raghunath Missir,[2] the plaintiff as the next reversioner brought a suit for a declaration that the alienations effected by the widow in 1914 were without consideration and without legal necessity and therefore not binding upon him. The Patna High Court quite simply held that the retrospective nature of s. 14 having transformed the limited estate into an absolute one, the reversionary right which was not in any case a vested interest and hitherto a mere spes successionis, is extinguished, the property devolving, after the widow's death, under the provisions of s. 15 of the HSA.[3]

That the right of the reversioner is obliterated once for all, was reiterated in Patna in Ramsaroop v. Hiralal Singh.[4] Along the same lines as the earlier decision[5] in holding that the word "possessed" in s. 14(1) did not refer to the time when the possession was claimed by the widow, it went even further to assert that where the widow had made over the possession of the properties to her alienees, her full ownership would emure to the benefit of the latter. Such a position, it is submitted, is

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estate the term of the alienation, which was not authorised prior to the coming into force of the Act, is completed, and the reversion is not to them, (the reversioners under the old law) for the limited estate is abolished, but to the woman's legal representatives?" — an ingenious argument from which — doubtless on deeper reflection — he resiles. See J.D.M. Derrett, "Anomalous Decisions from Patna on the HSA, 1956," (1958) 21 S.C.J.(J), 259-66, at 264 ff.

1. Dabke, "Full Ownership...," op. cit., at 178-9.
2. A.I.R. 1957 Pat. 480.
3. Followed in Mst. Janki Kuer v. Chhathu Prasad, A.I.R. 1957 Pat. 674; Dhirajkunwar v. Lakhansingh, A.I.R. 1957 M.P. 38; Mankumar v. Mt Bodhi, A.I.R. 1957 M.P. 211; Baijnath v Ramantar, A.I.R. 1958 Pat. 227; Hanuman Prasad v. Mst. Indrawati, A.I.R. 1958 All. 304.
4. A.I.R. 1958 Pat. 319.
5. Ayodhya v. Raghunath Missir, A.I.R. 1957 Pat. 480.

untenable, for as we have already seen, the retroactive effect is to property acquired not to that possessed by the female Hindu; moreover when it is assumed that the Act retrospectively improved the alienor's title, by giving her an absolute estate when she was selling at the price applicable to the sale of the property held subject to the woman's limited estate, the next step is to assert that without any extra payment the alienee becomes, upon the coming into force of the Act, absolute owner of the property — a viewpoint entirely unjustified by the general concept, let alone the words, of the statute.[1]

(b) The View That Reversionary Rights Subsist in Cases of Improper Alienations

Decisions such as the foregoing proceed on the assumption that the widow is the owner with limited powers of alienation, whereas the true position is that, though from many points of view she appears to be an owner, representing the estate, in fact she is only a representative during a hiatus in the full vesting, and that is why the rights which pass to the alienee depend to a vital extent upon the presence or absence of justification, of the reversioner's consent, or of equitable relief for the alienee.[2] It also proceeds on the view that with the coming into force of the HSA, s. 4 (1) (b) has the effect of abolishing reversioners altogether, as their existence is now inconsistent with the new scheme of succession as propounded in the statute. The observations of the Bombay High Court in Ramchandra v. Sakharam[3] to the effect that

> "... the text, rule or interpretation of Hindu law stands superseded only qua any matter on which provision is made in the Act; and s. 14 (1) makes no provision concerning property not possessed by a Hindu female," [4]

1. Derrett, "Anomalous Decisions...," op. cit., at 265.
2. Ibid., at 266.
3. A.I.R. 1958 Bom. 244.
4. Ibid., at 246.

sufficiently clarifies that despite the over-riding effect of s. 4 the fair conclusion must be that the right of the reversioners to challenge improper alienations effected by the female Hindu prior to the HSA, is not affected by the Act.

This may now be taken to be settled law inasmuch as judicial interpretation of sub-s. (1) of s. 14 leaves no room for doubt that in so far as the widow had parted with possession before the coming into force of the Act, the benefit of the sub-s. will accrue neither to her nor to her alienee. So their Lordships of the Andhra and Calcutta High Courts held, where the question first came up almost simultaneously in Venkayyamma v. Veeravva[1] and Gostha Behari v. Haridas[2] respectively. In a significant and far-reaching interpretation of the sub-s. Sastri, J., in the former decision was of the view that, for all the broad connotation of the word "possessed", the retrospective operation of the sub-s. could not be extended to the female Hindu who had parted with possession of her limited interest and put the vendee in possession. Neither, his Lordship stressed, could the vendee take advantage of the beneficient provisions of s. 14 (1), for

> "(T)he Act was not intended to benefit alienees who, with their eyes open, purchased property from the female limited owners without any justifying necessity before the Act came into force and at a time when the female vendors had only the limited interest of a Hindu woman." 3

The rationale for this, the learned Judge explained, was that on a transfer of property, it is only the transferor's interest that would pass to the transferee, the general principle being that a person cannot transfer to another more that what he or she is entitled to; as such the alienee took subject to the limitations inherent in the limited estate,

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1. A.I.R. 1957 A.P. 280.
2. A.I.R. 1957 Cal. 557.
3. Venkayyamma's case, cited above, at 282.

and the reversionary right in respect of such property emured.

Coming to exactly the same conclusion, Mookherjee, J., in Gostha Behari's case[1] further negatived the contention that in view of s. 4 of the Act, the limited estate would absolutely cease and reversioners altogether disappear from the picture, to hold that

> "(S). 4 in its relevant clauses (a) and (b) of sub-s. (1), merely abrogates the Hindu law and other laws so long applicable to Hindus, as against provisions made in the Act..." 2

the clear implication being that where the limited estate subsists, the rights of reversioners remain intact.[3]

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1. A.I.R. 1957 Cal. 557.
2. Ibid., at 560.
3. The same view is evident in numerous decisions. See Hari Kishen v. Hira A.I.R. 1957 Punj. 89; Thailambal v. Kesavan, A.I.R. 1957 Ker. 86; Marudakkal v. Arumugha, A.I.R. 1958 Mad. 255; Chandrasekhara v. Sivaramakrishna, A.I.R. 1958 Ker. 142; Mt. Lukai v. Niranjan, A.I.R. 1958 M.P. 160 (F.B.), dissenting with Ram Ayodhya v. Raghunath, A.I.R. 1957 Pat. 480; Mt. Janki Kuer v. Chhathu Prasad, A.I.R. 1957 Pat. 674 and overruling Dhirajkunwar v. Lakhansingh, A.I.R. 1957 M.P. 38; Ramchandra v. Sakharam, A.I.R. 1958 Bom. 244, where the mother made a gift of the property and then remarried, and it was held that despite the HSA, the reversionary right subsisted. Sansir Patelin v. Satyabati, A.I.R. 1958 Or. 75; Harak Singh v. Kailash Singh, A.I.R. 1958 Pat. 581 (F.B.) overruling Ram Ayodhya v. Raghunath, cited above, Mt. Janki Kuer v. Chhathu Prasad, cited above, and Ramsaroop Singh v. Hiralal Singh, A.I.R. 1958 Pat. 319, approved of in Kotturswami v. Veeravva, A.I.R. 1959 S.C. 577 at 581; Dayal v. Buja, A.I.R. 1959 Punj. 326, where Singh, J.'s, specious reasoning was that the gift to the heir was merely acceleration of succession and distinguishable from alienation by sale, but despite his entire agreement with the retrogade observations of the Patna High Court, felt bound by the decision in Hari Kishan v. Hira, cited above; Brahmadeo Singh v. Deomani Missir, Civil Appeal No. 130 of 1960; Ramappa v. Chandangouda, AIR 1960 Mys. 260; Pathumma Beebi v. Krishnan Asari, A.I.R. 1961 Ker. 247; Amar Singh v. Seva Ram, A.I.R. 1961 Punj. 530; Devi Singh v. Mst. Phulma, A.I.R. 1961 H.P. 10; Ram Gulam Singh v. Palakdhari Singh, A.I.R. 1961 Pat. 60, where it was further clarified that the alienations of the widow being binding on her, the alienees could never be trespassers qua the widow, though on the termination of the Hindu widow's estate, their position would certainly be that of trespassers qua the reversion; Bapurao v. Neroji, A.I.R. 1961 Bom. 300; Renuka Bala v. Aswini Kumar, A.I.R. 1961 Pat. 498; Tulsi Ahir v. Mt Sonia, A.I.R. 1962 Punj. 296; Gangadhar v. Smt. Saraswati, A.I.R. 1962 Or. 190; Sheopujan v. Ramsewak, A.I.R. 1963 Pat. 330; Nathuni Missir v. Ratna Kuer, A.I.R. 1963 Pat. 337, where the alienation was by way of invalid surrender; Nanheylal v. Banwari, I.L.R. (1963) 2 All. 308; Arkhita Das v. Hari Mohapatra, A.I.R. 1963 Or. 162; Rameshwar v. Hardas, A.I.R. 1964 All. 308 where it was stressed that the śāstric

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That there can now be no quarrel with this view of the law is evident from the wealth of decided cases from all over the country affirming and reiterating the correct position, and while the Patna High Court does no less in Gobardhan v. Hariram,[1] the decision must, it is submitted, be subject to closer scrutiny. The widow and daughter of the last male holder executed a sale deed in 1947, and the plaintiff, the daughter's son, claiming reversionary right, filed a suit for a declaration that the sale was without consideration or legal necessity. During pendency of the suit, the widow died in 1960. In negativing the plaintiff's claim, their Lordships, Misra and Singh, JJ., acknowledged that, as a consequence of the improper alienation, the property had not

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Hindu law not having been abrogated in its entirety by s. 4 of the HSA, the reversioners who are the creation of that law, continue to be part of the scene as does their right to challenge the validity of alienations effected by the female Hindu; Bai Kamla v. Occharlal, A.I.R. 1965 Guj. 84; Karuppadayar v. Periathambi, A.I.R. 1966 Mad. 165; Radha Rani v. Hanuman Prasad, A.I.R. S.C. 216, reversing Hanuman Prasad v. Mst. Indrawati, A.I.R. 1958 All. 304, where the further assertion of the Supreme Court was that, the reversioners are not bound to institute a declaratory suit during the lifetime of the widow. They can sue the alienee for possession after her death, treating the alienation as a nullity without the Court's intervention; Kempiah v. Girigamma, A.I.R. 1966 Mys. 189; Chaturbhuj v. Sarbeshwar, A.I.R. 1967 Pat. 138; Jandebi v. Upendra Sahu, A.I.R. 1968 Or. 187; Bai Champa v. Chandrakanta, A.I.R. 1973 Guj. 227; Radhey Krishnan v. Shiva Shankar, A.I.R. 1973 S.C. 2405; Bhaghirathi v. Nanibala, (1974) 79 C.W.N. 387; Ananth Bandhu v. Chanchala Bala, A.I.R. 1976 Cal. 303 (F.B.); Shiv Dass v. Smt. Devki, A.I.R. 1978 P.& H. 285; Puran Singh v. Ram Lok, A.I.R. 1983 P.& H. 162, where the contention that the sale (which had only partly been for legal necessity) had been converted into a mortgage so as to give the widow the benefit of s. 14 (1), was negatived, and the reversionary right upheld with the stipulation that the sum found to be for legal necessity be paid to the purchaser, on the principle evident in Bharpur Singh v. Mallan Singh, A.I.R. 1952 Pepsu 54 that, a person seeking equity must do equity. It is submitted that, the foregoing apart, where the Hindu male bequeathed or made a gift inter vivos under the old law, to females who had no subsisting right of maintenance in the property, the property so conveyed, is a restricted estate within the meaning of s. 14 (2), and the reversionary right is not extinguished. Similarly, where the female Hindu disposed by will and died before the commencement of the HSA, or made a gift inter vivos of her limited estate, such property is incapable of being enlarged under s. 14 (1), as she could not convey more than her life estate, and reversioners are again very much in the picture. / full discussion of decided cases Fora see below at 613 ff.

1. A.I.R. 1963 Pat. 335

converted to an absolute tenure, and the daughter but for being co-executant, would have been entitled to challenge the alienation as heir and reversioner. But, reasoned their Lordships, the HSA having terminated reversionary rights, the daughter's son's suit was not maintainable, and the result would be that the property would lie where it should be in terms of the sale deed, under which the title had been acquired by the defendant as the vendee.

To this ratio we put forward two objections. No doubt s. 15 does indeed terminate the reversion, but only in respect of property of which the female Hindu is absolute owner. By the learned Judges' own admission this did not happen, and since the reversionary right is a mere spes successionis, the incapacity of the daughter, the presumptive reversioner, does not thereby extinguish the reversion, and the search for the next reversioner, must go on. For, — and here our second objection is submitted — it was never in the contemplation of the Act to benefit alienees, and to enlarge their interest into an absolute indefeasible interest to the detriment of the reversion.[1]

(5) The Effect of S. 14 (1) on Property Reconveyed to the Widow After Her Alienation

The reconveyance by the alienee of the same property to the widow and its effect in the light of s. 14 (1) was a matter of some debate, and the question in brief, was whether, while no benefits of s. 14 (1) may accrue to the alienee, would the limited estate reconveyed by sale, gift or otherwise to the female Hindu be converted to an absolute tenure after the commencement of the HSA?

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1. See also Mohinder Singh v. Lachhman Singh, A.I.R. 1965 Punj. 317, objectionable on the same grounds.

A seemingly plausible argument put forward in support of the view that such reconveyance does not come within the purview of s. 14 (1) is the distinction made between the more generally applicable "life interest", as opposed to the "limited estate" which has definite legal connotations, and is an institution peculiar to Hindu Jurisprudence, so that what a transferee from the limited owner held was not the "limited interest", it being the particular preserve of the female Hindu, and defeasible on the happening of certain contingencies such as death, conversion, remarriage, surrender etc., but merely the more generally familiar "life estate" in legal systems. This being so, even where the same properties were reconveyed by the transferee either before or after the commencement of the HSA, as s. 14 (1) envisages the conversion into an absolute tenure of the limited estate only, the female Hindu could not avail of its provisions inasmuch as the alienee could not pass a better title than what he himself had.[1]

Such a reasoning, one submits, is untenable, based as it is on misconceptions for to hold that the words "limited interest" in s. 14 (1) does not include the life estate is to do less than justice to the broad sweep of the Act, the words "any property" being indicative of the wider compass to which the sub-s. applies.[2]

As we turn now to judicial decisions, it is at once apparent that it was generally this line of thought that the Orissa High Court adopted in Ganesh v. Sukriya,[3] to hold that where a pre-1956 donee

1. A.V. Krishna Murti, "Effect of Mode of Acquisition of the Property Possessed by a Female Hindu on s. 14 (1)," (1972) 1 An.W.R. (J), 13-15. This view is to a degree understandable in a South Indian for time was when Madras persisted in this retrograde approach and Andhra followed suit in Gopisetti Kondiah v. Gunda Subbarayudu, (1968) 2 An.W.R. 455. Balance however, was finally restored, and the myth exploded by the Madras High Court itself in Muthu Bhattar v. Chokku Bhattar, A.I.R. 1976 Mad. 8. Infra, 597-9.

2. Discussed below at length at 579 ff.

3. A.I.R. 1963 Or. 167.

from the widow retransferred the property to her in 1957, the interest of the donee being that of the limited owner, the provisions of s. 14 (1) would not be attracted as he could not transmit any higher title than he himself had.

It was likewise held in Andhra Pradesh that, where the property sold by the widow was then resold to her prior to the HSA, and she subsequently made a gift of it in 1959, the reversionary right subsisted, for the effect of her sale in 1937 was to rob her of any vestige of title therein; her purchase back in 1940 could therefore have no extra significance, and she took as any stranger would have done.[1] The correctness of decisions such as these are open to doubt, and in dissenting, the Madras High Court in criticism of the Orissa judgment[2] pointed out that the fallacy of the reasoning lay in treating alike a reconveyance in favour of the widow, and an alienation in favour of a stranger. For in fact there is this vital difference that whereas in the latter case, the estate conveyed would not have been in the possession of the widow and therefore open to challenge, in the case of an annulment of a conveyance by the consent of both parties, the effect of the alienation is wiped out and the original position restored. Since the Hindu female had acquired the property by lawful means, having purchased it for consideration, and was in possession with limited rights therein, when the HSA came into force — these facts alone are sufficient for the application of s. 14 (1) read with the Explanation added thereto.[3]

That this view did generally find acceptance soon became evident in Teja Singh v. Jagat Singh,[4] where in exactly similar circumstances

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1. Venkatratnam v. Palamma, (1970) 2 An.W.R. 264.
2. Ganesh v. Sukriya, cited above.
3. These arguments are put forward cogently in S. Malleswaram, "HSA, 1956, Section 14, Scope Of," (1972) 2 An.W.R. (J), 50-2.
4. A.I.R. 1964 Punj. 403, affirmed on appeal in Jagat Singh v. Teja Singh, A.I.R, 1970 P.& H.309 (F.B).

Mahajan, J.' persuasive argument was that, despite the decree in favour of the reversion, at both points of time, i.e. at the point of time when the limited owner had parted with possession of the property in 1938, and at the point of time when she had reacquired it after the HSA had come into force, she was in lawful possession, for given the wide phraseology of s. 14 (1), the effect of the two transactions, the gift and the gift back put together was to nullify the alienation made by her and to convert the estate gifted back to her to an absolute tenure.[1]

(6) The Effect of S. 14 (1) on Property which is the Subject-Matter of Pending Litigation

Every Act speaks with effect from the date of its commencement, and it would therefore follow that the words "property possessed" in s. 14 (1) of the HSA would apply to property possessed by the female Hindu at the commencement of the Act, i.e. to property acquired before its commencement. But with a view to obviate argument and litigation, the Legislature wisely introduced the clause "whether acquired before or after the commencement of the Act," thereby making it clear that

1. In vindication of this view, Ramamurti, J., expressly dissenting from the ratio in Ganesh v. Sukriya, A.I.R. 1960 Or. 167, further elucidated in Chinnakolandi v. Thanji, A.I.R. 1965 Mad. 497, that there is nothing in the Hindu law or under the general principles of the law of transfer which would prevent the alienee conveying back the property to the alienor in the same capacity and in the same right in which it was conveyed by the widow. This being so, the effect of s. 14 (1) would be to put an end to the reversionary suit by converting such estate into an absolute one. Followed in Jagannathan v. Kunjithapatham, A.I.R. 1972 Mad. 390; see also Bai Champa v. Chandrakanta, A.I.R. 1973 Guj. 227, where the donee having relinquished any interest he might have derived from the oral gift, this had the effect of reconveying the property to the widow so as to validate a testamentary disposition made by her after 1956; Bhagwan v. Vishwanath, A.I.R. 1979 Bom. 1 where Vaidya, J., held that notwithstanding the decree in favour of the reversioner prescribing a restricted estate, the repurchase by the widow of the previously alienated property, could not be said to come under s. 14 (2) as that decree was not the source of her

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the section also applied to property which a Hindu woman had inherited earlier before the commencement of the Act, provided it was in her possession at the commencement of the Act. The question however that the Courts were faced with was whether, where the female Hindu who might otherwise be entitled, could be regarded as "possessed" of that property where the HSA came into force during pendency of litigation.

A perusal of judicial decisions indicates that the Courts have uniformly construed that, given the wide amplitude of s. 14 (1), the female under such circumstances may indeed be said to be in possession within the meaning of the sub-s. In Ram Ayodhya v. Raghunath Missir,[1] for instance, the dicta, otherwise objectionable in upholding the widow's claim to absolute ownership despite previous improper alienations by her, is nevertheless in point. For in scotching the argument that the provisions of s. 14 (1) would have no application to property which is the subject-matter of litigation, the view that their Lordships took was that since s. 14 (2) only refers to a final decree or order of a civil court by which a restricted estate is prescribed, there is no power to such argument specially as s. 14 (1) is made expressly retrospective.[2]

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title. As such she conveyed her full title to the alienee in a subsequent sale to the abrogation of the reversionary right. Hari Ram v. Harbans Singh, A.I.R. 1973 H.P. 71, where the gifted property having been retransferred, it was held that the earlier declaratory decree obtained by the reversioners, neither prevented the reconveying of the property to the widow which effectively annulled the previous transfer, nor did it estop the widow from making a subsequent gift of it after the HSA had come into force.

1. A.I.R. 1957 Pat. 480.

2. A like attitude is evident in Dhirajkunwar v. Lakhansingh, A.I.R. 1957 M.P. 38, and Hanuman Prasad v. Mst Indrawati, A.I.R. 1958 All. 304. See also Bai Kamla v. Occharlal, A.I.R. 1965 Guj. 84, where pending a suit for reversionary claims, the court held that the effect of the HSA on property still in the possession of the widow would be to convert it to an absolute tenure. On the other hand, in Marudakkal v. Arumugha, A.I.R. 1958 Mad. 255 the limited

The question however assumed greater prominence for the first time in Bhabhani Prosad v. Smt. Sarat Sundari,[1] where it was pleaded on behalf of the widow that, as the HSA had come into force during the pendency of the suit, the limited estate in her possession as the sole heir of her husband who had died in 1914, was no longer open to reversionary claims. In upholding this claim their Lordships, Lahiri and Sen, JJ., ruled that on a plain construction of s. 14 (1), it is clear that it confers a right of full ownership upon a female Hindu in respect of the properties described in the Explanation. In this view of the matter, whether she had acquired the disputed property as heir to her husband or with her own funds, as she alleged, the widow must be held to have become absolute owner, and the fact that the HSA came into effect during the pendency of the appeal would make no difference. For, their Lordships held

> "(S). 14 of the Act makes no reservations in favour of pending litigations and lays down in unqualified terms that any property which is in the possession of a female Hindu whether acquired before or after the commencement of this Act shall be held by her as full owner and not as a limited owner." 2

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estate having been improperly alienated prior to the commencement of the HSA, the Court rightly held that there could be no force to the widow's contention that, as the HSA had come into force during pendency of appeal, she had become absolute owner. See also Rameshwar v. Hardas, A.I.R. 1964 All. 308, where a like decision was arrived at. Conversely it was held in Rukmani v. Krishnamoorthy, A.I.R. 1960 Mad. 576, that a pending litigation in regard to a sale in execution of a debt, which was decided only after the coming into effect of the HSA, would in no way give a new right to the daughter to claim a share in the father's property.

1. A.I.R. 1957 Cal. 527.

2. Ibid., at 528, following Laxmi Devi v. Surendra Kumar Panda, A.I.R. 1957 Or. 1. See also Venkamma v. Venkatareddi, A.I.R. 1959 A.P. 158, where during the pendency of the widow's appeal against a decree obtained by the next presumptive reversioner declaring a will alleged to have been executed by her husband and under which she claimed, to be a forgery, the HSA came into force, and Subbarao C.J., held that as s. 14 (2) cannot have any application to a case where the decree is the subject-matter of the appeal during the pendency of which the Act of 1956 came into force, the widow must be held to have become absolute owner. Followed in Annapurnamma v. Sankararao, A.I.R. 1960 A.P. 359, at 362.

That Madras applied the same principle is evident from the line of thought employed in Subbalakshmi v. Ramalakshmi.[1] The widow having died after instituting proceedings for partition and separate possession and even before a preliminary decree had been passed, the contention was that unless there had been a partition by metes and bounds, the right conferred on her by the HWRPA, 1937, would automatically lapse. In the opinion of Ramamurti, J., however, such a contention was wholly untenable and utterly lacking in substance, for the rights conferred by the HWRPA being neither inchoate nor imperfect, the widow merely worked out the right which had devolved upon her at her husband's death, by a demand for partition. As such therefore, where the widow was in possession of the property in a broad and comprehensive sense, the effect of s. 14 (1) would be that, on her death it would pass to her stridhana heirs so as to entitle them to further prosecute the suit for partition filed by the widow.[2]

The Supreme Court confirms this view in Mangal Singh v. Smt. Rattno[3] to hold that

> "(I)f on the date when the provisions of this section are sought to be applied, the property is possessed by a female Hindu, it would be held that she is full owner of it... Such a question may arise in her own lifetime, or may arise subsequently when succession to her property opens on her death," [4]

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1. A.I.R. 1964 Mad. 76.

2. Followed in Banarsi v. Marcchia, A.I.R. 1967 Pat. 340. That the female Hindu does become full owner of such property is also brought out by implication in Raghuwar v. Janki, A.I.R. 1981 M.P. 41, where the female claiming as heir to her father, died during the pendency of the suit, and the Court held that even assuming that she was indeed the heir and therefore full owner, her husband could nevertheless not be brought on record as her legal representative, as the devolution of such property is governed by s. 15 (2) (a) which lays down that "any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the other heirs referred to in sub-s. (1) in the order specified therein, but upon the heirs of the father."

3. A.I.R. 1967 S.C. 1786.

4. Ibid., at 1791.

so that the property being in the hands of trespassers, the widow must be held to have been possessed of it in law at the time of her death during pendency of litigation, and her legal representative who was brought on record was entitled to become full owner.

In this, the broad and comprehensive definition of the word "possessed", all such decisions, it is submitted, lay down the correct position, so as to give the fullest scope to the ameliorative intent of s. 14 (1) in fulfilment of the object of the Legislature to wipe out the disabilities from which a Hindu female suffered in regard to ownership of property under the old śāstric law, to abridge the stringent provisions against proprietary rights which were often regarded as evidence of her perpetual tutelage and to recognise her status as an independant and absolute owner of property.[1]

(7) The Effect of S. 14 (1) on Property Allotted in a Preliminary Decree for Partition

In the traditional Hindu law, the right to sever the status of jointness was the special preserve of the major coparcener or owner of a coparcenary interest who could bring about such severance merely by an unequivocal communication of a settled intention to sever.[2] However, while the female members were not entitled to initiate a partition, they were nevertheless entitled to shares should the joint status be disrupted. The basic rule is that the wives of the father, or, where the father is dead, or does not participate, the mothers and grandmothers take shares equal to those of their sons and grandsons as the case may be,[3] and whenever sons separate their mothers and step-mothers are entitled to share, each taking a share equal to

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1. Per Bhagwati, J., Tulasamma v. Sesha Reddi, A.I.R. 1977 S.C. 1944, at 1947.
2. Suraj v. Ikbal, (1913) L.R. 40 I.A. 40; Girja v. Sadashiv, A.I.R. 1916 P.C. 104.
3. Derrett, IMHL, op. cit., at 323.

a son.[1] Mere severance of status however is not enough, and their rights to shares arose for the first time when the coparceners separated the property by metes and bounds.[2]

In 1937, the HWRPA, for all its limitations brought about a change in that for the first time the widow became an owner by statute of her husband's interest in the joint-family property, and the right to demand partition as if she were a male owner was specially conferred on her under s. 3 (3), so that in the event of a partition, she became owner in severalty of her share, subject to the restrictions on disposition and the peculiar rule of extinction of the estate on her death, actual or civil.

The question however acquired a degree of complexity where on the institution of a suit for partition, the share of the joint properties allotted to a widow in a preliminary decree could be said to have converted to an absolute estate under the provisions of s. 14 (1) of the HSA. In the initial stages when the Judiciary was yet to comprehend the full impact of the complexities and subtleties inherent in the sub-section, there was some considerable doubt, and an unwillingness on its part to commit itself to one or the other view.

In Hiralal Roy Choudhary v. Kumud Behari,[3] the share of the widow having been defined under a preliminary decree for partition, on her death in 1957, the daughter claimed an equal share with the son by virtue of the provisions of s. 15 (1) (a). It was pleaded on her behalf that the widow did not acquire the property under the preliminary decree but by inheritance; all that the preliminary decree did was to declare her share in the property under the provisions of

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1. Ibid., at 325.
2. Pratapmull v. Dhanbati, A.I.R. 1936 P.C. 20.
3. A.I.R. 1957 Cal. 571.

the Hindu law then in force. To this eminently sensible and coherent reasoning, the learned Judge, Mullick, J., for all that he did not "consider it proper to record any final opinion on such an important question,"[1] nevertheless "assume(d)"[2] for the purpose of the case that as the property had been acquired under a preliminary decree which prescribed a restricted estate, sub-s. (2) of s. 14 would rule out the application of s. 14 (1), emphasising at the same time that,

> "(I)t is to be remembered , however, that no property is 'acquired' under a preliminary decree, and it is only under the final decree that a party can be said to acquire exclusive ownership in the property allotted to him." [3]

Quite obviously his Lordship was influenced by the ratio in Pratapmull's case[4] to which however the objection may be brought that, in view of the statute of 1956, the full implication of the revolutionary provisions of s. 14 was lost sight of, for in abolishing the limited estate, Parliament abolished simultaneously all such fetters as may have hindered the woman's absolute enjoyment of that property over which the Act gives her absolute right. Looming large in the decision is a foretaste of things yet to come, the formidable array of case law based on a misconstruction of the fundamental intent of the two sub-sections, i.e. that the antecedent right that a widow possessed

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1. Ibid., at 572. See also Bepin Behary v. Sm. Lakshasona, A.I.R. 1959 Cal. 27, where a similar judicial perplexity is evident, and doubt expressed as to the applicability of s. 14 (1) even on that property which the widow had acquired under a final decree for partition.

2. Hiralal's case, A.I.R. 1957 Cal. 571, at 572. In Bepin Behary's case, cited above, the same assumption is evident, and the obiter dicta is to the effect that while the application of s. 14 (2) may be avoided where there is a final decree on the reasoning that such decree merely recognised the widow's antecedent right under the HWRPA, it might plausibly be urged that s. 14 (2) might apply to a preliminary decree.

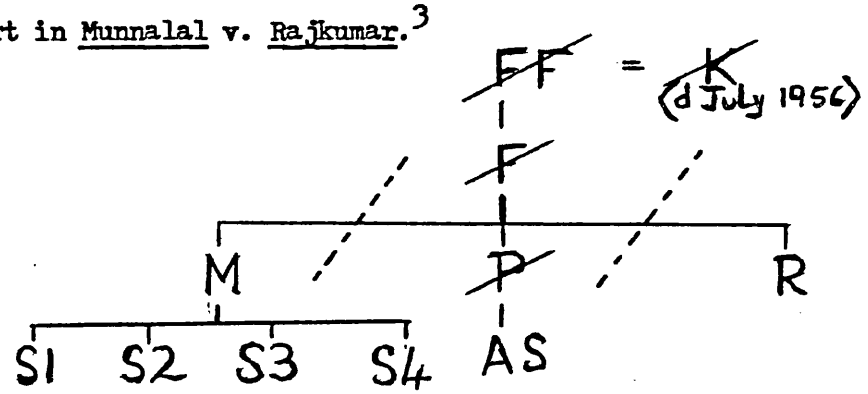
3. Hiralal's case, cited above, 572. Having negatived the daughter's claim on this count, the learned Judge nevertheless held her entitled equally with the son on another, and it is submitted, quite unfounded reasoning with which, we are not at the moment concerned.

4. A.I.R. 1936 P.C. 20.

in the property of her husband, either as his heir, or by virtue of her subsisting right of maintenance in the joint estate saves such property from the purview of s. 14 (2) which has application only where the property is acquired for the first time under a decree, order, award and the like, and of which more presently.

Judicial opinion of such doubtful veracity was however not to last, and a much surer grasp, a much firmer stance was soon enough evident in Billabasini v. Dulal Chandra,[1] where the widow, who had in 1954, been allotted a share of the family estate in a preliminary decree for partition, made an application after the HSA had come into force, claiming that she was entitled to hold such property as full owner. In allowing the claim Bachawat, J., rightly observed that the source of her title not being the preliminary decree, which merely recognised her antecedent title acquired by way of inheritance under the HWRPA, 1937, the nature of the widow's interest was enlarged to full ownership under s. 14 (1) of the HSA.[2]

That this is by far the more judicially sound, because the more equitible, interpretation, was soon enough ratified by the Supreme Court in Munnalal v. Rajkumar.[3]



1. A.I.R. 1958 Cal. 472.

2. Followed in Krishna v. Akhil, A.I.R. 1958 Cal. 671. See also the obiter dicta in Sasadhar Chandra Day v. Sm. Tara Sundari Dasi, A.I.R. 1962 Cal. 438, at 440 to the effect that "(I)t cannot be said that by (such) a declaration in the preliminary decree the Hindu female acquires a share in the joint-family property. Nor does the direction in the preliminary decree to allot her property... in lieu of her undivided share... amounts to acquisition of new property by her. The preliminary decree... cannot therefore, be said to be a decree within the meaning of sub-s. (2) of s. 14."

3. A.I.R. 1962 S.C. 1493.

The facts were briefly that three brothers, M, P, and R formed a joint Hindu family. In a partition suit instituted in 1952 by one of the sons of M, a preliminary decree was passed allotting a one-fourth share to each of the branches of M, P, (whose branch was represented by his adopted son AS) and R, the other one-fourth going to the grandmother K. At the death of K in July 1956, it was the contention of her grandsons, M and R that under s. 14 (1) of the HSA, K became full owner of the share declared in her favour and it passed to them as her nearest heirs under s. 15. AS claimed on the other hand, that s. 14 (1) did not apply and the share came back to the estate out of which it was carved to be rateably divided among them all. The whole issue thus revolved round the question as to whether the share of a widow declared in a preliminary decree remained inchoate and fluctuating (as the High Court had held), or whether it was property possessed by her within the meaning of s. 14 (1). Shah, J., declaring unequivocally in favour of the widow held that the Explanation to s. 14 (1) of the HSA gives to the expression "property" the widest possible connotation so as to include the share declared in a preliminary decree for partition. The rule of Hindu law as embodied in Pratapmull's case,[1] i.e. that till actual division of the share by metes and bounds of the joint-family estate, a Hindu female cannot be recognised as owner, must, his Lordship ruled, be held to be abrogated in view of the remedial nature of the HSA, which supersedes the rules of Hindu law in all matters expressly provided for in the Act.

Clearly reasoned and in keeping with the legislative intendment as this view is, it nevertheless came in for censure in a learned article.[2] In attacking the viewpoint of the Supreme Court, the crux

1. A.I.R. 1936 P.C. 20.

2. S.R. Gokhale, "A Note on Munnalal v. Rajkumar (A.I.R. 1962 S.C. 1493) and s. 14 of the HSA, 1956," A.I.R. 1965 (J), 85-7.

of the attack rests on the premises that the grandmother's rights at partition clearly belong to the law relating to a joint Hindu family and stand on quite a different plane and are distinct in nature from the rights provided for in the HSA. For, the argument continues, such property as was given to her, was given to her as a provision for her maintenance[1] (her husband having died prior to the Act of 1937), and there was therefore no ownership in her of the property so as to pass on her death to her heirs or to the heirs of her husband; once the necessity for maintenance ceases, the property would revert to the estate out of which it was taken. S. 14 cannot therefore apply for, in the author's assertion

> "(T)here must in the first instance be some property in limited ownership in the widow before the HSA can convert it into full ownership under s. 14,[2] and there is no such property in the grandmother according to the law of the joint-family which prevailed at the time of the partition." 3

It would be a different matter, the writer contends, where, as the Privy Council pointed out in Debi Mangal Prasad v. Mahadeo Prasad,[4] the coparceners may agree to give property to a female at a partition in lieu of maintenance, or as an absolute gift, and in such cases s. 14 (1) may apply. But, runs the argument, where specific agreement is absent, it cannot be said that the HSA provides for the changing of the rights of a female in the position of K into absolute ownership.

To such objections the rejoinder must be that the opening words of s. 14 (1), "Any property" are, as the Supreme Court explained, even without amplification large enough to cover any and every kind of property.[5]

1. Emphasis mine. The significance of this admission cannot be underestimated in negativing the argument put forward by the learned author as we shall presently see.
2. Shades of the earlier Madras attitude, discussed below at 573 ff.
3. Gokhale, op. cit., at 86.
4. I.L.R. (1912) 34 All. 234 (P.C.).
5. Per Bhagwati, J., Tulasamma v. Sesha Reddi, A.I.R. 1977 S.C. 1944, at 1947.

But so as to expand the reach and ambit of the section, and to make it all comprehensive the Legislature has enacted an Explanation (the purpose of which, as Mr. Gokhale so rightly points out, is to explain and not confer new rights[1]) which includes every kind of property including that acquired by her "at a partition or in lieu of maintenance... or in any other manner whatsoever immediately before the commencement of the Act." In view of this there can be no validity to the argument that unless the property allotted to the female Hindu as a provision for her maintenance is allotted to her absolutely, it must revert to the estate from which it was carved out. So the Supreme Court has held in Tulasamma v. Sesha Reddi[2] which lays down in no uncertain terms that such property is indeed property within the meaning of s. 14 (1), thus laying to rest the protracted controversy that had so preoccupied the Courts earlier. It cannot now be contended that the effect of such an interpretation would be to divest the coparceners of their vested right in the family property, for we must keep in mind that though s. 6 of the HSA does not in toto abrogate the Mitākṣarā coparcenary, the very same section by making the females specified in class I of the Schedule heirs of the intestate in regard to his undivided share, makes considerable inroads in the law relating to the joint Hindu family, and to the extent that s. 14 (1) impinges upon it — as certainly impinge it did in this case — it must be held to have been abrogated. Neither is there any validity in the argument that the application of the sub-section is restricted to the legal limited estate; the effect of such a forced construction would be to rob the Act of its beneficial aspects, for it was surely not the intention of Parliament to discriminate between widows who took under

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1. Gokhale, op. cit., at 86.
2. A.I.R. 1977 S.C. 1944.

the HWRPA, 1937, and those who did not, and between those Mitāksarā families which were bound to give shares to females at a partition and those that were not.[1]

Entirely unjustified is also the comment that the construction in Munnalal's case[2] leads to "unnatural and unfair results,"[3] and as such

> "(t)he Court is entitled and bound to assume that the Legislature did not intend such a construction to be adopted and to try and find out some more rational construction." [4]

But, it is submitted this was precisely what Parliament intended, to right a most ancient wrong, to remove the disability of the female Hindu to absolute ownership — and if this worked to the disadvantage of coparceners, to "unnatural and unfair results" in that they are divested of a moiety of the joint property so as to benefit the female Hindu, then so be it.

A landmark in the progressive interpretation of s. 14 (1), the authoritative dicta in Munnalal's case[5] thus paved the way for other like decisions. In Swaminatha v. Kamalammal,[6] the preliminary decree for partition in 1941 was followed by a compromise under the terms of which the widow was given a life estate in certain items of the joint-family property. In upholding her claim to absolute ownership in 1961, Ismail, J., clarified that notwithstanding the restrictions imposed on

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1. J.D.M. Derrett, "S. 14 of the HSA Once Again," (1973) K.L.T. (J), 19-22, at 20.
2. A.I.R. 1962 S.C. 1493.
3. Gokhale, op. cit., at 86.
4. Ibid.
5. A.I.R. 1962 S.C. 1493, followed verbatim in Dulei Bewa v. Bimali Bewa, A.I.R. 1964 Or. 33. See also Ballabha v. Jasodhara, 1.L.R. (1965) Cut. 398, supra at 502, where the widow, after the Act of 1956 was held to have become the absolute owner of her deceased husband's share on the basis of the preliminary decree for partition that was passed prior to her remarriage.
6. Second Appeal No. 1358 of 1963 (Mad.).

her by the compromise, sub-s. (2) of s. 14 would have no application as the preliminary decree which had declared the widow's share in the family property could never by itself constitute the source and foundation of her title, the very basis of the preliminary decree being the recognition and the working out of a pre-existing right in the properties sought to be partitioned.

Kerala ruled along similar lines in Saraswathi v. Anantha.[1] The contention of the grandson being that such items of the joint-family property as were allotted to the widowed grandmother in a preliminary decree for partition in 1958 was by way of "concession" on their parts, and as such she could not challenge the condition of reverter on her share of it notwithstanding s. 14 (1) of the HSA. Repudiating the claim of concession, Nair, J., referred to the authority of the Mitākṣarā to the effect that the widowed mother is entitled at a partition of the joint-family property[2] among her sons, to a share therein equal to that of a son. The preliminary decree for partition, his Lordship held, merely confirmed this share, and in view of the ruling in Munnalal v. Rajkumar[3] this share would be property possessed by her, and despite the restrictive clause of reverter s. 14 (2) would have no application[4] as its applicability does not arise in an appeal

1. A.I.R. 1966 Ker. 66.

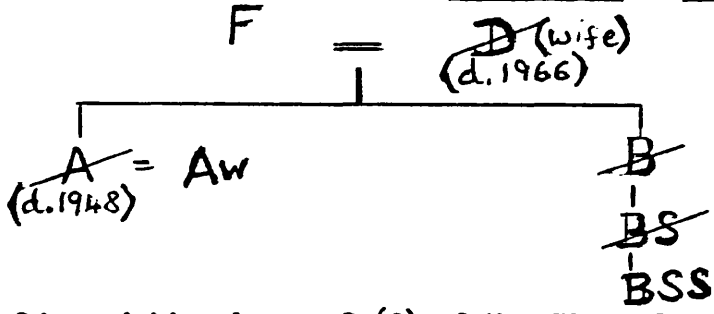
2. The rule is that "on the death of a father his separate property (or divided share) passes to his sons as ancestral property between them and the sons and grandsons of each of them (the 'male issue') — a position which persists notwithstanding the reforms of the HSA...": Derrett, IMHL, op. cit., at 252. This is confirmed by the S.C. in Arunchala v. Muruganatha, A.I.R. 1953 S.C. 495 where it was laid down that on the death of the grandfather or at a partition, his property comes to the father by virtue of the latter's legal right as a son of the former, and consequently assumes the character of ancestral property in his hands.

3. A.I.R. 1962 S.C. 1493.

4. It must be borne in mind that the position of the Mitākṣarā Hindu widow in the erstwhile Princely State of Travancore was not materially different from the position of the Mitākṣarā widow in British India. The provisions of the HWRPA, 1937, having no

against a decree where the question is of the propriety of the imposition of a restriction and not the effect of it, whereas a decree within the meaning of s. 14 (2) cannot be a decree which is under appeal but only a decree which has become final.

The same question came up again in Bhawarsingh v. Pilabai.[1]



In exercise of her right under s. 3 (3) of the HWRPA, 1937, Aw instituted a suit for partition of the joint estate, and the question was whether, for all that the preliminary decree passed in 1964 did not declare any share in favour of D as she had not been impleaded as a party to the suit, the one-fourth share due to her in law, passed to her husband at her death in 1966, so as to entitle him to a half share in the property as opposed to the one-fourth share each of Aw and BSS. Negativing the contention that such share could only accrue at a final decree for partition, Singh, J., following the dicta in Munnalal's case,[2] was quite clear that the right to a share has not to wait for its accrual till the property is actually divided, but arises even at the stage when shares in the property are declared in a preliminary

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application there, under the śāstric law which prevailed, the widow had no right to claim partition, but in case the sons partitioned, the widowed mother had the right to claim her share which she held as the widow's limited estate as contemplated by the Mitākṣarā law, and such restricted or limited estate, on the coming into force of the HSA, was enlarged into an absolute estate. In this case however, the preliminary decree for partition having been effected in 1958, it was not the conversion of the limited estate into an absolute estate, but the absolute estate itself as contemplated by s. 14 (1) to which no restrictions could apply that fell to the share of the widowed grandmother.

1. A.I.R. 1972 M.P. 204.
2. A.I.R. 1962 S.C. 1493.

decree, his Lordship further clarifying that

> "(S)imply because parties to a partition do not assign any share to a woman who on partition is entitled to a share, she cannot be deprived of her rightful share..." 1

In view of the foregoing, it must be regarded as settled law that such property is indeed "possessed" by the female in the broader meaning of the word and dicta to the contrary must be viewed with grave reservation. In Modi Nathubhai v. Chhotubhai,[2] for instance, despite a partition by metes and bounds between the father and his sons, it was held that not even in its broadest sense could the mother be said to be "possessed" of any property because at the time of partition it cannot be postulated that her right of possession had any reference to any particular item of the property, which could only arise at a partition by metes bounds between the sons. Based on the now exploded view as evident in Pratapmull's case,[3] it is submitted that after the passing of the HSA, and given the expressly remedial character of s. 14 (1), decisions such as these are no longer good law.

(8) The Effect of S. 14 (1) on the Undivided Coparcenary Interest

(a) The Absolute Right of the Widow in Such Property

We are next led to consider the entitlement of the widow in the coparcenary interest where the property had not been separated nor indeed a suit for partition instituted. The term "inherit" signifies acquisition by succession and not under a will. It is receiving property as heir on succession by descent.[4] It covers not only inheritance

1. Ibid., at 205, following Radhabai v. Pandharinath, A.I.R. 1941 Nag. 135.
2. A.I.R. 1962 Guj. 68.
3. A.I.R. 1936 P.C. 20.
4. Ayi Ammal v. Subramania, A.I.R. 1966 Mad. 369, at 370; Kameswara v. Vasudeva, A.I.R. 1972 A.P. 189, at 191. It is to be noted however that for the purposes of determining the claims of dependants under the HAMA, 1956, "heirs" would also include those who took by testamentary disposition.

under the ordinary Hindu law but also includes the share that a Hindu widow acquires as statutory heir to her deceased husband's joint interest under s. 2 of the HWRPA, 1937.

However clear as the terms of the Explanation to s. 14 (1) might seem that inherited property would also include within its purview the undivided limited interest that a Hindu widow acquired under the Act of 1937, such an interpretation was open to challenge, and in Kuppathammal v. Sakthi,[1] it was pleaded that in view of the repealing provisions of the HSA,[2] the HWRPA, 1937 stood repealed, and therefore under the Hindu law as distinct from the statute of 1937, the widows of the deceased would not be entitled to any share in the property in the presence of the son. Negativing this contention the Court held that, for all that the HSA repeals the Act of 1937, and there is no savings in it of any rights conferred or privileges which had accrued under the repealed enactment, nonetheless the effect of this repeal as obliterating all rights conferred by the repealed statute is subject to the provisions of s. 6 of the General Clauses Act, 1897, which lays down that

> "(W)here this Act, or any Central Act... made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears the repeal shall not... (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed."[3]

as such therefore, for all that the learned Judge, Ayyangar, J., did not consider the effect of s. 14 (1) to determine whether the widow

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1. A.I.R. 1957 Mad. 695.
2. S. 31 of the HSA, 1956, to the effect that "(T)he Hindu Law of Inheritance (Amendment) Act, 1929, and the Hindu Women's Rights to Property Act, 1937, are hereby repealed, was itself repealed in 1960.
3. The same view, i.e. that the provisions of the HWRPA, 1937, (notwithstanding the repeal of the statute by s. 31 of the HSA) are saved by s. 6 of the General Clauses Act, 1897, is evident in Sankara Rao v. Rajyalakshamma, A.I.R. 1961 A.P. 241, at 244; Subbalakshmi v. Ramalakshmi, A.I.R. 1964 Mad. 76, at 77; Ranganayakamma v. Rajeswaramma, A.I.R. 1964 A.P. 380, at 381.

obtains an absolute interest or not in the property which devolved on her under the HWRPA, it is submitted that given the wide amplitude of the word "possessed", there can be no doubt but that such property did indeed convert to an absolute tenure under the HSA, and judicial confirmation of this view was not slow in coming.

Thus in Lateshwar Jha v. Mt. Uma Ojhain,[1] objectionable though it certainly is on other counts, it was nevertheless correctly held that, where the husband had died after the passing of the HWRPA, 1937, the widow got the same interest in the joint-estate under s. 3 (2) as her husband himself had and this limited estate became her absolute property after the passing of the Act of 1956 at the commencement of which the disputed property in respect of which partition was sought must be considered possessed by her.

A similar view is in evidence in Sankara Rao v. Rajyalakshamma.[2] A Hindu died just before the passing of the HSA, 1956, leaving behind his widow and adopted son. The latter filed a suit for partition after the passing of the HSA claiming a three-fourth share in the property of the deceased as against the widow's one-fourth on the ground that as she had not exercised her right of partition under s. 3 (3) of the HWRPA 1937,[3] it must be held that she continued the legal persona of the husband till partition so as to entitle her to an equal share with the son in her husband's share of the joint-family property. Umamaheswaram, J., however, refused to accede to this view, holding on the

1. A.I.R. 1958 Pat. 502.

2. A.I.R. 1961 A.P. 241.

3. That where the widow died after partition proceedings had been instituted s. 14 (1) would prevail, was the view taken in Subbalakshmi v. Ramalakshmi, A.I.R. 1964 Mad. 76, supra, at , and in Smt. Indubai v. Vyankati, A.I.R. 1966 Bom. 64, where the express words in favour of her right were that, the widow having acquired full ownership over her interest in the joint-family property after her husband's death, it was not necessary for her to reduce her share to possession, either by actual partition or even by asking for partition, and her daughter

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contrary that, as no legal fiction is imported in s. 3 (2), the right of the widow under the Act of 1937 is not inchoate or imperfect till a claim for partition is made, but quite a concrete and tangible right with possession, which therefore inheres in her as an absolute right under s. 14 (1) of the HSA, and the mere fact that the widow did not claim partition, would not amount to her being regarded as not in joint possession of her husband's interest along with the surviving coparcener.[1]

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as heir would succeed to such property under s. 15 of the HSA. Nor would her absolute right to her share of the joint-family property be affected where no property is allotted to her at an actual, or preliminary decree for partition; after her death such property would pass on to her own heirs, and the fact that she was not in physical possession, nor indeed had herself demanded a partition, would make no difference.: Soliappa v. Meenakshi, (1970) 1 M.L.J. 383, and Singh J's remark obiter in Bhawarsingh v. Pilabi, A.I.R. 1972 M.P. 204 at 205, quoted at supra, 550.

1. See also Rup Raut v. Basudeo Raut, A.I.R. 1962 Pat. 436, at 440, where it was held that, had the widow not forfeited by reason of her remarriage prior to the Act of 1956, she would have acquired an right in respect of her deceased husband's undivided interest in the coparcenary property on the coming into force of the HSA. Other decisions attesting to this view are: Triloki Mandar v. Dukhni Devi, A.I.R. 1966 Pat. 389, Prasad, J., ruling that the very fact the widow had a right of partition implied that she was in possession with the other co-sharers; Commr. of Income Tax v. Roop Chand, (1967) 2 Mys. L.J. 31; Machiah v. Ponnavva, A.I.R. 1973 Mys. 1, where at the death of the widow who was in possession of her husband's estate, the daughter was held entitled as against the surviving male descendant of the common ancestor, the ratio being that the mother's entitlement to the coparcenary property under the HWRPA, 1937, had enlarged into a full right under s. 14 (1) of the HSA; Basta Ram v. Ved Prakash, A.I.R. 1974 P.&H. 152, where it was further clarified that as the coparcenary interest that a widow inherits, ripens into a full tenure under s. 14 (1), her sons alone are her heirs, the co-widow's son having no right of succession in such property; Dhanalakshmi v. The Official Trustee of Madras, I.L.R. (1974) 3 Mad. 113; Hanumappa v. Dase Gouda, I.L.R.(1975) 25 Kant. 175; Rabari v. Bai Mani, (1976) 17 Guj. 729, where at the widow's death in 1961, the sale by her son of her undivided share, was held to be invalid and recoverable by the other heirs; see also Jagiribai v. Ramkhilawan, A.I.R. 1976 M.P. 106, for a similar ruling; Animuthu v. Gandhiammal, A.I.R. 1977 Mad. 372, where the Court in upholding the option of the daughter-in-law to maintenance from the joint estate under s.19 of the HAMA, 1956, rather than a separated share of it, implicitly acknowledged that she was indeed entitled to her late husband's share

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(b) The Kartā's Power of Management of Such Property

The full heritable capacity that the HSA confers on the widow over even the undivided estate must nevertheless, it is submitted, be subject to the kartā's powers of management of the joint estate. It must be remembered that while the intrusion of the widow upon the coparcenary as a quasi-coparcener by the operation of the HWRPA, 1937, was a device to enable a widow to live separately and as her own mistress if she so wished, in the undivided state however, the Act preserved so far as was possible consistently with such an aim the essential features of the male issue's "birth-right" and the other coparceners' right of survivorship,[1] as also the right of the kartā, to bring within his managerial ambit, the estate of the widow who preferred, the, in many ways, haven of the joint-family to the separated state.

It may well be asked whether the same attitude can be taken

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family property. That whether she could at all opt for maintenance rather than take her share of the undivided estate under the HSA is questionable (See J.D.M. Derrett, "HSA and HAMA, S. 22: A Serious Conflict of Decisions," (1978) 80 Bom. L.R. (J). 1-3, at 2 — a point of law however with which we are at the moment not concerned; Narasimhachari v. Andalammal, A.I.R. 1979 Mad. 31, where the son's claim that his widowed mother had no manner of right in the joint estate as she was never in corporeal possession of it, was negatived, the court holding that her entitlement and right to possess it under the Act of 1937, enlarges itself by reason of the liberal and wide amplitude of s. 14 (1) of the HSA, 1956; Rasamani v. Patrabala, A.I.R. 1981 Gau. 42, where the same view was taken to demonstrate that even in the Dāyabhāga territory where the widow took under s. 3 (1) of the HWRPA, the effect of s. 14 (1) of the HSA was to entitle her daughters as heirs to such property, and to which the son of the predeceased wife of the deceased husband could lay no claim; Chockalingam v. Alamelu, A.I.R. 1982 Mad. 29, which reiterates the view taken in the foregoing decisions to hold that the son and daughter were equally entitled to the undivided share of the widowed mother in the joint-estate, over-ruling at the same time, the leading Madras case of Parappa v. Nagamma, A.I.R. 1954 Mad. 576 (F.B.), to the effect that where the widow dies without effecting a partition, her share of the joint-family property would revert to the coparcenary, the coparceners taking by survivorship, for in view of s. 14 (1) of the HSA, 1956, and its wide and comprehensive amplitude, the earlier F.B. decision loses all relevance. See also Vrat v. Smt. Gargi, A.I.R. 1983 All. 174 (N.O.C.), where it was held that, as the daughter was possessed of the undivided estate for her maintenance, it became her absolute property after the coming into force of the HSA.

1. J.D.M. Derrett, "Law and the Predicament of the Hindu Joint-Family," The Economic Weekly, 13 Feb. 1960, 305-11, at 307.

towards the provisions of the Hindu "Code". There the coparcenary interest is rudely wrested from the joint-family and distributed amongst many heirs. If they do not authorise the manager in the proper form, and give him the proper indemnities, untold inconveniences will follow when he carries on as before especially in the case of those who live in the joint-family anyhow.[1]

As such therefore, the widow entitled under the Acts of 1937 and 1956, has no doubt since 1956 an absolute interest in a coparcenary which, however, does not thereby cease to fluctuate[2] and to be subject to the manager's ordinary rights of management and representation. So the Patna High Court held in Jiwanandan v. Sia Ram,[3] where the plaintiff brought a suit for specific performance of an agreement to sell some landed property executed by the defendant who had been impleaded in his capacity as the kartā of the joint-family. The defense raised was that the mother being the absolute owner in respect to her husband's share in the coparcenary, she would not be bound by any such agreement entered into by the managing member of the coparcenary. The learned Judge, Mahapatra, J, held that as she was a member of the joint-family the mother was bound by the act of the kartā so far as it had been consistent with legal necessity and for adequate consideration.

Sound in essence as the ratio is, i.e. that the widow-mother of the undivided family is subject to the kartā's authority as any other member of the joint-family, the further ruling that she is so subject to his authority because without partition a Hindu widow cannot be

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1. Ibid.
2. As opposed to the coparcenary share that a female heir takes under s. 8 read with s. 6 of the HSA, 1956. Such share cannot fluctuate, for it has been statutorily quantified under the notional partition envisaged in Explanation I to s. 6.
3. A.I.R. 1961 Pat. 347.

taken to possess a property and in that sense the absolute ownership as provided in s. 14 (1) would not come to her benefit, is open to serious criticism. We have already noted, and judicial decisions have confirmed, that s. 14 (1) of the HSA merely converts into full ownership the limited entitlement of the widow under s. 3 (2) of the HWRPA, 1937, and for this purpose it is immaterial whether she chooses to remain joint or opts for partition.[1] Thus while on the one hand the judgment quite rightly subjects her to the kartā's authority so long as she remains joint, it loses sight at the same time of the essential purpose of her right to demand partition under the HWRPA, i.e. that was merely a means of securing and ensuring her maintenance from the joint estate against recalcitrant male members of the joint-family. Once it is recognised that under the HSA, the widow becomes absolute owner of such property, the question of partition, it is submitted, no longer has any relevance.

It has to be borne in mind that the HSA has left untouched the law relating to the Mitākṣarā joint-family except in so far as further accessions of property to an existing nucleus of survivorship is drastically reduced by the operation of s. 6 of that Act,[2] and every attempt must quite legitimately be made to confine the meaning of this departure within its narrowest possible construction.[3]

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1. It is interesting to note that the same learned judge resiles from this view in Rup Raut v. Basudeo Raut, A.I.R. 1962 Pat. 436, to come round to the opposite, and it is submitted, the correct interpretation, supra, at 500, f.n. 2, and in overruling his own decision in Jiwanandan's case, A.I.R. 1961 Pat. 347 explains at 440, "... I did not consider the nature or the rights of the Hindu widow under the HWRPA, 1937. Those observations of mine with reference to s. 14 were more or less obiter..."

2. J.D.M. Derrett, "Alienations at Hindu Law: A Revolutionary Full Bench Decision," (1957) 20 S.C. (J), 85-96, at 85.

3. Ibid., at 86.

Thus in Parvathi Ammal v. Ramanatha Iyer,[1] where the coparceners for the purpose of their joint-family trade executed an equitable mortgage, the plea of the predeceased coparcener's widow was that, since, by s. 14 (1) of the HSA, she had become absolute owner of her share in the coparcenary property, she became divided from the joint-family the day the Act came into force, and hence the equitable mortgage and the subsequent decree and court sale would not bind her share of the property. Negativing this contention, Iyer, J., held in clear terms that the widow's interest in such property is not imperfect or inchoate, but it is nevertheless an undefined share, for there is nothing in s. 14 (1) that indicates that such interest has become defined or been made definite by giving the widow a divided status separating her from other members of the joint-family from the commencement of the Act. The effect of s. 14 read with s. 4 (1) (b), his Lordship explained, is only to take away the conception of the woman's estate created by s. 3 (3) of the HWRPA, 1937. It does not however bring about a change in the widow's status in the joint-family, and so long as the undivided state continues, the representative capacity of the eldest son to encumber her interest in the joint-family property for binding family necessity, or to represent her in litigations connected with the joint-family property is not in any way affected by anything contained in the HSA.

To this very sound statement of the law, strength was added by the pronouncement in Fathimunnisa Begum v. Tamirasa,[2] where even though the mother was not originally impleaded in a suit by her sons to recover money due on a mortgage debt, it was held that an omission to include

1. I.L.R. (1970) 1 Ker. 326.
2. A.I.R. 1977 A.P. 24.

a member of the joint-family is not a fatal defect in the framing of a suit, for

> "(A) Hindu widow inheriting her husband's share under the HWRPA does not by itself disrupt the joint-family status... The enlargement of her limited estate into a full estate by virtue of s. 14 of the HSA, does not in any way bring about a change in the character of the joint-family or the widow's status as a member of the joint-family or the kartā's power to represent the joint-family including her." 1

However, simultaneously with the Andhra decision we are faced with an exactly opposite ratio in Smt. Shankaramma v. Madappa,[2] to the effect that despite legal necessity and the liability to discharge antecedent debts, the alienation of family property by the sole surviving coparcener would not bind the undivided female members who had become absolute owners under s. 14 (1) of the HSA, and this despite the precedent in Mysore in Melagiriyappa v. Lalithamma[3] that a single coparcener does indeed have the right to alienate the share of a female relative for legal necessity. Undoubtedly under the Hindu Law Women's Rights Act, Mysore, 1933, the female member's right to a share accrues independently of partition as was pointed out in Nagendra Prasad v. Kempananjamma,[4] but the view that once that share becomes an absolute estate, the kartā's powers are abrogated over that part of the estate which the female owns jointly with the sole surviving coparcener or the coparceners as the case may be, needs careful reconsideration. For, it is submitted, the HSA does not, as we have already seen, impinge upon the law of the joint-family except in a limited sense, and as and

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1. Per Rao, C.J., ibid., at 28.
2. A.I.R. 1977 Kant. 188.
3. A.I.R. 1961 Mys. 152.
4. A.I.R. 1968 S.C. 209.

*1 Whereas the widow who took under the Act of 1937 and the Act of 1956 is bound by the acts of the kartā, one who takes a share in family property for the first time under the Act of 1956 is not.

when necessary, the undivided female member's share must be subject to the incidents of joint-family property including the kartā's authority to alienate for legal necessity. To hold otherwise would be inequitable, for should the female owner opt for the protection and relative security of the joint state, she must likewise be prepared for such hazards as may have to be borne like any other owner of the coparcenary property. [*]

(c) The Widow's Right to Alienate Her Undivided Share in the Coparcenary Property

While it may be justifiable that absolute owner though she certainly is, as a member of the joint-family the widow must be subject to the incidents and liabilities arising out of the joint status, the more vexed question that faces us next is as to the extent of her right over that property over which she enjoys full ownership by virtue of s. 14 (1) of the HSA, the necessary corollary to which must be the absolute power to deal with it in accordance with the absolute owner's wishes on the one hand, and the restrictions qua alienations which by definition are intrinsic in such property, on the other.

In other words, the practical dilemma that called for resolution was whether, the widow having acquired full interest in her share of the coparcenary property, she had a greater right than did the coparceners themselves, by way of alienation of such interest.

Faced with this paradoxical situation, judicial construction has however tilted in favour of the widow in keeping with both the letter and the spirit of the new legislation. Thus in Madhusadan v. Ananta[1] where the widow's sale of her undivided interest after the HSA, was

1. A.I.R. 1963 Or. 183.

challenged on the basis that there having been no disruption of the joint status, she was incompetent to alienate, Misra, J's., ruling was to the effect that in fact s. 14 (1) gave her just such a right, the joint status and the fluctuations of her interest by births and deaths in the joint-family not being inconsistent with her right of alienation. For, his Lordship emphasised, as she was a statutory heir, and not a coparcener, she was merely a member of the joint-family, and in the absence of any statutory restriction, she could effect a valid alienation and the consent of other coparceners for this purpose, was immaterial.[1]

That by far the most comprehensive and forceful of such decisions is that of the Supreme Court's in Sukh Ram v. Gauri Shankar[2] is evident even at a glance, as within its brief compass the most controversial aspects are touched upon and summarily dealt with. The widow having alienated her undivided interest by way of sale, the contention of her husband's coparceners was that, since under the Benaras School of the Mitāksarā, a male copacener is not entitled to alienate even for value his undivided interest in coparcenary property without the consent of the other coparceners unless the alienation be for legal or other justifying necessity, it could not have been intended by Parliament to confer upon the widow a larger right over the coparcenary property than the right which the surviving coparceners could exercise at the date of the sale. In fact the Act of 1956, in their view, while it intended to confer upon the Hindu widow rights of full ownership in the interest in property in which she had prior to that Act, only a limited interest,

1. Contrast with this the erroneous view evident in Bindroo v. Munshi, A.I.R. 1971 J & K 142, to the effect that as the widow could not be a member of the coparcenary under the śāstric law, her right of maintenance from the joint-family property was not a pre-existing right to property to convert to full tenure in 1956 so as to validate the alienation made by her in 1969. It is submitted that the judgment ignores altogether her entitlement under the Kashmir Act analogous to the HSA, which whether divided or not, did indeed convert to an absolute estate under s. 14 (1) of the HSA.

2. A.I.R. 1968 S.C. 365, on appeal from Gauri Shankar v. Sukh Ram, A.I.R. 1962 All. 18.

it certainly did not intend to destroy the essential character of the joint-family property so as to invest the widow with power to alienate that interest without the assent of her husband's coparceners.

Such contentions were however baseless in Shah, J.'s, view for the "express and explicit"[1] intendment of s. 14 (1) being to convert the limited tenure of the Hindu widow in the joint-family property into a full estate, she "acquired a right unlimited in point of user and duration and uninhibited in point of disposition."[2] As such, for all that there are restrictions qua alienation of his interest in the joint-family property on a male member of a Hindu family governed by the Benaras School as established by the decisions in Madho Parshad v. Mehrban Singh,[3] Balgovind Das v. Narain Lal,[4] and Chandradeo Singh v. Mata Prasad,[5] nonetheless a widow acquiring an interest in that property by virtue of the HSA, is not subject to any such restrictions, and having become full owner on 17 June, 1956, she was competent to alienate such property of her own volition without the consent of the surviving coparceners. For, his Lordship added conclusively, there is "not a ground for importing limitations which (the) Parliament has not chosen to impose."[6]

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1. Ibid., at 366. 2. Ibid.
3. (1891) L.R. 7 I.A. 194 (P.C.).
4. (1893) L.R. 20 I.A. 116 (P.C.).
5. I.L.R. (1909) 31 All. 176 (F.B.).
6. Sukh Ram v. Gauri Shankar, A.I.R. 1968 S.C. 365, at 366. For like decisions, where on similar reasoning, and following the S.C., the widow's right to alienate her undivided share in the coparcenary property was upheld, see Rajendra Nath v. Shiva Nath, A.I.R. 1971 All. 448; Iala Sri Krishna v. Smt. Phool Kumari, A.I.R. 1973 All. 439; Mst. Sonakali v. Smt. Bahuria, A.I.R. 1973 Pat. 477, which further stressed that S.C. decisions are binding on all the Courts in India; Prithi Pal Singh v. Milka Singh, A.I.R. 1976 P. & H. 157 (F.B.), at 167; Vinod Kumar v. State of Punjab, A.I.R. 1982 P. & H. 372, stating at 386: "The provisions of s. 14 virtually abolished those (the traditional) limitations thereby making a Hindu female an absolute owner of her property, and indeed putting her on a higher pedestal than a Hindu male who may well be subject to the limitations of a Hindu coparcenary."

On a resumé of decisions such as these, and particularly in view of the unequivocal pronouncement of the Supreme Court in Sukh Ram's case,[1] we are faced with the paradoxical situation where the female is suddenly elevated to ownership rights even greater than those of a coparcener in coparcenary property. As was to be expected, there is, in certain quarters, a marked reluctance to accept this formula, and at least one instance is evident where the attack on the Supreme Court's view in regard to the coparceners' right of alienation of the joint property, is essentially an oblique unwillingness to accede to the full rights of alienation that a female is construed to possess in such property.

Shah, J.'s, statement to the effect that

> "(W)e are unable to agree... that restrictions on the right of the male members of the Hindu joint-family form the bed-rock on which the law relating to joint-family property is founded," [2]

especially, his Lordship clarifying, as in schools other than the Benaras School (to which this case belonged), this limitation has been dispensed with,[3] has been pounced upon as "taking the principles too far, and may be reconsidered."[4]

But, it is submitted, even if his Lordship did take the principles too far, it does not affect the hard core of the ratio, for the limitations on alienation on coparceners notwithstanding, the estate made absolute under the HSA cannot be subject to similar restrictions, for s. 14 (1) contemplates a secular law free of such impediments as the

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1. A.I.R. 1968 S.C. 365.
2. Ibid., at 366.
3. Ibid.
4. R. Dhavan, The Supreme Court of India, (Bom., Tripathi, 1977), at 374. The same author stresses at ibid, that what rights of alienation of his share a coparcener does possess is really a concession to convenience, and is in spirit opposed to the joint-family principle. See also ibid., at 279 ff., and Derrett, RISI, op. cit., at 424 ff.— a point of view with which there can be no quarrel when considered on its own merits as a separate issue.

śāstra might have chosen to impose on male members who were, in any case, the only beneficiaries under the old law.

The more frontal attack is the kind expressed in Hirabai v. Babu Manika,[1] where we are told that

> "(W)hen the female is a widow and gets the property in her hands because she happens to be the widow in the joint-family, all the previous historical impediments on her entitlement have been expressly removed, but nonetheless we do not find any evidence in the text in the several sections of the Succession Act so as to infer a change in the character of that property. Like every full owner she is entitled to deal with it but along with that are the inalienable attributes which are the part of the property itself."[2]

while such an opinion may, on the face of it seem justified in that, since no provision is made in the HSA in regard to coparcenary property, the law relating to joint-family property cannot be held abrogated under the provision of s. 4 of the Act, it must nevertheless be emphasised that s. 14 (1) does indeed make inroads in the coparcenary, and that to the extent it does, the law relating to joint-family property is indeed implicitly impinged upon; to construe otherwise would be to read limitations in the subsection where there are none, and violative of the entire scheme and intent of the Act of 1956 which postulates for the female Hindu as absolute an estate as the word "absolute" connotes.

It might equally be argued that the Act is not expropriatory and there cannot be confiscation, as it were, of others' properties merely because the person in possession happens to be a female who has acquired it for the satisfaction of her right of maintenance, whether under the old law, or by reason of her statutory entitlement under the HWRPA, 1937. But, it is submitted, it is precisely this "confiscation"

1. A.I.R. 1980 Bom. 315, supra, 521-3.
2. Ibid., Per Masodkar, J., at 329.

that s. 14 (1) contemplates in that any property acquired by the female Hindu and possessed by her at the commencement of the HSA, "in lieu of maintenance" is converted into an absolute tenure. Besides, it must be borne in mind that absolute logic and consistency cannot be maintained in the operation of the provisions of s. 14, when the HSA is essentially a legislation of social reforms involving extinguishment, fresh distribution and modification of property rights.

So, having arrived at this impasse, what are we to make of it? The great temptation is to regard this as, in a sense, poetic justice, the just deserts of those who for millennium and more, had subjugated their females to subordination by a denial to them of any meaningful property rights. But as a work of this nature does not allow for the luxury of emotional bias — objectivity being of its essence — we must not lose sight of perspective, and keeping in mind that the intention of Parliament was to accord equal rights to women, not better rights than men, that "any system of law that lasted suited all people's interests",[1] we have to recognise it for what it is, an inadvertent (- however reluctantly -) anomaly, the inevitable result of piecemeal legislation, and the constructional dilemma that accompanies it.

That s. 14 (1) is a fait accompli we are all agreed, and as the absolute rights of the widow may not be tampered with, the remedy lies in extending to the male members of the coparcenary, a corresponding absolute right of alienation of coparcenary property. As fragmentation of joint-family property is already in the contemplation of the Act in that, s. 30 lays down that

> "(A)ny Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so

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1. J.D.M. Derrett, in a letter to the present writer dated 20 Sept. 1983 (Unpub.).

> disposed of by him in accordance with the provisions of the ISA or any other law for the time being in force,"

it is submitted that an amendment of s. 30 of the HSA is in order, for if the interest of a male Hindu in Mitākṣarā coparcenary property[1] is capable of being disposed of by testamentary disposition, there seems no valid ground why he may not likewise be entitled to alienate in his lifetime by gift inter vivos, sale or other method of alienation, specially as the same right has been accorded to the female under s. 14 and in the same property. Fears that moves such as this may effectively bring about the destruction of the joint-family, appear ill-founded to those who know its incidents well and its enduring character.[2] Assuming moreover that that were to happen, as the abolition of the "birthright" would be a further step towards the equalising of claims in the joint estate as between male and female members, it is submitted that the resuscitation of the Mitākṣarā joint-family in the "Hindu Code" was uncalled for, and the time ripe for legislation to effect its extinction as originally envisaged in the "Hindu Code" Bill.

(9) The Effect of S. 14 on Property Allotted to the Female for Her Maintenance

We have already examined the imperative nature, in the traditional Hindu law, of the widow's right to maintenance out of the separate property of her husband where he died leaving behind a son, grandson or great-grandson, and out of the estate of the joint-family of which her deceased husband was a coparcener. Such property as was allotted to the female for maintenance purposes, was essentially and intrincally a part of the estate, and after her death it reverted to the next heir(s) of the husband, or to his coparceners as the case might be.

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1. See the Explanation to s. 30 of the HSA.
2. Derrett amongst others shares this optimism. See RLSI, op. cit., at 435, where he is of the view that, "so long as the father and his sons regard themselves as jointly and successively responsible for the maintenance of the members of the family, the joint family will remain and the MHL has not taken away its juridical framework."

After the coming into force of the HSA, the problem that for some long time perplexed the Judiciary was whether such property as was in the possession of the female Hindu in lieu of her maintenance when she was not an heir, whether in the classical law, or under the terms of the HWRPA, 1937, could be regarded as her absolute property by virtue of the provisions of s. 14 (1).

It would seem that, in view of the clear wording of the sub-section, and the specific inclusion in the Explanation thereof, of the words "in lieu of maintenance or arrears of maintenance," there would be no room for controversy. Yet till recently there was in fact an alarming divergence of judicial opinion, and the conflict in the interpretation of the two sub-ss. of s. 14 — already evident in areas other than maintenance — became all the more accute when the High Courts, and even the Supreme Court, were faced with the apparent dilemma as to the effect of s. 14 on a grant of land for maintenance to a female which she got under a gift, will, decree, order, award, or other instrument, the terms of which specified a restricted estate.

The problem that seemed to defy judicial solution revolved round the question as to whether a mere right of maintenance could be regarded as a right to property. Divergent attitudes emerged, the conservative stance negativing a right of maintenance as a pre-existing, an antecedent right, so that in their view former grants to secure maintenance, even if they amounted to shares in the family estate had to be considered as within sub-s. (2), so that the female took subject to whatever limitations were written into the grant; on the other hand the progressive attitude was that a right of maintenance being a subsisting right, it would prevent the "acquisition" from being an "acquisition" within the meaning of s. 14 (2). In other words, what the female acquired in lieu of maintenance is in the nature of a right to property, and notwithstanding the limitations written into it, such grant is converted into an absolute or "full" tenure.[1]

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1. J.D.M. Derrett, "S. 14 of the HSA, 1956, and a Recent Supreme Court Decision," (1971) 73 Bom. L.R. (J.), 50-4, at 50.

This depressing polarization of viewpoints had assumed alarming proportions by 1977, and in Madras, and its associate, the Andhra Pradesh, High Courts in particular, the conservative rigid posture gained ascendency, and was further reinforced, at one time, by the extraordinary notion that the only estate to be upgraded to an absolute estate by s. 14 (1) was the Hindu woman's "limited" estate, whereas if the estate sought to be enlarged was any other kind of estate short of full ownership capable of being called "restricted estate" in s. 14 (2), that estate remained subject to its restriction and was not enlarged;[1] in other words, what the female got in lieu of her maintenance under a gift, will, etc, was not a right to property under s. 14 (1), but an estate subject to the restrictions in the instrument and therefore clearly a "restricted" estate within the meaning of s. 14 (2)!

It is against this back-drop that we must now turn our attention to the flood of conflicting judicial decisions that this once "disagreeably disputed topic"[2] provoked, and establish the true position, by interpreting correctly the intention of the Legislature in the enactment of a section in the statute the consequences of which were to have such far-reaching significance.

(a) The View That a Right of Maintenance is Not a Right to Property

The majority of the Courts were agreed some long time ago, and the Supreme Court has confirmed, that

> "(S)ub-s. (2) of s. 14 is more in the nature of a proviso or exception to sub-s. (1). It can come into operation only if acquisition in any of the methods indicated therein is made for the first

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1. Derrett, "S. 14 of the HSA : A Gratifying ...," op. cit., at 21.
2. Derrett, "S. 14 of the HSA Once ...," op. cit., at 19.

> time without there being any pre-existing right in the female Hindu who is in possession of the property." 1

Or in other words, if the female had no right in the estate prior to the grant etc., the grantor could thereby create a limited or restricted estate in her favour, since what the statute aimed to abolish was the legal limited estate, the woman's estate which simply arose by operation of the Hindu law.

The question however was whether a bare right of maintenance could be regarded as just such a pre-existing right so as to rule out the application of s. 14 (2). The abundance of instances indicate if nothing more, that despite specific words to that effect in the Explanation to s. 14 (1). the Courts were, till only recently, unwilling to see a right of maintenance as a foundation for a woman's right to treat as an absolute estate even that property which is conveyed to her in recognition of her right to be maintained where she accepted a limited or otherwise restricted estate; so that maintenance not being a pre-existing right, as they saw it, grants made in satisfaction of that right were subject to any limitations imposed thereby. 2

Jaria Devi v. Shyam Sundar,[3] is an early example of this restrictive interpretation of the sub-s., the unwillingness, or even the incapacity, on the part of the Courts, to free themselves from traditional attitudes in the light of the legislative intendment as indicated in s. 14 (1). Where the widow had been allotted a moiety share of the property along with others in lieu of her admitted one-fourth share in the joint property under what was ostensibly a deed of partition but which the Court rightly

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1. Seth Badri Prasad v. Kanso Devi, A.I.R. 1970 S.C. 1963, at 1965
2. J.D.M. Derrett, "A Note on Kunji Thomman v. Meenakshi , A.I.R. 1970 Ker.284," (1971) K.L.T. (J), 25-6, at 25.
3. A.I.R. 1959 Cal 338

interpreted as a deed of family arrangement, it was held that, as the family settlement expressly stipulated that she would have no more than a life interest therein, the case would fall within the exception to s. 14 (2) and not within the general rule enacted in s. 14 (1), the clear inference being that her right having commenced for the first time under the settlement deed, the widow had no pre-existing right as such, and the restriction must thus be upheld. [1]

The ruling in Mali Bewa v. Dadhi Das, [2] similarly adheres to the notion that a bare right of maintenance may not convert to a right of property, that the widow's right having commenced under the compromise with her adopted son, it was not an antecedent right, and she was therefore bound by the terms of the compromise. What was overlooked here, as indeed in all other like decisions, was that the maintenance of the widow was a burden on the joint-family estate, and when a share of the estate is given

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1. A sizeable number of decisions indicate a similar view. See Basdeo v. Director of Consolidation, U.P., (1969) 67 All. L.J. 1027; Smt. Prema Devi v. Director of Consolidation , A.I.R. 1970 All. 238; Likhmi Chand v. Smt. Sukhdevi, A.I.R. 1970 Raj. 285; Suba Bewa v. Gauranga Chandra, A.I.R. 1971 Or. 242; Bai Parson v. Bhagwandas, (1972) 13 Guj. L.R. 123, having reiterated at 127 that, "a bare right of residence creates no estate in her (the widow's) favour," irrationally concludes at 128 that, "even though she may be in lawful possession of the property within the meaning of s. 14, she cannot be said to have acquired it so as to make her the full and absolute owner thereof by virtue of the operation of s. 14." Contrast, as against this, the excellent perspective in Kusumgauri v. Umiben, A.I.R. 1975 Guj. 126, discussed below at 699 ; Bindroo v. Munshi, A.I.R. 1971 J.& K. 142; Sarat Lakshmi v. Sisir Kumar, (1973) 78 C.W.N. 357; Ram Jag v. The Director of Consolidation, U.P., A.I.R. 1975 All. 151. Consider also the same retrograde attitude in Naraini Devi v. Ramo Devi, A.I.R. 1976 S.C. 2198, where the Supreme Court in a shallowly considered judgment, reminiscent of the earlier Gujarat stance, refused to countenance the widow's pre-existing claim to residence in the house obtained under an award, ruling instead that as her interest came under s. 14 (2), she was entitled to nothing more than the rent, "the wretched part about this decision (being) that the award stated that the rent was in lieu of maintenance." : J.D.M. Derrett, "A Hindu Law Miscellany," (1977) 79 Bom. L.R. (J), 21 -23, at 23 . And again "an unfortunate decision which does not deal adequately with the arguments in favour of the widow's inherent right of maintenance and consequently a pre-existing right in the nature of property adequate to enable a grant for maintenance to be converted into an absolute estate in 1956. ": J.D.M. Derrett, (unpub.).

2. A.I.R. 1960 Or. 81.

to her in satisfaction of that precise burden, it cannot be said to be an acquisition of a new right, and

> "(i)n fact in that family if anyone can be said to have acquired a right it was the son before whose adoption these ladies (the living widow and her deceased co-widow, both of whom were parties to the compromise), had, or might have had, the properties to themselves." 1

But quite apart from this question of maintenance as a subsisting right, it is submitted that on yet another count, his Lordship, Barman, J., could well have given the widow the benefit of s. 14 (1). The terms of the compromise expressly provided that the widows were to hold their shares for their lifetime and meet their maintenance out of the usufruct and if the usufruct be not sufficient for this purpose, then they would be entitled to sell such portions of their shares as might be necessary. The compromise decree therefore clearly envisaged the grant of the "limited" estate as known to Hindu law, and even if the word "limited" in the sub-s. is misconstrued to mean quite literally the legal limited estate, the widow's entitlement under the compromise was still capable of attracting the provisions of s. 14 s. 14 (1).[2]

The reluctance on the part of the Punjab High Court to concede to the female the full benefits of s. 14 (1) is also apparent in Puran Singh v. Resham Singh.[3] The widow having forfeited the estate inherited by her by reason of her unchastity, it was held that a part of the land reallotted

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1. Derrett, "S. 14 (2) of the HSA: A Disturbing ...," op. cit., at 71.
2. See also Arkhita Das v. Hari Mohapatra, A.I.R. 1963 Or. 162, which was decided along similar lines, but the more so reprehensible for a singular lack of cohesion and clarity of thought. While acknowledging that the restricted estate thus created was the "limited" estate well known in Hindu law and which is usually called widow's estate which carried with it the restrictions inherent in the legal conception itself, the learned Judge, Misra, J., was of the opinion that it was nevertheless a restricted right created prior to the commencement of the HSA, and therefore incapable of being enlarged into full ownership. The dichotomy inherent in this line of reasoning is self-evident, for, it is submitted, it is just such a limited right, i.e. one created prior to the commencement of the Act, that can at all come within the purview of s. 14 (1).
3. (1965) Curr. L.J. 848, cited at Bai Jabar v. Dhan Kaur, (1967) 69 Punj. L.R. 558.

to her for her maintenance would attract the provisions of s. 14 (2), as it is an acquisition for the first time under a decree of court. It is however submitted that such a grant of land for maintenance purposes even under a court decree would be capable of being enlarged as a full estate under s. 14 (1), for it has to be borne in mind that though unchastity may work a forfeiture of her inheritance, it does not, in the traditional law, similarly work a forfeiture of her maintenance. The right of maintenance persists, albeit in a diminished form, and what the decree confirmed was precisely this bare or starving maintenance — a subsisting right, and therefore capable of attracting s. 14 (1).

As one turns one's thoughts to the Patna decision in Shiva Pujan v. Jamuna Missir,[1] one is tempted to dismiss, and would indeed have dismissed it, as yet another instance of those "rogue" cases which persist in construing s. 14, as far as possible, to women's disadvantage, but for a disturbing, because thought-provoking, extension of the same view established in Kunji Thomman v. Meenakshi.[2] Where in the one, under a compromise, and in the other, under a family arrangement, land was given to the widowed daughter-in-law for her maintenance, it was held that her husband having predeceased his father, it was manifest that the widow did not acquire any interest in the estate of her father-in-law by inheritance or otherwise, and the instrument prescribing restrictions being the source of her title, she acquired a restricted estate under s. 14 (2). The Kerala High Court, in explaining the rationale for their decision held that though the principle of Hindu law settled by judicial decisions is that whereas a father-in-law who had separate properties was under a moral obligation to maintain his widowed daughter-in-law as a dependant during his lifetime, and upon his death her maintenance out of such property becomes a strictly legal liability in the

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1. I.L.R. (1968) 47 Pat. 1118.
2. A.I.R. 1970 Ker. 284.

hands of his heirs to the extent of the estate inherited,[1] nevertheless

> "(I)f a daughter-in-law has got properties from out of which she could have maintained herself very comfortably we do not think it right to hold that still there would be a moral obligation on the part of the father-in-law. In the absence of any moral obligation, no legal obligation against the heirs inheriting the estate can arise." [2]

It was further held that assuming that there was in fact a legal obligation on the part of the heir to maintain the widowed daughter-in-law out of the estate inherited by the former "we do not think that the second defendant can take advantage of s. 14 (1) of the HSA,"[3] for, reasoned their Lordships, the widow consented to allotment of properties not according to strict legal rights, in a deed which expressly stated that she had only a life interest in the properties given to her creating a vested remainder in favour of others.[4]

However, despite this weight of authority in favour of the dicta, a nagging doubt persists as to its merits. It is submitted that in the absence of proof to the contrary, the recognition by the father-in-law

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1. Ibid., at 285-6.
2. Ibid., at 287. In agreeing with this view, Derrett maintains that "...in order to be so entitled the daughter-in-law must have been poor and a dependant de facto. This point has been brought out splendidly in the judgment, and is not altogether obsolete law in spite of the different formulation of the daughter-in-law's rights under the HAMA, 1956, which did notapply in this case." See "A Note On ...," op. cit., at 26.
3. Kunji Thomman's case, A.I.R. 1970 Ker. 284, at 287.
4. Ibid., at 288. Derrett likewise endorses this position, stating that "Granted that, had the pleading established the facts, (which, it may be noted, it did not), the daughter-in-law might have had a claim against the estate in the hands of her widowed mother-in-law, the arrangement in this case, beautifully and ... correctly identified as a family arrangement amounted to a distribution of the deceased father-in-law's estate amongst five people, four of whom had no right to be maintained out of it ... and the fifth had only a contingent and hypothetical right of maintenance." : "A Note On ...," op. cit., at 26. But is such a right merely a "contingent" and "hypothetical" right? This difficult problem is dealt with below.

of his moral duty to maintain the widow of his predeceased son is indicative of that "inadequacy of her own assets" which the learned judges felt was a prerequisite for the burden of maintenance to fall on such property. Under such circumstances, the heir or heirs cannot escape their legal liability, and notwithstanding that the distribution of the estate was under a family arrangement with four of the participants not having any right of maintenance in it, to hold that despite this legal right, merely because the widow took under a family arrangement, s. 14 (2) must apply, seems strange reasoning. For, while certainly it is true that, the allotment did not purport to satisfy any right of maintenance of those who could claim no such right of maintenance, the burden of legal obligation towards the widowed daughter-in-law would it is submitted, save her entitlement from the operation of s. 14 (2). That the issue is not free from doubt, it is acknowledged here, and has been acknowledged elsewhere,[1] and it is submitted that a careful reappraisal might be in order in view of the vast number of decisions where the widow's subsisting right of maintenance has been vindicated as a right of property despite restrictions in the family arrangement or other instrument under which she took.

(i) The Ascendency of This View in Madras and Andhra Pradesh

This misconception of the sub-s., and the denial of maintenance as a right to property appears to have held special appeal for Tamil Nadu

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1. See J.D.M. Derrett, "A Hindu Law Miscellany," (1971) 73 Bom. L.R. (J.), 80-3, at 81, where on second thoughts, he has this to say: "This particular part of the judgment makes me pause, for I feel sure that she, a daughter-in-law, had an antecedent right of maintenance, such as would give to the share she took such a quality as would be bound to bring it within s. 14 (1)." "But" adds the writer, "the case is complex." Significant also is the passing over, by the Supreme Court in Tulasamma v. Sesha Reddi, A.I.R. 1977 S.C. 1944, at 1971, of this case, where, while approving of Saraswathi Ammal v. Anantha, A.I.R. 1966 Ker. 66, in so many words, Fazal Ali, J., confined himself to projecting the latter Kerala view without comment.

and Andhra Pradesh, and in fact it was from the latter High Court that the first reasoned judgment, given after mature deliberation and deep thought, further entrenched this rigid posture. In Gopisetti Kondiah v. Gundu Subbarayudu,[1] there were two cases before the division bench. In the Second Appeal, under the terms of his will, the deceased who had died in 1918, bequeathed half of the property to his mother for life, and the remainder to his widow, who would thereafter hold the estate absolutely. The mother in turn gifted away her portion in October, 1956, whereupon the widow sued for its recovery alleging that, as what the mother had got under the terms of the will was merely a limited estate, the alienation effected by the latter would not bind her. Their Lordships, in explaining the nature of the right of maintenance held that, in the traditional law, the right of maintenance was an indefinite right which did not by itself create in the widow a proprietary right in the property. But if that right is translated into a specific right in property, the estate so transferred in her favour can either be in recognition of her right to maintenance under the Hindu law, or create a restricted estate recognised under any other law in force. If it is the former, the mere transfer or acquisition and possession thereof in lieu of her right of maintenance would itself be sufficient to create an absolute estate under s. 14 (1). But as in this case the testator, while intending to give the entire properties absolutely to his wife, had interposed a life estate in respect of a moiety in favour of his mother, which after her death was to be a gift over absolutely to his wife, what the will conferred on the mother

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1. (1968) 2 An. W.R. 455.

was a new and therefore restricted right under s. 14 (2).[1]

This extraordinary notion, i.e. that a right of maintenance is not a right to property, based as it is on the supposition that it is not a subsisting right, was further reinforced in a number of decisions by reference to the concept of maintenance in the traditional law to the effect that, however imperative the nature of a right of maintenance may be, it is nonetheless an indefinite right which "by itself does not confer on her (the widow) any possessory lien or proprietary right or title in the property."[2] The creation of a charge against such property, so the argument goes, may enforce the right of maintenance, but beyond that a charge does not have the effect of transferring or creating a right in it,[3] and it is

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1. For similar decisions in South India, see also Santhana v. Subramania, I.L.R. (1967) 1.Mad. 68; Sesha Reddi v. Tulasamma, A.I.R. 1969 A.P. 300; overruled by the Supreme Court in Tulasamma v. Sesha Reddi, A.I.R. 1977 S.C. 1944, itself a milestone in resolving the controversy as to the nature of a female's right of maintenance and the effect of s. 14 on it; Pattibiraman v. Parijatham, A.I.R. 1970 Mad. 257; Unnamalai v. Vellaya, (1971) 1 M.L.J. 147; Thayammal v. Salammal, A.I.R. 1972 Mad. 83; Velmurugayya v. Lakshmana, (1974)2 M.L.J. 295; Soundararajan v. Venkataraman, (1976) 2 M.L.J. 466; Subbalakshmi v. Andiappa, (1977) 1 M.L.J. 2 (N.R.C.); Subba Naidu v. Rajammal, A.I.R. 1977 Mad. 64. The same erroneous construction of s. 14 is evident in Narayan Patra v. Tara Patrani, A.I.R. 1970 Or. 131, where the learned Judge, Patra, J., derived his inspiration from the retrograde decisions in the South to arrive at a conclusion that follows Gopisetti's case,(1968) 2 An. W.R. 455, verbatim.

2. Gurunadham v. Navaneethamma, A.I.R. 1967 Mad. 429, at 430. See also Gopisetti's case, cited above, at 460; Likhmi Chand v. Smt. Sukhdevi, A.I.R. 1970 Raj. 285, at 286; Narayan Patra's case, cited above, at 134; Santhanam K. Gurukkal v. Subramania Gurukkal, A.I.R. 1972 Mad. 279, at284.

3. Gurunadham's case, cited above, at 431; Gopisetti's case, cited above, at 468; Likhmi Chand's case, cited above, at 286; Narayan Patra's case, cited above, at 134; Santhanam's case, cited above, stating at 282 that, "There is nothing to show that she claimed any charge over the joint family properties," thereby reinforcing the erroneous notion that such a charge might conceivably alter the nature of her right so as to entitle her to the benefit of s. 14 (1). As against this, Derrett, all too aware of the haplessness of females in the face of their own ignorance and the intrigues of others "who could dispute females' claims and drive them into disadvantageous compromises," firmly refutes this view to hold that "The word 'acquired' in s. 14 (1) should then apply not only to property over which a charge has been made in the woman's favour, but also property over which she has a floating right to be maintained." : "S. 14 of the HSA Once ...," op. cit., at 22.

in fact liable to be defeated by a transfer of the property to a bona fide purchaser for value without notice of the widow's claim of maintenance.[1]

It is however submitted that this kind of construction cannot lend itself to any sensible interpretation of s. 14. True, a bare right of maintenance may be frustrated by certain alienations by the owners of the corpus, as has rightly been said. True also, that a charge when made, creates only a right of payment out of the property. But in invoking the traditional law, what has to be kept sight of is that a wife's right of maintenance out of her husband's properties stemmed from the notion that the wife is half her husband's body, and the right of maintenance therefore is an interest in the nature of property as a direct consequence of her co-ownership with her husband. Thus she is entitled by marriage alone to be maintained[2] and this, charge or no charge, is an encumbrance on the family unless very special circumstances apply, in which prior valid charges take precedence, or an equity in favour of a special kind of bona fide purchaser ousts her claim.[3] The charge therefore, which a widow may obtain does not make proprietary what was not proprietary before![4]

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1. Santhanam's case, A.I.R. 1972 Mad. 279, at 284

2. This has been attractively set out by their Lordships of the Patna High Court in Sumeshwar v. Swami Nath, A.I.R. 1970 Pat. 348, at 351, where they explain that "The right of a Hindu widow to get maintenance out of the joint family properties is an indefinite right; yet it is a right and she does not get maintenance gratis or by way of charity. She gets it in her right under the Hindu law." Equally attractive is the reiteration of this theory in Tulasamma v. Sesha Reddi, A.I.R. 1977 S.C. 1944, at 1954,: "The claim of a Hindu widow to be maintained is notan empty formality which is to be exercised as a matter of concession or indulgence, grace or gratis or generosity, but is a valuable spiritual and moral right which flows from the spiritual and temporal relationship of the husband and wife. As the wife is in a sense a part of the body of her husband, she becomes co-owner of the property of her husband though in a subordinate sense."

3. Derrett, "S. 14 of the HSA Once ...," op. cit., at 21.

4. Derrett, "S. 14 of the HSA: A Gratifying ...," op. cit., at 53. Note the perverseness of the dicta in Sesha Reddi v. Tulasamma, A.I.R. 1969 A.P. 300, where despite the prior charge obtained by the widow, it was held that s. 14 (2) would apply to such property, as it was only under the later compromise decree that she had acquired possession of it.

Nor is there any merit in the contention that a distinction must be drawn between a widow with a bare right of maintenance, i.e. one whose husband had died prior to the passing of the HWRPA, 1937, and in cases where the grants, settlements, compromises and decrees arose out of claims based on the Act of 1937. Conditions imposed in all such cases, so it was construed, could be ignored, as it acknowledged or effectuated the widow's pre-existing right of property, the Act of 1937 having statutorily quantified her share as equal to that of a son in the separate, and the share of her husband in the joint-family, properties.[1]

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1. See sub-ss. 3 (1) and 3 (2) of the HWRPA. This denial of a bare right of maintenance as a right of property, as against the entitlement of the widow under the Act of 1937, and the recognition of it as a pre-existing right, is adhered to in Gurunadham's case, A.I.R. 1967 Mad. 429, where the Court held that that,the decisions in Sasadhar Chandra v. Tara Sundari, A.I.R. 1962 Cal. 438, Sampat Kumari v. Lakshmi Ammal, A.I.R. 1963 Mad. 50, and Sharbati Devi v. Hiralal, A.I.R. 1964 Punj. 114, could be of little assistance to the widow in the present case, as those were instances of a pre-acquired right either under the Hindu law, or under the HWRPA. The decision was in turn approved of in Gopisetti's case, (1968) 2 An. W.R. 455, at 467. See also Narayan Patra's case, A.I.R. 1970 Or. 131, at 135; Pattabiraman's case,A.I.R. 1970 Mad. 257, at 259; Bai Parson v. Bhagwandas, (1972) 13 Guj. L.R. 123, where in refuting the widow's right of residence as a right of property, Sheth, J., states at 125: "It has not been disputed before me that the HWRPA, 1937, was not applicable to Bhavnagar at any time before it was repealed by the HSA, 1956," imputing thereby that while he was willing to concede that the widow's share under the Act of 1937 would attract the provisions of s. 14 (1), the widow with merely a right of residence could claim no such benefit; Raja Rao v. Hastimal, A.I.R. 1972 Raj. 191, at 196. A similar distinction is implied in Subba Naidu v. Rajammal, A.I.R. 1977 Mad. 64, at 65. Reprehensible as this construction is, note the even more incomprehensible attitude adopted in Sarat Lakshmi v. Sisir Kumar, (1973) 78 C.W.N. 357, following Jaria Devi v. Shyam Sundar, A.I.R. 1959 Cal. 338, where despite the widow's entitlement under the HWRPA, (of which incidently, inexplicably there is no mention in the judjment), it was held that, as she took property not strictly according to her share under a family arrangement, s. 14 (2) applied; Ram Jag v. The Director of Consolidation, U.P., A.I.R. 1975 All. 151, likewise ignores the Act of 1937 to arrive at an identical decision. See also Bindroo v. Munshi, A.I.R. 1971 J.&K. 142, discussed above at 569, f.n. 1

That this view is untenable is evident if we recall the nature of the interest that the widow acquired under the HWRPA, 1937. At her demand for partition under that Act she took property producing an income exactly the same as the minimum she could have claimed had she claimed separate maintenance in 1936.[1] The woman's interest under the Act of 1937 therefore enlarged on a right she had before, (that of maintenance which was never technically abolished), and the Act of 1956 merely manipulated and converted it further.[2] Nor is this inconsistent with the intention of Parliament which surely did not desire to discriminate between widows who took under the statute of 1937 and those who did not, nor between those Mitākṣarā families who were bound to give shares to females at a partition and those that were not.[3]

If a right is denied to women when they claimed no more than maintenance i.e. where they were at their weakest and least defended condition, while a right is acknowledged when they claimed a share,[4] then we are attributing to Parliament a frankly discriminatory outlook inconsistent with the legislative intendment; this attitude belittles the existing right of maintenance, and rests on the essentially inequitable notion that it cannot be a basis upon which a grant to secure it can be a grant to secure a right pre-existing that grant, with the effect that women taking grants for their maintenance when they are already dependants of the joint-family lose their chance for holding the land for an absolute estate, whereas those who took under the Act of 1937 and whether or not they have taken part in any agreement, arrangement or settlement find themselves owners of an absolute estate in undivided assets as from 17 June, 1956. This is a conservative position understandably kind to males but incorrect.[5]

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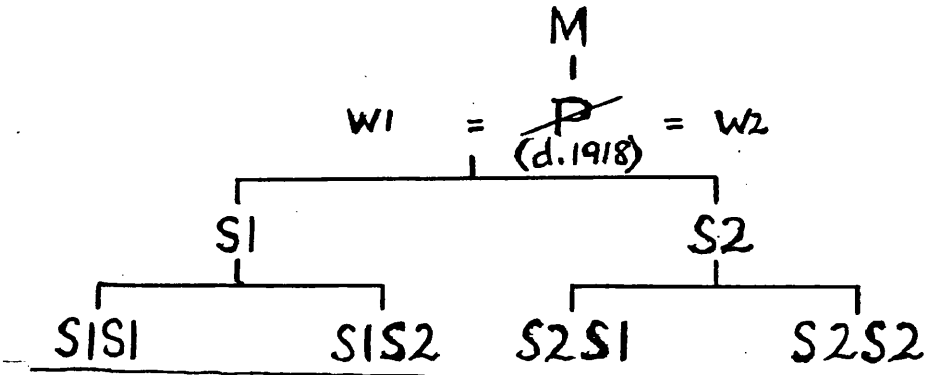
1. Derrett, "S. 14 of the HSA Once ...," op. cit., at 21.
2. Derrett, "S. 14 of the HSA: A Gratifying ...," op. cit., at 53.
3. Derrett, "S. 14 of the HSA Once ...," op. cit., at20.
4. Derrett, "S. 14 of the HSA: A Disturbing ...," op. cit., at 67.
5. J.D.M. Derrett, "The Tenure of Widows Who are Granted Land for Their Maintenance," (1972) K.L.T.(J), 33-4, at 33, f.n. 4.

(ii) The Reinforcement of the Conservative Stance on the Ground that the Restricted Estate under an Instrument is Not the Legal "Limited" Estate under s. 14(1).

The stance that a right of maintenance is not a right of property was abetted in the Madras and its allied High Court by a fundamental misconception of the word "restricted" in sub-s. (2) of s. 14. In any meaningful construction of s. 14, what we have to bear in mind is the purpose of s. 14 (2), that it is in the nature of an exception to s. 14 (1), so that while the intention of Parliament was to abolish the legal limited estate, it preserved to anyone who had the right to convey property to a woman the natural and obvious right of conveying it subject to a limitation of his own choice. To read more into it would be to misconstrue the sub-s. to the detriment of the new rights conveyed to the female under the HSA. And yet this is exactly what happened, and for some considerable time the view held sway in the South that, despite her right of maintenance under the Hindu law, where the female acquired property under an instrument which prescribed a restricted estate other than the "limited" estate, such acquisition was incapable of attracting the provisions of s. 14 (1), and she was bound by the terms of the instrument.

The second Appeal in Gopisetti's case[1] is the prototype of this kind of reasoning, and the extension and hardening of this theory is apparent in the Letters Patent Appeal in the same case.



1. (1968) 2 An. W.R. 455.

The facts briefly, and shorn of irrelevances, were that after P's death in 1918, and as a result of lack of amicability between W2 and her minor stepsons, P's mother acting as de facto guardian of the minors executed a maintenance deed in favour of W2 whereby some land was allotted to her for her maintenance. In 1957 W2 sold the land in reliance upon s. 14 (1) of the HSA, whereupon the sons of S1 and S2 contended that the alienation would not be valid and binding on them after W2's lifetime as what the maintenance deed had conferred upon her was merely a life estate. Their Lordships of the Andhra Pradesh High Court concurred with the judgment of Chandrasekhara Sastry, J., in the second appeal that such grant would indeed come within the purview of s. 14 (1), but it is submitted, it is their reasoning at arriving at this decision which requires careful reconsideration. In the Letters Patent Appeal they had made it clear that

> "(W)e cannot accept the contention... that a right to maintenance is a right in property; that it is a pre-existing right in lieu of which that property or portion thereof is given and, therefore, sub-s. (2) of s. 14 does not apply to property transferred in lieu of maintenance whether the instrument transferring the property creates a restricted estate or not." 1

On the other hand the pre-existing right of a Hindu female is in respect of property to which she would, under the Hindu law, obtain a limited interest.[2] Thus where specific property is transferred to her in discharge of her right of maintenance from out of the estate of her husband or of the property of the family, the widow acquired a right in such property in lieu of her maintenance which is the source of her title, and provided that no restrictions are placed by the instrument under which it is transferred, she takes an estate free of restrictions under sub-s. (1) of

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1. Ibid., at 462.
2. Ibid., at 460. Reiterated at 468 to the effect that, "if the transfer is only in lieu of a pre-existing right of maintenance and the terms and conditions are consistent with that, she would get an absolute estate under s. 14 (1)."

s. 14. In the present case therefore, as the maintenance deed did not stipulate any express prohibition against any alienation of the property, the recital merely stating that after her lifetime the property would revert to the minors, this was in accord with the rights she would have had in case the property had been transferred to her in lieu of her maintenance. Under such circumstances, s. 14 (1) applied, and her absolute right under it undeniable.[1] is

As one turns the dicta over in one's mind, it is at once apparent that the Court did not overtly look so much to the merits of the matter, as to the technical construction of the two expressions "limited owner" and "restricted estate"[2] There is of course no doubt but that one of the chief objects of the reformers from whose endeavours the HSA derives

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1. The denial of the right of maintenance as a pre-existing right apart, the same reasoning, that is, that it is only the legal limited estate in respect of which s. 14 (1) may be invoked, was also the basis of the reasoning in Seetharamayya v. Peraiah, A.I.R. 1964 A.P. 545; Venkat Narsing Rao v. Keshava Rao, (1964) 2 An. W.R. 383, at 385; Gurunadham's case, A.I.R. 1967 Mad. 429, at 431; Dharma Udayar v. Ramchandra, (1969) 1 M.L.J. 181; Thayammal v. Salammal, A.I.R. 1972 Mad. 83, following the decision of Natesan, J., in Lakshmi Ammal v. Sappanimuthu Nader, S.A. No. 1415 of 1965 (Mad.), at 85; Santhanam's case, A.I.R. 1972 Mad. 279, at 282-3; Chinnammal v. Kaveri, (1974) 2 M.L.J. 7 (N. C.), at 7; Velmurugayya v. Lakshmana (1974) 2 M.L.J. 295, at 298. On the other hand, it was held in Ram Jag v. Director of Consolidation, U.P., A.I.R. 1968 All. 419, that as it was nowhere mentioned in the deed of family arrangement under which the widow held the property for her maintenance that, after her death the property was to revert to her husband's collaterals, the effect of s. 14 (1) was to convert it to an absolute estate. Similarly, in Rama Vanti v. Bal Kaur, (1968) 70 Punj. L. R. 90, Mahajan, J., held that as the decree under which the widow was granted property for her maintenance merely stipulated that she was to hold it till her death, it did not either in express terms or by necessary implication prescribe a restricted estate so as to attract s. 14 (2). See also Hussain v. Venkatachala, A.I.R. 1975 Mad. 8, where while refusing to recognise a mere right of maintenance as a right to property, Maharajan, J., ruled that, as the compromise deed merely recognised the widow's pre-existing estate settled upon her under her husband's will, and the impositions of restrictions in the former being consistent with the limited estate, s. 14 (1) would have applied but that the female was not possessed of the estate on 17.6.56. Reminiscent of the Letters Patent Appeal in Gopisetti's case, (1968) 2 An. W.R. 455, these decisions are correct, but the reasoning, it is submitted, quite as misleading as that in the Andhra judgment. In contradistinction to these, see Thayyanayaki v. Venugopala, (1975) 2 M.L.J. 425, infra, at 659.

2. Derrett, "S. 14 (2) of the HSA: A Disturbing ... ," op. cit., at 68.

was to abolish the woman's limited estate.[1] However, just as the word "restricted" in s.14 (2) literally means any restriction short of full ownership, and therefore includes the traditional limited estate, similarly the words "limited" owner in s. 14(1) is not intended to exclude an owner of a "restricted" estate, but means merely an owner of an estate subject to a limitation.[2] The two words are an elegant variation, and not in contradiction or contradistinction.[3]

The error in Gopisetti's case[4] is briefly this, that the learned Judges believed that the test whether an estate is enlarged from a nominal restricted estate into an absolute estate, was not whether the woman acquired contractually or consensually the estate under the disposition relied upon, but whether the limitation chosen by the opposite parties was the old limited estate of Hindu females or some other restriction incompatible with that. They implied that the limited estate stricto sensu was removed in favour of an absolute estate; but that restricted estates, being restrictions unknown to the previous law, would bring the matter within s.14 (2) even if the woman had acquired a new right, independently of any earlier claim,[1] that in effect and conversely, where restrictions were inserted in the instrument, the widow could not claim under s.14 (1), and this despite her pre-existing right of maintenance, which their Lordships acknowledged in so many words.[5]

That this was surely not Parliament's intention, that the words "and "limited owner" must be taken in their natural sense, namely "subject to limitation", is proved by the careful wording of the Explanation which

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1. Ibid., at 63.
2. Derrett, "S.14 of the HSA: A Gratifying ...," op. cit., at 52.
3. J.D.M. Derrett, "S.14 of the HSA : A Deadlock Ready for the Supreme Court to Break," (Unpub.), 1-7, at 2.
4. Gopisette's case, (1968) 2 An. W.R. 455, at 468.
5. Derrett, "S. 14 of the HSA : A Disturbing ...," op. cit. at 68.

amounts to this:

> "(N)o matter where the property came from, provided she was lawfully entitled to it, where she acquired it by virtue of the law, she is full owner and not a limited owner."[1]

The reason for this is clear. Parliament wanted, at the expense of reversioners and other male participants, if necessary to enlarge women's existing rights in property, to give as much property to women of all ages and lengths of widowhood as was possible, thus righting a social injustice of long standing. If this could be prevented by their agreeing (in whatever circumstances) to any estate, short (in any way) of an absolute estate, whether the agreement might have been in 1936, 1955 or 1957, the purpose of the Legislature which was frankly discriminatory in favour of some women, would have been frustrated.[2]

Thus though it is ideal not to deprive reversioners where the widow's husband died before 1937, the notion that her right to maintenance is a subsisting right to property is not only consistent with Hindu tradition,[3] but is also a step towards the equalising of claims of females against males; and this generosity, a generosity shown to female heirs in the absence of male issue, and to all female heirs and share-takers under the HWRPA, 1937, extending it in favour of women who could not be heirs and share-takers before 1937 because of the number and identity of survivors of the deceased husband, is a realistic and progressive solution[4] to which the South Indian view, unused as it was to females having shares as such - and which probably was at the root of the regressive stance once adopted there - finally caved in.

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1. Derrett, "S. 14 (2) of the HSA: A Disturbing ...," op. cit., at 65.
2. Derrett, "S. 14 of the HSA, 1956: A Deadlock ...," op. cit., at 2.
3. Supra, at 274-6.
4. Derrett, "S. 14 of the HSA Once ...," op. cit., at 21-2.

(b) The View That a Right to Maintenance is a Right of Property

The formula which has eventually emerged after a protracted conflict of decisions, and now confirmed by the Supreme Court in Tulasamma v. Sesha Reddi[1] is that, where the female has a right to be maintained out of property at the time that a grant out of that property is made to her in recognition of this right or otherwise, then that grant must be construed as if it conveyed an absolute estate. But where, at the time when the grant is made, she had no right in the estate, and she is given a limited or other restricted estate in a portion of it or the whole of it, the condition in the instrument must be upheld, and the restriction will stand.[2] In other words, where the female had a subsisting right prior to the arrangement, any share given to her will become her absolute property notwithstanding the terms of the arrangement and irrespective of her consent to take it subject to limitations;[3] and this would apply equally to the pre-existing title of the widow in the property acquired by her as heir to her husband whether under the traditional law or the HRWPA, 1937.

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1. A.I.R. 1977 S.C. 1944.
2. Derrett, "S. 14 of the HSA: A Disturbing...", op.cit., at 67.
3. Ibid., at 66.

(i) The Operation of S. 14 (1) on Property Acquired by Inheritance

Almost immediately after the enactment of the HSA, when the controversy centering round s. 14 could hardly have been envisaged, their Lordships of the Patna High Court, Ramaswami, C.J., and Prasad, J., aware of the subtle nuances inherent in the two sub-ss., held in Mt. Dhanwantia v. Deonandan,[1] that where under a compromise in 1938, land had been allocated to the widows of the deceased coparcener for their maintenance, the reversionary right stood abrogated with the coming into force of the HSA, and there having been partition of the joint estate the half share of the widows under the HWRPA, 1937, would convert to an absolute estate under s. 14 (1) so as to render nugatory all restrictions on alienations imposed by the compromise decree. Correct as the decision is, it is submitted that what has not been brought out, for the reason that it was perhaps not clear at that early stage, is that the abrogation of the reversion was a direct consequence, not of partition nor of s. 14, as the learned Judges at one point indicate, but of an interest pre-existent to the instrument imposing restrictions, as numerous subsequent dicta were to testify.

A greater degree of force is added to this line of reasoning in Janak Dulari v. Dist. Judge, Kanpur,[2] where in explaining the nature of the two sub-ss. of s. 14, Bhargava, J., held that as the decree restricting her right was not the means of the widow's acquisition, the limitations prescribed in it could no longer have any validity in view of s. 14 (1) which converted her limited entitlement under

1. A.I.R. 1957 Pat. 477.
2. A.I.R. 1961 All. 294.

statute of 1937 to an absolute estate.

Or to put it in the words of the Calcutta High Court, as

> "(t)here was no longer a limited Hindu Widow's Estate in respect of the properties nor any reversionary interest in respect thereof,"[1]

the entire basis of the consent decree prescribing a widow's estate had ceased to exist since the passing of the HSA, the same High Court further adding that whereas the word "acquired" in sub-s. (1) has to be given the widest possible meaning, the language used in sub-s. (2) indicates that the same word will have a restricted meaning, namely a creation or acquisition of title for the first time where no prior title existed.[2] Thus where the female had already come by the property as heir under the traditional law, on partition she does not acquire any property in which she has no interest or title prior to partition.[3]

This progressive view is perhaps best exemplified by the authoritative interpretation of the much disputed s. 14 in Seth Badri

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1. Lalchand v. Sushila, A.I.R. 1962 Cal. 623, at 624.
2. Sasadhar Chandra Day v. Sm. Tara Sundari Dassi, A.I.R. 1962 Cal. 438, 440.
3. Ibid. As against the numerous instances of instruments prescribing restrictions on the estate a female took, contrast the set of facts in Sant Ram v. Gurdev Singh, A.I.R. 1960 Punj. 462, where the Ruler of the Native State gave his sanction to a will bequeathing property to a male Hindu, the sanction prescribing restrictions on alienation, and after the legatee's death, it was held that the limitations put by the sanctions given to the will were not put on the estate, and as the estate that his widow got was by succession to her husband and not under any instrument, by force of s. 14 (1) it vested absolutely in her divorced of all limitations. As against this see Swaran Singh v. Smt. Amro, (1967) 69 Punj. L.R. 391, where it was held that as the Riwaj-i-Am or general custom (under which the unmarried daughter was heir to her father's estates, both ancestral and self-acquired till her marriage) could not be called an instrument under which she had acquired, at her marriage in 1969, her father's collaterals could not claim the property, as her limited estate had become absolute under s. 14 (1).

Prasad v. Kanso Devi,[1] where under an arbitration award, the widow had been given certain properties subject to the widow's estate, her stepson sought an injunction against her to prevent her selling the property or committing waste, and the only question for determination was whether in 1961 she still held the property subject to the women's limited estate. In the view of the appellant as the provision in the award was for a widow's estate under the Hindu law, sub-s. (1) of s. 14 could have no application, while it was argued on behalf of the widow that as she was possessed of an interest which stemmed from the provisions of the HWRPA, 1937, she had become full owner thereof by virtue of s. 14 (1). Grover, J., speaking on behalf of his learned brothers was rightly of the view that the lady's antecedent right under the Act of 1937 which pre-existed the award, had the effect of bringing the share itself under s. 14 (1) and she had an absolute estate in it. His Lordship drew attention to the significance of the words "possessed" and "acquired" in sub-s. (1), and opined that just as the word "possessed" had been used in its widest connotation and it may be either actual or constructive or in any form recognised by law, so too the word "acquired" has to be given the widest possible meaning so as to make sense of the wide amplitude of the language used in the Explanation to sub-s. (1). On the other hand, the learned Judge reasoned, s. 14 (2) being more in the nature of a proviso or an exception to s. 14 (1), it could come into operation only if the acquisition is for the first time without there being any pre-existing right in the female Hindu who is in possession of the property. As such, therefore,

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1. A.I.R. 1970 S.C. 1963.

"(W)here at the commencement of the Act a female Hindu has a share in joint properties which are later on partitioned by metes and bounds and she gets possession of the properties allotted to her, there can be no manner of doubt that she is not only possessed of that property at the time of the coming into force of the Act, but has also acquired the same before its commencement."[1]

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1. Ibid., at 1966. For an appreciative critical assessment of this case see Derrett, "S. 14 of the HSA, 1956 and a Recent...," [1] This, [1] op.cit., the correct interpretation of s. 14 and in keeping with the avowed aim of the Legislature to bring about social reform by upgrading the position of women in Hindu society, is indicated in a host of decisions, both before and after the Supreme Court pronouncement. The favourable decisions in Madras apart, which are dealt with separately below, see also Saraswathi Ammal v. Krishna Iyer, A.I.R. 1965 Ker. 226; Raghunath Sahu v. Bhimsen Naik, A.I.R. 1965 Or. 59; Rampali Devi v. Mannalal, A.I.R. 1966 All. 584; Lachhia Sahuain v. Ram Shankar, A.I.R. 1966 Pat. 191; Ude Chand v. Mst. Rajo, A.I.R. 1966 Punj. 329; Bhai Jabar v. Dhan Kaur, (1967) 69 Punj. L.R. 558; Jagannathpuri v. Kamleshwaripuri, A.I.R. 1968 Bom. 25; Udhav Shankar v. Tarabai, A.I.R. 1968 Bom. 308; Brij Ram v. Gurdas Ram, (1968) 70 Punj. L.R. 292; Chhajju Ram v. Mst. Bhuri, A.I.R. 1969 Delhi 273; Mahadeo Pandey v. Mt. Bensraji, A.I.R. 1971 All. 515; Ram Sarup v. Sm. Toti, A.I.R. 1973 P.& H. 329; Guneshwar v. Haren, A.I.R. 1974 Gau. 73; Asharam v. Sarjubai, A.I.R. 1976 Bom. 272; Sampuran Singh v. Labh Singh, A.I.R. 1977 P.& H. 17; Smt. Sunderdevi v. Manakchand, A.I.R. 1975 Raj. 211; Dukhit Thakur v. Mst. Godami, A.I.R. 1980 Pat. 101; Mahabir Pandey v. Sashi Bhusan, A.I.R. 1981 Cal. 74; Shrimati Roop v. Sultan Singh, A.I.R. 1983 Delhi 77; Hirday Narain v. Kashi Prasad, A.I.R. 1983 All. 187. Note also the obiter dicta to the same effect in Sumeshwar v. Swami Nath, A.I.R. 1970 Pat. 348, at 351, "... in all cases where the widow had a right to get property under the HWRPA or otherwise, and where she got such an estate on partition (and even in the undivided state, it is submitted), before the coming into force of the Act, her limited estate will become her absolute estate on and from 17th June, 1956."

(ii) The Operation of s. 14 (1) on Property Acquired in Lieu of Maintenance

Now that we have established the correct position, i.e. that s. 14 (2) of the HSA cannot apply where the lady acquired her right otherwise than under the instrument, etc., the more difficult question that at one time so perplexed the judicial mind was whether, when a grant of land to a widow, who was as a matter of fact entitled to maintenance, is made subject to a condition that she shall not alienate it except for necessity, and/or that after her death it shall pass to other relatives, namely the grantors or their heirs, the result after June 17, 1956 was that under s. 14 (1) it became an absolute estate of which she could make an absolute disposition at her discretion; or was it rather still subject to a limitation coming within s. 14 (2)?[1]

The conservative position "which seems even at a glance, to be legalistic, formalistic, pedantic and unprogressive,"[2] must be dismissed out of hand, for the correct approach is that, whether or not it is mentioned in the deed, where the female had a right to be maintained it must be construed as a right to property and she could ignore the limitations and so could her transferees.[3]

In Sheojee Tiwary v. Prema Kuer,[4] where in two branches of a

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1. Derrett, "A Hindu Law Miscellany," (1971) op.cit., at 81.
2. Derrett, "S. 14 of the HSA and a Recent...," op.cit., at 52.
3. Derrett, "A Hindu Law Miscellany," (1971) op.cit., at 81.
4. A.I.R. 1964 Pat. 187.

divided family, the widows whose husbands had died prior to 1937, came into possession of the properties at the deaths of the last surviving male members of their respective branches, it was held that apart from the presumption that such estates were "in lieu of maintenance,"[1] the word "whatsoever" in the Explanation indicates the wide amplitude of s. 14 (1), so that even assuming that the ladies had not acquired in lieu of maintenance, but "in any other manner whatsoever", the irresistible conclusion could not be other than that s. 14 (1) applied. It is however submitted that though the true position has been admirably brought out here, on the set of given facts, this hypothetical extension of the application of s. 14 (1) was unnecessary, as it was precisely to that subsisting right of maintenance in lieu of which the widows held the property that s. 14 (1) applied, and the force of this right is such that however it may be given effect to

> "(w)hat is of the essence is that all these devices were meant to satisfy and recognise her legal claim which exists independently of the arrangement, instrument or award."[2]

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1. The same presumption worked in favour of the widow in Gulab Chand v. Sheo Karan, A.I.R. 1964 Pat. 45, discussed above at 493 where their Lordships having declared the widow absolute owner by virtue of her adverse possession held that even if she were presumed to be in possession in lieu of maintenance, her title would become absolute. See also Rani Bai v. Yadunandan, A.I.R. 1969 S.C. 1118, where it was similarly held that as the widowed daughter-in-law was presumably in possession in lieu of her right of maintenance, she could not be deprived of the properties until some proper arrangement was made for her maintenance. Likewise in Mst. Gaumati v. Shankar Lal, A.I.R. 1974 Raj. 147, where the Hindu widow entitled to maintenance was in possession and in exclusive control of the property for over fifty years, and there was nothing on record to show that any separate arrangement had been made for her maintenance, it was presumed that she held the property in lieu of maintenance, or "in any other manner whatsoever" so as to become full owner after the coming into force of the Act. Followed in Mool Kunwar v. Jeewalal, A.I.R. 1982 Raj. 267.

2. Per. Deshpande, J., Yamunabai v. Parappa, (1968) 70 Bom. L.R. 611, at 615. This view that a right of maintenance is itself an antecedent right capable of attracting the provisions of s. 14 (1) so as to rule out later restrictions imposed under various instruments

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Annasaheb v. Gangabai[1] assumes the greater importance not only for scrutinising the anomalies that would result on a narrow construction of s. 14,[2] nor only for laying to rest the artificial distinction made in the Madras decisions between the terms "limited owner" in s. 14 (1) and "restricted estate" in s. 14 (2)[3] but more importantly for pointing out that in the context of Hindu widows the right to maintenance is indistinguishable in quality from her right to a share in the family property whether under the HWRPA, 1937, or on actual partition of the joint estate, his Lordship, Palekar, J., adding conclusively that

> "(T)hat may well be the reason why the Explanation to sub-s. (1) of s. 14 of the Act makes the female allottee of property 'in lieu of maintenance' as much a limited owner as when the widow acquired on 'inheritance' or 'at a partition'. And if in the latter two cases it is conceded that sub-s. (2) does not apply on the ground of antecedent right to the family properties, we do not see any rational justification to exclude a widow who has an equally sufficient claim over the family properties for her

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is amply vindicated in Smt. Sharbati Devi v. Hiralal, A.I.R. 1964 Punj. 114; Purna Chandra v. Nimei Charan, A.I.R. 1968 Or. 196; Smt. Sohag Wanti v. Smt. Sodhan, A.I.R. 1968, Punj. 24; Bindbashni v. Smt. Sheorati, A.I.R. 1971 Pat. 104; Hanamangouda v. Hanamangouda, A.I.R. 1972 Mys. 286, followed in Chanamma v. Lingamma, A.I.R. 1972 Mys. 333, and Kempanna v. Shantarajiah, A.I.R. 1973 Mys. 333; Lakshmi Devi v. Shankar Jha, A.I.R. 1974, Pat. 87; Nanak Singh v. Smt. Chhindo, A.I.R. 1974, P.&.H. 220; Nand Singh v. Nacchatar Singh, A.I.R. 1975, P.&.H. 45; Siri Ram v. Hukmi, A.I.R. 1979. H.P. 46; Adhinarayan v. Ramhari, A.I.R. 1980 Or. 95; Champa Devi v. Madho Sharan Singh, A.I.R. 1981 Pat. 103; Tirath v. Manmohan Singh, A.I.R. 1981 P.&.H. 174; Smt. Sharbati Devi v. Satendra Prakash, A.I.R. 1983 All. 122 (N.O.C.).

1. (1970) 73 Bom. L.R. 407, followed in Radhabai v. Bhimrao (1973) 77 Bom. L.R. 210.

2. Ibid., at 415.

3. His Lordship rightly holding at 412-3 that, while the term "restricted estate" is a generic term by which all kinds of limited ownerships are covered, the expression "limited ownership has almost acquired a technical connotation with the estate of a Hindu female;

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maintenance."[1]

This fine line of distinction between the distinct right to property under the HWRPA, 1937, and the more amorphous right of maintenance, has been admirably illustrated in Sumeshwar v. Swami Nath,[2] where their Lordships, Untwalia and Dutta, JJ., in dissenting with the dicta in Gurunadham's case,[3] and after pointing out the well established distinction between sub-s. (1) and sub-s. (2) of s. 14, acknowledged that as against the limited estate acquired under the

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in essence however "limited ownership" is also restricted ownership and every case of limited ownership will fall within the meaning of "restricted estate" in sub-s. 2.

1. Ibid., at 415. J.D.M. Derrett expresses his delight at the cogent reasoning and the progressive view taken here at more than one place. See his "A Hindu Law Miscellany", (1971) op.cit., at 81; "The Tenure of Widows...," op.cit., at 33, f.n. 5; "A Hindu Law Miscellany, 1972-3," (1973) 75 Bom. L.R. (J), 89-93, at 89. The view here is in conformity with that expressed in Yamunabai v. Parappa, (1968) 70 Bom. L.R. 611, at 616 that property acquired in lieu of maintenance is on par with property acquired by inheritance or at a partition. In Kerala too, a similar view is in evidence in Radhakrishna Reddier v. Controller of Estate Duty, A.I.R. 1971 Ker. 202, his Lordship, Raghavan, J., holding that the nature of the estate that a widow takes at a partition being no different than what she took under the HWRPA, 1937 in British India (which it might be recalled did not apply to the erstwhile Princely State of Travancore), s. 14 (1) would apply to such property notwithstanding restrictions. It is however submitted that excellent as the rationale is, like the Bombay cases, the Court could well have enhanced the value of the judgment by emphasising on the nature of the right of maintenance itself, its pre-existing character, that had the HWRPA never been enacted, such estate would still have been capable of attracting s. 14 (1) as it was in lieu of maintenance. See also Premshankar v. Taradevi, A.I.R. 1980 M.P. 171, where to the argument that while a right of maintenance is a pre-existing right, the same could not be said in regard to a share which the mother gets at a partition of the joint-family assets inasmuch as it is dependent upon the happening of a certain event, i.e. partition, it was made clear at 175 that, "The provisions under the old śāstric Hindu law ensuring a share equal to that of a son to the widow mother at the time of partition was really in lieu of her right to maintenance."

2. A.I.R. 1970 Pat. 348.

3. A.I.R. 1967. Mad. 429.

HWRPA, 1937, which undoubtedly becomes an absolute estate under s. 14 (1), the question of property acquired in lieu of maintenance does create some difficulty.[1] The female gets the property because she has some title to it; nevertheless as she does not get it gratis or by way of charity but in lieu of a right, i.e. that of maintenance; however indefinite that right may be, the distinction is not as to whether the instrument awarding it has a restrictive clause or not, but

> "(t)he distinction is as to whether acquisition of the property is referable to some right or interest in the property in lieu of which she is getting it."[2]

Thus the Patna decision[3] makes it clear that a bare right of maintenance even if it has not been converted into a charge, does constitute an interest, though of an uncertain character, sufficient to make a dependant a holder of a pre-existent right, satisfaction of which has the effect of bringing the grant under sec. 14 (1),[4] and where the question of a decree, award, order or other instrument does

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1. Contrast this admission with the position taken in Radhakrishna Reddier v. Controller of Estate Duty, A.I.R. 1971 Ker. 202, discussed above at 592. Though the estate under discussion there was acquired at a partition of the joint family property, what we have to keep in mind is that under the Hindu law such estate was allotted to the female purely for her maintenance and was therefore essentially distinct from, because less distinct than, the estate that she acquired by inheritance, as the Patna Judges say.

2. Sumeshwar v. Swami Nath, A.I.R. 1970 Pat. 348, at 352. Or as Derrett puts it: "The test is not the nature of the right granted, but the nature of the grantee's claim before it was made: "S. 14 (2) of the HSA : A Disturbing...," op.cit., at 69. The same writer describes this judgment as "splendid," and refers to it as "a genuine piece of evolving Indian jurisprudence.": "A Note on Kunji ...," op.cit., at 25. See also his approval of it at "S. 14 of the HSA and a Recent...," op.cit., at 52-53; "The Tenure of Widows...," op.cit., at 33, f.n. 5, and "S. 14 of the HSA : A Gratifying...," op.cit., at 53-4.

3. Sumeshwar v. Swami Nath, A.I.R. 1970 Pat. 348.

4. Derrett, "A Note on Kunji...," op.cit., at 25.

not arise at all, it becomes all the simpler to maintain that as the female held "in lieu of maintenance" within the meaning of the Explanation to s. 14 (1), it became her absolute property on and from 17 June, 1956.

Just such a question came up for determination in Mallawwa v. Kallappa[1] and in negativing the contention that s. 14 (2) would apply to property given to a female for her maintenance, the Mysore High Court was clear that, if land is given to a Hindu widow for her maintenance, and she was in possession of it on 17th June, 1956 when the HSA came into force, then under s. 14 (1) read with the Explanation, her possession must be deemed to be as full owner and not as a limited owner, for land given for maintenance is land given "in lieu of maintenance within the Explanation."[2]

In Smt. Amar Kaur v. Joginder Kaur,[3] the unmarried daughter having come into possession of property for her maintenance at her marriage in 1961, the claim was that under the Riwaj-i-Am, this right of maintenance subsisted only for such time that she remained un-

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1. (1966) 2 Mys. L.J. 633.

2. See also Limba v. Maikrao, A.I.R. 1978 Bom. 83, where the husband having died in 1950, the Court ignoring the undoubted claim of the widow under the HWRPA, 1937, nevertheless recognised her absolute ownership over property in recognition of her right of maintenance, for which purpose, Vaidya, J., ruled, it was not necessary for the possession of the female to be that of an owner or of a limited owner.

3. (1967) 69 Punj. L.R. 545. In contrast it was correctly held in Smt. Giano v. Moti Ram, A.I.R. 1961 Punj. 545 that the daughter could make no such claim under s. 14 (1) where she married before the enactment of the HSA, as her right to maintenance under the customary law ended with her marriage. For a Rajasthan ruling similar to the later Punjab decision see Shiv Narain v. Raji, AIR. 1982 Raj. 119, where it was held that even after the deaths, first of her father and then of her brother, the unmarried daughter, possessed of property in satisfaction of her claim to maintenance out of the joint-family property, could successfully invoke s. 14 (1).

married. Pandit, J., however held that as the daughter had been in lawful possession of that property which she had acquired in lieu of maintenance, and as her marriage was subsequent to the coming into force of the HSA, the effect of s. 14 (1) was to convert it to a full estate.

(iii) The Vindication of This View in Madras and Andhra Pradesh

The ascendancy of the perverse view in Madras and Andhra notwithstanding, there were early indications that there was not entirely harmony of view, and despite some manifestation of indecision,[1] side by side with the "rogue" cases, there was also an awareness that Parliament not only destroyed limited estates at law in 1956, but intended to destroy as well limited estates granted by parties who were obliged to maintain or otherwise support women who were, to that extent, encumbrancers on the joint family assets,[2] and it mattered not whether the estate sought to be destroyed was the "limited estate" under the HWRPA, 1937, or any other kind of restricted estate given to a woman in lieu of a pre-existing right.[3]

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1. See Venkataraman v. Lakshmi Ammal, A.I.R. 1961 Mad 32, where the Court held at 33 that, "whether she (the limited owner) has become entitled to an absolute estate will become relevant only after her death or as a result of any alienation made by her purporting to convey an absolute estate. If an alienation is made, the controversy will be between the alienee and the reversioner." This, it is submitted, is a most inequitable proposition, for not only does it leave the law in a state of flux, but displays as well, a singular lack of sensitivity as to the immense psychological satisfaction that the female would surely derive from the secure knowledge that what she holds is hers free of all impediments, that her alienees, should she alienate, or her heirs after her, would have an absolute title with none of the problems of litigation that have so beridden the widow's estate in the traditional Hindu law.

2. Derrett, "The Tenure of Widows ...," op.cit., at 34.

3. The adherence to this correct approach is the basis of the rulings in Subbareddi v. Penchalamma, A.I.R. 1962 A.P. 368; Venkatasubba Reddi v. Penchalamma, (1962) 2 An. W.R. 156; Rangaswami v. Chinnammal, A.I.R. 1963 Mad. 387; Sampatkumari v. Lakshmi Ammal A.I.R. 1963 Mad 50, where one of the points decided at 60, was

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That Madras could on occasion display a singular magnanimity of vision is illustrated in Chinnappa v. Valliammal.[1] The husband having died in 1944, his father thereafter in discharge of his obligation to maintain members of the family, executed a maintenance deed in favour of his widowed daughter-in-law creating in her a restricted estate. At his death in 1960, despite the protests of the other heirs, it was held that not only had her maintenance grant converted to an absolute estate by virtue of s. 14 (1), but that she was absolutely entitled to a further share equally with the other class I heirs in her father-in-law's share of the joint-family property. The question that we must ask ourselves is, "Was this unjust? Did the Madras High Court go too far in so construing in her favour?" What must however be borne in mind is that, had the daughter-in-law not been allotted a maintenance grant (which would, it is submitted, in any event attract s. 14 (1)), she could still have claimed her husband's share under s. 3 (2) of the HWRPA, 1937, and under the principle in Sukhram's case,[2] it would not have mattered whether there had been a partition of the joint estate or not. Neither could her share as class I heir in her father-in-law's property be affected by this prior right over the family estate. Thus, bizarre as this seems, as Derrett comments, "it will be noted on reflection, that no actual injustice has resulted."[3]

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that as the limited estates that the widows took by inheritance under the HWRPA, 1937, had become absolute under s. 14 (1), the daughter could not claim as additional heir under s. 8 of the HSA. Venugopal v. Madhavkrishnan, A.I.R. 1964 Mad. 155, following Sampatkumari's case, cited above; Gadam v. Varapula, A.I.R. 1965 A.P. 66; Chinnakka v. Subbamma, (1968) 1 An. W.R. 65; Chellammal v. Valiammal, A.I.R. 1978 Mad. 21.

1. A.I.R. 1969 Mad. 187.
2. A.I.R. 1968 S.C. 365, discussed above at 560-3.
3. Critique, op.cit., at 221.

Chellammal v. Nallammal[1] is likewise indicative of the progressive instances in Madras, and despite some occasional doubtful comments in it,[2] Rammamurti, J., was clear that as what is carved and covered by the proviso or the exception in s. 14 (2) is only the modes expressly mentioned therein and arrangement ejusdem generis,[3] and as the claim for maintenance by the widow of a deceased coparcener is not a personal claim but has its basis upon the theory of survivorship whereby her husband's assets vest in the surviving coparcener(s), the extreme view that such restricted estate as she gets under a compromise etc. in satisfaction of her right to maintenance

> "(i)s wholly unrelated to the properties and the Hindu woman has no semblance of right to the properties so as to hold that s. 14 (2) alone would apply,"[4]

is without foundation.

However, by far the most effective vindication of the wide amplitude of s. 14 (1) resting as it does, on a denial of both false propositions, i.e. that a right of maintenance is not a right of property and that s. 14 (1) embraces merely the "limited" estate and no other restricted estate, is the decision of the division bench in Muthu

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1. (1971) 1 M.L.J. 439.
2. While critical enough of the view taken of the right of maintenance itself in cases like Gurunadham v. Navaneethamma, A.I.R. 1967 Mad. 429, and Dharma Udayar v. Ramchandra, (1969) 1 M.L.J. 181, his Lordship opined at 467 that they were distinguishable on the facts, and as the arrangement in each of the cases indicated "that the particular stipulation is not a mere setting out of the legal effect or describing the legal incidents of the estate created (i.e. the estate allotted to the women for their maintenance), but the parties have bestowed thought and were prescribing a particular restricted estate", s. 14 (2) would apply. Similarly his approval of the decision in Unnamalai v. Vellaya, (1971) 1 M.L.J. 147, on like grounds at 467-8 is, it is submitted, quite as suspect.
3. Chellammal v. Nallammal, cited above, at 447.
4. Ibid., at 471.

Bhattar v. Chokku Bhattar.[1] Where the widow in a joint Hindu family got possession of property for her residence, without any restriction or limitation attached to its enjoyment, the entire issue revolved round the usual question as to whether such property was capable of being enlarged to a full estate under s. 14 (1). The learned Judges, Pandian and Rao, JJ., in clear and concise terms distinguished between the "widow's estate" in the orthodox Hindu law, which was later on by usage described as the limited estate, and which "projected a particular circumstance whereby the limited owner could alienate the property for necessity etc.,"[2] and property acquired by a female Hindu in lieu of maintenance which obviously emures for her life and cannot be the subject-matter of any alienation at all; and in this sense their Lordships held, the argument that a female Hindu acquiring property in lieu of maintenance are owners of the limited estate, is untenable. But, the learned Judges continue, as each case has to be decided on its own merits, what is of the utmost significance is that, the right of a female member to reside in the family dwelling house which is but a limb of the right of maintenance, is a pre-existing right, based as it is upon her husband's right to share in the family property; and when that interest is constituted into a specific charge, an actual existing proprietary interest for the term of her life, to that extent "the right of maintenance is a right in re or an interest in ancestral property."[3] In the present case, as the possession of the property in her own right as a maintenance holder was not attributable to any act of trespass or illegality on the widow's part, it would follow that in

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1. A.I.R. 1976 Mad. 8.

2. Ibid., at 12.

3. Ibid., at 11, quoting from Ramanandan v. Rangammal, I.L.R. (1889) 12 Mad. 260 (F.B.), at 268.

keeping with the Supreme Court's interpretation,[1] such title, however restricted or inchoate it may be, is automatically enlarged under the statutory provisions of 1956. As such therefore

> "(t)he words 'limited owner' appearing in the latter part of s. 14 (1) are mere positive expatiation of the situation and they have therefore no impact upon the concept in the orthodox Hindu Law which deals with limited ownership or widow's estate."[2]

Praiseworthy as this extremely balanced reasoning is,[3] the division bench putting into proper perspective for the Madras High Court what decisions like Anna Saheb v. Gangabai[4] had earlier indicated in the North, viz. the recognition that all restricted estates and not merely the Hindu woman's limited estate is capable of attracting s. 14 (1),[5] its excellence, it is submitted, is somewhat tarnished by the obiter dicta, where in a reference to Dharma Udayar v. Ramchandra,[6] the learned Judges held that where restrictions of reverter are imposed on grants for maintenance, s. 14 (2) would cover such cases. This it is submitted, is a contradiction in terms of the intention of Parliament of which their Lordships were only too aware, and to which they themselves refer,[7] and Derrett is rightly dismissive of this

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1. See Eramma v. Veerupana, A.I.R. 1966 S.C. 1879, at 1882, where it was held that "the section applies only to property to which the female Hindu has acquired some kind of title however restricted the nature of her interest may be."
2. Muthu Bhattar's case, A.I.R. 1976 Mad. 8, at 12.
3. See Derrett's appreciation of it at "S. 14 of the HSA: A Gratifying ...", op.cit.
4. (1970) 73 Bom. L.R. 407.
5. See above at 581, f.n.1.
6. (1969) 1 M.L.J. 181.
7. Muthu Bhattar's case, A.I.R. 1976 Mad. 8 at 13, where it is explained that "...they (the Legislature) included this (the right of maintenance) in the Explanation to s. 14 (1) deliberately so as to expand that right and to make it an absolute right in the female concerned after the commencement of the HSA."

view[1] pointing out that as Parliament had made the basic decision, a grant in lieu of maintenance, irrespective of conditions thought reasonable before 1956, became the female's absolute property overnight.[2]

(iv) The Breaking of This Deadlock by the Supreme Court

The decision in Muthu Bhattar's case,[3] for all its merits, is nevertheless indicative that even as late as 1976, the Judiciary as a whole was not quite prepared to expand s. 14 to its fullest amplitude,[4] and the head-on conflict between the correct view obtaining in certain liberal and progressive decisions and the wrong construction of s. 14, based on a fundamental misunderstanding of the section and the intention of Parliament, had resulted in a state of chaos. A classic instance of a statutory provision which by reason of its inept draughtsmanship had created endless confusion for litigants and proved a boon for lawyers,[5] the time - long overdue - had at last come for the highest judicial authority, the Supreme Court, to step in and resolve the issue once and for all, thereby restoring to law that modicum of "clarity, certainty and simplicity which alone can make it easily intelligible to (the) people."[6]

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1. See his "S. 14 of the HSA : A Gratifying...," op.cit. at 54 where he states, "My opinion is that no such direction will prevent the absolute estate from accruing on 17th June, 1956, unless the woman had not any right of property, including a right to be maintained, in the corpus from which the actual grant or settlement was made to her."
2. Ibid.
3. A.I.R. 1976 Mad. 8.
4. Nor could the Supreme Court itself be absolved from blame, as is evident from the regressive view adopted in Naraini Devi v. Ramo Devi, A.I.R. 1976 S.C. 2198, discussed above at 569, f.n. 1, below, at 601.
5. Per. Bhagwati, J., Tulasamma v. Sesha Reddi, A.I.R. 1977 S.C. 1944, at 1946.
6. Ibid.

The Supreme Court was first faced with this particular issue in Nirmal Chand v. Vidya Wanti,[1] and as the widow was an heir under the HWRPA, 1937, it was held that as the partition deed under which she was given a life estate with restrictions on alienations was a mere recording of the true legal position as it then stood, such estate would come squarely within s. 14 (1). Correct as the dictum is, it was not of much assistance in that the more complex question of the nature of the right of maintenance and the effect of s. 14 on it remained unresolved.

In 1969 however, Rani Bai v. Yadunandan[2] brought this problem to the fore, and the Supreme Court did indeed decree in favour of the widow, thereby indicating that even a bare right of maintenance was capable of converting to an absolute estate under s. 14 (1), but observing at the same time that the widow in possession of property for her maintenance could not be ousted until proper provision had been made for her maintenance. But what, we may well ask, might this "proper provision" amount to? Would s. 14 (1) apply to any such provision, and why in the first place may she at all yield that of which she was already lawfully possessed for some other apparently intangible right? Hypothetical as these queries are, to the extent that they remain unanswered, the decision is, it is submitted, inconclusive.

However, the good work done by these decisions was soon enough rendered nugatory; Naraini Devi v. Ramo Devi[3] aggravated the situation further, and Madras, ever receptive to constructions disadvantageous to women, derived fresh inspiration to endorse the negative posture,[4]

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1. C.A. No. 609 of 1965, referred to in Tulasamma v. Sesha Reddi, A.I.R. 1977 S.C. 1944, at 1949-50.

2. A.I.R. 1969 S.C. 1118. 3. A.I.R. 1976 S.C. 2198.

4. See Soundararajan v. Venkataraman, (1976) 2 M.L.J. 466; Subbalakshmi v. Andiappa, (1977) 1 M.L.J 2 (N.R.C.); Subba Naidu v. Rajammal, A.I.R. 1977 Mad. 64.

and this despite the refreshingly apposite ratio emanating from its own High Court in Muthu Bhattar's case.[1]

How long this state of flux and agitation might have continued but for the Supreme Court's remarkably lucid and exhaustive exposition of the true state of the law in Tulasamma v. Sesha Reddi,[2] is now a matter of mere conjecture. The decision assumes the greater significance in that it may be regarded as a dénouement as it were, of the intricate drama of maintenance under s. 14, and the twists and quirks that the problem had brought in its wake.

The question before their Lordships of the Supreme Court was not the interaction of s. 14 (1) on property acquired under the Act of 1937, nor merely the effect of the section on a maintenance grant - though these too were considered in the course of the judgment - but of its impact on the more problematic issue of a maintenance grant with a contemporaneous restriction attached to it. That the ratio was followed verbatim in Bai Vajra v. Thakorbai,[3] which relies exclusively on it, is the measure, if not of its originality, at least of its incisive analysis of the right of maintenance in the traditional law, the intention of the Legislature in enacting s. 14, the wide amplitude of s. 14 (1) and the critical assessment of decided cases holding one or the other view.

Bhagwati, J., (speaking for himself and on behalf of Gupta, J.,) and Fazal Ali, J., in separate judgments, but for substantially the same reasons, unanimously held that s. 14 (2) had no application where property is given to the Hindu female in lieu of maintenance under an instrument which in so many words restricts the nature of the interest

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1. A.I.R. 1976 Mad. 8.
2. A.I.R. 1977 S.C. 1944.
3. A.I.R. 1979 S.C. 993.

given to her in the property, for in their Lordships' opinion there could not be any substance to the argument that as the right to maintenance *simpliciter* is lacking in all the necessary *indicia* of a legal right, it cannot be described as a pre-existing right. Neither, they held, was there any merit in the view that the instrument of compromise creates a restricted right incapable of attracting s. 14 (1).

In support of the first view, the learned Judge, Fazal Ali, J., in considering the legal nature of the incidents of a Hindu woman's right to maintenance referred to the ancient *smrtis* and the works of eminent authors on the Hindu law, and having comprehensively surveyed authoritative judicial pronouncements, arrived at the conclusion that, the right of maintenance flows from the social and temporal relationship between husband and wife by virtue of which the wife becomes a sort of co-owner in the property of her husband, though such co-ownership is of a subordinate nature. As such therefore, the personal obligation of the husband to maintain his wife becomes an equitable charge, a legal obligation to maintain his widow, in the hands of those who succeed to his property. Thus though such right to maintenance is not strictly a right to property, it is undoubtedly a pre-existing right in property, not a *jus in rem* but certainly a *jus ad rem* which existed in the Hindu law long before the passing of any statutory enactments designed to give her just such a right.

This being so, and considering that in the changed social climate s. 14 was specially enacted "to achieve a social purpose by bringing about change in the social and economic position of women in Hindu society,"[1] and to abolish the invidious distinction in matters of

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1. *Per.* Bhagwati, J., *Tulasamma* v. *Sesha Reddi*, A.I.R. 1977 S.C. 1944, at 1947.

inheritance between a male and a female,"[1] the provisions of s. 14 must be liberally construed in order to advance the object of the Act which is to enlarge the limited interest possessed by a Hindu widow which was in consonance with the changing temper of the times.[2] On the other hand sub-s. (2) of s. 14, being in the nature of an exception, it must be construed strictly so as to impinge as little as possible on the broad sweep of the ameliorative provision contained in sub-s. (1),[3] and must be confined to cases where property is acquired by a female Hindu for the first time as a grant without any pre-existing right, under a gift, will, instrument, decree, order or award, the terms of which prescribe a restricted estate in the property, for to hold otherwise would virtually emasculate s. 14 (1).[4] Thus as the claim or the right to maintenance is really a substitute for a share which the Hindu widow would have got in the property of her husband, it would not be a grant for the first time without any pre-existing right in the widow.[5] As the claim for maintenance even without a

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1. Per. Fazal Ali, J., ibid., at 1961. Or to put it in other words, "It was a step in the direction of practical recognition of equality of the sexes and was meant to elevate women from a subservient position in the economic field to a pedestal where they could exercise full powers of enjoyment and disposal of the property held by them as owners, untrammelled by artificial limitations placed on their right of ownership by a society in which the will of the dominant male prevailed to bring about the subjugation of the opposite sex."; Per. Koshal, J., Bai Vajia v. Thakorbai, A.I.R. 1979 S.C. 993, at 1003.

2. Per. Fazal Ali, J., Tulasamma v. Sesha Reddi, cited above, at 1966.

3. Per. Bhagwati, J., ibid., at 1947.

4. Ibid., at 1948.

5. Fazal Ali, J., explaining at 1967, ibid., that where a Hindu female who gets a share in her husband's property acquires an absolute interest by virtue of s. 14 (1) of the Act, it could not have been intended by the Legislature that in the same circumstances a Hindu female who could not get a share but has a right of maintenance would not get an absolute interest.

charge, is a pre-existing right, sub-s. 2

> "(h)as absolutely no application and the female's limited interest would automatically be enlarged into an absolute one by force of s. 14 (1) and the restrictions placed if any under the document would have to be ignored."[1]

To this eminently sensible construction of s. 14, supported by the authority of decided cases, their Lordships lent the considerable weight of their own opinion to negative the contention that the term "limited owner" in s. 14 (1) does not embrace the "restricted estate" mentioned in s. 14 (2), that unless the widow gets the property in lieu of maintenance, it is the conferment of a new right of a restricted nature. In the view of Fazal Ali, J., this surmise suffers from a serious fallacy, which is based on a misconception of the true position of the Hindu widow's claim for maintenance, the learned Judge reiterating his argument that if the widow's claim for maintenance or right to get the share of a son existed before the Act of 1937, it is futile to dub this right as flowing from the Act of 1937, and in view of this,

> "(t)he nature and extent of the right of the widow to claim maintenance is undoubtedly a pre-existing right, and it is wrong to say that such a right comes into existence only if the property is allotted to the widow in lieu of maintenance and not otherwise."[2]

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1. Per. Fazal Ali, J., ibid., at 1978.

2. Ibid., at 1976. So too Bhagwati, J., at 1951 that "even if the instrument were silent as to the nature of the interest given to the widow in the property and did not in so many terms, prescribe that she should have a limited interest, she would have no more than a limited interest in the property under the Hindu law as it stood prior to the enactment of the Act, and "...would be, to quote the words of this Court in Nirmal Chand's case, C.A. No. 609 of 1965, 'merely recording the true legal position', and that would not attract the applicability of sub-s. 2 but would be governed by sub-s. 1 of s. 14." While it is certainly true that this would be merely recording the true legal position, nevertheless recalling the distinction made in Muthu Bhattar's case, A.I.R. 1976 Mad. 8 see above at 598), the doubt creeps in mind as to whether the

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In addition, as Derrett sums up, the Supreme Court most neatly and convincingly reconsidered its previous rulings, explained some and apologised for Naraini Devi v. Ramo Devi[1] as per incuriam. A whole row of mistaken "conservative" High Court decisions was overruled, among them the troublesome Gopisetti Kondiah v. Gunda Subbarayudu,[2] and another row of "progressive" decisions was approved, and the present position is that if a widow was given lands by settlement or agreement or compromise in virtue of her right to be maintained by her husband's family, or out of her husband's estate, those lands became her absolute property on the day the HSA came into force.[3]

In Bai Vajra v. Thakorbai,[4] his Lordship, Koshal, J., was happy enough with the overall exposition of the correct position in Tulasamma v. Sesha Reddi[5] and contented himself with quoting in extenso from it to establish that the appeal on behalf of the widow must succeed, "as the facts in the latter are on all fours with those in the former."[6]

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right of maintenance is indeed technically the same as the legal limited estate. Interestingly enough, while the learned Judges advert to a number of decisions from Madras, there is nowhere mention of this extremely important case, reference to which might have led to a further discussion of the subtle distinction made between the two in the Madras decision.

1. A.I.R. 1976 S.C. 2198.
2. (1968) 2 An. W.R. 455.
3. "Landmarks in Family...," op.cit., at 13. Fazal Ali, J., adverted to his own reasoning and that of his learned brother Bhagwati, J., in Tulasamma v. Sesha Reddy, A.I.R. 1977 S.C. 1944 to rule likewise in Sellammal v. Nellammal, A.I.R. 1977 S.C. 1265, and Santhanam K. Gurukkal v. Subramanya Gurukkal, A.I.R. 1977 S.C. 2024, Kailasam, J., doing the same in Krishna Das v. Venkayya, A.I.R. 1978, S.C. 361.
4. A.I.R. 1979 S.C. 993.
5. Cited above.
6. Bai Vajra v. Thakorbai, cited above, at 1003. Ownership of a sort the right of maintenance certainly is, and clearly property to which the female has acquired some kind of title as envisaged in

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Thus to sum up, what the Supreme Court has decided stands, and will not be resiled from. S. 14 (1) will apply to all cases where the woman has not acquired the property for the first time under the instrument or arrangement in question. If the woman had a right to be maintained out of the corpus from whence the grant was made, then it is submitted that she did not acquire the property for the first time under the grant etc., and any cases to the contrary (e.g. saying that a right of maintenance is not a property right) are wrong.[1] Thus a grant subject to any restriction (whether limited estate, life estate, etc.) will be converted by the statute into an absolute estate under s. 14 (1).

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Eramma v. Veerupana, A.I.R. 1966 S.C. 1879, at 1882, and therefore capable of attracting the provisions of s. 14 (1). However, is it the ownership of a limited estate as known to Hindu law, as the learned Judge maintains at 1002 ? His Lordship sets out the incidents common to the legal limited estate and the estate acquired in lieu of maintenance, but to revert to the pertinent distinction made in Muthu Bhattar's case, A.I.R. 1976 Mad. 8, is a maintenance grant after all not a restricted estate which must nevertheless convert to an absolute estate under s. 14 (1) ?

1. J.D.M. Derrett, "Summary of Recommendation for the Construction of HSA, s. 14," March, 1972, (Unpub.), 1-2, at 1. The same writer reiterates that, "A woman enters the family by marriage, or by birth. In either case she acquires rights vis-à-vis the family. She is not given maintenance by its members as a matter of charity, as the Patna Judges (in Sumeshwar v. Swami Nath, A.I.R. 1970 Pat. 348, at 351) point out. Thus by marriage or birth she 'acquires' her right, including the right to receive land 'in lieu of maintenance'. Thus grants for maintenance when made to widows of the family or unmarried daughters or widowed daughters in special circumstances are prima facie in recognition of a right previously acquired and come under s. 14 (1); and the conservative position is wrong: "S. 14 of the HSA, 1956, and a Recent...," op.cit., at 54.

(10) Where the Property is Acquired Subject to the Restricted Estate For the First Time, s. 14 (2) Applies

If s. 14 (1) applies to property acquired under an instrument or arrangement which is merely declaratory of that right to property antecedently enjoyed by the female Hindu, there is consensus of judicial opinion that sub-s. (2) of s. 14 being in the nature of a proviso or an exception, its ambit is limited to covering only those cases of grants where the interest in the grantee is created by the grant itself or, in other words, where the gift, will, instrument, decree, order or award is the source or origin of the interest created in the grantee.[1]

A case in point is the division bench judgment of the Patna High Court in Mt. Sampato Kuer v. Dulhin Mukha Debi.[2] The widow having gifted her limited estate to her daughters, a day later they in turn executed a maintenance deed in favour of their mother, whereby the latter was to be in possession for her lifetime in lieu of maintenance but with no power of alienation. On the coming into force of the HSA, it was argued that as the widow was admittedly in possession, s. 14 (1) would apply to such property. It was held however, that as the female had acquired the property under the deed of maintenance, such property would be governed by the terms of the deed so as to rule out the application of s. 14 (1).

Technically correct as the ratio is, it is apparently based mechanically upon the fact that a maintenance deed is an "instrument" within the meaning of s. 14 (2).[3] It is submitted that the real position is that, the mother having validly gifted her limited interest, she lost possession of the property; the maintenance deed was

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1. Annasaheb v. Gangabai (1970) 73 Bom. L.R. 407, at 410.
2. A.I.R. 1960 Pat. 360.
3. Reminiscent of Ram Jag v. Director of Consolidation, U.P., A.I.R. 1968 All. 419, discussed above at 581, f.n.1.

the conferment of a new right to which she could lay no antecedent claim, and to such property s. 14 (2) applies squarely.

A similar situation arose in Mst. Kirpo v. Bakhtawar Singh,[1] where in settlement of a dispute as to whether the widow on her remarriage had forfeited her rights in her deceased husband's property, a compromise was arrived at whereby despite the forfeiture, she was allowed to retain possession of the property but with the specific stipulation that she could not alienate the same in any manner. It was held that s. 14 (2) applied to such a case, but unlike the Patna judgment,[2] Mahajan,J,explained in clear and concise terms that if the parties to a compromise give up their respective claims and accept the compromise as the basis of their titles, then their rights would flow from the compromise itself. Thus as the widow had lost the estate on her remarriage, and had re-acquired it by reason of the compromise, "the provisions of s. 14 (2) of the Act are satisfied to the hilt."[3]

In Veerabhadra v. Lakshmi,[4] where under a family arrangement the suit properties were given to the paternal great-grandmother for her lifetime with certain restrictions, his Lordship, Ekbote, J., held likewise, the learned Judge explaining that while every Hindu irrespective of his possessing any ancestral property, is personally bound to maintain his aged parents, he is under no such obligation in respect of grandparents, and inasmuch as the property in question was not ancestral qua the great-grandmother's maintenance, the instrument of family arrangement being the source and foundation of her right to it,

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1. A.I.R. 1964 Punj. 474.
2. Mt. Sampato Kuer v. Dulhin Mukha Devi, A.I.R. 1960 Pat. 360.
3. Mst Kirpo's case cited above, at 475.
4. A.I.R. 1965 A.P. 367.

it was clearly the acquisition of a right for the first time to which s. 14 (2) was applicable. A straightforward case of the application of s. 14 (2), what is objectionable is the general view taken of the right of maintenance, and the distinction made between the limited and the restricted estate for the applicability of s. 14 (1). The right to be maintained, his Lordship says, is a quite distinct right from the right to property, and where property is newly acquired under an instrument, what it creates is a right to property recognising the right of maintenance;[1] if the instrument prescribes restrictions, the restricted estate thus created cannot be equated with the woman's estate or life estate as is commonly understood under the old Hindu law. This attitude, now happily scouted, was to pave the way for Gopisetti's case[2] and other like decisions, with what results we have already seen.

That the effects of such a construction were long felt and merely served to exacerbate, further, an already controversial aspect of the law, is the measure of the ineptness of the Legislature, its lack of foresight and caution, in drafting a provision that could lend itself to such contradictory meanings. That in time the Madras High Court was itself to recognise the folly of this retrograde approach followed in 1977 by the Supreme Court's setting out of the true legislative intendment, does not exonerate the cryptic, not to say faulty draftsmanship.

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1. His Lordship reiterating even more emphatically at 371, that "One may have one right (that of maintenance), but if in pursuance of that right, any right to property is created, then it is that instrument that creates such right."

2. (1968) 2 An. W.R. 455.

(11) The Effect of S. 14 where the Property is Acquired under a Gift or Will

From the foregoing it will be clear that the problems that arose in the wake of s. 14 have been satisfactorily resolved where they related to sub-s. (1), and provided that the Supreme Court does not resile on its own decisions (an unlikely and far-fetched hypothesis), the most problematic of areas need not now be the subject of any further controversy.

The same ease of mind is however wanting when we come to the second sub-s,[1] though after prolonged controversy, it is now generally agreed that it must be so construed as giving people the right to create "restricted" estates where the female had no interest in the property prior to the grant.[2] Thus to come within s. 14 (2) the disposition or grant must be the root of the female's title, and this makes perfect sense against the backdrop of legal history and the motives of Parliament.

If we keep in mind that the ideal which the Legislature sought to achieve was to equalise the rights of the two genders, and not to elevate women's rights to a level unattainable by their male relatives,[3] it becomes clear that sub-s. (2) was enacted to maintain this parity of rights between the Hindu male and female, that where a life interest created in a Hindu male would give him no more than a life interest, s. 14 (2) prevents a similarly worded grant made to the Hindu female from becoming an absolute estate.[4] Thus neither male

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1. Derrett, "S. 14 of the HSA: A Disturbing...," op.cit., at 62.
2. Derrett, Critique, op.cit., at 221.
3. Ibid., at 224.
4. To put it in the words of Palekar, J., in Annasaheb v. Gangabai, (1970) 73 Bom. L.R. 407 at 410, where he points out that s. 14 (2)

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nor female has any right to claim that what is granted to him or her inter vivos or by will must inevitably be construed as an absolute estate,[1] for while legal limited estates are abolished, contractual or consensual limited estates are saved.[2]

However, if the right of maintenance is an indefeasible right, the question that next falls to be considered is whether, simply because the gift or testamentary disposition under which it was acquired, stops short of endorsing it as an absolute estate, it may be regarded as that consensual limited estate that is incapable of attracting s. 14 (1).

It has been observed in Sumeshwar v. Swami Nath[3] that where the property is acquired under a gift or will without a restrictive clause the woman would become full owner of it after the coming into force of the Act of 1956. But if the acquisition was with a restrictive clause in express terms, s. 14 (2) would subject her to that restriction,[4] for as their Lordships explained obiter

> "(In) cases of will or gift she gets the property not as a matter of right but gratis or as a matter of charity, may be for any other moral or laudable consideration, yet it is not a legal right which can be traced antecedent to the acquisition of the property by gift or will."[5]

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therefore "emphasises that in all cases where a grant can lawfully create a limited estate in favour of a Hindu male grantee, it can equally do so in the case of a Hindu female grantee and the general rule of sub-s. (1) would have no application."

1. Derrett, "S. 14 (2) of the HSA : A Disturbing...," op.cit., at 64.
2. Ibid., at 68.
3. A.I.R. 1970 Pat. 352.
4. Ibid., at 351-2.
5. Ibid., at 351.

But this, it may be noted, is, if not oversimplification, at least an incomplete interpretation; nor, given the circumstances of that particular case, did the Patna Judges need to elaborate at greater length. But circumstances may be envisaged where the property so acquired is traceable to a right antecedent to the gift or will, and it is this, it is submitted, which is at the crux of the problem and the criterion to utilise in unknotting the tangles of conflicting judicial views so as to arrive at an equitable solution in keeping with the legislative intendment.

(a) Acquisitions Inter Vivos and Bequests from the Limited Owner

When we consider cases of gifts, it must be borne in mind that before the promulgation of the HSA, 1956, a Hindu female's ownership of property was hedged in by intricate limitations on her rights of its disposal by acts inter vivos and also as regards her testamentary powers in respect of the same. She could of course alienate for accredited purposes, but other than that, as the Act was not intended to benefit transferees from the limited owner, it was open to the next presumptive reversioner to avoid it as not affecting his reversionary right after the death of such female. In instances of gifts and bequests of the limited estate made to a female, we have to determine how far, after the coming in force of the HSA, could s. 14 be said to have modified the traditional law so as to operate in favour of the female, be she the donor or testatrix, or the donee or legatee.

(i) Gifts

That the female gifting the property cannot herself claim the benefit of s. 14 (1), is clear from the Full Bench decision of Amar Singh v. Sewa Singh,[1] where their Lordships were called upon to

1. A.I.R. 1960 Punj. 530 (F.B.).

consider separately two cases of alienation made by the limited owner, the one by sale and the other, Kishen Singh v. Kishni,[1] by gift. The widow's gift of land to her daughter being impugned as not binding on the reversionary right, it was contended on behalf of the females that the case of a gift is unlike that of a sale and more akin to the case of an invalid adoption, and as in Kotturuswami's case[2] so too the widow in this instance must be held to be in constructive possession so as to attract s. 14 (1). The minority opinion of Dulat, J., lending support to this view[3] cannot, it is submitted, be countenanced, nor indeed his reasoning that

> "(I)f the main object of s. 14 is to enlarge the estate and the power of a limited owner ... as the Supreme Court has said, then there appears to me no justification for restricting the female owner's act in a case where such act is calculated to benefit her and not any purchaser who may have bought the property with eyes open,"[4]

for in making the distinction between an invalid adoption and an invalid gift, his Lordship, Mehar Singh, J., made it "crystal clear"[5] that in the case of a gift by the Hindu female the property passes to the donee to the extent of the life interest of the female and

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1. Regular Second Appeal No. 214 (P) of 1951.
2. A.I.R. 1959 S.C. 577, supra, at 480-1.
3. This erroneous view has been endorsed by the Full Bench in Smt. Chinti v. Smt Daultu, A.I.R. 1968 Delhi 264 (F.B.) at 267, the learned Chief Justice, I.D. Dua, holding that "In case the gift were wholly invalid then also on the authority of Gummalapura's case, A.I.R. 1959 S.C. 577, she might have claimed absolute ownership on the ground of being in constructive possession, the donee-daughter's possession being permissive." However, the fallacy inherent in such analogy has been pin-pointed by yet another Full Bench in Smt. Parmeshwari v. Smt. Santokhi, A.I.R. 1977 P.&H. 141 (F.B.), at 152, where it was observed correctly that the discussion in Kotturuswami's case A.I.R. 1959 S.C. 577, was totally remote to the point at issue, for "The core of the matter discussed therein was whether s. 14 visualises only those limited owners who were in possession and not those who had already parted with possession."
4. Amar Singh v. Sewa Singh, A.I.R. 1960 Punj. 530, at 537.
5. Ibid., at 535.

> "(s)he could not in any case oust the donee from possession even though the gift may not be binding on the reversioners of her husband."[1]

This being so, she did not obviously become absolute owner and ss. 15 and 16 could have no bearing in locating the heirs qua the same, for "the Act in so many words does not abolish either reversioners or their rights or status."[2] Thus sub-s. 2 of s. 14 would apply squarely to such property.

The principles established, it is clear that with the reversionary right subsisting, the donee is in no wise benefitted by such alienation either. Yet this was precisely the stance adopted by the Punjab High Court in Mt. Prito v. Gurdas.[3] The widow having made a gift of her limited estate to her daughters, to the claim of the reversioners that such gift being invalid, they would be entitled to the property after the donor's death, Tek Chand, J.'s rejoinder was that as legislative changes had to be taken into account, the effect of s. 14 in view of its retrospective character, was to abrogate reversionary rights altogether. Moreover as the gift did not prescribe a restricted estate, the donees must be held to have become full owners, his Lordship further holding that such is the broad scope of the words "Any property" in s. 14 (1) and the Explanation thereto, that they cannot be given restricted meaning, confining them to merely lawful possession. Simplistic as well as misleading, the judgment is, it is submitted, open to criticism on more than one count. The reversionary claim could only have been nullified if the donees could, as unmarried daughters, have claimed a pre-existing right of maintenance in the ancestral property, or as was customary in the Punjab, they were

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1. Per. Gosain, J., ibid., at 538.
2. Per. Mehar Singh, J., ibid., at 533.
3. (1958) 60 Punj. L.R. 194.

preferential heirs to the self-acquired property than remoter collaterals.[1] Other than these, their possession was tantamount to that of a trespasser's, for from the moment of the gifting over the reversionary right asserted itself, and broad as its scope certainly is, the elasticity of s. 14 (1) cannot be so stretched as to include unlawful possession as envisaged by the learned Judge, for it can never be in the contemplation of a legislative enactment to endorse illegal possession.[2] Thus despite the lack of restrictions the gifted property would undoubtedly be subject to s. 14 (2).

The gift to a married daughter is ratified neither by customary law nor either by the strict Hindu law for the obvious reason that with her marriage she becomes a stranger to her family of birth. Yet in Sm. Lal Devi v. Sri Muni Lal,[3] Dua, J.'s bias in favour of the female donee is likewise based on the assumption that such female being a Hindu and possessed of the property, it was open for her to argue that she was entitled to the advantage of sub-s. (1) of s. 14. Added to this fundamental misconstruction of the sub-s. is evident his Lordship's state of indecision as to the full import of s. 14 (2). To the further plea of the donee that as the deed of gift did not prescribe a restricted estate, s. 14 (2) would have no application, the learned Judge contented himself with observing that,

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1. And in such cases, as Gosain, J., explains in Amar Singh's case, A.I.R. 1960 P.& H. 530, at 540 that as "Prima facie the daughter would be entitled to succession qua the self-acquired property ... the gift in question may be unassailable, because it may amount to acceleration of succession."

2. One must again draw attention to Eramma v. Veerupana, A.I.R. 1966 S.C. 1879, where the Supreme Court puts to rest any such fallacious notion.

3. (1960) 62 Punj. L.R. 29.

> "(a)s this point has not been debated at the Bar ... I do not think it either necessary or proper to go into this somewhat difficult and debatable question of law."[1]

One submits that evasiveness of this nature has nothing in it to commend, and, precisely because of the "debatable question of law" involved, a more forthright attitude, however misapplied, might perhaps have been a more salutory approach. It is submitted that neither of these two arguments have any veracity, for in the first place what the married daughter acquired was merely her mother's limited interest and no more. Thus notwithstanding the lack of restrictions in the gift deed, such property could only be a restricted estate within the meaning of s. 14 (2).

The single Bench view of the same High Court in Smt. Chawli v. Hansa[2] in so far as it sought to give the benefit of s. 14 to even an alienee of a Hindu limited owner is, it is submitted, similarly erroneously decided. The relevant observation seems to have been made obiter entirely as an ancillary matter[3] after the quarrel had been concluded in favour of the donee on the main issue, i.e. that the daughters were the preferential heirs to fifth degree collaterals in respect of the gifted property. However, it is submitted that in this too, the learned Judge's observation that this principle would apply to both separate as well as ancestral property is open to criticism, for under the Riwaj-i-Am in the Punjab, we are told on the strength of authority that

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1. Ibid., at 36.
2. A.I.R. 1960 Punj. 404.
3. A view with which Sandhawalia, J., is in agreement. See Smt. Parmeshwari v. Smt. Santokhi, A.I.R. 1977 P.& H. 141 (F.B.), at 153, where the learned Judge states that, "A reference to the judgment would show that this aspect of the case was decided as if it was one of first impression."

> "(But) in regard to the acquired property[1] of the father, the daughter is preferred to collaterals."[2]

Neither did the decision appeal to their Lordships of the Full Bench and Sandhawalia, J., in overruling it in Smt. Parmeshwari v. Smt. Santokhi,[3] was of the view that, as the observations rested primarily on the issue of the possession of the alienees in reliance upon the interpretation of the word "possessed" in Kotturuswami's case,[4] the inference in their favour "was neither adequate nor well warranted."[5]

A similar lack of perception as to the full import of s. 14 (2) is evident in Smt. Chinti v. Smt. Daultu.[6] In negativing the contention that as the donee did not acquire a widow's estate in the gift, hers was not the limited estate which was intended to be enlarged into an absolute estate under s. 14 (1), their Lordships held on the authority of Kotturuswami's case[7] that, the word "possessed" in s. 14 (1) must be given the widest connotation so as to include any property over which the female had acquired some kind of title however restricted that title may be.[8] To construe otherwise, their Lordships held, would be to lose sight of the social purpose of the Act which

> "(i)s the culminating point of the process of emancipation and equality of woman in Hindu society so far as the right of succession is concerned ..."[9]

Thus as the donee-daughter was the owner as against the whole world,

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1. Emphasis mine.
2. W.H. Rattigan, A Digest of Civil Law for the Punjab Based Chiefly on the Customary Law, 13th ed., O.P. Aggarwala revised, (All-Delhi, Law Book Publishers, 1953), at 350.
3. A.I.R. 1977 P.& H. 141 (F.B.). 4. A.I.R. 1959 S.C. 577.
5. Smt. Parmeshwari v. Smt. Santokhi, cited above, at 153.
6. A.I.R. 1968 Delhi 264 (F.B.). 7. A.I.R. 1959 S.C. 577.
8. Following Eramma v. Veerupana, A.I.R. 1966 S.C. 1879.
9. Per. Dua, C.J., Smt. Chinti v. Smt. Daultu, A.I.R. 1968 Delhi 264 (F.B.), at 267.

fully entitled and competent to protect her right, title and interest under the gift-deed, her position could not be equated to that of a trespasser's, and the restrictions on her power of alienation did not thereby create a restricted estate as contemplated by s. 14 (2).

It is submitted that while certainly there can be no quarrel with the view that s. 14 (1) was meant to put an end to all limited estates of the Hindu female,[1] the further ruling that

> "(T)o restrict the broad concept of the expression "property possessed" by reference to the rights of some collaterals, whether under the customary or personal law ... (is to) cut down the plain meaning of the statutory language...,"[2]

cannot be countenanced, for as already indicated, one must not read into s. 14 (2) more than the words apparently indicate. The donee daughter

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1. Their Lordships' view has come in for critical scrutiny at Krishna Murti, op.cit., at 15, but, it is submitted, for the wrong reasons, for according to him it is only the limited estate of the female in Hindu law that is in the contemplation of s. 14 (1); all other life estates are subject to s. 14 (2). Iniquitous as this reasoning is, we need dwell upon it no further as in appropriate places this view has been quashed.

2. Smt. Chinti v. Smt. Daultu, A.I.R. 1968 Del. 264 (F.B.), at 268. This construction of the Delhi Full Bench though in a sense laudable in that it strove so hard to stretch the meaning of s. 14 to the fullest advantage of the female, is nevertheless so patently contrary to the plain intendment of the section that critical dissent was soon enough forthcoming. In Anath Bandhu v. Chanchala Bala, A.I.R. 1976 Cal.303, as there was no doubt in Mukherji's mind that a female's alienation by gift was on par with her alienation by sale, it was incomprehensible to the learned Judge how the Delhi Full Bench could be persuaded to hold that a donee-daughter had become full owner of the gifted property simply because she was in possession of it at the commencement of the Act. A similar express dissent with the Delhi view is voiced by the Punjab Full Bench in Sm. Parmeshwari v. Sm. Santokhi, A.I.R. 1977 P.& H. 141 where their Lordships "with the greatest deference" disagreed with their brothers of the Delhi Bench to hold at 150 that, where the female had parted with possession by executing a deed of sale or of gift "it would indeed be a strange result that though such a benefit plainly would not accrue to the original limited owner, it should nevertheless become available to someone deriving her title entirely from such an alienor."

was indeed lawfully possessed, but as despite the overriding effect of s. 4, the reversionary rights were not abrogated, her valid title subsisted only during the donor's lifetime. To read more into sub-s. (1) of s. 14 would be to stretch its scope artificially precisely beyond "the plain meaning of the statutory language."

The correct position obtains in Mst. Dassi v. Mst. Kapura,[1] where in Khosla, J.'s opinion, the widow's gift in 1951 of her second husband's property to her granddaughter by her first marriage did not have the effect of extinguishing the reversion, his Lordship explaining that "gift" in the Explanation to s. 14 (1) must of necessity refer to a valid gift[2] which the widow was wholly incapable of making, for while s. 14 cures the defect in the donee's title, the latter cannot benefit as the defect in the donor's title is not thereby removed. In other words, the donor could pass no better title than she herself possessed in the donated property.[3] The law put in proper perspective, a word of criticism is nevertheless due, for in holding that the widow was "wholly incapable" of making a valid gift, what the learned Judge meant was that, she was wholly incapable of making an absolute gift, a point that has been brought out splendidly in Amar Singh's case,[4] Mehar Singh, J., explaining that

> "(W)hen it is said that a female Hindu cannot make a gift or a gift made by her is totally invalid, what is meant ... is that she cannot make a gift

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1. A.I.R. 1958 Punj. 208.

2. Contrast this position with the incorrect interpretation contemporaneously held by the same High Court in Mt. Prito v. Gurdas, (1958) 60 Punj. L.R. 194, supra, at 615-6

3. See also Gurdas v. Mst. Prito, A.I.R. 1961 Punj. 203, where the donees' claim to absolute ownership over property acquired by gift from their mother was similarly negatived on the ground that as the reversionary claim had been decreed when the gift was made, the mother's death in 1953, reduced their possession to that of a trespasser's title.

4. A.I.R. 1960 Punj. 530 (F.B.).

> to the injury of the reversionary interest ... operating after her death, and the invalidity of the gift when it is avoided is operative not during the lifetime of a Hindu female but upon her death."[1]

In Smt. Sumitra v. Smt. Maharaju,[2] it was likewise held that as the donor did not have any absolute rights in the donated property, and ex hypothesi she was incompetent to transfer such rights, the donees, illegitimate daughters, did not acquire any absolute rights of ownership therein either. To construe otherwise, Capoor, C.J., held, would create an anomaly inasmuch as a male donee under similar circumstances would remain a limited owner whereas the female donee would become absolutely entitled. This it is submitted, is the correct interpretation, and an important point of consideration in any balanced construction of the two sub-ss. of s. 14. It has to be borne in mind that the purpose of s. 14 (2) is to equalise, to maintain the balance between the two sexes, that where neither of them has any right to the property, any grant as such must be construed as coming under s. 14 (2).

However this eminently sensible approach to the two sub-ss. has come in for sharp attack in Smt. Chinti v. Smt. Daultu,[3] where Dua, C.J., drew attention to the observation in Kaur Singh v. Jaggar Singh[4] to the effect that whereas a Hindu male holder of ancestral immoveable property governed by the Punjab customary law is still subject to restrictions on his powers of disposition, a Hindu female must be held to be full owner of any property possessed by her whether acquired before or after the commencement of the Act. This indicated to the learned Chief Justice that the anomaly was inherent in s. 14 itself and

1. Ibid., at 535.
2. A.I.R. 1963 H.P. 21.
3. A.I.R. 1968 Delhi 264 (F.B.).
4. A.I.R. 1961 Punj. 489.

> "... could only be remedied by (the) Parliament and not by judicial interpretation against Hindu females,"[1]

a point of view not to be countenanced[2] for though the anomaly undoubtedly exists,[3] it is submitted that it springs into existence only after the enactment of the HSA, and cannot be extended to the position prior to 1956 when the limited owner was precluded from any such privilege.

In Mst. Mukhtiar Kaur v. Mst. Kartar Kaur[4] an interesting variation of the same question arose. On the male holder dying sonless in 1939, his widow gifted the entire property in 1955 in favour of one of her daughters to the exclusion of the other three. The suit for reversionary claims by the collaterals was decreed in respect of ancestral property but was dismissed in regard to the non-ancestral property. In 1961 the widow executed a will of the previously gifted property and died shortly thereafter. On the other daughters instituting a suit for joint possession, it was held that as in the first instance the widow had gifted away her widow's estate, she could not be said to have been "possessed" of the property so as validate

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1. Smt. Chinti v. Smt Daultu, cited above, at 265.
2. See the dissenting comment of Sandhawalia, J., in Sm. Parmeshwari v. Sm. Santokhi, A.I.R. 1977 P.& H. 141, at 152 to the effect that "... they (their Lordships of the Full Bench in Smt. Chinti's case, cited above) brushed away this patent difficulty by observing that the anomaly was inherent in s. 14 itself. With great respect I may say that this is not so. There is no compulsion, either, in the language of s. 14 which necessitated the acceptance of such an anomaly as inherent." See also Krishna Murti, op.cit., who is rightly critical of this view, but on faulty reasoning, it is submitted. He notes at 15 that, "A donee either male or female from a limited owner ... would get only a life interest but not a limited estate. In such a case s. 14 (1) would not be attracted. If s. 14 is thus understood there is no scope for any anomaly as held by the Delhi High Court. What degree of veracity if any, may be attributed to this approach, we have already noted.
3. Supra, at 564.
4. A.I.R. 1966 Punj. 31.

her subsequent alienation by will. Neither could the donee's title be that of a full owner, for with her mother's death, the gift of the limited estate had ceased.[1] However, as the donee in this case was one among a number of preferential heirs to the self-acquired property, his Lordship, Pandit, J., ruled that she was entitled to a share equally with the rest in her capacity as such heir. This it is submitted, is the correct approach, a satisfactory and equitable solution in harmony with the spirit of the old law, and in tune with the legislative intendment in the new.

The gifting of the ancestral estate poses a rider no different in essence to that of a gift of self-acquired property, and in Sawan Mal v. Smt. Gita Devi,[2] where such property was in dispute, the donee's contention was that, not only was the gift merely valid during the widow's lifetime, but it was not even void as against the reversioners. Being merely voidable, inasmuch as it had not been set aside at the donor's death in 1951, the HSA's effect on it was to convert it to an absolute estate in the hands of the donee-daughter. The Court however rightly held that as the reversioners had filed for possession in March 1956, simply because the HSA had come into force during the pendency of the suit, the donee could claim no title to such property, for

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1. In similar circumstances, Untwalia, J., held likewise in Sulochana Kuer v. Deomati Kuer, A.I.R. 1970 Pat 352 in ruling that where a Hindu woman who was herself possessed of a Hindu woman's estate confers a similar estate on the donee by gift, the donee's acquisition cannot be said to be a limited estate within the meaning of s. 14 (1), and is open to challenge by the reversioners whether such transfer is absolute i.e. without restrictions, or otherwise. At the same time however, in his Lordship's view this was a pure question of the Anglo-Hindu law and the invoking of s. 14 irrelevant. This difference with the Punjab case apart, the learned Judge took it as read and did not deem it necessary either, to expand on the right of the donee as a reversioner jointly with her sisters.

2. (1966) 68 Punj. L.R. 449.

> "(A)s soon as they exercise their option to treat the alienation as void, if in law they are entitled to do so and claim possession, i.e. if the property is ancestral, the possession of ... (the) donee must be treated as that of a trespasser and not under any claim."[1]

But what where the next presumptive reversioner is a consenting party to the gift? Was he by such consent estopped from challenging the validity of the gift by the widow in favour of her daughter by a previous marriage? On the other hand, did the donee's consent to the imposition of certain restrictions in the gift deed make it a conditional gift? For such questions to be resolved, in Hardy, J.'s view in Smt. Kaushalya v. Mangtoo,[2] what had to be determined was whether the donee had agreed to a "restricted estate" within the meaning of s. 14 (2), the question assuming the greater importance as she had no pre-existing right in the property. His Lordship was clear that the proper interpretation of s. 14 (2) depends very much upon the nature of the estate created and

> "(i)f the instrument merely creates a life interest without any restrictions it is obvious that it cannot be a 'restricted estate'. But if along with the creation of a life interest certain valid restrictions are put then what is created is a 'restricted estate'."[3]

The test therefore is the intention of the parties[4] and as in this

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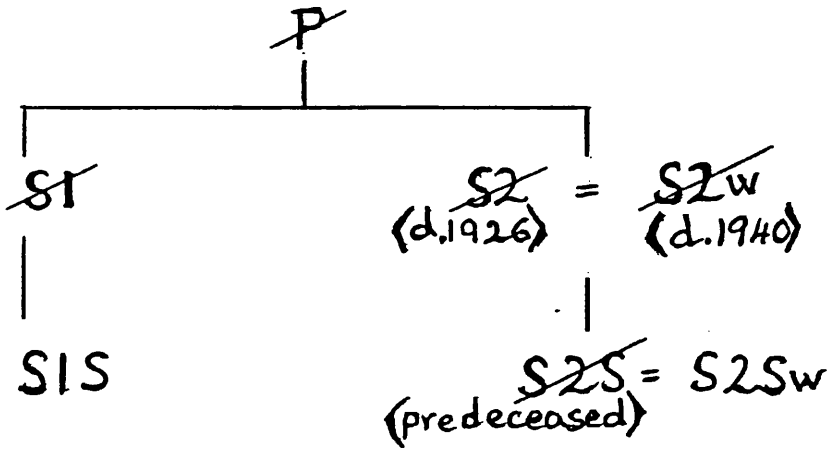
1. Ibid., at 451.
2. (1969) 71 Punj. L.R. (Delhi Sec.) 117.
3. Ibid., at 124.
4. While this statement is certainly true, we must bear in mind that whatever the intention of the parties - and in more instances than not, the intention in the imposition of restrictions was to preserve the estate at the expense of the full rights of females - a pre-existing right would have had the effect of bringing into operation sub-s. (1) of s. 14. It is submitted that the learned Judge could well have enhanced the force of his reasoning by a more definitive reference to what he had in passing noted at 123, i.e. "All her rights whatever they were, flowed from the gift", or in other words, the lack in the donee of a pre-existing claim.

case the restrictions which the donee had imposed upon herself and which in turn had induced the collateral to give his consent, the resulting gift did not merely create in her a life interest but also prevented her from alienating the same, and was thus a "restricted estate" within the meaning of s. 14 (2); as the Act of 1956 in no way abolishes reversioners or their reversionary rights or status

> "(t)he position of law before and after the Act continues to be the same, and the next reversioner is entitled in law to the protection of his reversion."[1]

The bearing of a pre-existing right in the gifted property came to the fore in Siri Ram v. Smt. Hukmi.[2]



The facts briefly were that S2W having come in possession of her husband's estate, gifted the same thereafter in favour of S2SW, the widow of her predeceased son. In a decree pursuant to a suit for the protection of his reversionary right by S1, it was agreed that the gift was valid during the lifetime of S2W. After the latter's death in 1940, the reversioner's suit was comprised, according to the terms of which

1. Smt. Kaushalya v. Mangtoo, (1969) 71 Punj. L.R. (Delhi Sec.) 117, at 125.

2. A.I.R. 1979 H.P. 46. We have already noted the bearing of this pre-existing right on s. 14 in Amar Kaur v. Joginder Kaur, (1967) 69 Punj. L.R. 545, supra at 594-5.

S2SW was allowed to remain in possession of the property for her lifetime in lieu of her maintenance. On S2SW alienating the property in 1966, it was contended that as her right over the property had ended with the donor's death, the compromise decree being the source of S2SW's title, the property would fall squarely within s. 14 (2) of the HSA. Mehta C.J., however ruled on the authority of decided cases and in particular relying heavily on Tulasamma v. Sesha Reddi[1] that, as on the death of one coparcener, his share in the joint estate enlarges the shares of the other coparceners, the Hindu law provides, as reason and justice require, that the surviving coparceners maintain the widow of the deceased coparcener. As such therefore, where the widow is possessed of property precisely in lieu of that pre-existing right of maintenance, her estate under s. 14 (1) is enlarged so as to make her full owner of the disputed property, and there is no substance to the argument that her right sprang into existence for the first time under the consent decree. True as this position is, it reinforces and reinstates the view that "the right of maintenance is a matter of moment"[2] and such is the force of that pre-existing right that it is in effect even capable of curing the defect in the donor's title to the extent of the gift conveyed.

This principle is well illustrated in Ram Sarup v. Smt. Patta.[3] The widow having transferred her limited estate in favour of her widowed destitute daughter who was unable to claim maintenance from her husband's family, at her alienation of the same after 1956 in apparent violation of the terms of the mutation, the reversioners who

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1. A.I.R. 1977 S.C. 1944.
2. Per. Fazal Ali, J., ibid., at 1960.
3. A.I.R. 1981 P.& H. 68.

had been parties to the gift sought a declaration for the safeguarding of their reversionary rights after the death of the donee on the ground that, as the deed of gift was an instrument within the meaning on s. 14 (2) the alienation would not bind them. In determining the nature of the right conferred by the gift, it was however held that, while it is undoubtedly true that a Hindu father is not bound to maintain his married daughter under the law, his moral obligation is not thereby diminished if she is widowed and destitute, for

> "(a)fter all if the father has a legal duty to maintain his unmarried daughter ... a married daughter can at least look towards maintenance under his moral obligation ... for she walked out of her father's family at his behest by (being given) away in marriage."[1]

Thus since under the Hindu law a moral obligation becomes a legal duty and the estate is inherited subject to the burden of this legal obligation, the gift by the mother was in recognition of the widowed daughter's pre-existing claim to maintenance, and such property in the hands of the donee, would mature into an absolute estate so as to oust the applicability of s. 14 (2).

In sum then, it is clear that as the reversion can in no sense be regarded as extinguished by the Act of 1956, the widow's alienation by gift, - as it is on par with her alienation by sale - is still subject to the limitations imposed by the old law, and impeachable by the reversioners. Decisions holding her as constructively possessed of such property must be dismissed out of hand. Neither in such cases, may the section be construed to the advantage of the female donee except, it is submitted, where the latter has an indefeasible subsisting right in it, the force of which is to render impotent all reversionary claims.

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1. Ibid., at 71.

(ii) Bequests

The limited owner was by definition as much incapable of alienating by will as by sale or gift, and in the event of her death prior to June 17, 1956, the reversionary claim was capable of asserting itself to the detriment of both the legatee and the donee. However, in the case of the female surviving the passing of the HSA, while the gift made prior to its enactment would remain subject to s. 14 (2), the position of the legatee is substantially improved, for the will executed by the female of her widow's estate cannot be regarded as invalid and inoperative, as the incapacity imposed by the Hindu law on her disposing power has subsequently been removed by s. 14 (1) of the HSA by virtue of which she acquires absolute powers of alienation over property "possessed" by her.

We have already observed that under such circumstances the reversion cannot claim to the detriment of the male legatee from the widow;[1] on the same principles it was held in Harnam Kaur v. Sher Singh[2] that where the widow in 1954 bequeathed the entire property which she had received by gift and by inheritance from her husband, to a female relative by marriage, the reversioner's claim that she had thereby exceeded her powers as a limited owner could only be partially accepted. His Lordship Khanna, J., was of the view that, while sub-s. (2) of s. 14 would apply to the property which was gifted in favour of the widow - with what degree of accuracy we shall presently see - as by operation of s. 14 (1) she had become full owner of the remaining estate which had come to her by inheritance, it was capable of being

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1. Supra, at 479, f.n. 1.
2. A.I.R. 1963 Punj. 402.

disposed of by will. The learned Judge further reasoned that the fact that the reversioner under the customary law had as much a right to assail a testamentary bequest by the limited owner as a gift or sale by her, could be of no assistance to him after 1956, for while in the latter case there is an immediate transfer of interest, the legatee is entitled as a beneficiary only at the death of the testatrix. In other words, his Lordship reiterated the well-known maxim that the will speaks on the death of the testator, and as in the present case the widow was still alive, and rather than revoking the will, had clearly indicated that she desired it to be acted upon, the infirmity originally attached to the document must be held to be cured as a result of her full ownership, and the reversionary right accordingly extinguished.

A similar decision was arrived at by the Rajasthan High Court in Smt. Sunderdevi v. Manakchand.[1] The widow having willed away her limited estate in 1953, at her death after the enactment of the HSA, Modi, J., was in complete agreement with the plea of the female legatee that as the will speaks at the death of the testator and not at the time of its execution, in view of the unfettered capacity to dispose of the property which the HSA had undoubtedly conferred upon the widow, the will was perfectly valid. Relying upon the dicta in Mst. Sirekanwar v. Kanwarlal,[2] the learned Judge ruled that where there is no inherent incapacity to dispose of property as in the case of a person who is a minor or of unsound mind, a person who does not possess, or own, or has no power to make a testamentary disposition of

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1. A.I.R. 1975 Raj. 211.
2. I.L.R. (1953) 3 Raj. 1013.

it may make a bequest, and such bequest would be valid provided the testator happened to be the owner at the time of his death. In this case the incapacity of the limited owner having been removed by the HSA before her death, there could be no question but that the will would take effect as a legitimate testamentary bequest, and this would be in keeping with the general principle, that,

> "(A) will unless a contrary intention appears therein must be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator and as if the condition of things to which it refers in this respect is that existing immediately before his death."[1]

To sum up this part of our study: where the widow alienates, by way of gift or testamentary disposition her limited estate, and dies prior to the coming into force of the HSA, the rights of the grantees in such cases cannot extend beyond her lifetime and the reversionary right is capable of being asserted immediately on her death. The same would apply to gifts inter vivos even if she survives till after 17 June, 1956, for having parted with possession of limited estate, the HSA has no application as s. 14 (1) cannot operate in a void. On the other hand, given that the will speaks on the death of the limited estate, testator, a will made prior to 1956, but given effect to only after the passing of the HSA, effectively extinguishes all reversionary claims, the full benefit accruing to the female legatee. After 1956, the limited estate in the hands of the female Hindu is converted to a full tenure under s. 14 (1), and she may freely alienate either for value or gratuitously.

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1. Halsbury's Laws of England, Vol. 34, (Hailsham Edition), Para 291 at 236.

(b) Acquisitions Inter Vivos and Bequests from a Male: The Position Before 1956

A question now remains whether s. 14 (1) will apply to grants made to females by will or by settlement inter vivos on the part of persons who are under an obligation to maintain them or whose estates would, in the ordinary way, be liable for their maintenance under the HAMA.[1] The problem is of some complexity and must be construed in conjunction with the law relating to gifts and bequests in the traditional law as modified by the statute of 1956.

Under the prior law, both in the Mitāksarā and Dāyabhāga schools, a Hindu even if he be joint, may be possessed of self-acquired, or, where he has terminated his joint status, of separate property which belongs exclusively to him, and as no other member of the coparcenary, not even his male issue, acquires any interest in it by birth, the father has the unqualified right to deal with it as he pleases - and in a manner which denies any right of interference by the son either to enforce a partition or to interdict an alienation. He may sell it, or make a gift of it, or bequeath it, and as in such property

> "(t)he other members of the family have neither community of interest nor unity of possession, the foundation therefore of a right to take such property by survivorship fails."[2]

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1. Derrett, "Landmarks in Family ...," op.cit., at 13.
2. Katama Natchiar v. The Rajah of Shivagunga, (1863) 9 M.I.A. 543, at 615.

On the other hand, there is a significant difference in regard to the ancestral estate in the two systems. As the notion of acquisition by birth is a concept unknown at Dāyabhāga law, ancestral property in the hands of the father is as much liable to be disposed of by gift or will as his separate or self-acquired property, subject of course to the claims of dependants for maintenance. Conversely, the general principle that a Mitākṣarā coparcener may not alienate, by sale or gift, his undivided assets is based on the theory of the right by birth in the joint stock, that community of interest, that unity of possession that is at the very core of the Mitākṣarā coparcenary. Neither could he bequeath by will what he could not have alienated by gift inter vivos,[1] for the right of survivorship being in conflict with the right by devise, the title by survivorship as a prior title takes precedence to the exclusion of that by devise; and it is in the context of these principles as modified by ss. 14 and 30 of the HSA, that we must construe the effect of gifts and bequests

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1. D.F. Mulla, Principles of Hindu Law, 14th ed., by S.T. Desai, (Bom. Tripathi, 1974), Rep. 1978. See also IMHL, op.cit., at 457, where Derrett explains that, "A bequest of an individual interest made before 17 June, 1956, will be inoperative as a bequest and can only operate with the approval of the surviving coparceners (if they estop themselves from disputing it) or by a family arrangement, which the law may infer from conduct, whereby the deceased's instructions are incorporated voluntarily in an agreement for the benefit of the entire family and thus binding upon minors."

made by a Hindu male to a female, of his separate as well as undivided assets.

(i) Gifts and Bequests of Separate Property

When a woman is selected, often against the general course of the law of inheritance, it is reasonable to presume in the absence of indications to the contrary that the testator thought her fit to deal with the gift, and the same would apply, perhaps even more strongly, when the property is actually given by deed inter vivos.[1] But as it is open to the grantor to make a gift of his choice, notwithstanding the general rule that bequests are construed as absolute gifts unless the will as a whole intends the contrary, in the construction of a deed of gift or a testamentary bequest, it is the obvious duty of the Court to give effect to the true intentions of the grantor and avoid any construction of the document that would defeat or frustrate or bring about a situation that is directly contrary to the intentions of the grantor.[2]

This position has not been affected by the extension of the property rights of women under the legislation of 1956, for if the test to apply is indeed the nature of the grantee's claim before the grant was made, to determine whether or not she could claim an absolute estate, then what one must bear in mind is that no female can claim a pre-existing right in a man's separate property; even the wife's right to be maintained ceases on her husband's death, and now under s. 21 (111) of the HAMA, she is merely a dependant like a mother or unmarried daughter, s. 22 (2) defining her claim to a mere

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1. Derrett, Critique, op.cit., at 201.

2. Per Ramamurti, J., Manvala v. Ramanujam, (1971), 1 M.L.J. 127, at 135.

maintenance grant:

> "(W)here the dependant has not obtained, by testamentary or intestate succession, any share in the estate of a Hindu dying after the commencement of this Act, the dependant shall be entitled ... to maintenance from those who take the estate."

S. 14 (1) cannot therefore be brought in defense to plead that, where the female acquired a restricted estate under a gift deed or by testamentary disposition in the propositus' separate estate, simply because it envisages the absolute ownership of women over property lawfully in their possession, the sub-s. must inevitably apply. For while Parliament has removed the compulsory limited estate, s. 14 (2) was specifically incorporated to equalise the claims of men and women in property over which the propositus had full disposing power, and as a testator or settlor can discriminate against males and give them limited interests, even when they are dependants, he can equally discriminate against females, provided that their rights of maintenance are not jeopardised thereby.[1]

The general principle therefore that sub-s. (2) applies only where the lady acquired for the first time without there being any pre-existing right in her favour, as confirmed and settled by the Supreme Court in Seth Badri Prasad v. Smt. Kanso Devi,[2] must be the guiding principle, and the intention of the donor the acid test in determining whether the woman takes an absolute interest under s. 14 (1), or whether in conformity with any limitations of the grantor's choice, she takes a restricted estate under s. 14 (2). In other words, whereas the Hindu law had developed a rule discriminating against females, which Parliament has abolished, the general law of

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1. Derrett, "Landmarks in Family ...," op.cit., at 13.
2. A.I.R. 1970 S.C. 1963.

India has provided other possibilities wherever a division of benefits between beneficiaries is intended, and since these do not discriminate against females they are not within the mischief intended to be remedied by s. 14 (1).[1]

The task that we must next turn to is to ascertain whether the Courts have indeed followed the well-known principle of endeavouring to occupy the testator's armchair to determine his wishes. In keeping with the prevailing attitude towards the property rights of women, grants are nowadays construed as giving the donee absolute ownership unless the document expressly or as a whole intends the contrary. But even in the following of this principle, a distinction must be made, and where the female has a right to be maintained out of such estate, the deed of gift is, to an extent, more liberally construed in her favour than where a restricted estate is conveyed to a female who can claim no such right.

(i-a) Where the Female Has a Right of Maintenance in Such Property

That the Hindu male has absolute powers of disposal over his separate property so as to enable him to give the gift of his choice, we have already established, and the task of the Courts in declaring in favour of the female donee becomes the easier where there are express words as to the absoluteness of the gift. In Annapurnamma v. Sankararao,[2] for instance, where under the terms of his will the husband had absolutely bequeathed his entire separate property and a half share in the joint-family property to his wife, Nayudu, J.,

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1. Derrett, Critique, op.cit., at 204.
2. A.I.R. 1960 A.P. 359.

concerned himself with the more intractable question as to the widow's entitlement under such circumstances in the joint estate, for there was no doubt in the learned Judge's mind that so far as the separate property was concerned, since the will envisaged in clear terms an absolute estate, the female's claim to absolute ownership could not be subsequently questioned.

Neither may a "restricted" estate within the meaning of s. 14 (2) be imputed merely because the terms of the will in so many words specifies the giving of a "Hindu widow's estate" to the female. In Shakuntala Devi v. Beni Madhav,[1] the property in dispute having been proved to be self-acquired, the question turned upon the right that the widow acquired as a beneficiary under her husband's will which gave her just such an estate. While admitting that, "the question is not free from difficulty,"[2] his Lordship, Katju, J., was of the view that, as what the widow acquired under the terms of the will was not merely a life estate but the technical Hindu "widow's estate", it could not be interpreted as a restricted estate in the sense of an estate for life. As such therefore, the learned Judge saw no reason

> "(w)hy the provisions of sub-s. (2) would prevent the applicant's interest from being perfected into full ownership."[3]

In other words, what the bequest gave the female was what she was entitled at law to get in case her husband predeceased her, and where the deceased who could well have disposed of his estate otherwise, chose instead to bequeath it to his widow in precisely the same terms

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1. A.I.R. 1964 All. 165.
2. Ibid., at 167.
3. Ibid., at 168.

as what she would have acquired as heir, any doubts that such property would attract s. 14 (1) must be dispelled, for

> "(t)here can be no presumption that a limitation must be conveyed by the expression 'Hindu woman's limited estate.'"[1]

This it is submitted is the correct interpretation, and despite expressions of doubt,[2] establishes the important principle which must be the guideline in determining the claim of a female with a right to maintenance, as opposed to one who has no such right in the property, where both are awarded limited or restricted estates by gift inter vivos or under a testamentary disposition. What it amounts to is this: As the female as a rule took a limited estate only in the property given to her in lieu of maintenance or inherited by her from her male relatives, the position before the enactment of 1956 was that, if the property was given to her by gift inter vivos or under a will, the Court was entitled to assume that the donor intended the donee to take a limited estate, and to such cases s. 14 (1) would apply after 1956. On the other hand if the document in express words conferred a limited estate, s. 14 (1) could have no application, as this would be construed as a restricted estate within the meaning of s. 14 (2). In

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1. Derrett, Critique, op.cit., at 202.

2. See Derrett, "S. 14 (2) of the HSA: A Disturbing...," op.cit., at 72, where at that time he expressed the view that "Shakuntala Devi's case is...due for consideration and, I trust, overruling." However, in progressively appreciating the widow's inherent right in such property where they have not been testamentarily cut down, the same writer is amenable to the view that "it can be argued that both (Shakuntala Devi's case, cited above and Kaliammal v. Andiammal, A.I.R. 1965 Mad. 451, discussed below) were correct as they were (silently) based on the widow's right to maintenance from the estate": "S. 14 of the HSA, 1956, A Deadlock...," op.cit., at 6.

other words, the construction of the document is of the crux, and, it is submitted, unless the subsequent clauses indicate a restricted estate, in the case at least of an heir or maintenance holder, a mere prohibition on alienation must be construed to mean the giving of the "Hindu widow's estate" which is capable of converting to an absolute tenure under s. 14 (1), for the cardinal rule that one must bear in mind is that statutory provisions must prima facie be construed as conferring in addition to, and not in derogation of, existing rights. This would seem to be a rational interpretation[1] of s. 14 as a whole, and in harmony with the view of the Supreme Court that it is erroneous to assume

> "(t)hat is a settled principle of law that unless there are express terms in the deed of gift that the donor who had an absolute interest, intended to convey absolute ownership, a gift in favour of an heir who inherits only a limited interest cannot be construed as conferring an absolute interest."[2]

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1. If the present writer has erred, it may perhaps not be held against her as an inexcusable error of judgment. The problem has proved not a little troublesome to more knowledgable minds. Derrett for instance, was at one stage unwilling to concede this latitude, and held firmly to the view that, "whenever a female took a limited estate by will, it is to be supposed that the testator had full disposing power over the property. We are not to consider what her rights were against him prior to his death, nor what estate she might have had if the will had not been made. The fact is that he could have cut her off altogether. He did not do so, she took under the will, and s. 14 (2) must apply.": "S. 14 (2) of the HSA: A Disturbing..." op.cit., at 72.

2. Nathoo Lal v. Durga Prasad, A.I.R. 1954 S.C. 355, at 358 , following Ram Gopal v. Nand Lal, A.I.R. 1951 S.C. 139. See also Smt. Tulsan v. Sahib Ram, A.I.R. 1966 Punj. 262, where following the Supreme Court and independently of the female's entitlement under s. 14, it was held under the rules of construction of wills that, as the two brothers and the wife of the testator were beneficiaries in equal shares and there was no suggestion in the will from which the wife could be presumed to have been given a life estate, there could not, in such a case, be any scope for the presumption of a life estate being conferred on the female Hindu merely because she was a female.

The mere giving of a limited estate cannot thus be meant to imply the giving of a restricted estate within the meaning of s. 14 (2), and neither, it might be added, may a limitation be imputed where none is intended, and in this regard the decision in Harnam Kaur v. Chanan Singh[1] merits careful consideration. The presumptive reversioner having agreed to the gift by the husband to his wife of two-thirds of his separate property on the only stipulation that she was not to squander it, the will subsequently executed by her in 1954, bequeathing the same property to a female relative was challenged. On appeal Khanna, J., arrived at the surprising conclusion that the Trial Court's finding that, as the gift was a mere provision for maintenance, s. 14 of the HSA which had in the meanwhile come into operation, could not validate the bequest by the widow, was unassailable, for

> "(I)t is settled law that the High Court cannot in second appeal interfere with the finding of fact of the lower appellate Court however grossly erroneous that finding may be."[2]

One submits that as the entire question as to the entitlement of the legatee as against the reversion rested precisely on that particular "finding of fact," for the High Court not to have gone into the merits of the case and to accept the lower court's view "however grossly erroneous", is an instance of grave deviation from the principle that law should correspond to facts.[3] Prohibition against waste can in

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1. A.I.R. 1963 Punj. 402.

2. Ibid., at 403.

3. See Derrett, Critique, op.cit., at 26-7. The same author draws our attention at ibid., to this principle as enunciated by the Privy Council in Hunoomanpersaud's case, (1856) 6 M.I.A. 393, at 410-1 that, as the Courts must administer justice according to equity and good conscience "the substance and merits of the case are to be kept constantly in view."

no wise be construed to mean a "restricted"estate within the meaning of s. 14 (2) and the learned Judge's view therefore that

> "(T)he aforesaid two-third share in land is covered by sub-s. (2) ... and as such the appellants cannot derive much benefit from s. 14 qua the two-third share."[1]

unacceptable, for the survival of the widow after 1956 having cured the defect in the will, it must be held to take effect in accordance with her wishes.

On the other hand, it may happen that the words used in the document may allow for ambiguity, and in such cases

> "(T)he golden rule of construction ... is to ascertain the intention of the parties to the instrument after considering all the words in their ordinary natural sense, (and) to consider the relevant portion of the document as a whole, and also to take into account the circumstances under which the particlar words were used."[2]

This formula came in handy in Manvala v. Ramanujam[3] with attractive results. Shortly before his death, the testator executed a will whereby after excluding a particular item of property, he set aside the remaining estate for the charities of his choice. The excluded property, a house, he gifted during his lifetime to his wife, expressly stating in his will that it was to remain in her possession. After her death after 1956, the bequest by her of the house was challenged on the ground that the

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1. Harnam Kaur v. Chanan Singh, A.I.R. 1963 Punj. 402, at 404. Contrast here the correct position as established in Sm. Sankaribala v. Sm. Asita, A.I.R. 1977 Cal. 289 (discussed below) where a similar gift for maintenance was rightly held to be incapable of converting to an absolute tenure under s. 14 (1), as the terms of the gift deed stated in unambiguous words the giving of a restricted estate.
2. Ramkishorelal v. Kamal Narayan, A.I.R. 1963 S.C. 890, at 893-4.
3. (1971) 1 M.L.J. 127.

corpus of the disputed property had been bequeathed to the trust for charities, and a limited right, a mere right of residence having been carved out in favour of the wife, she was under a total legal disability to claim absolute ownership either under the terms of the will or even on the basis of adverse possession. In negativing this contention, Ramamurti, J., was of the view that as the words employed by the testator in the several clauses of the will undoubtedly disclosed a latent ambiguity, in that while on the one hand it designated "the whole of my remaining estate," to the charities, on the other the words "belonging to my estate"[1] would have to be taken note of, and the rule of construction in ss. 75, 77, 80 and 83 of the ISA applied to ascertain the true intention of the testator. As such therefore, much would depend upon

> "(t)he true and correct interpretation of the will with such assistance or light thrown by the testator's own declaration and his conduct immediately after the execution of the will during his lifetime..."[2]

The will having specifically provided that the testator's wife would be in possession, it could not be construed to mean that he was thereby giving her merely a restricted right of residence, for in such a case he would have employed entirely different language and made a distinct and separate provision for its devolution after her death. Moreover, the learned judge held, as the title deeds to the property had been handed over to the wife, and even on the evidence of the original trustees, there could be no manner of doubt that the property in question had been deliberately excluded from the scope of the trust. Under such circumstances therefore, one of two things may be

1. Ibid., at 135.
2. Ibid., at 134.

inferred: either that there had been a gift of the house to the wife, though ineffectively in the absence of a registered gift deed, or that that particular estate being outside the purview of the will, the widow was entitled as heir, and by reason of the merger of both interests, she became the sole and absolute owner under s. 14 (1).

Undoubtedly correct as the decision is, it is submitted that the widow's claim as heir apart, there can be no doubt but that, had she not been related to the deceased, she would nevertheless have taken absolutely as legatee under the terms of the will. That the testator intended the gift made in his lifetime to take effect, is clear from the express terms of the will which envisages

> "(t)he whole of my remaining estate after excluding[1] the properties which are hereinafter mentioned as those that should go to my wife ..."[2]

be utilised for charities, and in view of this clearly-worded provision no inference may be drawn that

> "(t)he testator had died intestate with regard to this property except to the limited extent of the right of residence carved out in favour of his wife."[3]

Neither could it be deduced that, simply because the will is silent about the powers of alienation, what the widow got was merely a restricted estate under s. 14 (2), for silence on such matters will operate in favour of the grant coming prima facie under s. 14 (1).[4]

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1. Emphasis mine.
2. Manvala v. Ramanujam, cited above, at 129.
3. Per Ramamurti, J., ibid., at 138. It is submitted that the reliance on Mohanlal v. Habibullah, A.I.R. 1963 Pat. 430, is misplaced here. In the latter decision, inasmuch as the bequest was of a maintenance grant, which in itself connotes a restricted estate unless a pre-existing right inheres in the legatee, the Court was perfectly within its competence to hold that the testator must be deemed to have died intestate, and to declare in favour of the heirs.
4. Derrett, "Summary of Recommendations...," op.cit., at 2.

To this extent, therefore, the judgment requires reconsideration, for in the complex issue of the construction of wills, the Court's duty is, it is submitted, to be precise and unambiguous, and - in the setting out of the correct interpretation - to set a precedent and lay to rest subsequent judicial controversy as might arise on similar causes of action.

The same principle will apply conversely, and where the testator in so many words indicates a restricted estate, the harmonious construction of the two sub-ss. of s. 14 cannot allow for the application of s. 14 (1). A case in point is the decision in Sobhabati v. Raghunath,[1] where the contention made on behalf of the widow was that, as the rights which she had acquired under her husband's will were no higher than the rights which she would have got over the properties on his death, and as her right to succeed to the property and her right to take it accrued simultaneously, the will must be construed as giving her no higher rights than what she would have been entitled to as heir so as to allow for the operation of s. 14 (1). It was however rightly held that as the husband had not died intestate, the widow's only claim being that of a legatee under his will, it was not open for her to plead a pre-existing right as such in the property; and as what the will gave her was not the "Hindu widow's estate"[2] which could attract s. 14 (1), but expressly prohibited her from making any alienation

> "(a) feature which is foreign to the conception of a widow's estate where a widow has a certain restricted right of alienation of the corpus of the property,"[3]

such estate was incapable of being enlarged into an absolute tenure.

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1. (1970) 36 Cut. L.T. 121.
2. See Shakuntala Devi's case, A.I.R. 1964 All. 165.
3. Per Patra, J., Sobhabati v. Raghunath, cited above, at 131.

It is however submitted that a restriction on alienation, express or implied, does not necessarily connote a restricted estate; we must note here once again that it is not merely the legal limited estate but other types of restricted estates as well that may well come within s. 14 (1), and indeed when we consider the distinction made in Muthu Bhattar's case,[1] it could have been argued by an alert counsel that, as a grant for maintenance with no power of alienation is, strictly speaking, not the Hindu widow's estate but is nevertheless capable of attracting s. 14 (1),[2] similarly the widow's claim in this case could well have been justified notwithstanding the stipulation against alienation, but that such an interpretation becomes impossible on a construction of the will as a whole, and the further clauses which clearly contemplate the cutting down of her tenure to something less than an absolute estate. In the first instance, the will postulates the giving to the female of the income not the corpus, the words "without however any right of alienation,"[3] merely reinforcing the

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1. A.I.R. 1976 Mad. 8.

2. Ibid., discussed above at 598. . It may well be argued that this is a principle applicable to a grant for maintenance out of the joint-family property only. But the overruling by the Supreme Court of the F.B. decision in Ajab Singh v. Ram Singh A.I.R. 1959 J. & K. 92, (FB), (infra at 667-8), is significant and makes us pause awhile. The legacy of a restricted estate in the separate property of the Hindu male held originally to come under s. 12 (2) of the J. & K. Act (corresponding to s. 14 (2) of the HSA), was reconsidered in Tulasamma v. Sesha Reddi, A.I.R. 1977 S.C. 1944, Fazal Ali, J., apologising in 1975: "In this case also the various aspects ... and the nature and extent of the Hindu women's right to maintenance were not considered at all, and the Court proceeded by giving an extended meaning to the provisions of sub-s. (2) of s. 14 which in that case was sub-s. (2) of s. 12 of the Jammu & Kashmir HSA, 1956." The issues involved are of considerable complexity and deserve independent and careful scrutiny.

3. Sobhabati v. Raghunath, (1970) 36 Cut. L.T. 121, at 122.

earlier clause. The insistence on the widow to adopt and the further provision of a half hypothetically to her in the event of disharmony between her and the adopted son, only to revert at her death for him to take absolutely - provisions such as these, leave no room for doubt that, having secured her maintenance, it was never the intention of the testator to bequeath to her any but the restricted estate as contemplated in s. 14 (2).

Credence is lent to this line of thought by the Full Bench decision in Smt. Jaswant Kaur v. Harpal Singh.[1] Where the deceased owner of the estate had executed a will in respect of his entire property, bequeathing half of it to his younger brother, and the remainder to his wife for the purposes of maintenance and the marriage expenses of their two daughters, with this stipulation, however, that she would not be competent to transfer the corpus, the same to revert to his brother after her death, it was the widow's claim that the alienations by gift, sale and mortgage effected by her could not be impeached as s. 14 (1) is applicable to property which is given by gift or will to a female who is not a stranger to the family and is entitled, either to inherit that property or to maintenance from the donor/testator. Their Lordships of the Full Bench were however clear that, as during the lifetime of her husband the female had no claim to the property, her rights accruing only by virtue of the will which envisaged the taking by her of a restricted estate, she would be bound by the terms of the document so as to bring the property squarely within s. 14 (2).

This lucid interpretation of the statutory intention apart, the

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1. A.I.R. 1977 P. & H. 341 (F.B.).

deeper significance of the decision lies in that, in accounting for the inclusion of the words "devise" and "gift" in s. 14 (1), Mittal, J., explained that

> "(t)hese words are to be taken in the context in which these were taken under (the) Hindu law prior to the coming into force of the Act,"[1]

and while the Court was entitled to assume that the grant of such an estate stricto sensu, would operate to attract the provisions of s. 14 (1), there can be no such assumption where the testator in express terms restricts the nature of the gift, and even the female with a right of maintenance or one who but for the will, would have taken as heir, cannot claim a greater right than what is given to her under the gift deed or by bequest.

Thus in keeping with this principle, where the deceased husband had executed a registered deed gifting certain properties to his wife in life estate for her maintenance, the question in Sm. Sankaribala v. Sm. Asita[2] was whether, after her husband's death, as a consequence of her subsequent remarriage after 1956, she had forfeited all her right, title and interest in the property of the deceased.[2] Sen, J., rightly held that though the HWRA, 1856, applied neither to the property which the female had taken in absolute interest as heir to her husband under the HSA, nor even to the gifted property, as it had not been acquired by her in any of the three ways set out in s. 2 of the former Act, the life interest in the latter estate remained as such under s. 14 (2) of the 1956 Act, and the enabling provisions of s. 14 (1) could have no application to such property. That the gift deed did indeed stipulate a mere life estate there can be no doubt,

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1. Ibid., at 345.
2. A.I.R. 1977 Cal. 289.

for not only did it specify that any alienation by the female of the property would be "void and invalid and disallowed in Court,"[1] the further clauses specifying that after her ownership would revert back to him, the property to go to his heirs and those of his father's side in the event of his demise prior to her, and the final conclusive clause that "none of the heirs of your father's family shall become the owner or possessor thereof,"[2] are words of unambiguous import indicating thereby that under no circumstances did the donor contemplate the taking by his wife of an absolute estate. Thus, the restricted estate must stand, for in adding the various categories of acquisition to sub-s. (2) of s. 14, the intention of Parliament was merely to ensure that any transaction under which a Hindu female gets a new or independent title under any of the modes mentioned therein which prescribes a restricted estate, would not be disturbed and would continue to occupy the field covered by s. 14 (2).[3]

As the intention of the testator must be the guiding principle, the construction of deeds of gift and wills presents problems of not inconsiderable complexity, and the onus upon the Courts to collect from the documents indications sufficient to provide an intelligible and workable disposition which does not frustrate the wishes of the donee or testator,[4] is a heavy one.

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1. Ibid., at 293.

2. Ibid.

3. Tulasamma v. Sesha Reddi, A.I.R. 1977 S.C. 1944, at 1967, the learned Judge, Fazal Ali, J., further explaining at 1967-8: "This would be the position even if a Hindu male was to get the property by any of the modes mentioned in s. 14 (2); he would also get only a restricted interest and therefore (the) Parliament thought that there was no warrant for making any distinction between a male or a female in this regard and both were therefore, sought to be equated."

4. Derrett, Critique, op.cit., at 232.

That they are not always successful is illustrated by the recent decision of the Kerala High Court in Janki v. Govinda,[1] where despite the obviously uncomplicated nature of the set of facts, his Lordship Vadakkel, J.'s inept ruling has little in it to commend. In 1947, a testator bequeathed certain items of his property to his relatives with this provision that a specified quantity of paddy from the paddy lands so bequeathed should be supplied to his two widows for their lifetime. Provision was also made for them to reside in the family house, which however with certain other items of property (referred to as "Item No I") was to remain in the possession and enjoyment of the executor, the said properties including the residential house to be divided by metes and bounds only after the deaths of both the widows. Sometime during that period, one of the widows died, and after 1956, the surviving widow claimed that she was entitled to invoke s. 14 (1) in respect of the house.

Vadakkel, J., held, however, that the disposition did not create any interest in the female's favour in lieu of maintenance so that neither of the two sub-ss. of s. 14 was attracted. To the argument that it was the taking into account of the husband's obligation to maintain his wives that the provision for residence had been incorporated in the will, his Lordship countered that as the right of maintenance had already been met with by the disposition for certain payments of both money and paddy, "the right if at all, is only a monetary claim, and not any right in Item No. I."[2] Thus as the will conveyed merely a right of residence, and no restricted right in respect of

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1. A.I.R. 1980 Ker. 218.
2. Ibid., at 219.

the immovable property in question, sub-s. (1) of s. 14 would have no application. His Lordship further reasoned that there having been no allotment of any property under the will in favour of the widows, be it in lieu of maintenance or otherwise, and in effect no property having been "acquired" within the meaning of sub-s. (2), the latter would not apply either.

On a less than careful assessment of the facts, it would seem that the widow's claim was right, and the disputed property could indeed attract s. 14 (1). She had, after all, a right to be maintained; indeed in the absence of sons she was their to such property, and it could well be argued that what had been conferred upon her by the will was in lieu of just such a right. What would seem to lend weight to this line of thought is the obviously faulty reasoning that, as a beneficiary under the will, all she was entitled to claim was a right of residence, the inference being that the right of residence was separate to, and distinct from, the right of maintenance to which had already been taken care of by the provision of paddy and money.

This argument, it is submitted, is untenable. Whatever the controversy over the nature of the right of maintenance, i.e. whether or not it is a right of property, there is unity of view, and judicial decisions have some long time back established that, the right of residence in the family house is an indefeasible right, being a component of the right of maintenance, and to quote the Supreme Court,

> "(w)here (however) property is acquired by a Hindu female at a partition or in lieu of the right of maintenance, it is in virtue of a pre-existing right, and such an acquisition would not be within the scope and ambit of sub-s. (2), even if the instrument, order or award allotting the property

prescribes a restricted estate in the property."[1]

In the present case, his Lordship saw it fit to quote the selfsame words,[2] but merely to reinforce his view that the right of residence not being a part of the right of maintenance, the widow could claim no pre-existing right so as to rule out the application of s. 14 (1)!

At a glance therefore, one is tempted to sweep aside the judgment, for it would seem that s. 14 (1) would indeed prevail. But on a more careful scrutiny, one is forced to an awareness of certain other subtleties that must be taken into consideration. Where the females were already entitled, was the testator's intention merely that his widows take the limited estate which was to revert to his heirs after them? If this were so, then in the event of the survival of either widow, the limited estate would transform to an absolute tenure after 1956. But this was clearly not his intention for in that event the necessity of testamentary disposition would have been rendered superfluous. But having executed a will whereby the widows' maintenance and residence was provided for, there is categorical instruction that, at the death of one widow, the other would not be entitled to the share payable to her co-widow, and further that in spite of the right of residence, the house was to be in the enjoyment and possession of the executor, to be divided by metes and bounds and shared by the beneficiaries specified therein once that right was over. The testator's intention could not be clearer. What he was giving to his widows was not property in lieu of maintenance, nor even their entitlement of the limited estate under the general Hindu law, but merely a grant for maintenance for life after which the estate

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1. Per Bhagwati, J., Tulasamma v. Sesha Reddi, A.I.R. 1977 S.C. 1944, at 1948-9.
2. Janki v. Govinda, cited above, at 221.

was to be disposed of in the manner stated in the will.

At this stage it is possible to argue whether - given that the widow was an heir in her own right in the traditional law - the husband had at all the power to be so restrictive in his will. If we bear in mind that as the owner of the "limited"estate, despite certain other legal limitations, the widow had nonetheless the right to alienate the corpus as well as the income for her necessary requirements - and such requirements having already been met with under the terms of the will - the testator was motivated by an obvious desire to prevent wasteful and unnecessary litigation, and in view of women's general inexperience and lack of knowledge in such areas, to protect the rights of both, the widows and the reversion. If it is true that unless the terms of the will as a whole suggest that the female shall not have an absolute right of disposal over the property, a bequest to a female imports as absolute an estate as a bequest to a male,[1] the reverse too is in order, and the testator, it is submitted, was well within his powers to restrict her powers by testamentary disposition.

Since sub-s. 2 of s. 14 is based on the sanctity of contracts and grants, the enhanced rights of the female under s. 14 (1) can, in this instance, have no effect, and the testator's intention that his widows take as legatees rather than as limited heirs, upheld. As there was no subsisting right as such, the widow's title deriving from the will, s. 14 (2) applied squarely to such property. The suit by the widow for an absolute tenure must fail, as fail it did, except that the learned Judge failed to recognise it as the "restricted" estate envisaged in sub-s. (2) of s. 14.

1. See Ram Gopal v. Nand Lal, A.I.R. 1951 S.C. 139.

The next problem that we must set ourselves to resolve is the proper construction of wills where the gift purports to make a bequest of the estate or part of it to the widow or another female heir, the subsequent clauses providing for others to take it after her death. The Court must, in such instances, ascertain whether the testator intended to give an absolute estate to the female if she survived him and added other provisions as afterthoughts in the event of her dying in his lifetime, or that the principal legatee was intended to be given merely a limited or a life-estate with remainder over to others.[1] Though the decision as between the two interpretations is often a matter of great difficulty, where however the residuary bequest is to a male, the general principle, in view of the new property rights of women is to give the principal female legatee an absolute estate unless it is clear that the testator intended to cut down or circumscribe the bequest.[2]

But what where the principal and secondary legatees are both women related to the testator in a manner as would entitle them, at the time that the will was made, to claim maintenance as of right from the estate being disposed of? Just such a problem presented itself in Kaliammal v. Andiammal.[3] A Hindu male died leaving behind among others, his wife and unmarried daughter. In pursuance of the instructions of the deceased, there came into existence a division of the estate under which the property that fell to the widow's share was a life estate without power of alienation, the same to go to the daughter after her death. At the daughter's death in 1957, the widow after terminating her status of limited estate holder, asserted full

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1. Derrett, Critique, op.cit., at 234.
2. Ibid.
3. A.I.R. 1965 Mad. 451.

ownership of the property and executed a sale deed in respect of it. In upholding her claim, Venkatadri, J., was of the view that however one looked at the case, the widow's contention was irrefutable. Reasoning along the lines of Shakuntala Devi's case,[1] his Lordship held that, as in any case the widow would have inherited as heir at her husband's death, the limited estate in her possession must be held to have converted to an absolute tenure under s. 14 (1), the restriction on alienation in no way derogating from such absolute ownership. In the alternative, his Lordship reasoned, even assuming that the female got the estate under the terms of the deed, there could be no question but that she was absolutely entitled, as at the daughter's death in 1957, she inherited the estate of the latter which was a vested remainder in her.

At this stage it is possible to distinguish Shakuntala Devi's case[2] in that while the giving up of the "Hindu widow's estate" may be unimpeachable, the express prohibition against alienation in Kaliammal's case[3] could well hold, and indeed disagreement followed fast on the heels of the decision. Thus:

> "(W)hether this (the dicta) is correct I beg leave to doubt. The husband could have bequeathed the entire estate to a home for cows, and unless she (the widow) could prove that she was as a dependant, entitled to some allowance for her maintenance, she could be disinherited, and would take for the first time any concessions made to her by the trustees of the cow's home."[4]

Though there is much truth in this assertion in that the owner is

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1. A.I.R. 1964 All. 165.
2. Ibid.
3. Cited above.
4. Derrett, "S. 14 of the HSA and a Recent...," op.cit., at 51-2. To the same writer however, goes the credit of reversing his earlier stance to refer to Kaliammal's case, cited above, as supporting "the progressive view." See "S. 14 of the HSA Once...," op.cit., at 22. See also supra at 637.

at total liberty to dispose of his property in the manner he pleased, one must here, it is submitted, revert to the well-known principles of the construction of wills, i.e.

> "(T)he crux in each case is to determine whether the words purporting to cut down the woman's freedom are precatory, and so capable of being disregarded. Or are they rather dispositive attempts to show an intention on the testator's part inconsistent with the legatee's taking an absolute estate?"[1]

In this case it is clear that the prohibition against alienation was a means employed by the testator as a safeguard of the property for the daughter. Once the reason for the restriction was removed, and considering the very real interest of the widow in the property, it is not improbable to assume that had the same conditions prevailed at the time the will was made, the testator would have given the property as unconditionally to his widow as to his daughter. Such a bequest cannot therefore be regarded as a merely contingent bequest, for

> "(T)he importance of the distinction between a vested and a contingent interest is that if the legatee dies before he is entitled to possession the vested interest passes to his heirs, for it is part of his property, while the contingent interest drops."[2]

On the other hand, clear and unambiguous dispositive words are not to be controlled and qualified by any general expression of intention. In Smt. Mango v. Smt. Joginder Kaur,[3] where the husband had executed a will in favour of his wife conferring absolute interest in his property, and the widow, after the coming into force of the HSA, bequeathed it in turn to one of her daughters to the exclusion of the others, the latter bequest was upheld on the ground that, the subsequent clause in the will stating that the female would enjoy all the benefits during her lifetime, which implies a limited estate, would be

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1. Derrett, IMHL, op.cit., at 474-5.
2. Ibid., at 479.
3. (1972) 74 Punj. L. R. 1050.

over-ridden by the earlier clause in the beginning of the operative part of the document where the testator had in unambiguous terms stated that she would be the malik[1] (owner) of the property. For

> "(T)he true intention of the testator has to be gathered not by attaching importance to isolated expressions, but by reading the will as a whole with all its provisions and ignoring none of them as redundant or contradictory."[2]

Nor, the Court held, following the ratio in Ram v. Lachmandas,[3] could the wishes of the testator that after his widow's death the property should go to his daughters, be construed as derogating from the absolute rights of the widow for where the dispositive words are clear and they indicate the creation of an absolute estate in the first devisee, all subsequent devises must fail as being in repugnance with the conferral of an absolute estate in the first instance. This it is submitted, is a clear and rational construction in keeping with the view that subsequent clauses in derogation of an absolute estate initially given, are merely provisions of contingency in the event of the legatee dying in the lifetime of the testator, and such contingency not having arisen,

> "(O)nce it is clear that his (the testator's) directions are merely requests, hopefully suggested rather than mandatorily insisted upon, they are ignored for purposes of administration of the estate."[4]

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1. "The presence of the word malik or tamlik or cognate expressions which ordinarily imply full ownership may assist the Court in arriving at a view that an absolute estate was intended, and such a construction will enable words to be disregarded as repugnant which subsequently direct that the female legatee shall abstain from waste or shall hand over the property to designated persons or which otherwise inhibit her management." : Derrett, IMHL, op. cit., at 474.
2. Navneet Lal v. Gokul, A.I.R. 1976 S.C. 794, at 797.
3. A.I.R. 1954 All. 715.
4. Derrett, IMHL, op.cit., at 468.

A similar decision was arrived at in Lalit Mohan v. Profulla Mohan,[1] made simpler by the fact that the testator having made the gift of an absolute estate to his wife, with full rights of alienation at her pleasure, their Lordships, Banerjee and Maitra, JJ., held that, the subsequent clauses providing that should she die leaving any portion of those properties, the testator's third, fourth and youngest sons, or in the absence of any of them, his or their heirs, would receive the same, could have no effect. As the will clearly contemplated the conferral of unfettered powers of alienation on the female, she could not be held to have acquired a mere life estate. The second part of the will is therefore an instance of a conditional bequest contingent upon the happening of an event, which never happened. The argument that could conceivably be put forward, i.e. that the contingency contemplated in the will was still capable of happening, is, it is submitted, rendered nugatory, for under the enabling provisions of s. 14 (1), the widow constituted a fresh stock of descent, and the learned Judges rightly held that, under such circumstances, at her death, all the children of the testator, and not merely those of them who were named as beneficiaries in his will, would be equally entitled to the property as their mother's heirs.

A problem of some greater complexity presented itself in Venugopala Pillai v. Thayyanayaki Ammal,[2] which was in appeal against the judgment of Mohan, J., in Thayyanayaki Ammal v. Venugopala Pillai.[3] Prior to his death, the testator executed a will in 1921, whereunder he gave a life estate over the suit properties in favour of his wife, the said properties to be taken in equal moieties by his minor

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1. A.I.R. 1982 Cal. 52.
2. (1979) 1 M.L.J. 87.
3. (1975) 2 M.L.J. 424.

daughter and brother. The will further provided that in the event of the daughter dying without male issue, her share was to pass on to the heirs of the brother. Subsequently the validity of the will having been challenged, a compromise was arrived at, under the terms of which the brother relinquished his half share on the stipulation that the widow would take the properties for her life as widow's estate without any powers of alienation, and after her, her daughter should enjoy the same as daughter's estate equally without any powers of alienation. There was the further provision that if the latter left any male heirs they would be entitled absolutely, but on failure of them, the estate would be taken absolutely by the brother of the deceased or his heirs. Some time thereafter, the daughter died in 1940 without leaving male issue, and the heirs of her uncle challenged the propriety of the widow's acts in having settled or testamentarily disposed of the properties shortly before her death in 1966, their specific contention being that hers being a widow's estate without any contemporaneous powers of alienation, it was not enlarged into an absolute estate under s. 14 (1). In reversing the decision of Mohan,J., and in reliance upon the dicta in Tulasamma v. Sesha Reddi,[1] his Lordship, Rao, OCJ., held that, as the compromise was a distinct deed arrived at between members of a Hindu family under which the widow's established right to maintenance for life out of her husband's properties was recognised by a certain methodology or arrangement, it was merely a reiteration and a declaration of a pre-existing vested right, and after the coming into force of the HSA, the widow in possession of such properties must be deemed to have become absolute owner under s. 14 (1).

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1. A.I.R. 1977 S.C, 1944.

It is submitted however that the decision in Tulasamma's case[1] can hardly be said to harmonise with the facts in the present decision.[2] A more apposite analogy which could have been relied upon is the correct approach obtaining in Shakuntala Devi's case.[3] After all the widow was heir to her husband, and but for the will, would have taken exactly the same widow's estate as envisaged in both the will and the compromise. But here we have to ask ourselves the question whether it was at all in the contemplation of the husband to give her the Hindu "widow's estate", or indeed something other than that capable of being a "restricted estate" within the meaning of s. 14 (2). On a construction of the will as a whole the provisions for the subsequent devolution of the properties are such as can leave no room for doubt that it was the intention of the testator to confer on his widow a gift with such limitations as are known to the law generally, rather than the legal limited estate under the provisions of the personal law of the Hindus. Under such circumstances therefore, she cannot be held to have had a pre-existing right on the pattern of Tulasamma v. Sesha Reddi;[4] and if s. 14 (1) was not intended to interfere with the freedom to give and the freedom to bequeath, it was likewise not intended to interfere with the freedom to contract, and where

> "(a) Hindu female expressly enters into a contract restricting the interest already possessed by her,

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1. Ibid.
2. The Supreme Court, it may be borne in mind, was dealing with the indefeasible claim of the widow to a pre-existing right of maintenance in the family property, as against the separate estate of the testator in the present dispute.
3. A.I.R. 1964 All. 165.
4. Cited above.

> the interest so restricted of her own volition or agreement would not get enlarged as a result of s. 14 (1)."[1]

Thus as the compromise was the basis of the creation of a new right in the widow, the widow's estate that it gave her is as capable of coming under s. 14 (2) as any other restricted estate,[2]

> "(a)s otherwise if it were to be held that it is a widow's estate (in the technical sense of the legal limited estate), it would defeat the latter clauses in the compromise relating to conferment of remainders."[3]

It is further submitted that even assuming that the attempt in the will to create an estate in tail male having failed on the basis of the ratio in Tagore v. Tagore,[4] so as to negative the claim of the subsequent devisee, s. 14 (1) cannot be invoked in aid of the widow. The compromise having been effected in the lifetime of the daughter, the creation by deliberate choice as between the parties, of a restricted estate had already established the character of the widow's right so as to negative any hypothetical claim to absolute ownership in her as heir to her daughter.

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1. Per Reddy, J., quoting from his own judgment in Sampuran Singh v. Labh Singh, A.I.R. 1977 P. & H. 17, at Smt. Jaswant Kaur v. Harpal Singh, A.I.R. 1977 P. & H. 341, at 346.
2. A view that would lead to the harmonious construction of the two sub-ss. of s. 14 as we already noted in our study of the maintenance rights of females, and authoritatively asserted in Tulasamma v. Sesha Reddi, A.I.R. 1977 S.C. 1944, his Lordship, Fazal Ali, J., explaining at 1978 that, "... the words "restricted estate" used in s. 14 (2) are wider than limited interest as indicated in s. 14 (1) and they include not only limited interest, but also any other kind of limitation that may be placed on the transferee."
3. Per Mohan, J., Thayyanayaki Ammal v. Venugopala Pillai, (1975) 2. M.L.J. 424, at 428.
4. (1872) 9. Beng. L.R. 377, where an attempt to create an estate in tail male was frustrated as an estate unknown to Hindu law and therefore void. As a consequence subsequent bequests dependent on the failure or determination of the previous estate were likewise held ineffective by reason of the illegality of the first disposition in tail male.

From an analysis of decisions such as the foregoing, it would seem appropriate to deduce that grants for maintenance to women who at the time the grant was made, were entitled to no more than maintenance and but for that disposition would have no more than maintenance, should be understood to come within s. 14 (2),[1] if the grant as a whole suggests that that was what the donor/testator intended. On the other hand, the mere giving of a widow's estate does not, it is submitted, come within this category, and must be more liberally construed, for

> "(S)ub-s. (2) of s. 14 is in the nature of a proviso, and has a field of its own without interfering with the operation of s. 14 (1) materially. The proviso should not be construed in a manner so as to destroy the effect of the main provision or the protection granted by s. 14 (1) or in a way so as to become totally inconsistent with the main provision."[2]

(i-b) Where the Female is a Stranger to the Property

The death-knell of the legal "limited" estate may have been sounded on 17 June, 1956, but though it no longer applies at law, it may well be created by volition of parties as much by gifts inter vivos and testamentary dispositions as by award, order or decree of court, or by compromise or settlement. If the test for the application of s. 14 (1) is indeed that the female must have acquired some vestige of title in the property however restricted the nature of that interest may be,[3] then the fundamental principle that

> "(w)here a female Hindu became possessed of property not in virtue of any pre-existing right but otherwise, and the grantor chose to impose certain conditions on the grantee, the Legislature did not want to

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1. Derrett, Critique, op.cit., at 223.
2. Per Fazal Ali, J., Tulasamma v. Sesha Reddi, A.I.R. 1977 S.C. 1944, at 1978.
3. See Eramma v. Veerupana, A.I.R. 1966 S.C. 1879, supra, at 488-9.

> interfere with such a transaction by obliterating or setting at naught the conditions imposed,"[1]

becomes all the more reinforced in cases where the gift of the separate property is to females who are strangers to the estate, as for instance the married daughter. All such females take a windfall, and must obey the limitations written into the grant, whether of the "limited" kind or one of the newer variations of the restricted estate employed by modern testators.[2]

In Radhakrishna v. Govindaswami,[3] where the father's will made prior to 1937, expressly provided for his daughter to take the estate without power of alienation, the property to devolve thereafter on her male issue, the son subsequently born to her died, and at her own death in 1961, the contention of the testator's adopted son was that, the child not having survived his mother, under the terms of the will he alone became entitled to the property as against the female's legatee. Ismail, J., however ruled that, as the son had, from the moment of his birth, acquired a vested remainder in the properties, he had immediately become a fresh stock of descent, and consequently at his death, his mother as his heir inherited the vested remainder alongside her own life interest; and by virtue of the operation of s. 14 (1), what would otherwise have remained a woman's estate, converted to an absolute tenure capable of being transmitted or bequeathed by the female.

At a glance it would seem that the validity of the judgment could well be said to rest on the construction of the will and the intention of the testator as indicated therein. Had his intention merely been to give his daughter a restricted estate revertible to his own heir,

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1. Per Fazal Ali, J., Tulasamma v. Sesha Reddi, A.I.R. 1977, S.C. at 1968.
2. Derrett, IMHL, op.cit., at 425.
3. (1975) 1 M.L.J. 212.

i.e. the adopted son, the stipulatory clause designating the property to her male issue, would have been unnecessary, and indeed it is not improbable that the restriction on alienation was by way of a precautionary measure not for his own family's benefit, but for his daughter's male line of descent. Yet the argument of the learned Judge that the lady was entitled as heir to her son must fail, for it is a cardinal principle of law that where the testator selects his first takers he is quite free, but once the vesting of the property has been achieved what is prevented is an attempt on his part to control its future devolution.[1] In other words, the testator cannot pretend to legislate and derogate from the law of the land,[2] and in accordance with this principle, a Hindu may not bequeath or provide by testamentary contract so that the property disposed of, or to be disposed of, shall pass by a rule of succession differing from the current Hindu law of succession.[3]

Thus the attempt at the creation of an estate in tail male must fail in keeping with the ratio in Tagore v. Tagore,[4] and the mother therefore accordingly disentitled to take as heir to her son. Neither may it be argued that as any provision is void as would prevent an estate which is intended to vest absolutely from passing by the ordinary law of devolution, the legatee takes an absolute interest. For the testator, it is submitted, explicitly gave the female an estate such as was not intended to vest in her absolutely but which was to pass on for the benefit of her male line of descent.[5] Her

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1. Derrett, IMHL, op.cit., at 467. 2. Ibid.
3. Ibid., at 466-7. 4. (1872) 9 Beng. L.R. 377.
5. It may well be contended that the learned Judge's ruling that the lady did indeed take a vested remainder at her son's death, is correct in view of Kaliammal's case, A.I.R. 1965 Mad. 451. But the distinction to remember is that, as in the latter decision, the bequest was not in repugnance of the law of succession, the mother's

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acquisition under the will being an acquisition for the first time, the restrictions on alienation could not effect its conversion to an absolute tenure thus bringing the property squarely within the provisions of s. 14 (2).

This interpretation would harmonise with the correct approach obtaining in Kashiram v. Bhura.[1] The testator in his will while creating devise in favour of his daughter, also provided that at her death the estate conferred on her was to pass in the line of her male issues. In the absence of such male issues, the property was to revert to his sons, natural born or adopted, and in the event of their dying issueless, to his wives, and on their deaths as a last resort to his brother. The transfer in 1971 of the property by the daughter under a gift deed being challenged, Verma, J., on a close scrutiny of the will was of the view that it conferred on her no such absolute rights of ownership in the property. Relying upon the Supreme Court ruling in Navneet Lal v. Gokul[2] that

> "(I)t is one of the cardinal principles of construction of wills that to the extent it is legally possible effect should be given to every disposition contained in the Will unless the law prevents effect being given to it,"[3]

his Lordship held that the bequest in tail male clearly indicated the testator's intention of the giving to his daughter of a life estate, the same to devolve on her male heirs after her death. But, the learned Judge further clarified, as a will cannot create a course of

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claim as heir on the grounds of vested remainder was justified. In the present case, the bequest itself being void, the question of the mother obtaining a vested interest as remainderman could not arise at all.

1. A.I.R. 1981 M.P. 236.
2. A.I.R. 1976 S.C. 794.
3. Ibid., at 797.

succession unknown to the Hindu law, the exclusion of the female heirs by the creation of an estate in tail male, being void, the estate conferred on the female would nevertheless lawfully take effect but merely as a life estate, particularly as the word malik used elsewhere in the will for other legatees, but conspicuous by its absence in regard to the daughter (as also the provisions for its subsequent devolution, it is submitted) was further confirmation of the view that such estate was not intended to attract s. 14 (1), and was in fact a restricted estate within the meaning of s. 14 (2). Neither, the learned Judge held, was there any credence to the argument that the sir (agricultural) lands having vested in the State on the coming into force of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands)Act, (1 of 1951), the retaining of the home farm lands under s. 4 (2)[1] was a fresh grant to the female independent of the will. The term malik-makbuza in s. 38 (1)[2] being merely descriptive of the home farm lands, his Lordship was rightly of the view that, it was not open for her to claim that it conveyed an absolute heritable and transferable title in her.

In view of the principle that an estate in tail male is invalid as being repugnant to the general law of succession, it is submitted that the reasoning of their Lordships of the Supreme Court and the ratio in Appaswami v. Sarangapani[3] requires careful reappraisal. The testator's daughter and her adopted son having effected certain

1. S. 4 (2) lays down: "Notwithstanding anything contained in sub.s. (1), the proprietor shall continue to retain possession of his home-stead home-farm land, ..."

2. S. 38 (1) provides that, "Every proprietor who is divested of his proprietary rights in an estate or mahal shall, with effect from the date of vesting be a malik-makbuza of the home-farm land in his possession."

3. A.I.R. 1978 S.C. 1051.

alienations of the property in December 1956, they were challenged by the reversioners as not binding on them beyond the lifetime of the female, their contention being that the adopted son could not claim either under the will or even on the basis of succession. The will provided that after the death of the testator's wife, the properties were to go to his daughter, and after her, to her Putra Pouthra Santhathies.[1] Failing them, the estates were to go to the daughter's female descendants, and if they were not in case, to the daughter's husband, and after him, to his santhathies. The Madras High Court was of the view that, as the will envisaged the taking of the property by the husband on failure of male issue, the testator could not have intended to include any son by adoption, and the latter's claim rested not on the strength of the will, but as heir to his adoptive father who took a vested remainder.

On appeal the Supreme Court agreed in the first instance with the High Court that, on a proper construction of the will, the life estate given to the daughter could not be held to have enlarged to an absolute estate after the coming into force of the HSA as s. 14 (2) would apply to such property. Their Lordships were likewise in agreement with the lower Court's ruling that the reversioner's claim could not be validated, they however holding that the will itself was the basis of the adopted son's rights as the words Putra Pouthra Santhathies could not be interpreted to exclude an adopted son as the

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1. Derrett explains at IMHL, op.cit. at 475-6, that where a bequest is made to 'X and his santana', "References to santana or putra-pautra-krama and the like are antiquated terms of art now used merely to convey what in English law is known as an 'estate of inheritance or an absolute estate,' and after the death of X (the legatee) any part of the property to remain will pass to his heirs by testamentary or intestate succession as if such words had not been used." Note here however, that the clause subsequent giving the property to the female descendants on failure of Putra Pouthra Santhathies, leaves no manner of doubt that what was intended to be created was an estate in tail male.

> "(H)indu Law has recognised the institution of adoption and once a boy has been adopted validly, he is for all purposes recognised as the son."[1]

Though one would have no quarrel with this view given the sacramental nature of adoption in the Hindu law, one is nevertheless left wondering how the highest judicial authority could have omitted to take into consideration the fundamental principle that, where an estate in tail male is created, it must be held to be void as being in repugnance to the general law of succession. It is therefore submitted with respect that, the Supreme Court was in error in finding for the adopted son, for the earlier bequest to the heirs male being invalid, the successive bequests contingent upon the former must fail as well. The adopted son could claim neither as legatee nor as heir to his adoptive father, and as the female continued to hold a life estate, the reversioners' impugning of the alienations justified.[2]

Legal decisions generally surveyed, thus confirm that whatever the problems that the construction of gift deeds and wills might individually present, a Hindu male's absolute capacity to dispose of his separate property in the manner he wishes cannot be interdicted. Where the document purports to give a life estate, the donee takes subject to restrictions unless the reading of the gift deed or will as a whole suggests a contrary intention. The enlargement of women's rights under s. 14 (1) of the HSA was not intended to oust this rule of general application as the incorporation of the provisions of s. 14 (2) clearly testifies and the Hindu female donee is as much bound by the wishes of the grantor as the male.

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1. Per Kailasam, J., Appaswami v. Sarangapani, A.I.R. 1978 S.C. 1051, at 1060.

2. More credit therefore to the Madhya Pradesh High Court for not blindly toeing the line of the Supreme Court in ibid., and coming to an independent reasoned decision consistent with the general law in Kashiram v. Bhura, A.I.R. 1981 M.P. 236.

In the face of this unalterable principle, we are at once in a dilemma when we consider the Supreme Court's overruling of the Full Bench decision of Ajab Singh v. Ram Singh[1] in Tulasamma v. Sesha Reddi.[2] In giving his concubine an estate for life in his separate property, the testator expressly forbade her from alienating the corpus, the same to pass, after her death, to his collateral heirs and failing them, to the Arya Samaj. After 1956, on the female's absolute alienation of the property being challenged, their Lordships of the Full Bench reasoned that as the intention of the Legislature in engrafting sub-s. (2) of s. 12 of the J & K. Act of 1956 (corresponding to sub-s. (2) of s. 14 of the HSA), was clearly to leave untouched transfers made by the last male holder in favour of the female where the grant contemplated the giving of a limited or restricted estate, it could not enlarge to an absolute under s. 12 (1) (corresponding to tenure s. 14 (1) of the Central Act), so as to make her a fresh stock of descent.

This seems to be to all intents and purposes, the correct interpretation of the true function of the two sub-ss. of s. 14. Yet the overruling of that decision in Tulasamma's case[3] makes one ponder. Could their Lordships of the Supreme Court really have meant that the grant of maintenance even in separate property is of such moment that it interferes so as to take precedence over the absolute right of the grantor to grant the estate of his choice? Intriguingly enough the same learned Judge, Fazal Ali, J., who delivered the judgment of the Full Bench, also spoke on behalf of the Supreme Court; but unfortunately, in apologising for the decision, he gives no more than the

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1. A.I.R. 1959 J. & K. 92 (F.B.).
2. A.I.R. 1977 S.C. 1944.
3. Ibid.

most cursory of explanations[1] which touches not at all upon the principles involved. Left to one's own devices, one ponders in puzzlement at a stance which, if correct, renders purposeless s. 14 (2) and the function that its inclusion in the HSA was intended to serve.

When a female devotes her entire life to the services of one man alone, there is, it is submitted, only a very fine line of distinction between her status and that of the legitimately married woman. The ancient rsis recognised this, and under the traditional law the concubine faithful to the memory of her deceased paramour, had as much a right to be maintained out of his interest in the joint assets as his widow. The "Hindu Code" on the other hand, leaves her out in the cold; she is neither an heir nor a dependant, and cannot claim as such against any part of the propositus' estate, and had the facts related to the period post-1956, their Lordships could conceivably have called equity in aid to justify on moral grounds[2] the adjusting of claims as between the rival claimants though not the giving to the concubine of an absolute estate where the terms of the will were of unambiguous import in giving her a restricted estate.

However, now that it has been established beyond doubt that s. 22 of the HAMA is prospective,[3] the concubine's right under the unamended law to claim maintenance from the joint-family property remains intact. Consequently, s. 14 (2) must, in these circumstances be allowed to play its part, and the female necessarily confined to the restricted estate envisaged in the will. The overruling by the Supreme Court of the decision is quite as incomprehensible as the endorsement by the same bench of Kunji Thomman's case[4] in the list of approved decisions.[5]

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1. Ibid., at 1975.
2. See Derrett, IMHL, op. cit., at 422; Critique, op. cit., at 267.
3. Supra, at 332.
4. A.I.R. 1970 Ker. 284.
5. Supra, at 571-3.

(ii) Gifts and Bequests of the Ancestral Estate

An altogether different set of considerations must be taken into account in determining the nature of the interest that a female takes in property given to her under the terms of the gift deed or will where the estate is ancestral. A gift of the joint family property by a single coparcener without legal justification cannot create in the donee a right to demand partition against the coparceners,[1] for to be joint is to be co-owner co-enjoyer of sources of income or properties which could be sources of income: it is the condition psychologically of common fortune and mutual dependence,[2] and unauthorised gifts are therefore usually described as "void".[3]

In exceptional circumstances, however, a substantial body of case law endorses the Mitākṣarā view that a Hindu father or other managing member has power to make a gift within reasonable limits of ancestral immoveable property for pious purposes.[4] But such alienations must be by acts inter vivos and not by wills, for though bequests stand substantially on the same footing as gifts,[5] nevertheless a member of the joint family could not, until 17 June 1956, dispose by will any portion of the property even for charitable purposes and even if the portion bore a small proportion to the entire estate.

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1. Derrett, IMHL, op.cit., at 286.
2. Derrett, Critique, op.cit., at 57.
3. So Mit. I. 1.25, op.cit lays down: "...properties other than immoveables were alone determined fit to be given away."
4. According to Mit. I. 1.28, op.cit., "... Even a single individual may conclude a donation, mortgage or sale, of immoveable property during a season of distress, for the sake of the family and specially for pious purposes.
5. See Tagore v. Tagore, (1879) 9 Beng. L.R. 377, at 399, where it was held that, "Even if wills are not universally to be regarded in all respects as gifts to take effect upon death, they are generally to be so regarded as to the property which they can transfer, and the person to whom it can be transferred."

The rules of the Mitākṣarā coparcenary which the legislation of 1956 has not disturbed otherwise than by ss. 6 and 14, still exist, and in the respects in which they exist, they are still as vigorous as they were originally intended to be; thus despite the modification of the rules in view of the new rights retrospectively conferred on the female under s. 14, the alienation in her favour under a gift deed or by testamentary disposition must nevertheless be construed in conjunction with the law relating to the gratuitous alienation of the undivided interest.

(ii-a) Where the Female Has a Pre-Existing Right in Such Property

The right to be maintained may not in all cases be a right of a certain and fixed nature[1] but where a female does have a right to succeed to the estate, or at the very least a right to be maintained out of it, she has a precedent right,[2] and though this might be postponed to certain other rights which might emerge, she is in reality a qualified participant and sharer;[3] any share given to her in lieu of this subsisting right will become her absolute property notwithstanding her consent to take it subject to limitation and irrespective of the expectations and collateral arrangements of the grantors.[4] This principle is as much applicable to acquisitions of the ancestral estate inter vivos and by testamentary dispositions as of acquisitions under any other arrangement, instrument, decree, order or award, for the gift or legacy not being at the root of the title, the law of survivorship in the Hindu law cannot be said to operate to the detriment of the female's entitlement under s. 14 (1).

The omission to observe this fundamental guideline is to militate against the true function of s. 14 by excluding innumerable females,

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1. Derrett, "S. 14 (2) of the HSA : A Disturbing...," op.cit., at 66.
2. Derrett, "The Tenure of Widows...," op.cit., at 73.
3. Derrett, Critique, op.cit., at 221.
4. Ibid., at 222.

through no fault of their own, from the scheme of Parliament which was to abolish the legal limited estate and to make women absolute owners of property of which they were lawfully possessed. Judicial decisions incompatible with this line of thought must therefore be rejected as inconsistent with the new awareness of the rights of women as ushered in by the "Hindu Code."

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* In Annapurnamma v. Sankararao[1] for instance, where the deceased husband had in 1950 bequeathed absolutely a half share in the joint family properties to his wife, the contention of the son after 1956 was that all that the lady had acquired was a restricted estate to last for her lifetime. Ruling in favour of an absolute estate for the widow, his Lordship was of the view that while she could lay no claim to the property on the basis of the will as

> "(O)bviously the will did not take effect in respect of the (disputed) properties and by the time the will could come into operation, the doctrine of survivorship would also have operated and the property must be deemed to have reverted back to the other joint-family member," [2]

nevertheless as under the HWRPA, 1937, she was heir to her husband's interest in the joint stock, the effect of s. 14 (1) was to convert her limited estate to an absolute tenure. This, it is submitted, is the correct method of approach, for it is clear that, but for her entitlement as heir, the female would have been disqualified, as under the old law the lack of capacity in a male to devise ancestral property would have operated to the benefit of the survivorship. But as the female was heir to her husband's interest in the joint-family property, it was precisely because this pre-existing right inhered in her that the validity of the bequest in her

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* 1. A.I.R. 1960 A.P. 359. Read before Blanda v. Duni Chand, A.I.R. 1963 Punj. 34, (below at 670)
2. Per Nayudu J., ibid, at 360.

favour could not be questioned, and the extinguishment of survivorship by reverter was much the consequence of her entitlement under the very statute of 1937, which enlarged to an absolute estate under s. 14(1).

It is not open to the Courts to construe the will of a sole surviving coparcener in such a manner as to give the female a restricted right in the legacy where she has a right of maintenance in the property, simply because the male in question who has as much a right to dispose of the joint assets in his hands as if it were his separate property, chooses to insert restrictions. In the Second Appeal in Gopisetti's Case,[1] the Full Bench, while recognising that

> "(T)he Legislature by this provision intended to give effect to the long-felt need to remove the fetters upon the right of a Hindu female to hold and dispose of property, and by emancipating her from tutelage, which otherwise would be contrary to the changed social consciousness which desired equality of treatment of both sexes," [2]

nevertheless ruled that as the subsisting right of maintenance is not a right of property[3] the title of the widow-mother was the grant of a fresh right created under the instrument itself, and as under the terms of the latter she was conferred a restricted estate, such property was incapable of attracting s. 14 (1).[4]

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1. (1968) 2 An. W.R. 455, discussed at supra, 579 ff.

2. Per Reddy, C.J., ibid., at 461. In view of the eventual decision in derogation of the female's rights, the unconscious irony of the learned Chief Justice's words is much to be appreciated.

3. Derrett makes the perceptive observation that, "On the surface this error (of judgement in the Second Appeal) appears to be due to the notion that a right to be maintained is not a right to property. But in reality and substance the Court favoured the claims of the widow, seeing the discretion of the testator as an interference with the expectations of the latter," a value judgement about the exercise by the testator of his undoubted discretion, which in the writer's view was "unwarranted." See "S. 14 (2) of the HSA : A Disturbing...," op. cit., at 69-70.

4. Or in other words, where the female "might seek the suit property under a will, for example, for the first time, having no previous

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It is however submitted that such a view cannot be countenanced, for the only relevant question is whether the restricted estate was granted in recognition of a pre-existing right in satisfaction of claims operating in respect of, or over the property prior to the disposition.[1] Though she took under the will, the widow-legatee was a dependant of the joint-family entitled to be maintained out of its properties, and but for the will, such right of maintenance would have continued unaffected in the hands of any heir or legatee of the son. The effect of the bequest in settlement of this antecedent right in the joint-family property was thus the conversion of her existing right into a different right;[2] it was not the conferral of a new right, an acquisition under the deed, so as to attract s. 14 (2), but merely the confirmation of a pre-existing right. The will did not create but merely transmuted,[3] and as such, the restrictions must be ignored and her rights held to have enlarged under s. 14 (1), for

> "(P)arliament's intention ... was not to place women at the mercy of male draughtsmanship, but to secure that women should take no limited estate when rights devolved on them by law, but only where they acquired a right for the first time subject to a limitation of the grantor's discretion (as in the case of a male grantee)." [4]

Equally reprehensible is the Supreme Court's dicta in Mst. Karmi v. Amru.[5]

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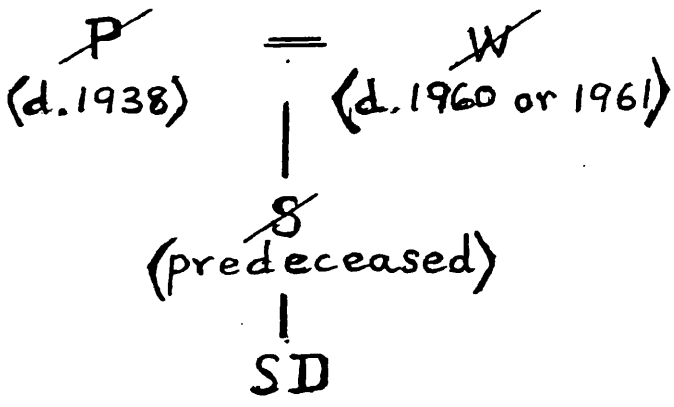
right to the property beyond the right to be maintained (which their Lordships held was no right to property in itself...), it would not be turned into an absolute estate under s. 14 (1) if the testator indicated that she should have a limited estate in the property...,": Derrett, Critique, op.cit., at 203.

1. Derrett, "S. 14 (2) of the HSA : A Disturbing...," op.cit., at 71.
2. Ibid., at 69.
3. Derrett, "The Tenure of Widows...," op.cit., at 33.
4. Derrett, "S. 14 (2) of the HSA : A Disturbing...," op.cit., at 69.
5. A.I.R. 1971 S.C. 745.



Under the terms of the will executed by the sole surviving coparcener, P, the entire estate, after his death, was to devolve on his widow W, for her lifetime, the same to go to his collaterals thereafter. In 1958 W in turn bequeathed it to SD, and when at her death a few years later the collaterals asserted their claim on the basis of the earlier will, their Lordships were of the view that W, having succeeded to the properties under the strength of her husband's will, she could not claim any rights in them over and above that given to her by testamentary disposition. As such therefore,

> "(T)he life estate given to her under the will cannot become an absolute estate under the provisions of the HSA." [1]

The legacy to the female was obviously in fulfilment of a pre-existing right, and yet the award to her of a restricted estate in a judgement as brief as it is inexplicable, where their Lordships were not even willing to concede that the widow as heir had a claim to the estate independently of the will,[2] leaves one wondering whether this was not indeed a straightforward case of a misconstruction of s. 14 as a

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1. Per Hegde, J., ibid at 746.
2. Along the lines of Annapurnamma v. Sankararao, A.I.R. 1960 A.P. 359.

consequence of the apparently simple wording of sub-s. (2) of the section. The assumption without overt argument or proof that the widow had no antecedent claim, is an extraordinary state of affairs, and can only be rationalised on the assumption that if the Court did not go into these matters, it does not mean that they were not evident from the paper book.[1] That it was held that s. 14 (2) applied

> "(C)an only be accounted for on the basis that she was disqualified from maintenance or from claiming as a dependant on the basis of facts not disclosed in the judgement. The case of Karmi must therefore be confined to its own facts, which may never be divulged."[2]

Thus this, it has been conjectured, must have been by evil chance one of those rare instances that occurs once in a thousand whereby the widow is disqualified from claiming a precedent right even of maintenance from the estate, as for example where she may have had such large means that she could not have effectively claimed any maintenance under the HAMA; on the other hand, it might equally have been that by reason of her adultery, the recognition of a pre-existing right inhering in her could have been prevented, or likewise if she had been criminally responsible for the death of P, or even by reason of gifts made to her by P during his lifetime whereby all claims to maintenance were already secured.[3]

This attempt to reconcile the obviously faulty ratio on hypothetical suppositions, is an effort to restore a degree of credence to a decision otherwise singularly at variance with the settled principle that s. 14 (2) cannot apply where the lady acquired her right otherwise than under the instrument etc. One submits that even supposing that any of such reasons w pertinent, where clarity is the order of the

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1. Derrett, "A Hindu Law Miscellany," (1971), op.cit., at 82.
2. Derrett, "The Tenure of Widows...," op.cit., at 33.
3. Derrett, "A Hindu Law Miscellany," (1971) op.cit., at 83.

day, brevity is hardly a merit. The Supreme Court could ill have afforded to base its decision on undisclosed facts, for their Lordships could hardly have been unaware that the case was entirely capable of being "misunderstood and misused,"[1] leading to the kind of protracted, dreary and costly litigation as has marked the construction of s. 14 as of its inception. The failure on its part to reduce uncertainty and to establish a more positive approach on the basis of given facts does not - it has to be said with all due respect - call for an apologist attitude towards the Supreme Court, and the decision, judged on its merits, must be held to be wrong. The Supreme Court, highest judicial authority though it may be, is not infallible, and has been known in the past to resile from its own correct dicta;[2] this, it is submitted, is a similar instance where the proper principle obtaining in Seth Badri Prasad v. Smt. Kanso Devi[3] disregarded for a literal and [illegible] was oppressive construction of s. 14 (2).

Decisions such as the foregoing are regressive, and lacking in that perspicacity so necessary for the judicious construction of s. 14 so as not to detract from the rights that it was in the contemplation of the Legislature to confer on women. Fortunately several other decisions, in taking the reverse view, confirm that an acquisition under a deed of gift or testamentary disposition is as capable of enlarging to an absolute estate as under any other instrument, notwithstanding the imposition of restrictions in it, where an antecedent right inheres in the female. *

In Blanda v. Duni Chand,[4] where in settlement of a dispute and under

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1. Derrett, "The Tenure of Widows...," op.cit., at 33.

2. We have already noted the resiling of the Supreme Court in Naraini Devi v. Ramo Devi, A.I.R. 1976 S.C 2198, from its own earlier view in Rani Bai v. Yadunandan, A.I.R. 1969 S.C 1118, of the right of maintenance as a pre-existing right.

3. A.I.R. 1970 S.C 1963.

4. A.I.R. 1963 Punj. 34.

* Read here Annapurnamma's case, A.I.R. 1960 A.P. 359 (above at 671-2).

a compromise, the sole surviving coparcener having made a gift of the property to his widowed daughter-in-law for her maintenance, expressly restricted her from either selling or mortgaging the same, the contention of his collaterals was that the gift of such property by the widow after 1956 was devoid of all validity, as what the lady had acquired was a limited estate incapable of being enlarged to a full tenure under s. 14 (1). The learned Judge, Mahajan, J., though dismissive in the first instance of the contention that a gift, orally made, could not attract the provisions of s. 14 (2),[1] ruled in favour of an absolute estate for the widow. In his Lordship's reasoning, despite the prohibition against sale and mortgage, as it was nowhere stated that, at the female's death, the property must revert to the heirs of the donor, the contention that a restriction on her right to make a gift should be implied, could not be upheld in view of the clear provisions of s. 14 (2) which stipulate the spelling out rather than the implication of such restrictions. Thus for all that it was not the Hindu widow's estate that was gifted to her, as the female was possessed of property in lieu of maintenance, s. 14 (1) would have the effect of transforming it to a full tenure.[2]

It is submitted that on a careful analysis of the decision one is not quite in agreement with the rationale of the learned Judge. Where

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1. The Court clarifying at 35 that, "The use of the term 'gift' ... refers to all gifts valid at law whether oral or written and the connotation of the term 'gift' cannot be deemed to have been abridged by the use later on, of the term 'or other instrument' (in s. 14 (2))."

2. The moral obligation of the father-in-law to maintain his widowed daughter-in-law from out of his separate property is a legal liability in the hands of his heirs, and as much enforceable under s. 14 (1) as is such right in the ancestral estate. In view of this, the incorrect approach obtaining in Kunji Thomman v. Meenakshi, A.I.R. 1970 Ker. 284, provides an interesting contrast to our present study. On the other hand, like the present case, in Chinnappa v. Valliammal, A.I.R. 1969 Mad. 187, the execution of a maintenance deed in satisfaction

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the express stipulation is as to restrictions by sale or mortgage, it is clear that the tenor of the grant is against alienations in general, including, by implication, gratuitous alienations. What however nullifies such restrictions is, as was rightly held, the claim of the widowed daughter-in-law to a subsisting right of maintenance out of the property in the hands of the sole surviving coparcener; in view of this indefeasible right, such property, whether there was an embargo or not on alienations by gift or otherwise, must convert to an absolute estate under s. 14 (1).

The sole surviving coparcener may have an absolute disposable interest in the property, yet where the language employed in the disposition allows for ambiguity, the Court is entitled to look at the surrounding circumstances[1] at the time of execution to determine the estate that the female takes in the light of legislative changes. An

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of the daughter-in-law's claim to maintenance from out of the joint properties, was likewise rightly held to attract s. 14 (1). But there the similarity ends, for the statement of his Lordship, Ismail, J., at 191 that, the transaction not being a gift, it was therefore "not open to (the) challenge," could by implication be construed to mean that a gift deed under the exact circumstances could indeed be challenged - a point of view not to be countenanced, for what is of the essence is not the nature or character of the document, but the indefeasibility of the right of maintenance.

1. This formula is of the essence and came in handy in Gopala Menon v. Sivaraman, A.I.R. 1979 S.C 1345, the Supreme Court confirming the decision of the Kerala High Court in Sivaraman v. Gopala Menon, A.I.R. 1969 Ker. 246. Notwithstanding s. 48 of the Madras Marumakkattayam Act 22 of 1932, which stipulates that where a person bequeaths any property to his wife alone, such property shall, unless a contrary intention appears from the will, (emphasis mine), be taken as tavazhi property by the wife, her sons and daughters, (see also Derrett, IMHL, op.cit., at 355-6), their Lordships held that where the gift conveys by words of unambiguous import an unrestricted estate "with power of alienation," the bequest would not be in repugnance with s. 48. The fact that the testator had made additional stipulations as to the use of the income, would not detract either, from the absolute estate of the female as the absolute and unrestricted power to dispose of property is a necessary incident of an absolute estate.

example of this is Isakki v. Pappammal.[1] A husband entering in his third marriage in 1927 executed a settlement deed which provided for a portion of the property to be enjoyed by the settlor and settlee jointly during their lives, with neither of them during the lifetime of the other having the power to alienate the same. The deed further stipulated that after their deaths, the settled property and the remainder of the estate were to be taken absolutely by their male heirs, and failing them, the female heirs, including the settlor's daughter from his first marriage, should take equally. The deed also provided that in the event of the settlee having no children, the scheduled properties under the deed were to be taken by her with absolute rights. At his death in 1937, leaving as his only children two daughters, one by his first wife and the other the child of the settlee, while the widow claimed that though she took a life interest in the properties, the subject of the settlement deed, the interest which she had acquired as heir to her husband in the remainder of the estate had converted to an absolute and heritable tenure under the Act of 1956, the heirs of the step-daughter contended that, the settled properties apart, as the rest of the estate had been testamentarily disposed of as well, they were entitled to set up title as co-owners along with the widow. In the opinion of Natesan, J., however, this latter contention was difficult to uphold given the surrounding circumstances,[2] and while he was agreed that the female would take a life

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1. A.I.R. 1968 Mad. 61.

2. The Court holding at 64, ibid., that to read the deed as such would be to construe it as envisaging the postponing of the son's interest till after the lifetime of the widow; and to accede to such a construction would be to ascribe to the testator whose anxiety for a son was in such evidence, a desire not in consonance with the normal wishes and attitudes of the class of people to which he belonged. The learned Judge was equally convinced at 64 that, despite the sole surviving coparcener's unfettered powers of disposal,

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interest in the settled properties, his Lordship held that as no testamentary disposition could be spelt out in regard to the remainder,[1] the limited estate that the widow took as her husband's heir, would become her absolute property under s. 14 (1), notwithstanding that

> "(I)f the settlor could be consulted today he may vehemently assert in the background of the subsequent events and legislation that his intention was as now interpreted by the appellate Court." [2]

In Ashok Kumar v. Kishan Kumar[3] the inherent right of the female in the joint-family property reinforced by the sole surviving coparcener's right to make the gift of his choice, was the basis of the ruling in favour of the daughter-in-law. The sole surviving coparcener executed a will in terms whereof he bequeathed one of the properties absolutely to his son's widow, and then proceeded to create two further successive life estates in respect of the other properties, one in favour of the widow, and the other in favour of her infant daughter, the latter estate to devolve absolutely on her male issue. Prior to her death, the widow alienated the property given to her in absolute estate, and in recognition (one assumes) of the testator's volition to

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"all the same I do not think that any Hindu could postpone his son taking his estate after him for the lifetime of his widow when the son is yet to be born and nothing can be predicted about him." Significantly too, his Lordship added, the absence of any provision for the maintenance of the first wife, did not warrant imputing a testamentary intent to the settlor where the just and lawful claims and demands on his dispositive powers are ignored.

1. The "remainder" would exclude an item of property set out in schedule 8 of the deed, which, the parties had agreed among themselves, would vest in the defendants absolutely.

2. Isakki v. Pappammal, A.I.R. 1968 Mad. 61 at 65, Derrett explaining the underlying rationale as, "He (the settlor never contemplated that they (the ladies concerned) should have a disposable, absolute estate in them. But since these arrangements were in fulfilment of an obligation he already had towards them, the settlees were held entitled to the properties absolutely under s. 14 (1) of the HSA." : Critique, op.cit., at 203.

3. A.I.R. 1983 NOC 48 (Delhi), reported in A.I.R. 1983 NOC 21.

give such an estate, the alienation was accepted as in exercise of her absolute right over it. At her death therefore in 1967, the sole question for decision was whether the life estate in her possession had converted to an absolute tenure despite the widow's unchastity and the birth of an illegitimate son to her. In view of the decisive ruling in Tulasamma v. Sesha Reddi,[1] his Lordship Anand, J., was in no doubt that, as the bequest in its totality indicated that both the absolute as well as the life estates had been given for the same reason, it was not possible to apportion the right of maintenance against any particular part of the property, and

> "(T)he limited estate conferred on her by the testator was a clear recognition of the obligation of the testator to provide maintenance for her out of the property..." [2]

Thus as the grant was in recognition of a pre-existing right, notwithstanding that such right was merely a right of maintenance and therefore distinguishable from the Hindu "widow's estate", the grant of such a life estate simpliciter, even under a will, would operate to bring it outside the purview of the exception to s. 14 (1), for

> "(t)he bequest in (her) favour ... was not only not in derogation of her right to maintenance but in furtherance or recognition of that right and to effectuate it." [3]

Further, his Lordship clarified, the rule of Hindu law, that of forfeiture in the event of unchastity, could not be retrospectively applied, for once the estate had vested on the death of the testator, there could not be a subsequent divesting,[4] and as such, the wide amplitude of s. 14 (1) was sufficient to bring it within the scope

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1. A.I.R. 1977 S.C 1944.
2. Ashok Kumar v. Kishan Kumar, cited above, at 22.
3. Ibid.
4. For confirmation of this rule see Punithavalli Ammal v. Ramalingam, A.I.R. 1970 S.C 1730, supra, at 511.

of the sub-s.[1]

The right of alienation in the sole surviving coparcener apart, we must next consider the gift made by a single coparcener and its validity if any, in the light of the cardinal principle that it is only a gift of all the coparceners, which would, under certain conditions, be a gift attributable to the coparcenary body and therefore valid.[2]

Inevitably, where such consent was not forthcoming, the resulting dissension and its veracity would depend essentially upon the nature of the female's claim in the ancestral property; a pre-existing claim, it is submitted, would operate to modify the rule, so as bring the property within s. 14 (1) to the detriment of the survivorship.

The decision in Hari Dutt v. Shiv Ram[3] vindicates this view. A Hindu female having acquired certain items in the ancestral estate in 1926 by way of an absolute gift from her father-in-law for her maintenance, her husband brought a suit against both donor and donee for declaring the gift invalid on the grounds that it was made without the

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1. The case reported in note form is obviously confined to the property in dispute. But what of the life estate acquired by the testator's grand-daughter? It is submitted that, as in 1927 when the gift was made to her she was an infant, it would not be unreasonable to assume that she had been married prior to the passing of the HSA. The daughter's right to maintenance from out of the ancestral estate ceases on her marriage; the life estate given to her for just such a purpose could not have enlarged under s. 14 (1). The attempt at the creating of an estate in tail male must also be held to be void as being in repugnance to the general pattern of inheritance, notwithstanding that coincidently the female's heirs happened to be sons, so that at her death the taking of the estate by her male heirs would be valid, not on the basis of the will, but only if they happened to be the next reversioners of the deceased testator.

2. Derrett, IMHL, op.cit., at 286, who further explains that, "If there is no son of a living or deceased coparcener in the womb and no minor coparcener or owner of a coparcenary interest, all the coparceners etc., together will be able to give, sell, exchange or mortgage the joint-family property (subject to rights of maintenance) and the alience need fear no suits to set aside the alienation." : Ibid, at 284.

3. A.I.R. 1979 H.P 41.

consent of the other coparcener of the family,[1] i.e. himself. The suit was compromised and a life estate created in favour of the lady. After 1956, the gift by her of the property under a testamentary disposition was challenged, the usual contention being that the restricted estate given to her under the consent decree was an acquisition for the first time so as to attract the provisions of s. 14 (2). In the view of the Court however, the right of maintenance which the female had in the family properties, was a right acquired independently and even prior to the gift which was made in recognition of just such a right.[2] But even assuming that the gift could not have been made without the consent of the other coparcener, the transaction, his Lordship, Mehta C.J., held, was not void ab initio but merely voidable. Having been challenged, the subsequent obtaining of a consent decree and the award of a life estate could not be said to altogether obliterate the gift but merely to limit its operation during the lifetime of the female. In other words,

> "(t)he compromise resulted merely in the adjustment of (the female's) right in the property. Such adjustment cannot be said to have brought forth or created a right which was not in existence," [3]

and to such property, the right to which the lady had already acquired from the moment she had entered into the family of her husband on

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1. The rule that where all the coparceners together make a gift, it is unassailable is indicated in Smt. Basant Kaur v. Smt. Tej Kaur, A.I.R. 1967 P. & H. 429, where independently of the HSA, it was held that where the last male holders made a gift of the property to their mother for her maintenance, as there was no indication in the document that the property was given for life, the mere fact that it was given for purposes of maintenance did not mean that the property was not given absolutely.

2. See also Tirath v. Manmohan Singh, A.I.R. 1981 P. & H. 174, where Gupta, J., likewise held that, as the gift of property to the widow of a pre-deceased son was in recognition of her pre-existing right of maintenance, the restrictions put on her by way of a subsequent compromise, would cease to have effect after the commencement of the HSA.

3. Per Mehta, C.J., Hari Dutt v. Shiv Ram, cited above, at 45.

marriage, s. 14 (1) would apply and the restrictions in the compromise ignored.

The ruling in Baijnath Kuer v. Maheshwari[1] is along similar lines. The husband having executed a Mokarrari Heyati deed (a deed conferring a life estate) in 1922 in favour of his wife for her maintenance, the widow after his death executed a deed of relinquishment in favour of the surviving coparcener, and in consideration thereof, the latter executed a maintenance deed in favour of the female in 1935. Subsequently as a consequence of a change of heart, on the widow's challenging the deed of relinquishment as being a sham and invalid document and therefore inoperative and ineffective, the suit was referred to arbitration, and in 1947 she was awarded lands in life interest for her maintenance. His Lordship, Sinha, J., keeping in mind the view taken by the Supreme Court authorities of the pre-existing nature of the right of maintenance in coparcenary property, held that as the Mokarrari Heyati deed as also the deed of maintenance executed in 1935, were precisely in recognition of this antecedent right, the acquisition under the arbitration award being likewise clearly a provision by way of maintenance, it could not be said to be an "acquisition" within the meaning of s. 14 (2).[2]

In a resumé of the foregoing, one therefore comes to the inescapable conclusion that for the purposes of a pre-existing right in the joint estate, acquisition by way of gift or under a testamentary

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1. A.I.R. 1981 Pat. 255.

2. See also Jinnappa v. Smt. Kallavva, A.I.R. 1983 Kant. 67, where on a similar reliance on the Supreme Court rulings in Seth Badri Prasad v. Smt. Kanso Devi, A.I.R. 1970 S.C 1963, Tulasamma v. Sesha Reddi, A.I.R. 1977 S.C 1944, Bai Vajia v. Thakorji, A.I.R. 1979 S.C 993, and the view taken in them of the antecedent nature of the right of maintenance in the joint-family property, the Karnataka High Court likewise held that the restricted estate acquired by the widow in the family property, was converted to an absolute right under s. 14 (1).

disposition is essentially the same as acquisition under any other instrument, decree, order or award, and seen in the light of this construction, the inclusion of the words "devise" and "gift" in the Explanation to s. 14 (1) confirms the view that, it was not in the contemplation of Parliament to discriminate between females with like rights but which may be awarded to them under a motley array of instruments.

(ii-b) Where the Female is a Stranger to the Coparcenary Property

The problem that next awaits us in this, the penultimate section of this part of our study, is the effect of s. 14 where a gift is made to a female who has no antecedent claim either of maintenance or as heir under the HWRPA, 1937, in the joint estate. It is submitted that in such cases sub-s. (2) of s. 14 would operate to exclude the property from the wide spectrum of s. 14 (1), for the female being a stranger to the property or family, the instrument is the source or foundation of her title; she must take subject to the restricted estate irrespective of whether or not there were restrictions in the instrument, for despite the dent made by s. 6 of the HSA on the right to take by survivorship, the reverter by survivorship is still capable of asserting itself in cases where improper alienations - gratuitous or otherwise - were effected prior to 1956.

It is a settled principle of the Punjab Customary law that the daughter is a better heir than the collaterals, but only in respect of the non-ancestral property belonging to her deceased father. Thus in Mst. Bakhtawari v. Sadhu Singh,[1] where a gift to the daughter of the ancestral property was made in 1949, on the coming into effect of the HSA, the donee's plea was that in view of her new right as preferential heir under the statute of 1956, the reversionary right stood extinguished.

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1. A.I.R. 1959 Punj. 558.

Their Lordships, Gosain and Grover, JJ., however negatived this contention to hold that while such a claim would certainly have had force if the donor had died after the HSA had come into force,[1] the consequence of his death in 1955 had considerably affected the position to the detriment of the female. In 1955 when succession opened out, the collaterals who were better heirs qua ancestral property, became entitled; their position changed from that of reversioners to that of owners, and property once vested could not be divested merely because subsequently a new rule of succession had come into force, and as such the claim of the female under ss. 8[2] and 14 (1) could not be validated.

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1. That this is certainly the correct interpretation has been demonstrated in Giani Ram v. Ramji Lal, A.I.R. 1969 S.C. 1144, where prior to the HSA, the father's improper alienation by sale of the ancestral lands having been declared null and void as against the reversionary claims of the sons, after the former's death in 1959, it was held that, had the testator died prior to the Act of 1956, his three sons would have taken to the exclusion of his widow and daughters. But as the death took place after 1956, the property must be deemed to have reverted to the estate, and all persons who would, but for the alienation, have taken the estate, must be held entitled to inherit the same. Thus under the new rules of succession, the widow and the daughters would take equally and along with the sons. The decision in Smt. Manshan v. Tej Ram, A.I.R. 1980 S.C. 558, is even more apposite to our discussion here. The gift to the daughters of the ancestral estate having been challenged, a decree was passed declaring in favour of the reversionary right at the moment of the donor's death. On the latter dying after the HSA had come into effect, it was held that the daughters in supersession of the prevalent custom became the preferential heirs, and were entitled to inherit their father's interest in the ancestral property to the exclusion of the collaterals. Note though, that if under the exact circumstances, the gift had been a bequest, the legatee daughters would have taken absolutely not only to the exclusion of the reversion, but to the exclusion of all other heirs as well on the established principle that, the will speaks at the death of the testator.

2. A principle of moment in that it establishes that s. 8 has no retrospective application, and of value in determining the identity of the next reversioner under such circumstances.

Credence is lent to this line of reasoning in Jagir Singh v. Baboo Singh.[1] The gift to the married daughters having been challenged, a compromise was arrived at and a decree for declaration was granted to the effect that the gift would be ineffective as against the reversion in respect of half of the gifted land, and in respect of the other half, the donees were to be in possession with no power of alienation, the same to revert to the collaterals at the death or remarriage of the last survivor of the three daughters. In 1965 the last surviving sister claimed to have become absolute owner entitled to make an alienation by gift inter vivos under s. 14 (1). Mittal, J., however, in reliance upon the interpretation of the two sub-ss. of s. 14 by the Supreme Court,[2] was rightly of the view that as under the Customary Law of the Punjab, the married daughters have no pre-existing right in the property of their father, the acquisition of the property by virtue of the deed of gift was the root of their title, and having agreed under the compromise to the taking of a life estate, s. 14 (2) operated to prevent it from converting to a full tenure.

However, that the female, stranger though she may be, is still capable of asserting absolute ownership over property which she has acquired by gift inter vivos if all the coparceners together assent to the making of the gift to her, we have already noted. Just such a situation occurred in Indukuri v. Katari,[3] where the father together with his sons settled property on his daughter with the provision that she was to enjoy the income during her lifetime, and after her, her children

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1. A.I.R. 1982, P. & H. 208.

2. His Lordship referred to the Supreme Court authorities of Santhanam K. Gurukkal v. Subramanya Gurukkal, A.I.R. 1977 S.C 2024; Bai Vajia v. Thakorbhai, A.I.R. 1979 S.C 993; and particularly, Tulasamma v. Sesha Reddi, A.I.R. 1977 S.C 1944.

3. A.I.R. 1972, A.P. 192.

were to take the property absolutely. The female having died issueless in 1964, her brothers claimed that they were entitled to the suit land as against the husband. His Lordship, Rao. J, however held otherwise, for in his view the settlement deed indicated the award of an estate as was clearly capable of attracting s. 14 (1). It was rightly construed that the injunction against damage to the property could not be regarded as a condition against alienation. Moreover the incorporation of the words, "from today we and our representatives have no concern at all with this property," the more reinforced by the additional clause that after the female's death, her children were to take the lands absolutely were definitive proof that the estate intended to be conveyed was a heritable estate and not a life estate, and the donee's acquisition coming within s. 14 (1), it was not open for any of the donors to reclaim it.[1]

A careful review of judicial decisions thus indicates a persistence as between the Courts, of a conflict of opinion as to the proper construction of s. 14 (2) and the purpose that it was meant to serve. The authoritative pronouncement of the Supreme Court in Tulasamma v. Sesha Reddi,[2] in so far as it goes, has served its purpose well, but despite the reiterating by their Lordships of the established principle that s. 14 (2) may only apply where the female has acquired the property for the first time, there is nevertheless in evidence a certain confusion, a certain dichotomy of view in a failure to grasp the essential

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1. In Guramma v. Mallappa, A.I.R. 1964 S.C 510, the Supreme Court had laid down that gifts of affection by fathers to daughters in performance of the duty to see to their welfare even after their marriages, were valid and binding on the coparceners provided that such gifts were reasonable relative to the wealth of the family. It is however submitted that, while the gift of affection in our present case is, as a whole, endorsed by the Supreme Court ruling, the implication in the latter of need in the donee, is of no relevance here, as the gift was a gift together, and on the volition of the father and brothers.

2. A.I.R. 1977 S.C 1944.

distinction between the pre-existing right that the female acquires in the ancestral estate by reason of her right to maintenance or otherwise, and her right in the propositus' separate property where her claims are regulated by the disposing powers of the donor where she is not an heir under the HWRPA, 1937.

This confusion, all the more compounded where the acquisition, the object of the quarrel, is by way of gift inter vivos or under a testamentary disposition, calls for urgent resolution, and as judicial solution on the pattern of Tulasamma v. Sesha Reddi[1] is nowhere in sight, the Legislature must be called upon to play its part in an effort to cut the Gordian knot. The amendment of s. 14 (2) is, it is submitted, of pressing necessity, and if the sub-s. is amended to the effect that

> "(N)othing contained in sub-s. (1) shall apply to any property acquired by way of gift or under a will ... where the terms of the gift will or other instrument ... prescribe a restricted estate in (omit 'such property') the separate property of a male Hindu or where the female Hindu acquires an interest for the first time in Mitakshara coparcenary property."

such amendment would, one feels certain, serve the dual purpose of obviating the misery and financial loss - which profits none but the legal profession - that the parties to protracted litigation are inevitably brought upon to bear, and lend at the same time, that "clarity, certainty and simplicity" to the law which Bhagwati, J., had [illegible] for pleaded as far back as 1977.[2]

(iii) The Position After 1956

While the HSA has brought about no change in the inability of a male Hindu to dispose, by gift inter vivos, his share of the joint-family [illegible] of

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1. A.I.R. 1977 S.C 1944.
2. Ibid., at 1946.

property, s. 30 of the Act read with s. 6 confers upon the Mitākṣarā coparcener and likewise a member of the joint-family governed by Punjab Customary law, the power of testamentary disposition over his undivided assets provided that a female heir in Class I of the Schedule to the HSA or a daughter's son capable of inheriting, survives the testator.

Keeping in mind this scheme and in the light of the revolutionary provisions of s. 14, the final problem awaiting resolution in this section, is an attempt at ascertaining the position after 1956 where grants are made by settlements inter vivos or by will to females on the part of persons who during their lifetime were under an obligation to maintain such donees.

Once Parliament has allowed a coparcener to dispose of his interest, virtually all a male's property is capable of being disposed by will, and this is controlled by nothing but the rights of dependants under s. 22 of the HAMA.[1] Thus where a grant is made by will to a woman who would have had a right to be maintained had the testator died prior to 1956, does she literally have a subsisting right at his death after 1956? The case would not be otherwise where the female is the widow of a coparcener in the Mitākṣarā joint-family, for his interest passes by succession under s. 6, and is as much liable to be disposed of by will or other instrument as his separate estate.[2] The Court may however consider that since she could have forced, as a dependant, some provision out of the heirs or legatees, she has the same right to an absolute estate as one who had a right to be maintained.

In this dilemma, it is possible to argue on the one hand that, women taking restricted rights by will are in the same position as

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1. Derrett, Critique, op.cit., at 224.
2. Derrett, "S. 14 (2) of the HSA : A Disturbing ...," op.cit., at 70.

those who took restricted estates by law. All pre-1937 widows and widows post 1937 who did not demand partition were put in the same position by s. 14 (1) if the former had been given land for their maintenance, and a widow-dependant who takes under her husband's will should be entitled to no less on equitable grounds.

On the other hand, it is equally possible to argue that

> "(O)nce this freedom (of testamentary disposition) has been consigned it seems impossible ... to suppose that Parliament denies the right to create restricted grants for those who have no certain prospects, but for that grant, of obtaining rights larger than maintenance," [1]

and where the Court is satisfied that a restricted estate deliberately created by the testator is such as would satisfy the demands of the HSA relative to dependants' rights, the female must either take the legacy subject to the restriction or exercise the option open to her of renouncing it, and claim her rights as a dependant under the HAMA.

Judicial development in this area is only just about beginning, but the proper construction would seem to be that, as the testator would be well within his rights to leave the estate to the legatee of his choice, and thereby exclude the female altogether[2] reducing her status to that of a dependant compelled to claim as such under the HAMA, the position of the widow, or daughter, or other female dependant of the estate, is akin to that of any other female; where she takes a restricted or limited estate under the testator's will, she is

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1. Derrett, Critique, op.cit., at 224.

2. An example of this is to be seen in Smt. Mohinder Kaur v. Wassan Singh, A.I.R. 1968 P. & H. 389, where taking into account the new law of succession under the HSA, and in an attempt to prevent litigation after his death, the testator bequeathed his entire estate to his two sons expressly excluding his wife and two daughters after having made adequate provisions for their maintenance. Subsequently by reason of the disqualification of one of the sons, the Court upheld the claim of the other that, no intestacy may be construed in regard to the half share of the former, for where the testator had deliberately excluded the female heirs, his intention was clear beyond doubt that they were not intended to be benefitted beyond what the terms of the will had envisaged.

confined by the restriction and cannot escape it, because the question, one submits, of a pre-existing right does not arise at all.

The basis of the reasoning in Jagdish Prasad v. Mauleshwar,[1] though not, it is respectfully submitted, the construction of the will, would bear out the viewpoint adopted above as correct. The testator, the bulk of whose estate comprised bhumidhari (agricultural) holdings, specified in his will that his widow after him was to take the property for her life with power of alienation, the same to devolve, after her death, on his grandsons including those descended from his first wife. The question for decision was whether the will could be so construed as to have conferred on the female a full heritable estate so as to exclude from succession, upon her dying intestate without alienating the property, the grandsons of the first wife. The giving of a life estate with power of alienation would seem to many to be a contradiction in terms, and the ingenious attempt of the learned Judge, Nandan, J., at resolving this inconsistency, though laudable, is entirely misplaced, one submits. In reliance upon the dicta in Beni Madho v. Harihar Prasad,[2] his Lordship expressed the view that there is nothing in the law that prohibits the grant of a life estate with full power of transfer during the donee's lifetime by a testator in his property, for

> "(W)here there is a bequest to A even though it may be in terms apparently absolute followed by a gift of the same to B absolutely 'on' or 'after' or 'at' A's death, A is prima facie held to take a life-interest and B an interest in remainder, the apparently absolute interest of A being cut down to accomodate the interest created in favour of B." [3]

While there can be no disputing that the testator was favourably

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1. A.I.R. 1982 All. 162.

2. A.I.R. 1946 Oudh 20.

3. Per Nandan, J., Jagdish Prasad v. Mauleshwar, cited above, quoting from Ramchandra v. Mrs Hilda Brite, A.I.R. 1964 S.C 1323.

inclined towards all his grandsons as the inclusion of their names in the will clearly testifies, it is equally certain that his very real concern was for his wife given her advanced age. In the passage quoted from the Supreme Court judgement,[1] the emphasis is clearly on the words "apparently[2] absolute interest" the word "apparently" allowing for that latitude of construction upon an inherent ambiguity in the wording employed in the will. On the other hand, where the estate is conferred "with power of alienation", no ambiguity may be imputed, and the will must be construed as contemplating the conferral of an absolute estate.

To augment the correctness of this construction, one has only to turn to the learned Judge's own admission which concedes in so many words that, having devised an absolute estate, the testator must have hoped[3] at the same time that the widow would not alienate the property.[4] But, it is submitted, to hope is one thing, to specify expressly quite another, and we must refer back to the principle that mere requests hopefully suggested, cannot be equated to the force of mandatory injunctions.[5]

This must therefore be construed as of an instance where the subsequent absolute bequest to the male descendants was a provision by way of a precautionary measure in the possible circumstance of the female legatee's own death prior to that of the testator's - an eventuality not to be ruled out in view of the former's advanced age. Thus to hold that,

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1. Ramchandra v. Mrs Hilda Brite, cited above.
2. Emphasis mine.
3. Emphasis mine.
4. Jagdish Prasad v. Mauleshwar, cited above, at 165.
5. Derrett, IMHL, op.cit., at 468.

> "(h)is wife though old, probably older than himself was alive, and the testator had a foreboding that she would survive him," [1]

is to attribute to the testator a sense of prescience nowhere supported by the facts.

Untenable as this construction of the testator's intention certainly is, the correct approach obtaining in the other more vital aspect in the decision has much in it to commend. To the further contention that notwithstanding the restrictions, if any, on the estate conferred on her by will, the widow must be deemed to have become full owner under s. 14 (1) by reason of her pre-existing right of maintenance and even of inheritance in the estate, the view taken was that quite apart from the fact that, as the bulk of the property which passed under the will "was agricultural land ... to which the HSA did not apply,"[2] what the testator as full owner with power of disposition had purported to give, was not to give to his wife an estate in lieu of maintenance, but to give to the donee of his choice, the estate of his choice at his pleasure.

This view sums up in a nutshell the exact position, and the only criticism that may be forthcoming is the regrettable brevity and the

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1. Jagdish Prasad v. Mauleshwar, cited above, at 165. Neither, it is submitted, is there any validity to his Lordship's ruling at ibid., that as the creation under a will of a Hindu woman's limited estate was out of question as no longer known to law, the giving of the power of alienation must have been considered necessary in order to make it appear that the estate conferred by the will in the property devised was in conformity with the law. One is tempted to ask where the learned Judge had been all these years when just this problem of whether or not the "limited" estate could be created by testamentary or other instruments was being fought out and resolved by the Judiciary.

2. Ibid., at 167-8. The same view was taken in Smt. Prema Devi v. Jt. Director of Consolidation, A.I.R. 1970 All. 238, but not to be countenanced and rightly refuted in Smt. Laxmi Devi v. Surendra Kumar Panda, A.I.R. 1957 Or. 1; Sant Ram v. Gurdev Singh, A.I.R. 1960 Punj. 462; Mst Taro v. Darshan Singh, A.I.R. 1960 Punj. 145. See also Derrett, Critique, op.cit., at 230-2.

lack of a fuller projecting of the picture as set out above. Consequently it may well be that in litigation as must inevitably arise in the future, the courts are apt to be misled, and failing to grasp entirely the significance of the change of status of the female after 1956, to rule in her favour on the basis of a non-existent pre-existing right.

To reiterate the correct stance is to attempt to obviate this danger, and the present writer would consider herself sufficiently recompensed for her labours were the Judicial machinery to bear in mind that a testator, disposing of property to one whose rights commence only at his death, is equally capable of creating a restricted right in her favour under s. 14 (2), as a full one, and in such instances, as she does not have a legal subsisting right superior to the grant, she is thereby not disadvantaged by it.[1] This would be well within the Legislative intendment in engrafting sub-s. (2) of s. 14 which, everyone is agreed, was enacted with a view to equalising the claims of the two genders,[2] and in keeping with the eminently rational notion that,

> "(W)hile there can be no presumption that a grant to a woman is for a limited estate, it is equally true that where an existing right is being recognised no statute lays down a hard and fast method whereby it must be satisfied and if 'women's rights' mean what they are claimed to mean, women are not privileged as against men." [3]

This view, and the setting out of the proper function of s. 14 (2) after 1956, is borne out by the judgement in Chanan Singh v. Balwant Singh.[4] The dispute was in regard to the power of the legatee-daughter

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1. Derrett, Critique, op.cit., at 224.
2. In other words, "as a testator or settlor can discriminate against males, and give them limited estates, even when they are dependants, he can equally discriminate against females, provided that their rights of maintenance are not jeopardised thereby." : Derrett, "Landmarks in Family...," at 13.
3. Ibid.
4. A.I.R. 1984 P. & H. 203.

to bequeath, in her turn, the property which she held in life estate under the terms of her father's will executed in 1959. His Lordship Gupta, J., held that as the testator

> "(w)as the absolute owner of the land in dispute, and therefore... was competent to will away the property in any manner he liked," [1]

where the document in clear terms restricted the enjoyment of the property to the produce thereof, and expressly prohibited the alienation of the corpus with the further proviso that, after the daughter's death, the gift was to revert to his two brothers, and failing them to their male descendants, in such circumstances, the legatee's claim to an absolute estate under s. 14 (1) must fail, specially as on her own admission, she was given merely a life estate in the property. Interpretation to this effect puts into proper perspective the law. No doubt s. 14 (1) has a part to play in the scheme of the Hindu Code, but s. 14 (2) - of equal significance - may not be ignored, and while an alert counsel could well have brought to the attention of the Bench, the invalidity of the creation of an estate in tail male, the position of the female, it is submitted, would not thereby be affected despite the description of her as Malik,[2] as the tenor of the will as a whole is unequivocally to the contrary.

(12) The Effect of S. 14 Where the Female is Not "Possessed" of Property

However persistent the right of maintenance may be, that it is not in itself a right of a certain and fixed character, it has already been ascertained; obviously therefore, where the husband had died

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1. Ibid., at 204.

2. The use of the word malik may not in all cases be inferred as connoting absolute ownership. The word merely means "owner", and its use in the context of a restricted estate is equally congruous, as for instance, "the owner of a restricted estate."

joint prior to the passing of the HWRPA, 1937, and neither had any property been allotted to the widow in lieu of her maintenance, in such conditions she is confined to a mere maintenance right, and despite the amplified judicial construction of the word "possessed" in s. 14 (1), the joint effect of the sub-s. and the Explanation thereto, is to exclude all such females from its ambit, as acquisition and possession "in lieu of maintenance" is made the pre-requisite for the operation of s. 14 (1) and the absolute ownership of property contemplated therein.[1]

The Courts have construed accordingly and negatived every claim under s. 14 (1) where the pre-condition of "possession" has not been met with.

In Damodhar Rao v. Bhima Rao,[2] we have an example of such ruling His Lordship, Tukol, J., in explaining the basic rules governing ownership as envisaged in s. 14 (1), held that where the husband had died in 1929 and the provisions of the HWRPA applied to the Hyderabad State only in 1953, the alienation by the widow of the property could not be validated, for as the suit house had not been allotted to her in lieu of her right to separate residence and maintenance, the mere right of residence could not create in her the power of alienation that she claimed under s. 14 (1).[3]

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1. This their Lordships of the Supreme Court had made clear as far back as 1959 in Kotturswami v. Veeravva, A.I.R. 1959 S.C 577, at 581, : "Reference to property acquired before the commencement of the Act certainly makes the provisions of the section retrospective, but even in such a case the property must be possessed by a female Hindu at the time the Act came into force in order to make the provisions of the section applicable."

2. A.I.R. 1965 Mys. 290.

3. On a similar count of non-possession it was held in Anandibai v. Sonabai, A.I.R. 1974 Mys. 1, that a mere right to maintenance would not attract the provisions of s. 14 (1), the Court further negativing the contention that as the suit was one for possession of the

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Raj Kumar v. Prem Prakash[1] provides another such instance. At the widow's death in 1961, the question for determination was whether, having been expressly restricted under the terms of her husband's will to a mere right of residence in the property, there was any legality to the lease effected by her after the commencement of the HSA. In elucidating the essential characteristics of s. 14 (1), the learned Judges, Mahajan and Singh, JJ., held that the word "acquired" in the sub-s. implies that there fell to the female some right, title or interest in the property by virtue of which she could claim to be in exclusive possession, and property so acquired and possessed could then mature into full ownership. On the other hand, a mere right of occupation and user, with no right of ownership - however limited - is

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properties, it implied that the female was in possession of them in lieu of maintenance. See also Hussain v. Venkatachala, A.I.R. 1975 Mad. 8, supra at 581 , f.n. 1, where despite the vindication of the view of maintenance as a pre-existing right which could effectively nullify all restrictions in the instrument conferring it, it was held on the facts and on "abundant authority" that the widow not being in possession on 17.6.56, she could not claim the benefit of s. 14 (1). Why she was not in possession, we are not told, but were she to have been physically ousted as a consequence of the illegal possession of another, it is submitted that she would still be held to have been "possessed" within the meaning of s. 14 (1). See Mangal Singh v. Smt. Rattno, A.I.R. 1967 S.C 1786, supra, at 485 . Also of relevance are the decisions in Ramcharitra Singh v. Soneful Devi, A.I.R. 1977 Pat. 201, the Court holding that as the estate had passed by survivorship at the death of the husband prior to 1937, the widow could not be said to be in constructive possession; Smt. Ram Devi v. Prakash Narain, A.I.R. 1979 NOC 34 (All.), and Pachi v. Kumran, A.I.R. 1982 Ker. 137, where the obiter dicta in the former was in consonance with the view taken in the latter that, so long as the sons remained joint, the widow could not be recognised as the owner of property, her right being restricted to a mere right of residence; Sulabha v. Abhimanya, A.I.R. 1983 Or. 71, and Smt. Ram Rakhi v. Amar Nath, A.I.R. 1983, P. & H. 156, Gupta, J., explaining in the latter at 159 that limited ownership being the sine qua non for the applicability of s. 14 (1), "property must vest in her (the widow), and she should have the occupation, control and usufruct of it to the exclusion of all other members of the coparcenary."

1. A.I.R. 1972 P. & H. 458.

incapable of attracting the provisions of s. 14 (1), and such property must be held to be a restricted estate within the meaning of s. 14 (2), in keeping with the wishes of the testator, it is submitted.[1]

However, what has to be borne in mind is that the principle must be rigidly confined to the narrow limit it was meant to encompass, and where property is mutated in the female's name, the view of the Bombay High Court that it is not acquisition within the meaning of s. 14 (1) is not to be countenanced.

In Narayanrao v. State,[2] the husband, as a consequence of matrimonial disharmony, handed over to his separating wife certain items of property and fully completed the formalities in regard to the necessary mutation entries. Subsequently harmony having been restored, the wife returned to the matrimonial home, and in 1959 affected an alienation of the said lands. In 1962 when under the Maharashtra Agricultural Land (Ceiling on Holdings) Act, 1961, the husband was called upon to declare his surplus holdings, he excluded those items of property, on the ground that possession having been delivered to his wife in 1953 in lieu of her maintenance, the effect of s. 14 (1) was to make her absolute owner. In a thoroughly reprehensible ruling, the Bombay High Court held that unless there is an instrument of transfer,

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1. This view is confirmed in Kusumgauri v. Umiben, A.I.R. 1975 Guj. 126, where the Court likewise held that, a mother's right of residence under her son's will could not be equated to a share in the property, as a general right of residence is one thing, and property allocated in lieu of that right, quite another. Note however, Desai, J's dissenting comment at 131-2, of the view expressed in Bai Parsan v. Bhagwandas, (1972) 13 Guj. L.R 123 of the right of residence as being a purely personal right, : "Sheth, J., took the view (in the latter case) that a bare right of residence created no estate in favour of a Hindu widow and the provisions of s. 14 ... were not attracted ... In our opinion with respect, the observations made by the learned Judge are very wide, "for," as the learned Judge explained, "acquisition for such purpose would attract s. 14 (1)."

2. A.I.R. 1981 Bom. 271.

the mere handing over of property would not amount to the acquisition contemplated in s. 14 (1), and while mutation of names in the revenue records may

> "(a)t the most serve as evidence of possession, and on occasion, even as presumption of title,"[1]

nevertheless for the vesting under the sub-s., the possession must refer to some legitimate claim of title. Such a view, it is submitted, is as incomprehensible as it is untenable for its blatant disregard of the very essentials upon which s. 14 (1) rests. To regard the right of maintenance as incapable of referring to some legitimate claim or title is to join ranks with the view long since made obsolete by the Supreme Court ruling in Tulasamma v. Sesha Reddi,[2] and where property had been actually physically handed over, for the Court to postulate that as no document had been executed

> "(i)n accordance with the provisions of law transferring the suit lands... in the year 1953 or any time thereafter, the fact that (the female's) name was shown in the Kabjedar column as the occupant of the suit land, could not confer any title upon her,"[3]

is to adhere to the formalities to the detriment of the true purpose of s. 14 (1). Self-contradictory, and violative of the Legislative intendment, the judgment must be rejected out of hand, as much for the view it takes of maintenance as for the wrong construction of the important Patna decision in Sumeshwar v. Swami Nath[4] to suit its own purposes.

In vindicating the notion of maintenance as a pre-existing right capable of attracting s. 14 (1), his Lordship, Untwalia, J., had further declared in unequivocal terms that

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1. Ibid., at 274.
2. A.I.R. 1977 S.C 1944.
3. Narayanrao v. State, cited above, at 275.
4. A.I.R. 1970 Pat. 348.

> "(W)here in mutation proceedings a bona fide dispute between the parties is compromised... there is no necessity to have the petition registered... as it is merely a recital of a fact by which the Court is informed that the parties have come to an arrangement." [1]

This, it is submitted is the correct position, for where the lady is "possessed" non-compliance with registration formalities does not render her any less possessed of land. The Bombay High Court was not unaware of this, but perversely cut down its significance to hold that,

> "(T)he (Patna) Court held that even assuming that the document required registration, still the absense of registration would be of no avail because in that case (the widow) must be held to have acquired title... by adverse possession." [2]

But this, it is submitted, was merely an incidental remark, the more to reinforce the widow's claim, and certainly not the basis of the Patna ruling, as the Bombay Court implies.

The correct position obtains in Bishwanath Pandey v. Badami Kaur.[3] In a brief but forceful construction of the law, their Lordships of the Supreme Court held that, where in 1931, the widow of the deceased was mutated as such, the plea of the reversioners that the mutation was only by way of consolation without any rights in the property, could be of no avail, for after the coming into force of the HSA, and the conferral of absolute proprietary rights on the widow, their locus standi to challenge her status had come to an end. In other words, the mutation itself was sufficient indication of the possession and acquisition that is the pre-requisite for the operation of s. 14 (1).

Thus non-delivery of possession does not thereby rob the widow of her rightful possession within the meaning of s. 14 (1), and the significance of Gupta, J.,'s statement in Tirath v. Manmohan Singh,[4]

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1. Ibid, at 349.
2. Narayanrao v. State, cited above, at 275.
3. A.I.R. 1980 S.C 1329.
4. A.I.R. 1981 P. & H. 174.

to the effect that, where a gift deed has been signed by the donees in token of their acceptance of the same,

> "(i)t is only the donor who could object to the delivery of possession. If the donor supports that a valid gift was made, then non-delivery of possession, if any, becomes immaterial," [1]

may be taken to be the rule of general application.

To the extent therefore that it excludes from its ambit widows entitled to maintenance but not "possessed" of any property, s. 14 (1) is, one submits, unduly discriminatory. Somewhat reminiscent of the late unlamented HWRPA, 1937 - in that both statutes indicate a decided partiality for some females to the exclusion of others of similar status - the bias of the HSA in favour of those in actual possession as a consequence of their own assertiveness or other chance circumstances, is a partisan approach somewhat difficult to comprehend.

If the right of maintenance is itself recognised as a pre-existing right, the source and foundation of that right which emanates from the sub-s., the actual "possession" of property should surely not have been made the fundamental criterion for the accrual of the benefits of s. 14 (1). It is therefore submitted that, on purely humane and equitable grounds Parliament could well have considered extending its bounty to include within the purview of the new law, all such widows - progressively fewer as the years go by - who may not be possessed of property but whose claim to the pre-existing right is not thereby lesser than those in actual possession in lieu of that self-same pre-existing right. However, inequitable as this may seem, as Parliament in its wisdom saw fit to exclude such females, we must resign ourselves to its express intention, and the Judiciary - the function of which is to read into a statute what it states, not add to its meaning - has in the

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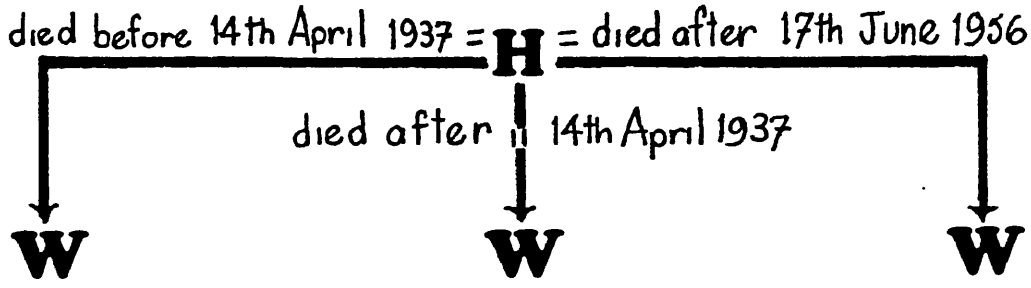
1. Ibid., at 177.

construction of the section, adhered accordingly as to the legislative intendment.

The story must necessarily close with a reference to where it began - to Article 44 of the Constitution and the promise in it of a uniform civil code for the entire nation. Intractable as the fulfilment of that promise may seem at the moment, and as fragmentary as the legislative attempt to codify the Hindu law certainly is, we must not in our haste and impatience dismiss as insignificant what is in effect, a momentous step towards the greater goal.

Problems of construction and anomalies - inevitably the result of piecemeal attempts at reform, and perhaps nowhere in greater evidence than in the interaction of s. 14 with the uncodified law - have indisputably crept in, but once these are resolved either by legislative amendment or by judicial pronouncements, and the period of transition over, Hindus, who constitute about eighty per cent of the population, may hopefully look forward to a more settled and satisfactory era in the realm of their personal law. The majority community would then have set the pace, and it may well be that, in the light of these improvements, a law of uniformity may evolve - a synthesis of the existing personal laws, a coherent and codified body of rules applicable to all alike irrespective of their personal affiliations to the varying religious denominations that are so intrinsically part of the scene in secular India.

(13) The Progression, at a Glance, of the Female's Right to Own Property Leading to S. 14 of the HSA, 1956



1. Where she is merely confined to a right of maintenance, s. 14 (1) has no application.
2. Where she is possessed of property, the presumption is that it is in lieu of her maintenance so as to attract s. 14 (1).
3. Where under an instrument, order, award or decree, she is allotted property in lieu of maintenance, she takes absolutely under s. 14 (1) notwithstanding restrictions in the instrument.
4. Where his separate property is gifted to her either inter vivos, or under a testamentary disposition, s. 14 (1) or s. 14 (2) will apply according to the terms of the document.
5. Where his interest in the joint-family property is gifted to her, it is related to her pre-existing right of maintenance so as to attract s. 14(1) notwithstanding restrictions in the instrument.

1. Her entitlement under s. 3(3) of the HWRPA, 1937, to limited ownership of his separate property under s. 3 (1) of the Act is converted to an absolute estate under s. 14 (1).
2. Her entitlement under s. 3 (3) of the HWRPA, 1937, to limited ownership of his interest in joint-family property under s. 3 (2) of the Act is converted to an absolute estate under s. 14 (1) whether or not she had exercised her claim to partition under s. 3 (3) of the Act of 1937.

1. She is class I heir under the Schedule to the HSA, 1956, and takes equally with other class I heirs.

a) His separate estate provided it has not been disposed of by gift inter vivos or by testamentary disposition.

b) His interest in the joint-family property provided it has not been testamentarily disposed of.

2. In cases of gift inter vivos or of testamentary disposition of his separate estate, or of the testamentary disposition of his interest in the joint-family property, she is entitled as a dependant under s. 22 of the HAMA, 1956, to claim maintenance from those who take the estate.
3. Where his separate property is gifted to her either inter vivos or under a testamentary disposition, s. 14 (1), or s. 14 (2) will apply according to the terms of the instrument.
4. Where his interest in the joint family property is testamentarily gifted to her, s. 14 (1) or s. 14 (2) should apply according to the terms of the instrument.

CONCLUSION

In an overview of the study, it is evident that in the professedly secular democracy of the Republic of India, the Constitutional promise in Article 44 of a uniform civil code for the entire nation, assumes the greater significance in opening up new vistas for women in the male-oriented Indian social set-up.

A major step towards the implementation of this goal was the codification in large measure, in 1955-6 of the personal law of the majority community, and despite certain obvious flaws, omissions and contradictions, the "Hindu Code" accords to the female new rights in matters concerning Marriage and Divorce, Succession, Guardianship and Adoption and Maintenance, which go a long way towards the equalising of the status of the two sexes, and of the elimination of restrictive and antiquated rules.

On the other hand, the personal laws of the minority communities remain as yet unamended, and while no opposition is anticipated from the numerically smaller denominations, Muslim intransigence towards codification is notorious, and any suggestion at reform is resisted as interference with the fundamental right of the practice of their faith.

But in the quest to subjugate existing personal laws to a common law for all, the Legislature has put on the statute book a common secular law of marriage, divorce and inheritance and all Indians irrespective of their religious affiliations, may now resort to the provisions of the SMA, 1954, should they so desire. The DPA, 1961, weak and ineffectual as it may be, is a measure aimed at the eradication of the evil of the dowry system, while the amended Cr. P.C., 1973, of particular value in the protection that it affords from vagrancy to destitute divorced females. Laudatory as these measures are, a law of uniformity has yet to emerge. Muslim intransigence continues to be a major stumbling block, and while

to many the woes of this most vocal of minorities might appear self-imposed and imaginary, the tilt in the Constitution in favour of Hindus and those culturally allied to them, does nothing to allay their fear of losing their identity as a community. So as to reassure them of the bona fides of the Constitution and make that much easier the implementation of Article 44, it is recommended that:

1. Explanation (1) of Article 25 be abrogated.
2. As a corollary to Article 48, a new measure be legislated banning the slaughter of cows in public places only.
3. Article 290 (A) be either abrogated, or amended with an Explanation thereto for this unusual provision.

So as to rectify the weaknesses and omissions in the "Hindu Code", it is suggested that:

1. Ss. 11 and 17 of the HMA be amended, and the condition of monogamy be replaced by a carefully regulated polygamy.
2. S. 18 (b) be amended, and the lenient penalisation in it replaced by a more rigorous form of punishment.
3. S. 23 of the HSA be amended, and the rule of residence in the family dwelling house applicable to daughters, extended to the mother, son's daughter and daughter's daughter.
4. S.24 be amended, and the rule extended to include the father's widow.
5. S. 21 (vi) of the HAMA be amended, and the word "her" included.
6. S. 22 be amended, and the list of dependants extended to include the divorced daughter deprived of alimony, the paternal grandmother up to two generations, and the permanently kept concubine.

In regard to social legislation other than the "Hindu Code", changes are called for in:

1. S.2 of the DPA, and the abrogation suggested of Explanation I.
2. Ss. 3 and 4, and the lenient penalisation therein, replaced by a more rigorous form of punishment.

* 1. The DPA, 1961, was recently amended by the Dowry Prohibition (Amendment) Act, 1984. As yet to arrive in the libraries in London, the amending Act, - a copy of which the present writer was able to consult by courtesy of Dr. W. Menski, Lecturer in the Faculty of Law, School of Oriental and African Studies, University of London, - incorporates in substantial measure the suggestions made in this study.

3. S. 8 and the breaking of the law made a cognisable offence which would include not only the demanding of dowry, but also the taking of it.[1]*
4. S. 127 (3) (b) of the Cr. P.C., and its amendment in the light of the Supreme Court's construction. The amended sub-s. may be put thus:

> "(t)he woman ... has received, ... the whole of the sum which, under any customary or personal law ... was payable on such divorce, (delete 'cancel such order') take into consideration such sum in determining her maintenance under s. 125."

In its construction of these enactments, the Judiciary must bear in mind their social purpose, and in areas of ambiguity interpret accordingly. Thus:

1. In the application of s. 13 (1-A) (i) to s. 23 (1) (a) of the HMA, it must adhere to the construction that, a party cannot take advantage of his own wrong and turn the judicial relief therein into the first stage of divorce.
2. A narrow and literal construction of s. 20 (3) of the HAMA be avoided, and the words "unmarried daughter" interpreted to include a major unmarried daughter, as the latter's entitlement under the traditional law has not been expressly abrogated, and this definition must necessarily encompass divorced and widowed daughters.
3. Similarly, a liberal construction of s. 21 (ix) is in order, and in view of the revised rules for women, the words "so long as she remains unmarried", which would naturally suggest "until her first marriage", be given wider latitude of interpretation than the words would suggest.

The Hindu female's rights in property in the traditional law, and the restrictions in her powers of enjoyment of the same, were to a significant extent determined by her status of subordination in the patriarchal familial structure.

Given the sacramental nature of a Hindu marriage, the wife as the companion of the married householder had a vital role to play in assisting him in the fulfilment of his religious duties. At what precise moment the decline in her status from honoured companion to subordination took place it is difficult to gauge.What is certain is that, both in the smṛti and the Epic literature, while women are generally reviled and opprobrium heaped upon them, the exacting ideal of pativratā is insisted upon as the only means of their salvation.

The widow's status was correspondinly a degraded one. With the fall in popularity of the practice of niyoga which had served as a substitute for remarriage, widow remarriage too began to be looked upon with distaste, for the insistence on virginity as a pre-condition for the sacramental marriage rites precluded its approval. Child marriages inevitably led to child widows whose rank and file swelled, and doomed from the moment of widowhood, these little ones were made to expiate the impieties of a previous existence in shame and suffering.

Henceforward, if the widow chose to survive her husband, the harshest of austerities were prescribed for her both in appearance and in demeanour, an added indignity being the custom of tonsure so as to harmonise her outward appearance with the ideals of renunciation that she was expected to follow.

Satī, the barbarous relic of a dim past, but which fitted quite well in the frame of the brahminical law of marriage as a sharpened form of the severe demands made on the matrimonial fidelity of the widow, survived till well into the nineteenth century, but its outlawing by the British in 1829, paved the way for an era of social reform headed by the crusaders of the Bengali renaissance. The HWRA, was passed in 1856, and this was followed by the Child Marriage Restraint Act in 1929, though in tradition-bound India these measures, for decades to come, were quietly ignored and the practices continued.

Despite the emergence of India as a rapidly developing nation, by and

large, traditional attitudes still persist, and the Hindu woman is at heart the traditional Hindu wife in whom the ideal of pativratā burns quite as brightly as when it was first propounded. Consequently the trappings of widowhood may be on the wane, but if the traditional shackles still bind the Hindu widow, her own attitude no less than the male-oriented society she lives in is the cause of her plight. The time has now surely come for her to assert her individuality - to marry or not to marry according to her preferences rather than remain a prisoner, in the grip, as it were, of the ancient smṛtis.

The concept of female tutelage in the Hindu law has had, till recently, lasting repercussions on the scheme of succession. Apart from the share that a female takes at a partition of the family property, the widow, in default of male issue, was entitled to succeed both to her husband's separate estate as well as to his interest in the joint-family property in the Dāyabhāga system, and to the latter only in the Mitākṣarā school, provided that she had been chaste up to that time.

The texts in the Mitākṣarā indicate unambiguously that every description of property belonging to a woman, be it inherited from a male or obtained at a partition, becomes her strīdhana, though it is not a necessary corollary that her power of alienation is the same over every variety of it. Conversely, the Dāyabhāga limits her interest to mere enjoyment with moderation, for the property to devolve at her death, not to her strīdhana heirs, but to the next heirs of her husband.

The characteristics of the woman's estate, and the restrictions inherent in it as they emerge in the Dāyabhāga system, are indications in themselves as to how far removed the concept of the "limited estate" is from woman's property as envisaged in the Mitākṣarā. But in the extending of these principles to the Mitākṣarā school, the Privy Council drastically limited the scope of strīdhana, and in a series of momentous decisions that august body established - despite dissident opinion of eminent authorities and those learned in the śāstric lore - that all

property, whether moveable or immoveable, inherited by a widow, daughter, or mother, must be held subject to the limitations known to the Dāyabhāga law in all the schools.

In an assessment of the "limited estate" and the incidents attendant upon it, it is clear that the institution was a contrived device to keep intact the patriarchal power and strength of the joint-family, and the Privy Council, more than anything or anybody else, was instrumental in perpetrating this inequitable system of female inheritance so out of tune with the precepts of the sages of old, without any proof that such precepts had become obsolete.

Where she is not an heir, the widow if not unchaste, has an absolute right of maintenance from both the separate, as well as the interest in the joint estate, of her deceased husband. As the claim arises only against those who take the property, the donee or devisee is as much bound as the heir or coparcener. This would apply equally to the bona fide purchaser for value if he has notice of the claim, though equity steps in to protect the bona fide purchaser who purchases without notice of the right. However, the creditor's priority of claim militates against the right of the maintenance holder, provided that the deceased's debts are not "tainted", as do debts incurred by the kartā for justifiable legal necessity.

While it was early recognised that the father's liability to maintain his son's widow is a merely moral obligation, as the heir - and likewise the donee or devisee - take the property subject to the Pious Obligation, it ripens into a legal liability in their hands. In the hands of the stranger donee or devisee, the property assumes the nature of a trust from which is exigible the maintenance of the son's widow.

No stridhana in the widow's possession - except income-producing stridhana, the gift to her by her husband or his father - may affect the rate of maintenance, though the rate must necessarily be affected by the

assets in her hands of her husband, whether joint or separate. Beyond these fundamental rules the rate - like arrears of maintenance for which neither demand nor refusal need precede the claim, and which is defeasible only on proof of waiver, abandonment, estoppel, or limitation - is dependent upon a great category of circumstances small in themselves which determine an increase or decrease in it.

Unchastity on the widow's part disentitles her to maintenance, but on her return to a life of continence, the law allows her a starving maintenance. Whether or not remarriage, where it is permissible under caste custom, affects the right under the HWRA, 1856, is a moot question, but where maintenance is secured by decree, or under a will, agreement or compromise, the claim remains unaffected, unless there is a provision to the contrary in the document.

In an assessment of the right of maintenance, while there can be no gainsaying its essentially compassionate nature, it is equally evident that, by far the more pressing motivation was surely the time-hallowed notions of family probity and prestige, as it was a means of securing the joint stock from fragmentation, the insistence on chastity and penance on the widow's part further circumscribing any tendency towards extravagance and waste.

In the new awareness for reform that swept the country in the first half of this century, the Legislature took a step in this direction in 1937 when the HWRPA became law. While the three categories of widows mentioned in the Act took "the same share as a son" in the separate, and "the same interest" as the deceased husband in the joint, assets, they took it subject to the limited estate - creating in the latter entitlement a palpable anomaly which gave rise to grave constructional problems in the Mitākṣarā school.

While on the one hand, the Act conferred on the widow a statutory interest in Mitākṣarā coparcenary property, what it did not and could not convey to her was the Mitākṣarā "birthright", and she was thus

precluded from the status of a coparcener, though she was not thereby debarred from assuming managerial responsibilities, particularly if she was the only member left sui juris in the joint-family. At the same time however, as the owner of a coparcenary interest, she was impliedly accorded under the statute the right to question alienations made by the kartā, and by the same token it imposed on her the kartā's authority to bind her interest for justifying legal necessity. The widow's general right to be maintained out of the joint assets was still available, the option resting with her, to claim maintenance or to take a share at partition - which right the Act accorded to her - but not both.

In certain other respects her lack of status as a coparcener worked to her disadvantage. The fluctuation of her share ceased with the death of the sole surviving coparcener and the extinction of the joint-family, and as she was not a coparcener, her rights by survivorship could not arise, and she was confined to her interest under s. 3 (2). Additionally, because she took the "same interest" as her deceased husband, though subject to the limited estate, added restrictions were imposed upon her power of alienation, and those who took her interest after her death or surrender were not only bound by those alienations which were outside a widow's normal powers, but not by those which were outside the powers of a coparcener as well.

Where the widow died without effecting severance of status, the rule of survivorship was upheld in the devolution of her interest, but as the institution of a suit for partition is evidence of a definite and unambiguous intent to separate, her share was deemed to have devolved accordingly where she died pending a suit for partition. Where partition was effected by metes and bounds, the separated interest devolved as such under the ordinary Hindu law.

The changes effected by the Act were thus, in a sense, dramatic, and inept as the provisions were, the status of the widow - and therefore of the wife - was upgraded. But such benefits as it conferred, were at

best minimal. Of its many limitations, the retention in it of the "limited estate" was its undoing. Partial, imperfect, transitional, it could not stand the test of time, and not long thereafter, Parliament in Independent India undid this piece of unintentional mischief.

By far the most radical departure from tradition is the incorporation in the HSA, 1956, - which repeals the HWRPA, 1937 - of s. 14. In abolishing the legal "limited estate", s. 14 (1) confers on the Hindu female the status of an independent and absolute owner of any property possessed by her, whether acquired before or after the commencement of the Act. But so as not to give females the edge over males, sub-s. (2) of the section is more in the nature of an exception to s. 14 (1), and has been construed to mean that where the instrument conferring the property confers it for the first time, and does so with a limitation cutting down the tenure, the woman takes subject to the "restricted" estate.

Judicially, the word "possessed" in s. 14 (1) has been construed in a broad sense to include not only actual physical possession, but also constructive possession as well as possession in law, including the female's acquisition by prescriptive title though not of property of which she is illegally possessed.

As possession is a prerequisite for the application of s. 14 (1), where the widow had remarried prior to the commencement of the Act, the rule of forfeiture precludes its operation, but if the remarriage is subsequent to the acquisition of the absolute estate, it cannot work a divestation of the property already vested in the widow. The son's widow and the brother's widow are disqualified if they remarry in the lifetime of the propositus, but the mother's remarriage is no bar to succeeding to her son.

An adoption made prior to the HAMA could not work a defeasance of the absolute estate on the principle that the old law stood abrogated to the extent it conflicted with the new, and the reprieval of the doctrine of "relation back" in the HAMA does not make any difference where the widow

is the sole heir. But where she is joined by other heirs mentioned in class I of the Schedule, the fiction is a reality and the adoptive son participates in the notional partition envisaged in s. 6, to determine the shares that pass by succession including that of the widow.

The share of the female, declared in a preliminary decree of partition is property within the meaning of s. 14 (1), as is the widow's interest in the undivided assets, notwithstanding the resultant anomaly that her powers of alienation in the coparcenary property are thereby upgraded beyond even that of the coparcener's. As the acquisition of property "in lieu of maintenance" is an acquisition related to a right antecedently acquired, a grant for such a purpose, despite the imposition of restrictions in it, is likewise converted to an absolute under the sub-s. tenure

However, as the traditional law is abrogated only to the extent of its repugnance with the new, s. 14 (1) benefits neither the female nor her alienee, and the reversion subsists, in cases of improper alienations by sale of the limited interest. Similarly, as the limited owner was incapable of alienating other than her limited interest, after her death prior to 17 June, 1956, the gift by her inter vivos or by devise to a female, is incapable of attracting s. 14 (1). Nor could she or her female alienee claim an absolute estate in property gifted inter vivos in the event of her survival till after that date, for in the first instance the parting of possession hinders the application of s. 14 (1), while the donee is inhibited in that she is incapable of taking more than the donor could give. In all such cases, though, these principles are inapplicable where the donee, or devisee has an indefeasible subsisting right of maintenance in the property, the force of which is to render impotent all reversionary claims. Equally, a testamentary disposition made prior to 1956, but given effect to at the death of the testatrix after 1956, effectively extinguishes the reversion on the principle that the will speaks at the death of the testator.

On the other hand, as a Hindu male possesses full disposing power over his separate property, the construction of the deed of gift or will is

of the crux, and where it purports to give a life estate, the female takes under S.14 (2) unless the tenor of the document as a whole suggests a contrary intention. The gift inter vivos or by will of joint-family property prior to 1956, is as capable of enlarging to an absolute estate as under any other instrument notwithstanding the imposition of restrictions in it, where a pre-existing right inheres in the female, though the position is otherwise where the female is a stranger to the family. As the gift or devise is the source of her title, she takes a restricted estate under s. 14 (2), and the intention of the donor is immaterial, for in all such cases of improper alienations, the principle of survivorship operates to the detriment of the female's claim to absolute ownership.

After 1956 the position must be otherwise. The right of the Hindu male to the absolute disposal of his interest by devise precludes the apparently notion of a pre-existing right in the joint assets, and the position of the mother, or daughter, or other female dependant is akin to that of any other female. Where under the testator's will she is given a restricted estate, she either takes subject to s. 14 (2), or exercises the option open to her of renouncing the legacy and claiming as a dependant under s. 22 of the HAMA, 1956.

As the acquisition and possession of property is a pre-condition for the application of s. 14 (1), where the female is confined to a right of maintenance, mere occupation and user with no right of ownership - however limited - in her, is incapable of attracting s. 14 (1), and inequitable as this may appear, as Parliament in its wisdom saw fit to exclude such females, we must resign ourselves to its express intention.

The story must necessarily close with a reference to where it began - to Article 44 of the Constitution and the promise in it of a uniform civil code for the entire nation. Thus codified, and in time shorn of its anomalies and contradictions, the personal law of the majority community may well have set the pace for the emergence of a codified body of rules applicable to all alike, irrespective of personal affiliations to the vary-

ing religious denominations that are so intrinsically part of the scene in secular India.

In the light of our investigation, it is suggested that the time has come for the Legislature to consider:

1. Abolishing the Mitākṣarā "birthright", and the amending of s. 6 and its Proviso to the effect that,

> "(W)hen 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 (delete 'by survivorship ... Provided that ... shall devolve') by testamentary or intestate succession, as the case may be, under this Act and not by survivorship."

2. Amending s. 14 (2) to the effect that,

> "(N)othing contained in subsection (1) shall apply to any property acquired by way of gift or under a will ... where the terms of the gift, will or other instrument ... prescribe a restricted estate in (delete 'such property') the separate property of a male Hindu, or where the female Hindu acquires an interest for the first time in a Mitakshara coparcenary property."

3. Amending s. 30 to the effect that,

> "(A)ny Hindu may dispose by gift inter vivos or by will or other testamentary disposition any property ... applicable to Hindus."

While these amendments would, it is hoped, play a significant role in equalising claims and resolving ambiguities, the Judiciary must bear in mind that:

1. Where the widow takes along with any other class I heir, the principle that an estate once vested cannot be divested is subject to the fiction of relation back if the adoption is effected after 21 December 1956.
2. The nature of the interest that the female devisee takes in coparcenary property devised after 1956, is still a matter of debate. To prognosticate what dimensions the controversy may assume is to rush in where angels might fear to tread. But the eminently equitable construction must be that, as a pre-existing right in the property is precluded, all females take the interest envisaged in the will.

FINIS

APPENDDIX I

C U R R E N T I N D I A N S T A T U T E S

HINDU MARRIAGE ACT, 1955
HINDU SUCCESSION ACT, 1956
HINDU MINORITY AND GUARDIANSHIP ACT, 1956
HINDU ADOPTIONS AND MAINTENANCE ACT, 1956
DOWRY PROHIBITION ACT, 1961
THE CODE OF CRIMINAL PROCEDURE ACT, 1973

SPECIAL MARRIAGE ACT, 1954

(Act No 43 of 1954 as amended by Act No 32 of 1963, 29 of 1970 and 68 of 76)

(19 October, 1954)

An Act to provide a special form of marriage in certain cases, for the registration of such and certain other marriages and for divorce.

Be it enacted by Parliament in the Fifth Year of the Republic of India as follows:

CHAPTER I — Preliminary

1. Short title, extent and commencement

(1) This Act may be called the Special Marriage Act, 1954.

(2) It extends to the whole of India except the State of Jammu and Kashmir, and applies also to citizens of India domiciled in the territories to which this Act extends who are in the State of Jammu and Kashmir. (See sec. 29 (a) of The Foreign Marriage Act, 1969).

(3) —

2-3. —

CHAPTER II — Solemnization of Special Marriages

4. Conditions relating to solemnization of special Marriage

Notwithstanding anything contained in any other law for the time being in force relating to the solemnization of marriages, a marriage between any two persons may be solemnized under this Act, if at the time of the marriage the following conditions are fulfilled, namely;

(a) neither party has a spouse living;

(b) neither party —

(i) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

(ii) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(iii) has been subject to recurrent attacks of insanity of epilepsy.

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1. ML(A)A, 1976.

(c) the male has completed the age of twenty-one years and the female the age of eighteen years;

(d) the parties are not within the degrees of prohibited relationship;

Provided that when a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited relationship: and

(e) where the marriage is solemnized outside the territories to which this Act extends, both parties are citizens of India domiciled in the said territories.

Explanation —

5. Notice of intended marriage

When a marriage is intended to be solemnized under this Act, the parties to the marriage shall give notice thereof in writing in the form specified in the second Schedule to the Marriage Officer of the district in which at least one of the parties to the marriage has resided for a period of not less than thirty days immediately preceding the date on which such notice is given.

6. Marriage notice book and publication

(1) The Marriage Officer shall keep all notices given under section 5 with the records of his office and shall also forthwith enter a true copy of every such notice in a book prescribed for that purpose to be called the Marriage Notice Book, and such book shall be open for inspection at all reasonable times, without fee, by any person desirous of inspecting the same.

(2)-(3) —

7-14. —

CHAPTER III — Registration of Marriage celebrated in other forms

15. Regitration of marriages celebrated in other forms

Any marriage celebrated, whether before or after the commencement of this Act, other than a marriage solemnized under the Special Marriage Act, 1872[1] or under this Act, may be registered under this Chapter by a Marriage Officer in the territories to which this Act extends if the following conditions are fulfilled namely:-

(a) a ceremony of marriage has been performed between the parties and they have been living together as husband and wife ever since;

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1. 3 of 1872.

(b) neither party has at the time of registration more than one spouse living;

(c) neither party is an idiot or a lunatic at the time of registration;

(d) the parties have completed the age of twenty-one years at the time of registration;

(e) the parties are not within the degrees of prohibited relationship: Provided that in case of a marriage celebrated before the commencement of this Act, this condition shall be subject to any law, custom or usage having the force of law governing each of them which permits of a marriage between the two; and

(f) the parties have been residing within the district of the Marriage Officer for a period of not less than thirty days immediately preceding the date on which the application is made to him for registration of the marriage.

16-18. —

CHAPTER IV — Consequences of Marriage under this Act

19. Effect of marriage on member of undivided family

The marriage solemnized under this Act of any member of an undivided family who professes the Hindu, Buddhist, Sikh or Jaina religion shall be deemed to effect his severance from such family.

20. Rights and disabilities not affected by Act

Subject to the provisions of section 19, any person whose marriage is solemnized under this Act, shall have the same rights and shall be subject to the same disabilities in regard to the right of succession to any property as a person to whom the Caste Disabilities Removal Act, 1850 (XXI of 1850)[1] applies.

21. Succession to property of parties married under Act

Notwithstanding any restrictions contained in the Indian Succession Act, 1925[2] with respect to its application to members of certain communities, succession to the property of any person whose marriage is solemnized under this Act, and to the property of the issue of such marriage shall be regulated by the provisions of the said Act and for the purposes of this section that Act shall have effect as if Chapter III of Part V (Special Rules for Parsi Intestates) had been omitted therefrom.

21A. Special provision in certain cases

Where the marriage is solemnized under this Act of any person who professes the Hindu, Budhist, Sikh or Jaina religion with a person

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1. 21 of 1850.

2. 39 of 1925.

who professes the Hindu, Budhist, Sikh or Jaina religion, section 19 and section 21 shall not apply and so much of section 20 as creates a disability shall also not apply.

CHAPTER V — Restitution of Conjugal Rights and Judicial Separation

22. Restitution of conjugal rights

When either the husband or the wife has without reasonable excuse, withdrawn from the society of the other the aggrieved party may apply by petition to the District Court for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why the application shall not be granted, may decree restitution of conjugal rights accordingly.

Explanation — Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving resonable excuse shall be on the person who has withdrawn from the society.

23. Judicial Separation

(1) A petition for judicial separation may be presented to the District Court either by the husband or the wife, —

(a) on any of the grounds specified in sub-section (1) and sub-section (1-A) of Sec. 27 on which a petition for divorce might have been presented; or

(b) on the ground of failure to comply with a decree for restitution of conjugal rights;

and the court on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why the application should not be granted, may decree judicial separation accordingly.

(2) Where the court grants a decree for judicial separation, it shall be no longer obligatory for the petitioner to cohabit with the respondent, but the court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such petition, rescind the decree if it considers it just and reasonable to do so.

CHAPTER VI — Nullity of Marriage and Divorce

24. Void marriages

(1) Any marriage solemnized under this Act shall be null and void and may on petition presented by either party thereto against the other party be so declared by a decree of nullity if, —

any of the conditions specified in clauses (a), (b), (c), and (d) of section 4 has not been fulfilled; or

(ii) the respondent was impotent at the time of the marriage and at the time of the institution of the suit.

(2) Nothing contained in this section shall apply to any marriage deemed to be solemnized under this Act within the meaning of section 18, but the registration of any such marriage under Chapter III may be declared to be of no effect if the registration was in contravention of any of the conditions specified in clauses (a) to (e) of section 15:

Provided that no such declaration shall be made in any case where an appeal has been preferred under section 17 and the decision of the District Court has become final. —

25. Voidable marriages

Any marriage solemnized under this Act shall be voidable and may be annulled by a decree of nullity if, —

(i) the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage; or

(ii) the respondent was at the time of the marriage pregnant by some person other than the petitioner; or

(iii) the consent of either party to the marriage was obtained by coercion or fraud, as defined in the Indian Contract Act, 1872[1]:

Provided that, in the case specified in clause (iii), the court shall not grant a decree unless it is satisfied:-

(a) that the petitioner was at the time of the marriage ignorant of the facts alleged;

(b) that procedings were instituted within a year from the date of the marriage; and

(c) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree:

Provided further that in the case specified in clause (iii), the court shall not grant a decree if —

(a) proceedings have not been instituted within one year after the coercion had ceased or, as the case may be, the fraud had been discovered; or

(b) the petitioner has with his or her free consent lived with the other party to the marriage as husband and wife after the coercion had ceased or, as the case may be, the fraud had been discovered.

26. —

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1. 9 of 1872.

27. Divorce

(1) Subject to the provisions of this Act and to the rules made thereunder, a petition for divorce may be presented to the District Court either by the husband or the wife on the ground that the respondent;-

(a) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

(b) has, deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or

(c) is undergoing a sentence of imprisonment for seven years or more for an offence as defined in the Indian Penal Code[1]; or

(d) has, since the solemnization of the marriage treated the petitioner with cruelty; or

(e) has been, incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation — In this clause, —

(a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder of disability of mind and includes schizophrenia;

(b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the respondent, and whether or not it requires or is susceptible to medical treatment; or

(f) has been, suffering from venereal disease in a communicable form; or

(g) has been, suffering from leprosy, the disease not having been contracted from the petitioner; or

(h) has not been, heard of as being alive for a period of seven years or more by those persons who would naturally have heard of the respondent if the respondent had been alive;

(Explanation — In this sub-section, the expression "desertion" means desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expression shall be construed accordingly.)

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1. 45 of 1860.

(i) has not resumed cohabitation for a period of one year or upwards after the passing of a decree for judicial separation against the respondent; or

(j) has failed to comply with a decree for restitution of conjugal rights for a period of one year or upwards after the passing of the decree against the respondent.

(1-A) A wife may also present a petition for divorce to the District Court on the ground,—

(i) that her husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality;

(ii) that in a suit under section 18 of the Hindu Adoptions and Maintenance Act, 1956[1], or in a proceeding under section 125 of the Code of Criminal Procedure, 1973[2](or under the corresponding section 488 of the Code of Criminal Procedure, 1898)[3] a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards.

27A. Alternate relief in divorce proceedings

In any proceeding under this Act, on a petition for dissolution of marriage by a decree of divorce, except in so far as the petition is founded on the ground mentioned in clause (h) of sub-section (1) of section 27, the court may, if it considers it just so to do having regards to the circumstances of the case, pass instead a decree for judicial separation.

28. Divorce by mutual consent

(1) Subject to the provisions of this Act and to the rules made thereunder a petition for divorce may be presented to the District Court by both the parties together on the ground that they have been living separately for a period of one year or more, they have not been able to live together and they have mutually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date if the petition is not withdrawn in the meantime the District Court shall on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized under this Act and that the averments in the petition are true, pass a decree declaring the marriage to be dissolved with effect from the date of the decree.

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1. 78 of 1956.
2. 2 of 1974.
3. 5 of 1898.

29. Restriction on petitions for divorce during first one year after marriage

(1) No petition for divorce shall be presented to the District Court unless at the date of the presentation of the petition one year has passed since the date of entering the certificate of marriage in the Marriage Certificate Book:

Provided that the District Court may, upon application being made to it, allow a petition to be presented before one year has passed on the ground that the case is one of exceptional hardship sufferred by the petitioner or of exceptional depravity on the part of the respondent, but if it appears to the District Court at the hearing of the petition that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the District Court may, if it pronounces a decree, do so subject to the condition that the decree shall not have effect until after the expiry of one year from the date of the marriage or may dismiss the petition, without prejudice to any petition which may be brought after the expiration of the said one year upon the same, or substantially the same facts as those proved in support of the petition so dismissed.

(2) In disposing of any application under this section for leave to present a petition for divorce before the expiration of one year from the date of the marriage, the District Court shall have regard to the interests of any children of the marriage, and to the question whether there is reasonable probability of reconciliation between the parties before the expiration of the said one year.

30. Remarriage of divorced persons

Where a marriage has been dissolved by a decree of divorce, and either there is no right of appeal against decree or if there is such a right of appeal, the time for appealing has expired without an appeal having been presented, or an appeal has been presented but has been dismissed, either party to the marriage, may marry again.

CHAPTER VII — Jurisdiction and Procedure

31-34. —

35. Relief for respondent in divorce and other proceedings

In any proceeding for divorce or judicial separation or restitution of conjugal rights, the respondent may not only oppose the relief sought on the ground of petitioner's adultery, cruelty or desertion, but also make a counter-claim for any relief under this Act on that ground, and if the petitioner's adultery, cruelty or desertion is proved, the court may give to the respondent any relief under this Act to which he or she would have been entitled if he or she had presented a petition seeking such relief on that ground.

36. Alimony pendente lite

Where in any proceeding under Chapter V or Chapter VI it appears to the District Court that the wife has no independent income sufficient for her support and the necessary expenses of the proceeding, it may, on the application of the wife, order the husband to pay to her the expenses of the proceeding, and weekly or monthly during the proceeding such sum as having regard to the husband's income, it may seem to the court to be reasonable.

37. Permanent alimony and maintenance

(1) Any court exercising jurisdiction under Chapter V or Chapter VI may, at the time of passing any decree or at any time subsequent to the decree on application made to it for the purpose, order that the husband shall secure to the wife for her maintenance and support, if necessary, by a charge on the husband's property such gross sum or such monthly or periodical payment of money for a term not exceeding her life, as, having regard to her own property, if any, her husband's property and ability and the conduct of the parties and other circumstances of the case, it may seem to the court to be just.

(2) If the District Court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as it may seem to the court to be just.

(3) If the District Court is satisfied that the wife in whose favour an order has been made under this section has remarried or is not leading a chaste life, it may, at the instance of the husband vary, modify or rescind any such order and in such manner as the court may deem just.

38-41. —

CHAPTER VIII — Miscellaneous

42. Saving

Nothing contained in this Act shall affect the validity of any marriage not solemnized under its provisions; nor shall this Act be deemed directly or indirectly to affect the validity of any mode of contracting marriage.

43. Penalty on married person marrying again under this Act

Save as otherwise provided in Chapter III, every person who, being at the time married, procures, a marriage of herself or himself to be solemnized under this Act shall be deemed to have committed an offence under section 494 and section 495 of the Indian Code,[1] as the case may be and the marriage solemnized shall be void.

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1. 45 of 1860.

44. Punishment of bigamy

Every person whose marriage is solemnized under this Act and who, during the lifetime of his or her wife or husband, contracts any other marriage shall be subject to the penalties provided in section 494 and section 495 of the Indian Code (Act XLV of 1860) for the offence of marrying again during the lifetime of a husband or wife, and the marriage so contracted shall be void.

45-50. —

51. Repeals and Savings

(1) The Special Marriage Act, 1872[1], and any law corresponding to the Special Marriage Act, 1872, in force in any Part B State immediately before the commencement of this Act are hereby repealed.

(2) Notwithstanding such repeal. —

(a) all marriages duly solemnized under the Special Marriage Act, 1872[1] or any such corresponding law, shall be deemed to have been solemnized under this Act;

(b) —

(3) —

THE HINDU MARRIAGE ACT, 1955

(Act XXV of 1955 as amended by Act No. 73 of 1956, 58 of 1960, 44 of 1964 and 68 of 1976[1])

(18 May, 1955)

An Act to amend and codify the law relating to marriage among Hindus

Be it enacted by Parliament in the Sixth Year of the Republic of India as follows:

CHAPTER I — Preliminary

1. Short title and extent

(1) This Act may be called The Hindu Marriage Act, 1955.

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1. ML(A)A, 1976.

(2) It extends to the whole of India except the State of Jammu and Kashmir, and applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories.

2. Application of Act

(1) This Act applies —

(a) to any person who is Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj;

(b) to any person who is a Buddhist, Jaina or Sikh by religion; and

(c) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi, or Jew by religion, unless it is proved, that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passad.

Explanation —

(3) The expression "Hindu" in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

3. —

4. Overriding effect of 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 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 have effect in so far as it is inconsistent with any of the provisions contained in this Act.

CHAPTER II — Hindu Marriages

5. Conditions for a Hindu Marriage

A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:-

(i) neither party has a spouse living at the time of the marriage;

(ii) at the time of the marriage, neither party —

(a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

(b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(c) has been subject to recurrent attacks of insanity or epilepsy;

(iii) the bridegroom has completed the age of eighteen years and the bride the age of fifteen years at the time of the marriage;

(iv) the parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two;

(v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two;

(vi) where the bride has not completed the age of eighteen years, the consent of the guardian in marriage, if any, has been obtained for the marriage.

6. —

7. Ceremonies for a Hindu Marriage

(1) A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.

(2) Where such rites and ceremonies include the Saptapadi (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken.

8. Registration of Hindu marriages

(1) For the purpose of facilitating the proof of Hindu marriages, the State Government may make rules providing that the parties to any such marriage may have the particulars relating to their marriage entered in such manner and subject to such conditions as may be prescribed in a Hindu Marriage Register kept for the purpose.

(2)-(4) —

(5) Notwithstanding anything contained in this section, the validity of any Hindu marriage shall in no way be affected by the omission to make the entry.

CHAPTER III — Restitution of Conjugal Rights and Judicial Separation

9. Restitution of conjugal rights

When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the District Court, for restitution of conjugal rights and the Court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

Explanation — Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society.

10. Judicial separation

(1) Either party to a marriage, whether solemnized before or after the commencement of this Act may present a petition praying for a decree for judicial separation on any of the grounds specified in sub-section (1) of Section 13, and in the case of a wife, also, on any of the grounds specified in sub-section (2) thereof, as grounds on which a petition for divorce might have been presented.

(2) Where a decree for judicial separation has been passed it shall no longer be obligatory for the petitioner to cohabit with the respondent, but the Court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such petition, rescind the decree if it considers it just and reasonable to do so.

CHAPTER IV — Nullity of Marriage and Divorce

11. Void marriages

Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto, against the other party be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of section 5.

12. Voidable marriage

(1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled on any of the following grounds, namely, —

(a) that the marriage has not been consummated owing to the impotence of the respondent; or

(b) that the marriage is in contravention of the conditions specified in clause (ii) of Section 5; or

(c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner is required under Section 5, the consent of such guardian was obtained by force or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent; or

(d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

(2) Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage —

(a) on the ground specified in clause (c) of sub-section (1), shall be entertained if —

(i) the petition is presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered: or

(ii) the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered;

(b) on the ground specified in clause (d) of sub-section (1) shall be entertained unless the Court is satisfied —

(i) that the petitioner was at the time of the marriage ignorant of the facts alleged;

(ii) that proceedings have been instituted in the case of a marriage solemnized before the commencement of this Act within one year of such commencement and in the case of marriages solemnized after such commencement within one year from the date of the marriage; and

(iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the said ground.

13. Divorce

(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party —

(i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

(ia) has, after the solemnization of marriage, treated the petitioner with cruelty; or

(ib) has, deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or

(ii) has ceased to be a Hindu by conversion to another religion; or

(iii) has, been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation — In this clause, —

(a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;

(b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including subnormality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment; or

(iv) has, been suffering from a virulent and incurable form of leprosy; or

(v) has, been suffering from venereal disease in a communicable form; or

(vi) has, renounced the world by entering any religious order; or

(vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive;

Explanation — In this sub-section, the expression "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.

(1A) Either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground —

(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties).

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground, —

(i) in the case of any marriage solemnized before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner:

Provided that in either case the other wife is alive at the time of the presentation of the petition; or

that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality; or

(iii) that in suit under Section 18 of the Hindu Adoptions and Maintenance Act, 1956[1], or in a proceeding under Section 125 of the Code of the Criminal Procedure, 1973[2], (or under the corresponding Section 488 of the Code of Criminal Procedure 1898 [3]), a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards or

(iv) that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.

Explanation — This clause applies whether the marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976.

13-A. Alternate relief in divorce proceedings

In any proceeding under this Act, on a petition for dissolution of marriage by a decree of divorce, except in so far as the petition is founded on the grounds mentioned in clauses (ii), (vi) and (vii) of sub-section (1) of Section 13, the court may, if it considers it just so to do having regard to the circumstances of the case, pass instead a decree for judicial separation.

13-B. Divorce by mutual consent

(1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the District Court by both the parties to a marriage together whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976, on the ground that they have been living separately for a period of one year or more, that they have

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1. 78 of 1956.
2. 2 of 1974.
3. 5 of 1898.

not been able to live together and that they mutually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.

14. No petition for divorce to be presented within one year of marriage

(1) Notwithstanding anything contained in this Act, it shall not be competent for any court to entertain any petition for dissolution of a marriage by a decree of divorce, unless at the date of the presentation of the petition one year has elapsed since the date of the marriage:

Provided that the Court may, upon application made to it in accordance with such rules as may be made by the High Court in that behalf, allow a petition to be presented before one year has elapsed since the date of the marriage on the ground that the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent, but, if it appears to the court at the hearing of the petition that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the Court may, if it pronounces a decree, do so subject to the condition that the decree shall not have effect until after the expiry of one year from the date of the marriage or may dismiss the petition without prejudice to any petition which may be brought after the expiration of the said one year upon the same or substantially the same facts as those alleged in support of the petition so dismissed.

(2) In disposing of any application under this section for leave to present a petition for divorce before the expiration of one year from the date of the marriage, the Court shall have regard to the interest of any children of the marriage and to the question whether there is reasonable probability of a reconciliation between the parties before the expiration of the said one year.

15. Divorced persons when may marry again

When a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again:

16. —

17. Punishment of bigamy

Any marriage between two Hindus solemnized after the commencement

of this Act is void if at the date of such marriage either party had a husband or wife living; and the provisions of Sections 494 and 495 of the Indian Penal Code[1] shall apply accordingly.

18. —

CHAPTER V — Jurisdiction and Procedure

19-23. —

23-A. Relief for respondent in divorce and other proceedings

In any proceeding for divorce or judicial separation or restitution of conjugal rights, the respondent may not only oppose the relief sought on the ground of petitioner's adultery, cruelty or desertion, but also make a counterclaim for any relief under this Act on that ground; and if the petitioner's adultery, cruelty or desertion is proved the court may give to the respondent any relief under this Act to which he or she would have been entitled if he or she had presented a petition seeking such relief on that ground.

24. Maintenance pendente lite and expenses of proceedings

Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable.

25. Permanent alimony and maintenance

(1) Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be order that the respondent shall, pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant, the conduct of the parties and other circumstances of the case it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immoveable property of the respondent.

(2) If the court is satisfied that there is change in the circumstances of either party at any time after it has made

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1. 45 of 1860.

an order under sub-section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just.

(3) If the court is satisfied that the party in whose favour an order has been made under this section has remarried, or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it may at the instance of the other party vary, modify or rescind any such order in such manner as the court may deem just.

26. Custody of children

In any proceeding under this Act, the court may, from time to time pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, alter the decree upon application by petition for the purpose, made from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the court may, also from time to time revoke, suspend or vary any such orders and provisions previously made.

27-28A. —

CHAPTER VI — Savings and Repeals

29. Savings

(1) A marriage solemnized between Hindu before the commencement of this Act, which is otherwise valid, shall not be deemed to be invalid or ever to have been invalid by reason only of the fact that the parties thereto belonged to the same gotra or pravara or belonged to different religions, castes or sub-sections of the same caste.

(2) Nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the the dissolution of a Hindu marriage, whether solemnized before or after the commencement of this Act.

(3) Nothing contained in this Act shall affect any proceeding under any law for the time being in force for declaring any marriage to be null and void or for annulling or dissolving any marriage or for judicial separation pending at the commencement of this Act, and any such proceeding may be continued and determined as if this Act had not been passed.

(4) Nothing contained in this Act shall be deemed to affect the provisions contained in the Special Marriage Act, 1954 [1],

1. 43 of 1954.

with respect to marriages between Hindu solemnized under that Act, whether before or after the commencement of this Act.

THE HINDU SUCCESSION ACT, 1956

(No. 30 of 1956)

(17 June, 1956)

An Act to amend and codify the law relating to intestate succession among Hindus.

Be it enacted by Parliament in the Seventh Year of the Republic of India as follows:

CHAPTER I — Preliminary

1. Short title and extent

(1) This Act may be called the Hindu Succession Act, 1956.

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

2. Application of Act

(1) This Act applies —

(a) to any person, who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj,

(b) to any person who is a Buddhist, Jaina or Sikh by religion, and

(c) to any other person who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu Law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

Explanation —

4. Overriding effect of Act

(1) 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 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 in so far as it is inconsistent with any of the provisions contained in this Act.

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

CHAPTER II — Intestate Succession

General

5. —

6. Devolution of interest in coparcenary property

When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:

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

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

7. —

8. General rules of succession in the case of males

The property of a male Hindu dying intestate shall devolve according to the provisions of this chapter —

(a) firstly, upon the heirs, being the relatives specified in class I of the Schedule;

(b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule;

(c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and

(d) lastly, if there is no agnate, then upon the cognates of the deceased.

9. Order of succession among heirs in the Schedule

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

10. Distribution of property among heirs in class I of the Schedule

The property of an intestate shall be divided among the heirs in class I of the Schedule in accordance with the following rules:

Rule 1. The intestate's widow, or if there are more widows than one, all the widows together, shall take one share.

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

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

Rule 4. The distribution of the share referred to in Rule 3 —

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

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

11-13. —

14. Property of a female Hindu to be her absolute property

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

Explanation — In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance, or device, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act.

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

15. General rules of succession in the case of female Hindus

The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16 —

(a) firstly, upon the sons and daughters (including the children of any predeceased son or daughter) and the husband;

(b) secondly, upon the heirs of the husband;

(c) thirdly, upon the mother and father;

(d) fourthly, upon the heirs of the father; and

(e) lastly, upon the heirs of the mother.

(2) Notwithstanding anything contained in sub-section (1) —

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

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

16-20. —

21. Presumption in cases of simultaneous deaths

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

22. —

23. Special provision respecting dwelling-houses

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

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

24. Certain widows remarrying may not inherit as widows

Any heir who is related to an intestate as the widow of a predeceased son, the widow of a predeceased son of a predeceased son or the widow of a brother shall not be entitled to succeed to the property of the intestate as such widow, if on the date the succession opens, she has remarried.

25-26. —

27. Succession when heirs disqualified

If any person is disqualified from inheriting any property under this Act, it shall devolve as if such person had died before the intestate.

28. Disease, defect, etc., not to be disqualified

No person shall be disqualified from succeeding to any property on the ground of any disease, defect or deformity, or save as provided in this Act, on any other ground whatsoever.

29. —

CHAPTER III — Testamentary Succession

30. Testamentary succession

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[1] 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 ... shall, notwithstanding anything contained in this Act or in any other law for the time being in force, be deemed to property capable of being disposed of by him or by her within the meaning of this section.

CHAPTER IV — Repeals

31. (Repealed by the Repealing and Amending Act 58 of 1960)

THE SCHEDULE

(See section 8)

Heirs in class I and class II

Class I

Son; daughter; widow; mother; son of a predeceased son; daughter of a predeceased son; son of a predeceased daughter; daughter of a predeceased daughter; widow of a predeceased son; son of a predeceased son of a predeceased son; daughter of a predeceased son of a predeceased son; widow of a predeceased son of a predeceased son.

Class II

(i) Father.

(ii) (1) Son's daughter's son, (2) son's daughter's daughter, (3) brother, (4) sister.

(iii) (1) Daughter's son's son, (2) daughter's son's daughter, (3) daughter's daughter's son, (4) daughter's daughter's daughter.

(iv) (1) Brother's son, (2) sister's son, (3) brother's daughter, (4) sister's daughter.

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

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

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

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

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

Explanation — In this Schedule, references to a brother or sister do not include references to a brother or sister by uterine blood.

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1. 39 of 1925.

HINDU MINORITY AND GUARDIANSHIP ACT, 1956

(No. 32 of 1956)

(25 August, 1956)

An Act to amend and codify certain parts of the law relating to minority and guardianship among Hindus

Be it enacted by Parliament in the Seventh Year of the Republic of India as follows:

1. Short title and extent

(1) This Act may be called the Hindu Minority and Guardianship Act, 1956.

(2) It extends to the whole of India except the State of Jammu and Kashmir and applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories.

2. —

3. Application of Act —

(1) This Act applies —

(a) to any person who is a Hindu by religion in any of its forms of developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj;

(b) to any person who is a Buddhist, Jaina or Sikh by religion; and

(c) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

Explanation —

4. Definitions — In this Act —

(a) "minor" means a person who has not completed the age of eighteen years;

(b) "guardian" means a person having the care of the person of a minor or of his property or of both his person and property, and includes —

(i) a natural guardian,

(ii) a guardian appointed by the will of the minor's father or mother,

(iii) a guardian appointed or declared by a court, and

(iv) a person empowered to act as such by or under any enactment relating to any Court of Wards;

(c) "natural guardian" means any of the guardians mentioned in section 6.

5. Overriding effect of 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 effect with respect to any matter for which provision is made in this Act;

6. Natural guardians of a Hindu minor

The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint-family property), are —

(a) in the case of a boy or an unmarried girl — the father, and after him, the mother: provided that the custody of minor who has not completed the age of five years shall ordinarily be with the mother;

(b) in the case of an illegitimate boy or illegitimate unmarried girl — the mother, and after her, the father;

(c) in the case of a married girl — the husband:

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section —

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi).

Explanation — In this section, the expressions 'father' and 'mother' do not include a step-father and a step-mother.

7. Natural guardianship of adopted son

The natural guardianship of an adopted son who is a minor passes, on adoption, to the adoptive father and after him to the adoptive mother.

8. —

9. Testamentary guardians and their powers

(1) A Hindu father entitled to act as the natural guardian of his minor legitimate children may, by will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property (other than the undivided interest referred to in section 12) or in respect of both.

(2) An appointment made under sub-section (1) shall have no effect if the father predeceases the mother but shall revive if the mother dies without appointing, by will, any person as guardian.

(3) A Hindu widow entitled to act as the natural guardian of her minor legitimate children, and a Hindu mother entitled to act as the natural guardian of her minor legitimate children by reason of the fact that the father has become disentitled to act as such, may, by will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property (other than the undivied interest referred to in section 12) or in respect of both.

(4) A Hindu mother entitled to act as the natural guardian of her minor illegitimate children may, by will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property or in respect of both.

(5) The guardian so appointed by will has the right to act as the minor's guardian after the death of the minor's father or mother, as the case may be, and to exercise all the rights of a natural guardian under this Act to such extent and subject to such restrictions, if any, as are specified in this Act and in the will.

(6) The right of the guardian so appointed by will shall, where the minor is a girl, cease on her marriage.

10-11. —

12. Guardian not to be appointed for minor's undivided interest in joint-family property

Where a minor has an undivided interest in joint-family property and the property is under the management of an adult member of the family, no guardian shall be appointed for the minor in respect of such undivided interest.

13. Welfare of minor to be paramount consideration

(1) In the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of the Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor.

HINDU ADOPTIONS AND MAINTENANCE ACT, 1956

(Act 78 of 1956 as amended by Act 45 of 1962)

21, December, 1959

An Act to amend and codify the law relating to Adoptions and Maintenance among Hindus

Be it enacted by Parliament in the Seventh Year of the Republic of India as follows:

CHAPTER I — Preliminary

1. Short title and extent

(1) This Act may be called the Hindu Adoptions and Maintenance Act, 1956.

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

2. Application of Act

This Act applies —

(a) to any person, who is a Hindu by religion in any of its forms or developments, including a Vaishaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj,

(b) to any person who is a Buddhist, Jaina or Sikh by religion

(bb) any child, legitimate or illegitimate, who has been abandoned both by his father and mother or whose parentage is not known and who in either case is brought up as Hindu, Buddhist, Jaina and Sikh; and

(c) to any other person who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

Explanation — (1)-(2) —

(3) The expression "Hindu" in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

3. Definitions

(a) —

(b) "maintenance" includes —

(i) in all cases, provisions for food, clothing, residence, education and medical attendance and treatment;

(ii) in the case of an unmarried daughter, also the reasonable expenses of and incident to her marriage;

(c) "minor" means a person who has completed his or her age of eighteen years.

4. Overriding effect of 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 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 in so far as it is inconsistent with any of the provisions contained in this Act.

CHAPTER II — Adoption

5. Adoptions 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 Chpater, and any adoption made in contravention of the said provisions shall be void.

(2) An adoption which is void shall neither create any rights in the adoptive family in favour of any person which he or she could not have acquired except by reason of the adoption, nor destroy the rights of any person in the family of his or her birth.

6. Requisites of a valid adoption

No adoption shall be valid unless —

(i) the person adopting has the capacity, and also the right, to take in adoption;

(ii) the person giving in adoption has the capacity to do so;

(iii) the person adopted is capable of being taken in adoption; and

(iv) the adoption is made in compliance with the other conditions mentioned in this Chapter.

7. Capacity of a male Hindu to take in adoption

Any male Hindu who is of sound mind and is not a minor has the capacity to take a son or a daughter in adoption:

Provided that, if he has a wife living, he shall not adopt except with the consent of his wife unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

Explanation — If a person has more than one wife living at the time of adoption, the consent of all the wives is necessary unless the consent of any one of them is unnecessary for any of the reasons specified in the preceding proviso.

8. Capacity of a female Hindu to take in adoption

Any female Hindu —

(a) who is of sound mind,

(b) who is not a minor, and

(c) who is not married, or if married, whose marriage has been dissolved or whose husband is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind,

has the capacity to take a son or daughter in adoption.

9. Persons capable of giving in adoption

(1) No person except the father or mother or the guardian of a child shall have the capacity to give the child in adoption.

(2) Subject to the provisions of sub-section (3) and sub-section (4) the father, if alive, alone have the right to give in adoption, but such right shall not be exercised, save with the consent to the mother unless the mother has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

(3) The mother may give the child in adoption if the father is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

(4) Where both the father and mother are dead or have completely and finally renounced the world or have abandoned the child or have been declared by a court of competent jurisdiction to be of unsound mind or where the parentage of the child is not known, the guardian of the child may give the child in adoption with the previous permission of the court to any person including the guardian himself.

(5) Before granting permission to a guardian under sub-section (4), the court shall be satisfied that the adoption will be for the welfare of the child, due consideration being for this purpose given to the wishes of the child having regard to the age and understanding of the child and that the applicant for permission has not received or agreed to receive and that no person has made or given or agreed to make or give to the applicant any payment or reward in consideration of the adoption except such as the court may sanction.

Explanation — For the purposes of this section —

(i) the expression "father" and "mother" do not include an adoptive father and an adoptive mother;

(ia) "guardian means a person having the care of the person of a child or both his person and property and includes —

(a) a guardian appointed by the will of the child's father or mother; and

(b) a guardian appointed or declared by a court; and

(ii) —

10. Persons who may be adopted

No person shall be capable of being taken in adoption unless the following conditions are fulfilled, namely, —

(i) he or she is a Hindu;

(ii) he or she has not already been adopted;

(iii) he or she has not been married, unless there is a custom or usage applicable to the parties which permits persons who are married being taken in adoption;

(iv) he or she has not completed the age of fifteen years, unless there is a custom or usage applicable to the parties which permits persons who have completed the age of fifteen years being taken in adoption.

11. Other conditions for a valid adoption

In every adoption the following conditions must be complied with:

(i)-(ii) —

(iii) if the adoption is by a male and the person to be adopted is a female, the adoptive father is at least twenty-one years older than the person to be adopted;

(iv) if the adoption is by a female and the person to be adopted is a male, the adoptive mother is at least twenty-one years older than the person to be adopted;

(v)-(vi) —

12. Effects of adoption

An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child 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 —

(a) —

(b) any property which vested in the adopted child before the adoption, shall continue to vest in such person subject to the obligations, if any, attaching to the ownership of such property including the obligation to maintain relatives in the family of his or her birth;

(c) the adopted child shall not divest any person of any estate which vested in him or her before the adoption.

13. Right of adoptive parents to dispose of their properties

Subject to any agreement to the contrary, an adoption does not deprive the adoptive father or mother of the power to dispose of his or her property by transfer inter vivos or by will.

14. Determination of adoptive mother in certain cases

(1) Where a Hindu who has a wife living adopts a child, she shall be deemed to be the adoptive mother.

(2) Where an adoption has been made with the consent of more than one wife, the seniormost in marriage among them shall be deemed to be the adoptive mother and the others to be step-mothers.

(3) Where a widower or a bachelor adopts a child, any wife whom he subsequently marries shall be deemed to be the step-mother of the adopted child.

(4) Where a widow or an unmarried woman adopts a child, any husband whom she marries subsequently shall be deemed to be the step-father of the adopted child.

15. Valid adoption not to be cancelled

No adoption which has been validly made can be cancelled by the adoptive father or mother or any other person nor can the adopted child renounce his or her status as such and return to the family of his or her birth.

16-17. —

CHAPTER III — Maintenance

18. Maintenance of wife

(1) Subject to the provisions of this section a Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her lifetime.

(2) A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance —

(a) if he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish, or of wilfully neglecting her;

(b) if he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband.

(c) if he is suffering from a virulent form of leprosy;

(d) if he has any other wife living;

(e) if he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere;

(f) if he has ceased to be a Hindu by conversion to another religion;

(g) if there is any other cause justifying her living separetely.

(3) A Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion to another religion.

19. Maintenance of widowed daughter-in-law

(1) A Hindu wife whether married before or after commencement of this Act, shall be entitled to be maintained after the death of her husband by her father-in-law:

Provided and to the extent that she is unable to maintain herself out of her own earnings or other property or, where she has no property of her own, is unable to obtain maintenance —

(a) from the estate of her husband or her father or mother, or

(b) from her son or daughter, if any, or his or her estate.

(2) Any obligation under sub-section (1) shall not be enforceable if the father-in-law has not the means to do so from any coparcenary property in his possession out of which the daughter-in-law has not obtained any share, and any such obligation shall cease on the remarriage of the daughter-in-law.

20. Maintenance of children and aged parents

(1) Subject to the provisions of this section, a Hindu is bound during his or her lifetime, to maintain his or her legitimate or illegitimate children and his or her aged or infirm parents.

(2) A legitimate or illegitimate child may claim maintenance from his or her father or mother so long as the child is a minor.

(3) The obligation of a person to maintain his or her aged or infirm parent or a daughter who is unmarried extends in so far as the parent or the unmarried daughter, as the case may be, is unable to maintain himself or herself out of his or her own earnings or other property.

Explanation — In this section, the word "parent" includes a childless step-mother.

21. Dependants defined

For the purposes of this chapter, "dependants" means the following relatives of the deceased:

(i) his or her father;

(ii) his or her mother;

(iii) his widow, so long as she does not remarry;

(iv) his or her son or the son of his predeceased son or the son of a predeceased son of his predeceased son, so long as he is a minor: provided and to the extent that he is unable to obtain maintenance in the case of a grandson, from his father's or mother's estate, and in the case of a great grandson from the estate of his father or mother or father's father or father's mother;

(v) his or her unmarried daughter, or the unmarried daughter of his predeceased son, or the unmarried daughter of a predeceased son of his predeceased son, so long as she remains unmarried: provided and to the extent that she is unable to obtain maintenance, in the case of a grand-daughter, from her father's or mother's estate and in the case of a great grand-daughter from the estate of her father or mother or father's father or father's mother;

(vi) his widowed daughter: provided and to the extent that she is unable to obtain maintenance —

(a) from the estate of her husband; or

(b) from her son or daughter, if any, or his or her estate;

(c) from her father-in-law or his father or the estate of either of them;

(vii) any widow of his son or of a son of his predeceased son, so long as she does not remarry: provided and to the extent that she is unable to obtain maintenance from her husband's estate, or from her son or daughter, if any, or his or her estate; or in the case of a grandson's widow, also from her father-in-law's estate;

(viii) his or her minor illegitimate son, so long as he remains a minor;

(ix) his or her illegitimate daughter, so long as she remains unmarried.

22. Maintenance of dependants

(1) Subject to the provisions of sub-section (2), the heirs of a deceased Hindu are bound to maintain the dependants of the deceased out of the estate inherited by them from the deceased.

(2) Where a dependant has not obtained by testamentary or intestate succession, any share in the estate of a Hindu dying after the commencement of this Act, the dependant shall be entitled, subject to the provisions of this Act, to maintenance from those who take the estate.

(3) The liability of each of the persons who takes the estate shall be in proportion to the value of the share or part of the estate taken by him or her.

(4) Notwithstanding anything contained in sub-section (2) or sub-section (3), no person who is himself or herself a dependant shall be liable to contribute to the maintenance of others, if he or she has obtained a share or part of the value of which is or would, if the liability to contribute were enforced, become less than what would be awarded to him or her by way of maintenance under this Act.

23. Amount of maintenance

(1) It shall be in the discretion of the court to determine whether any, and if so, what maintenance shall be awarded under the provisions of this Act, and in doing so the court shall have due regard to the considerations set out in sub-section (2) or sub-section (3), as the case may be, so far as they are applicable.

(2) In determining the amount of maintenance, if any, to be awarded to a wife, children or aged or infirm parents under this Act, regard shall be had to —

(a) the position and status of the parties;

(b) the reasonable wants of the claimant;

(c) if the claimant is living separately, whether the claimant is justified in doing so;

(d) the value of the claimant's property and any income derived from such property, or from the claimant's own earnings or from any other source;

(e) the number of persons entitled to maintenance under this Act.

(3) —

24-25. —

26. Debts to have priority

Subject to the provisions contained in section 27, debts of every description contracted or payable by the deceased shall have priority over the claims of the dependants for maintenance under this Act.

27. Maintenance when to be a charge

A dependant's claim for maintenance under this Act shall not be a charge on the estate of the deceased or any portion thereof, unless one has been created by the will of the deceased, by a decree of court, by agreement between the dependant and the owner of the estate or portion, or otherwise

28. —

CHAPTER IV — Repeals and Savings

29. Repeals

The Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946[1] and, sub-section (2) of section 30 of the Hindu Succession Act, 1956[2], are hereby repealed.

30. Savings

Nothing contained in this Act shall affect any adoption made before the commencement of this Act, and the validity and effect of any such adoption shall be determined as if this Act had not been passed.

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1. 19 of 1946.
2. 30 of 1956.

THE DOWRY PROHIBITION ACT

Act 28 of 1961

(20 May, 1961)

An Act to prohibit the giving or taking of dowry

Be it enacted by Parliament in the Twelfth Year of the Republic of India as follows:

1. Short title, extent and commencement

(1) This Act may be called the Dowry Prohibition Act, 1961.

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

(3) It shall come into force on 1st July, 1961.

2. Definition of "dowry"

In this Act, "dowry" means any property or valuable security given or agreed to be given either directly or indirectly —

(a) by one party to a marriage to the other party to the marriage; or

(b) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person;

at or before or after the marriage as consideration for the marriage of the said parties, but does not include dower or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies.

Explanation 1. For the removal of doubts, it is hereby declared that any presents made at the time of a marriage to either party to the marriage in the form of cash, ornaments, clothes or other articles, shall not be deemed to be dowry within the meaning of this section, unless they are made as consideration for the marriage of the said parties.

Explanation 2. The expression "valuable security" has the same meaning as in section 30 of the Indian Penal Code.

3. Penalty for giving or taking dowry

If any person, after the commencement of this Act, gives or takes or abets the giving or taking of dowry, he shall be punishable with imprisonment which may extend to six months, or with fine which may extend to five thousand rupees, or with both.

4. Penalty for demanding dowry

If any person, after the commencement of this Act, demands, directly or indirectly, from the parents or guardian of a bride or bridegroom, as the case may be, any dowry, he shall be punishable with imprisonment which may extend to six months, or with fine which may extend to five thousand rupees, or with both; Provided that no courts shall take cognizance of any offence under this section except with the previous sanction of the State Government or of such officer as the State Government may, by general or special order, specify in this behalf.

5. Agreement for giving or taking dowry to be void

Any agreement for the giving or taking of dowry shall be void.

6. Dowry to be for the benefit of the wife or her heirs

(1) Where any dowry is received by any person other than the woman in connexion with whose marriage it is given, that person shall transfer it to the woman —

(a) if the dowry was received before marriage, within one year after the date of marriage; or

(b) if the dowry was received at the time of or after the marriage, within one year after the date of its receipt; or

(c) if the dowry was received when the woman was a minor, within one year after she has attained the age of eighteen years; and pending such transfer, shall hold it in trust for the benefit of the woman.

(2) If any person fails to transfer any property as required by sub-section (1) and within the time limited therefor, he shall be punishable with imprisonment which may extend to six months, or with fine which may extend to five thousand rupees, or with both; but such punishment shall not absolve the person from his obligation to transfer the property as required by subsection (1).

(3) Where the woman entitled to any property under sub-section (1) dies before receiving it, the heirs of the woman shall be entitled to claim it from the person holding it for the time being.

(4) Nothing contained in this section shall affect the provisions of section 3 or section 4.

7. Cognizance of offences

Notwithstanding anything contained in the Code of Criminal Procedure, 1898[1], —

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1. 5 of 1898.

(a) no court inferior to that of a Presidency Magistrate or a magistrate of the first class shall try any offence under this Act;

(b) no court shall take cognizance of any such offence except on a complaint made within one year from the date of the offence;

(c) it shall be lawful for a Presidency Magistrate or a magistrate of the first class to pass any sentence authorized by this Act on any person convicted of an offence under this Act.

8. Offences to be non-cognizable, bailable and non-compoundable

Every offence under this Act shall be non-cognizable, bailable and non-compoundable.

9. —

10. Repeals

The Andhra Pradesh Dowry Prohibition Act, 1958, Andhra Pradesh Act[1], and the Bihar Dowry Restraint Act, 1950, Bihar Act[2], are hereby repealed.

THE CODE OF CRIMINAL PROCEDURE, 1973

No 2 of 1974

(25 January, 1974)

An Act to consolidate and amend the law relating to Criminal Procedure

Be it enacted by Parliament in the Twenty-fourth Year of the Republic of India as follows:

CHAPTER I — Preliminary

1. Short title, extent and commencement

(1) This Act may be called the Code of Criminal Procedure Act, 1973.

---

1. 1 of 1958. 2. 25 of 1950.

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

Provided —

(a) —

(b) —

Explanation —

(3) It shall come into force on the 1st day of April, 1974.

2-3-4. —

CHAPTER II-VIII —

CHAPTER IX — Order for Maintenance of Wives, Children and Parents

125. (1) If any person having sufficient means neglects or refuses to maintain —

(a) his wife, unable to maintain herself, or

(b)-(c)-(d) —

A Magistrate of the first class may upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided —

Explanation — For the purposes of this chapter,—

(a) —

(b) "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband, and has not remarried.

(2)-(3) —

Provided —

Provided further —

Explanation — If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

(4) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) —

126. —

127. (1)-(2) —

(3) Where any order has been made under section 125 in favour of a woman who has been divorced by, or has obtained a divorce from, her husband, the Magistrate shall, if he is satisfied that —

(a) the woman has, after the date of such divorce, remarried, cancel such order as from the date of her remarriage;

(b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order, —

(i) in the case where such sum was paid before such order, from the date on which such order was made,

(ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband to the woman;

(c) the woman has obtained a divorce from her husband and that she had voluntarily surrendered her rights to maintenance after her divorce, cancel the order from the date thereof.

(4) At the time of making any decree for the recovery of any maintenance or dowry by any person, to whom a monthly allowance has been ordered to be paid under section 125, the Civil Court shall take into account the sum which has been paid to, or recovered by, such person as monthly allowance in pursuance of the said order.

128. —

CHAPTER X-XXXVI —

CHAPTER XXXVII — Miscellaneous

474-83. —

484. (1) The Code of Criminal Procedure, 1898, is hereby repealed.

(2)-(3) —

APPENDIX II

S E L E C T E D I N D I A N S T A T U T E S

(AS AMENDED)

PRIOR TO THE "HINDU CODE"

HINDU WIDOW'S REMARRIAGE ACT, 1856
HINDU LAW OF INHERITANCE (AMENDMENT) ACT, 1929
HINDU WOMEN'S RIGHTS TO PROPERTY ACT, 1937

THE HINDU WIDOWS' REMARRIAGE ACT

Act 15 of 1856

(25 July, 1856)

An Act to remove all legal obstacles to the marriage of Hindu widows

Preamble — Whereas it is known that, by the law as administered in the civil courts established in the territories in the possession and under the Government of the East India Company, Hindu widows with certain exceptions are held to be, by reason of their having been once married, incapable of contracting a second valid marriage, and the offspring of such widows by any second marriage are held to be illegitimate and incapable of inheriting property; and

Whereas..., and

Whereas...; It is enacted as follows:

1. Marriage of Hindus widows legalized

No marriage contracted between Hindus shall be invalid, and the issue of no such marriage shall be illegitimate by reason of the woman having been previously married or betrothed to another person who was dead at the time of such marriage, any custom and any interpretation of Hindu law to the contrary notwithstanding.

2. Rights of widow in deceased husband's property to cease on her remarriage

All rights and interests which any widow may have in her deceased husband's property by way of maintenance or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to remarry, only a limited interest in such property with no power of alienating the same shall upon her remarriage cease and determine as if she had then died; and the next heirs of her deceased husband or other person entitled to the property on her death, shall thereupon succeed to the same.

3. —

4. Nothing in this Act to render any childless widow capable of inheriting

Nothing in this Act contained shall be construed to render any widow who, at the time of the death of any person leaving any property, is a childless widow, capable of inheriting the whole or any share of such property, if before the passing of this Act she would have been incapable of inheriting the same by reason of her being a childless widow.

5. Saving of rights of widow remarrying, except as provided as ss. 2 to 4

Except as in the three preceding sections is provided, a widow shall not by reason of her remarriage forfeit any property or any right to which she would otherwise be entitled; and every widow who has remarried shall have the same rights of inheritance as she would have had had such marriage been her first marriage.

6. —

7. Consent to remarriage of minor widow

If the widow remarrying is a minor whose marriage has not been consummated, she shall not remarry without the consent of her father, or if she has no father, of her paternal grandfather, or if she has no such grandfather, of her mother, or failing all these, of her elder brother or failing also brothers, of her next male relative.

Punishment for abetting marriage made contrary to this section —

Effect of such marriage: proviso —

Consent to remarriage of major widow. In the case of a widow who is of full age, or whose marriage has been consummated, her own consent shall be sufficient consent to constitute her re-marriage lawful and valid.

THE HINDU LAW OF INHERITANCE (AMENDMENT) ACT

Act 2 of 1929

(1 October, 1929)

WHEREAS it is expedient to alter the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate; it is hereby enacted as follows:

1. Short title, extent and application

(1) This Act may be called the Hindu Law of Inheritance (Amendment) Act, 1929.

(2) It extends to the whole of India, except Part B States, but it applies to persons who, but for the passing of this Act, would have been subject to the law of Mitakshara in respect of provisions herein enacted, and it applies to such persons in respect only of the property of males not held in coparcenary and not disposed of by will.

2. Order of succession of certain heirs

A son's daughter, daughter's daughter, sister, and sister's son shall, in the order so specified, be entitled to rank in the order of succession next after father's father and before a father's brother:

Provided that a sister's son shall not include a son adopted after the sister's death.

3. Savings

Nothing in this Act shall:

(a) affect any special family or local custom having the force of law, or

(b) vest in a son's daughter, daughter's daughter or sister an estate larger than, or different in kind from, that possessed by a female in property inherited by her from a male according to the school of Mitakshara law by which the male was governed, or

(c) enable more than one person to succeed by inheritance to the estate of a deceased Hindu male which by a customary or other rule of succession descends to a single heir.

THE HINDU WOMEN'S RIGHTS TO PROPERTY ACT

Act 18 of 1937, as Amended by Act II of 1938

(14 April, 1937)

An Act to amend the Hindu law governing Hindu women's rights to property

WHEREAS it is expedient to amend the Hindu Law to give better rights to women in respect of property; it is hereby enacted as follows:

1. Short title and extent

(1) This Act may be called the Hindu Women's Rights to Property Act, 1937.

(2) It extends to the whole of India, except Part B States.

2. Application

Notwithstanding any rule of Hindu Law or custom to the contrary, the provisions of section 3 shall apply where a Hindu dies intestate.

3. Devolution of property

(1) When a Hindu governed by the Dayabhaga school of Hindu Law dies intestate his property, and when a Hindu governed by any other school of Hindu Law or by customary law dies intestate leaving separate property, his widow, or if there are more than one widow all his widows together, shall, subject to the provisions of sub-section (3), be entitled in respect of property of which he dies intestate to the same share as a son;

Provided that the widow of a predeceased son shall inherit in like manner as a son if there is no son surviving of such predeceased son, and shall inherit in like manner as a son's son if there is surviving a son or son's son of such predeceased son;

Provided further that the same provision shall apply mutatis mutandis to the widow of a predeceased son of a predeceased son.

(2) When a Hindu governed by any school of Hindu Law other than the Dayabhaga school or by customary law dies having at the time of his death an interest in a Hindu joint-family property, his widow shall, subject to the provisions of sub-section (3), have in the property the same interest as he himself had.

(3) Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu woman's estate, provided however that she shall have the same right of claiming partition as a male owner.

(4) The provisions of this section shall not apply to an estate which by a customary or other rule of succession descends to a single heir or to any property to which the Indian Succession Act, 1925,[1] applies.

4. Saving

Nothing in this Act shall apply to the property of any Hindu dying intestate before the commencement of this Act.

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1. 39 of 1925.

5. Meaning of the expression "die intestate"

For the purposes of this Act, a person shall be deemed to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect.

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